

**CYBERSMUT AND THE FIRST AMENDMENT:  
A CALL FOR A NEW OBSCENITY STANDARD**

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## I. INTRODUCTION

Assume that a computer literate college student in a metropolitan and cosmopolitan center purchases some sexually explicit magazines at an adult bookstore in the area. The student uses an electronic device known as a scanner to convert the pictures from these magazines into graphic interchange files ("GIFs"). The student then posts these computer files to the *alt.binaries.pictures.erotica* Usenet newsgroup on the Internet. Another student at a small college in a conservative rural community accesses these files on the Net and *downloads*, or transfers, the images. In that student's community, the pictures are considered obscene. Could either or both of these students be convicted and their computer equipment confiscated for transporting or transmitting obscene materials in violation of federal law?<sup>1</sup> This article examines such issues

1. This hypothetical is an amalgamation of, and take-off on, two recent incidents which occurred in cyberspace. A University of Michigan student, Jake Baker, was arrested for posting a sexually explicit fictional story on the Internet which described assaults on a female character who shared the same name as a fellow Michigan co-ed. See, e.g., Robert Davis, *Graphic 'Cyber-Threats' Land Student in Court*, USA TODAY, Feb. 10, 1995, at 3A; Steven Levy, *TechnoMania*, NEWSWEEK, Feb. 27, 1995, at 24, 29; Edward A. Cavazos, *Litigation On-Line: Cyber Issues Loom for Lawyers*, AM. LAW., May 1995, at 54, 55. The case against Baker for transmitting a threat in interstate commerce in violation of federal law eventually was dismissed. Robert Davis, *Judge Calls Cyberfantasy Free Speech*, USA TODAY, June 22, 1995, at A1. Two other defendants were not as fortunate. Richard and Carleen Thomas were convicted in a federal court in Memphis for transporting materials in interstate commerce. The Thomases had operated a commercial bulletin board in northern California. Thirteen GIF images downloaded by a postal inspector in Tennessee were found to be obscene by a Memphis jury. See, e.g., Henry J. Reske, *Computer Porn a Prosecutorial Challenge*, 80 A.B.A.J. 40 (Dec. 1994); Erik Ness, *Big Brother and Cyberspace: Will Your Freedom and Privacy be Roadkill on the Information Superhighway?*, PROGRESSIVE, Dec. 1994, at 22, 27; Wendy Cole, *The Marquis de Cyberspace*, TIME, July 3, 1995, at 43.

surrounding cybersmut<sup>2</sup> against the backdrop of the First Amendment. Part II discusses the technological aspects of cyberspace, concerns regarding the presence of smut in cyberspace, and the democratic potential of these technological advances. Part III examines judicial decisions which shape the law of obscenity, while Part IV focuses on federal statutory prohibitions. Finally, Part V argues that cyberspace has at last illuminated the inadequacies of the current legal definition of obscene speech and offers a new definition for the twenty-first century.

## II. CYBERSPACE: ITS GROWING PRESENCE, PROBLEMS AND POTENTIAL

### A. A Brief Overview of Cyberspace

That great expanse of digital data known as cyberspace was christened such by novelist William Gibson.<sup>3</sup> The National Information Infrastructure ("NII") is a global webbed network of interconnected computers and databases of which the Internet, a collection of host and

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The Thomas case is discussed in more detail *infra* notes 169-83 and accompanying text. The hypothetical posed differs from both cases in that it involves potential obscenity prosecutions, not prosecutions for threats as in Baker's case, and unlike the Thomas case, of defendants not engaged in commercial transactions. Further, the hypothetical poses the issue of whether or not both the person who posts obscenity and the person who downloads the files can be prosecuted.

2. The term cybersmut has been chosen to describe sexually explicit speech in cyberspace which is not protected under the First Amendment. Because a thesis of this article is that the line between unprotected obscene speech and protected pornographic speech is constitutionally infirm in this Information Age, characterizing such speech as obscenity would not be appropriate. That term is reserved for the new definition discussed *infra* part IV. The term cybersmut, with its pejorative connotation, reflects the views of many individuals toward sexually explicit speech, while at the same time, its judgmental overtone suggests that in reality what constitutes smut is a matter of taste. Not included in this definition is child pornography, which raises an entirely separate set of problems and requires an equally different legal analysis.

3. "Cyberspace. A consensual hallucination experienced daily by billions of legitimate operators, in every nation, by children being taught mathematical concepts . . . . A graphic representation of data abstracted from the banks of every computer in the human system. Unthinkable complexity. Lines of light ranged in the non-space of the mind, clusters and constellations of data. Like city lights, receding . . . ." WILLIAM GIBSON, *NEUROMANCER* 51 (1984).

gateway computers, is a part.<sup>4</sup> The Department of Defense gave birth to the Internet in the late 1960s. It grew to encompass academic and research applications in addition to its military purposes in the 1980s, and today is instrumental in a variety of personal and business communication activities.<sup>5</sup>

The Internet can be accessed through university or corporate providers, small dial-up bulletin board providers, or large commercial providers such as CompuServe, America Online, Prodigy, GENie and Delphi<sup>6</sup>, which offer a variety of other services in addition to Internet access. Once accessed, navigators such as Gopher, WorldWideWeb, and Mosaic help cyberspace travelers reach their information destination or, *surf the net*, for available resources.<sup>7</sup> Today, anywhere from thirty to forty million people in more than one hundred sixty countries have access to the Internet.<sup>8</sup> The number of users has increased more than one thousand percent in the last three years,<sup>9</sup> and Internet usage continues to

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4. For an overview of computer networks, see, e.g., WILLIAM A. TOLHURST, USING THE INTERNET 137-39 (1994); Dan L. Burk, *Patents in Cyberspace: Territoriality and Infringement on Global Computer Networks*, 68 TUL. L. REV., 6-24 (1993); David J. Loundy, *E-Law 2.0: Computer Information Systems Law and System Operator Liability Revisited*, available in gopher.eff.org. (1994) (update of *E-Law: Legal Issues Affecting Computer Information Systems and System Operator Liability*, 3 ALB. L.J. SCI. & TECH. 79 (1993)). For a discussion of the NII, its effect on society, potential impediments to its growth and the role of government, see Ralph J. Andreotta, *The National Information Infrastructure: Its Implications, Opportunities, and Challenges*, 38 VILL. L. REV. 571, 571-73 (1993). Eventually the National Research and Education Network ("NREN") will replace the NII. John M. Stevens, *Antitrust Law and Open Access to the NREN*, 28 WAKE FOREST L. REV. 571, 571-73 (1993).

5. See Winston P. Lloyd, *What's The Frequency Uncle Sam?: Will the Government Hold Up the Information Superhighway in the Name of Competition?* 30 WAKE FOREST L. REV. 233, 235 (1995); Andrew Kantor, *Internet: The Undiscovered Country*, PC MAG., Mar. 15, 1994, at 116; Mike Snider, *Growth Spurt Causes Traffic Tie-Ups on Internet*, USA TODAY, Mar. 22, 1995, at D6; Steven Levy, *TechnoMania*, NEWSWEEK, Feb. 27, 1995, at 24, 25.

6. For a survey of online services, see Andrew Kantor, *Making On-Line Services Work for You*, PC MAG., Mar. 15, 1994, at 110, 111.

7. *Id.* at 118. Many books also exist to assist users on how to navigate the Internet. See, e.g., TRACY L. LAQUEY, THE INTERNET COMPANION: A BEGINNER'S GUIDE TO GLOBAL NETWORKING (1993); MICHAEL FRAASE, THE MAC INTERNET TOUR GUIDE: CRUISING THE INTERNET THE EASY WAY (1993); ED KROL, THE WHOLE INTERNET: USER'S GUIDE AND CATALOG (1994).

8. Phillip Elmer-DeWitt, *Welcome to Cyberspace*, TIME, Spring 1995, at 4, 9 (special edition).

9. *Id.*

grow at an explosive rate.<sup>10</sup>

Networked users<sup>11</sup> enjoy a variety of communication options on the Internet. For example, *E-mail* allows users to communicate directly by sending electronic messages to each other.<sup>12</sup> A wider application of E-mail is the *Mailing List* which permits many users to subscribe and post messages for other subscribers to read.<sup>13</sup> Unlike E-mail and mailing lists, *Internet Relay Chat* ("IRC") allows users to exchange messages simultaneously in an interactive mode which resembles a conversation.<sup>14</sup> Finally, *Usenet* functions as an electronic bulletin board and permits a more public interactive discussion similar to a conference meeting.<sup>15</sup>

Aside from Usenet, other Bulletin Board Services ("BBSs") exist in cyberspace, representing a large and growing segment of the digital community. In addition to the BBSs sponsored by the large commercial providers, close to 50,000 other BBSs operate in the United States.<sup>16</sup> A BBS, which can cost as little as a couple of hundred dollars to establish, requires only a computer modem, a telephone line, and the appropriate software to function. The system operator of the BBS, or *sysop*, sets the policies of the BBS, such as the cost of the access fee, the acceptance or

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10. See, e.g., Andrew B. Whinston, *Reengineering Education*, J. INFO. SYSTEMS EDUC., Fall 1994, at 127-28. Access revenue should top one billion dollars in 1995. Snider, *supra* note 5, at D6. Commercial services in particular have experienced substantial growth. *On-Line Services Are Flourishing*, USA TODAY, Feb. 23, 1995, at D4. Growth promises to continue since a recent Gallup poll found that fifty-eight percent of those surveyed had not even heard about the Internet. Paul Wiseman & Dottie Enrico, *Technoterror Slows Info Highway Traffic*, USA TODAY, Nov. 14, 1994, at B1.

11. Connecting to a network requires a computer with a modem, communications software, and an access link to the network. For an excellent explanation of the functioning of networked communications, see Ethan Katsh, *Law in a Digital World: Computer Networks and Cyberspace*, 38 VILL. L. REV. 403, 414-38 (1993).

12. RAYMOND T. NIMMER, *THE LAW OF COMPUTER TECHNOLOGY* § 16.06 (2d ed. 1992 & Supp. 1994). These messages can be read immediately or stored for later access. Once read the messages can be stored for repeated access or deleted.

13. All messages are sent to a LISTSERVER, which distributes them to the list's subscribers. For example, CYBERIA-L is a list whose subscribers discuss legal issues affecting cyberspace. In mailing lists which are moderated, not all messages are posted. See generally Loundy, *supra* note 4, at n.36. Like magazines, subscribers to lists can subscribe and unsubscribe as their interests direct. Kantor, *supra* note 5, at 117.

14. For a discussion of these and other Internet Services and cyberspace communities, see William S. Byasse, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 200-03 (1995).

15. See Henry H. Perritt, Jr., *Tort Liability, The First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH. 65, 136-37 (1992). An example of a Usenet newsgroup is *alt.binaries.pictures.erotica*, to which the files in the opening hypothetical were posted.

16. Bruce Haring, *Bulletin Boards Find a Niche*, USA TODAY, Apr. 26, 1995, at D3. Some BBSs are connected to FidoNet, a network of thousands of personal computer bulletin boards. Loftus E. Becker, Jr., *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others*, 22 CONN. L. REV. 203, 208 n.22 (1989).

prohibition of pseudonym use, and the means of verifying any pertinent information, such as the user's age.<sup>17</sup> Potential users can learn of available BBSs through advertisements in relevant magazines.<sup>18</sup>

Presently, no central governing authority controls either the Internet or cyberspace in its entirety,<sup>19</sup> although service provider agreements may contractually restrict the conduct of users.<sup>20</sup> A common conceptualization of the net, therefore, is that "it's our new frontier, a digital Wild West,"<sup>21</sup> fraught with criminal activity of which child pornography and the exposure of children to cybersmut are primary concerns.

### B. Children and Cybersmut

Child pornography does exist in cyberspace, particularly because of its global expanse which reaches into countries with laws more permissive than those of the United States. Customs officials have arrested individuals for downloading child pornography posted on bulletin boards in Denmark<sup>22</sup> and England.<sup>23</sup> The threat of pedophiles stalking children online raises additional concerns.<sup>24</sup>

Along with these very serious problems, the availability of cybersmut to children online troubles many Americans. While *Penthouse* and

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17. See JONATHAN D. WALLACE & REES W. MORRISON, *SYSLAW: THE SYSPROP'S LEGAL MANUAL* 28 (1988).

18. See Haring, *supra* note 16 (listing as examples BBS MAG., BOARDWATCH, COMPUTER SHOPPER, and ONLINE ACCESS).

19. Byasse, *supra* note 14, at 200-01. See generally Christopher Anderson, *The Accidental Superhighway (The Internet Survey)*, *ECONOMIST*, July 1-7, 1995, at 50.

20. For a discussion of some of the restrictions imposed, see *infra* notes 324-29 and accompanying text.

21. Michael Meyer & Anne Underwood, *Crimes of the 'Net'*, *NEWSWEEK*, Nov. 14, 1994, at 46. Criminal activity on the net without a doubt poses a serious social problem. See generally Michel Meyer, *Stop! Cyberthief!*, *NEWSWEEK*, Feb. 6, 1995, at 36; Vic Sussman, *Gotcha! A Hard-Core Hacker Is Nabbed*, *U.S. NEWS & WORLD REP.*, Feb. 27, 1995, at 66.

22. Jordana Hart & Monica Young, *Child Pornography Via Computer Is Focus of Federal Sweep*, *BOSTON GLOBE*, Mar. 7, 1993, at 48; Scott Dean, *Cyberspace: The Final Frontier*, *PA. L.J.*, Apr. 12, 1993, at A-1; Barbara Kantrowitz, *Child Abuse in Cyberspace*, *NEWSWEEK*, Apr. 18, 1994, at 40; Mike Snider, *FBI Probes On-Line Child Pornography*, *USA TODAY*, Jan. 23, 1995, at D1.

23. Vic Sussman, *Folicing Cyberspace*, *U.S. NEWS & WORLD REP.*, Jan. 23, 1995, at 56. Federal law prohibits the distribution, receipt, and possession of child pornography. 18 U.S.C. §§ 2251-2257 (1991) (Protection of Children Against Sexual Exploitation Act of 1977).

24. Sandy Rovner, *Molesting Children By Computer*, *WASH. POST*, Aug. 2, 1994, (Health), at Z15.

comparable magazines are available online,<sup>25</sup> much more sexually explicit material is available as well, containing themes of bondage, sado-masochism and bestiality.<sup>26</sup> Usenet on the Internet and thousands of BBSs, including the large commercial providers, offer conferencing facilities, chat rooms, and private rooms where participants can discuss sexually explicit topics, post and retrieve sexually explicit pictures, and engage in cybersex.<sup>27</sup>

The demand for cybersmut caused the University of Delft in the Netherlands to unplug an experimental project involving a database of digitized pornography<sup>28</sup> and Carnegie Mellon University to cut sexually oriented newsgroups on Usenet from its Internet Servers.<sup>29</sup> A recent study conducted through Carnegie Mellon University entitled *Marketing Pornography on the Information Superhighway* suggests that over eighty-three percent of the pictures on Usenet groups which stored digitized images were pornographic.<sup>30</sup> While the study suggests a pervasive presence of smut in cyberspace, Usenet represents only 11.5%

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25. *Penthouse Magazine Comes to Internet*, PENTHOUSE, Mar. 1995, at 33-36 (announcing its arrival on the Internet). Playboy is planning a pictorial "Women of the Net" for the spring of 1996. Mike Snider, *Playboy to Net Models in Cyberspace*, USA TODAY, Apr. 17, 1995, at D1.

26. See generally Joel Garreau, *Bawdy Bytes: The Growing World of Cybersex*, WASH. POST, Nov. 29, 1993, at A1, A10; Edmund L. Andrews, *Senate Committee Backs a Smut Ban on Computer Nets*, N.Y. TIMES, Mar. 24, 1995, at A1; Philip Elmer-Dewitt, *Snuff Porn on the Net*, TIME, Feb. 20, 1995, at 69.

27. See generally Joshua Quittner, *Vice Raid on the Net*, TIME, Apr. 3, 1995, at 63; Gerard Van der Leun, *Twilight Zone of the Id*, TIME, Spring 1995, at 36 (special edition); *X-Rated: The Joys of CompuSex*, TIME, May 14, 1984, at 83. For a discussion of cybersex in chat zones and private rooms, see Stolen Kiss, *Confessions of a Cyberslut*, PENTHOUSE, Dec. 1994, at 152-54, 181-82. The increase in technosex and its social effects are potentially revolutionary. See HOWARD RHEINGOLD, *VIRTUAL REALITY* 347-52 (1991).

28. Jared Sandberg, *Electronic Erotica: Too Much Traffic*, WALL ST. J., Feb. 8, 1995, at B1.

29. Derek Slater, *Cyberspace and the Law*, COMPUTERWORLD, Dec. 5, 1994, at 115 (interview with attorney and author Edward Cavazos).

30. Philip Elmer-De Witt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 38. The study is published in the *Georgetown Law Journal*. Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories and Animations Downloaded 8.6 Million Times by Consumers in over 2000 Cities in Forty Countries, Provinces and Territories*, 83 GEO. L.J. 1849 (1995).

of the traffic on the Internet,<sup>31</sup> which itself is only a part of cyberspace. Other statistics suggest that less than five percent of the bulletin boards on the net offer cybersmut.<sup>32</sup>

While the pervasiveness of cybersmut is debatable, its obviousness is not. Cybersmut appears to be clearly marked for those users who want to access it and for those users who want to avoid it.<sup>33</sup> Unfortunately, children without parental supervision might fall into the category of users desiring access. While cyberspace offers great educational opportunities for child<sup>34</sup> and adult users alike, the minimal effort needed to gain access to cyberspace haunts those Americans concerned about the availability and accessibility of cybersmut to children.<sup>35</sup>

### C. A Global Marketplace of Economically Priced Ideas

Technological developments often herald revolutionary trends in information retrieval and global communications.<sup>36</sup> Of primary importance is the potential for the increased exercise of the right of free

31. *Id.* at 40. The study has been the object of a great deal of criticism on-line. See Donna L. Hoffman & Thomas P. Novak, *A Detailed Critique of the Time Article: On a Screen Near You: Cyberporn*, Message posted to CYBERIA-L, LISTSERVER list, July 1, 1995; Alma Whitten, *CyberWire Dispatch* (forwarded messages posted July 5, 1995 on CYBERIA-L); see also Jeffery Rosen, *Cheap Speech: Will the Old First Amendment Battle Survive the New Technologies?*, NEW YORKER, Aug. 7, 1995, at 75. But see Catharine A. MacKinnon, *Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace*, 83 GEO. L.J. 1959 (1995) (study participants to be commended for exposing newest wave in tide of pornography).

32. Meyer, *supra* note 21, at 38. The number of prosecutions for transmitting cybersmut is estimated at anywhere from a handful to dozens. Reske, *supra* note 1, at 40.

33. Leslie Miller, *The Internet's Steamy Side: On-Line Sex, Once Found, Can be Raunchy*, USA TODAY, June 19, 1995, at 1A; Anne Wells Pranscomb, *Internet Babylon? Does the Carnegie Mellon Study of Pornography on the Information Superhighway Reveal a Threat to the Stability of Society?*, 83 GEO. L.J. 1935, 1956-57 (1995).

34. Whinston, *supra* note 10, at 130; see also Belinda Thurston, *Kids Eager to Spend Summer in Cyberspace*, USA TODAY, May 17, 1995, at D8 (large commercial providers feature special summer menus for children).

35. A desire to make cyberspace safe for child travelers led Senator Exon to introduce a bill prohibiting indecency on the net. Jim Exon, *To Make Cyberspace Safe for the Family*, N.Y. TIMES, Mar. 31, 1995, at A30 (letter to the editor). For a discussion of the Exon initiative see *infra* notes 221-28 and accompanying text.

36. See Allen S. Hammond, *Regulating Broadband Communication Networks*, 9 YALE J. ON REG. 181, 189-90 (1992) (broadband communication networks can change communications from a passive to an interactive mode and expand opportunities for speech and assembly). New communication technology holds great potential for biomedical applications as well. Douglas D. Bradham et al., *The Information Superhighway and Telemedicine: Applications, Status, and Issues*, 30 WAKE FOREST L. REV. 145 (1995) (discussion of telemedical projects and history of telemedicine).



speech guaranteed by the First Amendment.<sup>37</sup>

Networked communications hold great promise for the expansion of political discourse,<sup>38</sup> particularly since a significant component of political speech is information and informed discussants.<sup>39</sup> Many public officials now have an online presence for dissemination of views and receipt of feedback.<sup>40</sup> Political issues and social controversies such as the Oklahoma bombing,<sup>41</sup> international hostage takings,<sup>42</sup> and capital punishment<sup>43</sup> are being actively debated in cyberspace as well.

Unlike other forms of mass communication, the net allows access to millions of users, resulting in a wide variety of individual viewpoints being debated and explored.<sup>44</sup> Anonymity encourages the timid to engage in public discourse as well, further expanding the diversity of

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37. See Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1086 (1994) (interactive communications will reinforce users' First Amendment interests). See also Stephen A. Smith, *Communication and the Constitution in Cyberspace*, COMM. EDUC., Apr. 1994, at 87, 91 (freedom of speech and assembly in an electronic forum).

38. See Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1640 (1995) (network "promises to become one of the most powerful democratic tools ever devised").

39. See HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING THE ELECTRONIC FRONTIER* 91 (1993) (access to current information will amplify the "ability of groups of citizens to debate political issues").

40. See Howard Fineman, *The Brave New World of Cybertribes*, NEWSWEEK, Feb. 27, 1995, at 30; Barbara Kantrowitz & Debra Rosenberg, *Ready, Teddy? You're Online*, NEWSWEEK, Sept. 12, 1994, at 60; *E-Mail Brings Congress Closer to Constituents*, ASHEVILLE CITIZEN-TIMES, June 13, 1994, at 3B. See also Angela J. Campbell, *Political Campaigning in the Information Age: A Proposal for Protecting Political Candidates' Use of On-Line Computer Service*, 38 VILL. L. REV. 517 (1993) (discussing use of online services in 1992 campaigns and recommending legislation to enhance nondiscriminatory access).

41. Bruce Haring, *Okla. Bombing Echoes Through Cyberspace*, USA TODAY, Apr. 21, 1995, at D1.

42. Leslie Miller, *Activism Goes On-Line: Rally 'Round Causes in Cyberspace*, USA TODAY, Apr. 25, 1995, at D1.

43. Prior to his death, Girvies Davis, a prisoner who was executed May 17, 1995 at the Statesville Correctional Center in Illinois, established a web home page to plead his cause at <http://www.mcs.net/~bkmurph/girvies.htm>.

44. See Eric C. Jensen, Comment, *An Electronic Soapbox: Computer Bulletin Boards and the First Amendment*, 39 FED. COMM. L.J. 217, 222 (1987) ("The diversity of interests and the large number of boards indicate that the goal of a free market in the supply of communications has been better achieved with bulletin boards than in the newspaper or broadcasting industry."); Jonathan Gilbert, Note, *Computer Bulletin Board Operator Liability for User Misuse*, 54 FORDHAM L. REV. 439, 441 (1985) ("In an age when most forms of mass communication, and thus public debate, are controlled by a small number of people, bulletin boards have the potential to play an important role in the exploration and exchange of ideas."); Wallace & Morrison, *supra* note 17, at iii ("someone said, '[F]reedom of the press belongs to those who own one.' A BBS is a potent means of self-expression and of dissemination of information.")

opinions aired.<sup>45</sup> This decentralized paradigm of public expression gives all participants an equal voice without respect to societal position,<sup>46</sup> and allows for a brisk exchange of point and counterpoint.<sup>47</sup> Moreover, the price paid by users of such a quintessential *marketplace of ideas*<sup>48</sup> is relatively low, a vital consideration for the health of the First Amendment, since without full participation unskewed by wealth "the promise of the First Amendment is only imperfectly realized."<sup>49</sup>

In sum, it seems that technology has resurrected the seventeenth century concept of a commons wherein public meetings abound and discussion flourishes.<sup>50</sup> However, the commons of the twenty-first

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45. Amicus Curiae Brief of the Interactive Services Association at 15-16, *United States v. Thomas*, No. 94-CR-20019 (W.D. Tenn. 1994), *appeal docketed*, No. 94-6648 (6th Cir. Dec. 9, 1994). While the online industry promotes open discussion more effectively than other mediums, its interactive nature could make it more susceptible to a chilling effect on protected speech. *Id.* at 11.

46. *Who Speaks for Cyberspace*, *ECONOMIST*, Jan. 14, 1995, at 69-70.

47. Smith, *supra* note 37, at 90. Further, participants offended by one discussion are always free to start another group. Sussman, *supra* note 23, at 59.

48. As Professor Katsh observed: "The marketplace of ideas is now global as well as national and individual as well as institutional." M. Ethan Katsh, *Rights, Camera, Action: Cyberspatial Settings and the First Amendment*, 104 *YALE L.J.* 1681, 1716 (1995).

49. Eugene Volokh, *Cheap Speech and What It Will Do*, 104 *YALE L.J.* 1805, 1806 (1995). The cost of speech has been a consideration of the Court in some First Amendment cases. *See, e.g.*, *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994) (residential signs represent an unusually cheap and convenient form of communication). *But see* *FCC v. Pacifica Found.*, 438 U.S. 726, 774 (1978) (Brennan, J., dissenting) (Brennan suggests that the Court is insensitive to the costs of alternative ways of hearing taboo words). In *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), the Court recognized the importance of money in the realm of political speech by striking down campaign expenditure limits as being unconstitutional.

50. One intriguing issue posed by cyberspace is whether or not information systems constitute a public forum. Public fora are usually owned by the government, dedicated to the communication of ideas, and subject to public access. *See, e.g.*, *United States v. Grace*, 461 U.S. 171 (1983) (public sidewalk is a public forum); *United States v. Kokinda*, 497 U.S. 720 (1990), *rev'g* 866 F.2d 699 (4th Cir. 1989) (plurality opinion) (postal sidewalk not a traditional public forum); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992) (airport terminal operated by a public authority is not a public forum); *Madsen v. Womens Health Ctr., Inc.*, 62 U.S.L.W. 4686 (U.S. June 30, 1994) (forum around abortion clinic is a traditional public forum). *See generally* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 *UCLA L. REV.* 1713 (1987). Although a discussion of the application of the public forum doctrine to cyberspace is beyond the scope of the article, other writers have examined the topic admirably. *See* David J. Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway (Where are the Public Forums on the Information Superhighway?)*, 46 *HASTINGS L.J.* 335 (1995) (The NII, like a city, includes both public and nonpublic forums); Edward J. Naughton, Note, *Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 *GEO. L.J.* 409 (1992) (public access rules for networked communications may be premature now but necessary at a later time if content-based restrictions imposed by private operators become pervasive). *See also* Henry H. Perritt, Jr., *Access to the National Information Infrastructure*, 30 *WAKE FOREST L. REV.* 51 (1995) (comprehensive discussion of access rights generally on NII).

century<sup>51</sup> is not geographically bounded; instead, through the power of electronics, the commons is virtually boundless.<sup>52</sup> Unfortunately, such an amorphous community poses considerable constitutional questions for one area of First Amendment jurisprudence, that of obscenity.

### III. THE JURISPRUDENCE THAT SHAPES THE LAW OF OBSCENITY

#### A. An Introductory Examination

Obscenity is not constitutionally protected speech. The historical basis for this conclusion, however, is debatable.<sup>53</sup> Arguably the censorship of obscene speech practiced in England by Star Chamber and the Ecclesiastical Courts was limited to seditious libel and religious heresy.<sup>54</sup> The first case involving obscenity unconnected to treasonous or blasphemous speech, *The King v. Sir Charles Sedley*,<sup>55</sup> primarily involved lewd conduct, not sexually explicit speech.<sup>56</sup> Notwithstanding that distinction, English traditions may not even be relevant to the United States since the issue under American jurisprudence implicates a constitutional issue.<sup>57</sup>

It has been argued that the framers of the Constitution did not intend to exclude sexually explicit obscene speech from constitutional protec-

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51. Other characterizations include the descriptive terms silicon salons, digital nightclubs, electronic villages and virtual town halls, village greens, and coffeehouses. See Anne W. Branscomb, *Common Law for the Electronic Frontier*, SCI. AM., Sept. 1991, at 159; Craig Bomberg, *In Defense of Hackers*, N.Y. TIMES, Apr. 21, 1991, (Magazine), at 46-47.

52. Although separated spatially, the level of interaction gives users a feeling that they are in the same place. Katsh, *supra* note 11, at 415.

53. For a discussion of the history of laws restricting obscene speech, see M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF THE LAW* 181-85 (1989); ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT 233-48 (1986) [hereinafter AG's 1986 REPORT]; Samuel T. Currin & H. Robert Showers, *Regulation of Pornography: The North Carolina Approach*, 21 WAKE FOREST L. REV. 263, 264-65 (1986).

54. *United States v. 12 200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 134-35 (1973) (Douglas, J., dissenting).

55. [1663] 1 Keble 620 (K.B.), 83 Eng. Rep. 1146.

56. Sir Sedley, on a tavern balcony in an intoxicated state, uttered profane remarks and poured urine on the crowd below. AG's 1986 REPORT, *supra* note 53, at 238. See also *Memoirs v. Massachusetts*, 383 U.S. 413, 428 n.4 (1966) (Douglas, J., dissenting).

57. *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 698 (1959) (Douglas, J., concurring).

tion.<sup>58</sup> Since the framers intended to allow greater protection for political speech and religious practices than what was enjoyed under English rule, it is difficult to imagine why they would choose, on the other hand, to restrict sexually explicit speech.<sup>59</sup> Nevertheless, *Commonwealth v. Holmes*,<sup>60</sup> decided in 1821, represents the first suppression in the United States of a literary work solely for its sexually explicit content.<sup>61</sup> Later in that century upon the urging of Puritan Anthony Comstock, the federal government and most state legislatures passed laws criminalizing obscene speech.<sup>62</sup>

Providing such speech is not constitutionally protected, a state or federal government can ban it even though such a statute would be based upon the content of the speech. It was not until 1957, however, in *Roth v. United States*<sup>63</sup> that the Court expressly held that "obscenity is not within the area of constitutionally protected speech or press,"<sup>64</sup> although the Court had hinted previously that obscene speech was not protected.<sup>65</sup>

Expressly rejecting constitutional protection for a class of speech requires that class of speech to be defined. In its first attempt at a definition, the *Roth* Court formulated the test of obscenity as "whether

58. Justice Douglas was a proponent of this viewpoint. See, e.g., *United States v. 12 200-ft Reels of Super 8mm. Film*, 413 U.S. 123, 132 (1973) (Douglas, J., dissenting); *Miller v. California*, 413 U.S. 15, 40 (1973) (Douglas, J., dissenting); *Roth v. U.S.*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting). But see *Smith v. California*, 361 U.S. 147, 163 (1959) (Frankfurter, J., concurring) (publication of obscene matter was an English common law offense which was carried across the Atlantic).

59. The libraries of many of the framers included the erotic classics of their time. NAT HENTOFF, *FREE SPEECH FOR ME BUT NOT FOR THEE* 317 (1992).

60. 17 Mass. 336 (1821).

61. The subject of that early case, John Cleland's *Memoirs of a Woman of Pleasure (Fanny Hill)*, was also the subject of a Supreme Court case almost one hundred fifty years later which refined the definition of obscenity. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

62. See MORRIS L. ERNST & ALAN U. SCHWARTZ, *CENSORSHIP: THE SEARCH FOR THE OBSCENE* 29-33 (1964); 53 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 127-28 (Philip B. Kurland & Gerhard Casper eds. 1975) [hereinafter LMB Roth]. For a discussion of federal law prohibiting obscene speech, see *infra* notes 146-214 and accompanying text.

63. 354 U.S. 476 (1957), *aff'g* 237 F.2d 796 (2d Cir. 1956). *Roth* squared the federal obscenity statute with the First Amendment while *Alberts v. California*, a companion case, squared the California Penal Code with the Fourteenth Amendment. *Id.* at 479-80.

64. *Id.* at 485.

65. See, e.g., *Near v. Minnesota*, 283 U.S. 697, 716 (1931) ("[T]he primary requirements of decency may be enforced against obscene publications"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . ."); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) ("Certainly no one would contend that obscene speech, for example, may be punished only upon a showing [of a clear and present danger].").

to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."<sup>66</sup> In *Manual Enterprises Inc. v. Day*,<sup>67</sup> the Court added patent offensiveness to the test.<sup>68</sup> Finally, in *Memoirs v. Massachusetts*<sup>69</sup> a plurality amended the definition to include being "utterly without redeeming social value."<sup>70</sup> In sum, *Roth* and its progeny defined obscenity as the coalescence of three elements: "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."<sup>71</sup>

This definition proved problematic, however. It never commanded a majority of the justices on the Court. As a result, a policy established in *Redrup v. New York*<sup>72</sup> resulted in convictions being reversed whenever at least five members of the Court, applying their separate tests for obscenity, found the alleged obscene speech to be protected.<sup>73</sup> Such a policy, which left the Court as the final arbiter of whether or not the material was obscene, gave little guidance either to prosecutors or potential defendants as to what speech could be criminalized.<sup>74</sup> This was the period in which Justice Potter Stewart penned his famous summation of the issue: "I shall not today attempt further to define the kinds of

66. *Roth*, 354 U.S. at 488-89. The Court favored a more objective formulation instead of the English "most susceptible persons" *Hicklin* test. *Id.* at 489 (referencing *Regina v. Hicklin*, [1868] 3 Q.B. 360).

67. 370 U.S. 478 (1962) (plurality opinion), *rev'g* 289 F.2d 455 (D.C. Cir. 1961).

68. *Id.* at 486 (patent offensiveness and prurient appeal both must conjoin before material can be found obscene under federal law).

69. 383 U.S. 413 (1966).

70. *Id.* at 418. This third prong, being utterly without social value, had been included in Justice Brennan's definition in an earlier case. See *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) (plurality opinion) (citing dicta in *Roth*, 354 U.S. at 484). The Court in *Roth* also had observed that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Roth*, 354 U.S. at 484.

71. *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966).

72. 386 U.S. 767 (1967) (*per curiam*).

73. Thirty-one cases were decided in this manner. *Miller v. California*, 413 U.S. 15, 22 (1973).

74. The defense attorney in the case in which the Court reworked the *Roth-Memoirs* definition had pleaded during oral argument for more guidance for lower courts in applying the appropriate standards. "They work on a case-by-case basis, and I had one judge say to me, when I pointed out *Blount v. Rizzi*, he says: That only counts if the defendant's name is Rizzi and the plaintiff's name is Blount; and other wise it's distinguishable on that fact." 78 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 141 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LMB Miller]. The burden of proving no redeeming social value was also quite harsh for prosecutors.

material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it*, and the motion picture involved in this case is not that."<sup>75</sup>

Finally, in 1973, the Court in *Miller v. California*<sup>76</sup> announced a new conjunctive test for obscenity which shifted the bulk of the responsibility for making the determination back to the jury.

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>77</sup>

The Court expressly rejected as unworkable the *Memoirs* "utterly without redeeming social value" prong<sup>78</sup> and confined the permissible scope of such regulation to works which depict or describe sexual conduct.<sup>79</sup> By way of example the Court suggested for regulation "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" and "patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."<sup>80</sup> The *Miller* definition is still the law with respect to what speech can be banned as being obscene and therefore unprotected under the First Amendment. Whether or not *Miller* succeeded in clarifying what speech belongs in that class which enjoys no constitutional protection, however, is far from clear.

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75. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (emphasis added).

76. 413 U.S. 15 (1973) (5-4 decision), *reh'g denied*, 414 U.S. 881 (1973).

77. *Id.* at 24 (citations omitted).

78. *Id.*

79. *Id.*

80. *Id.* at 25. These examples were not intended to be an exhaustive list. *See, e.g., Ward v. Illinois*, 431 U.S. 767 (1977) (state statute not void for vagueness because it did not expressly include sado-masochistic materials within its ban).

*B. The Reason for the Distinction: A Question of Harm*

Obscenity, it is argued, is not properly a class of protected speech because it contributes nothing to the "unfettered exchange of ideas."<sup>81</sup> Such socially worthless speech, then, can be suppressed in order "to prevent people from having immoral thoughts. The failure to do so, it is argued, threatens the moral fabric of our society."<sup>82</sup> Undoubtedly, the state can proscribe certain sexually explicit *conduct*, particularly in public places, on moral grounds.<sup>83</sup> However, it is difficult to understand why an *obscene* idea that can be proscribed exists for jurisprudential purposes if there is no such thing as a false idea.<sup>84</sup> While legitimate government interests in partial proscription include the protection of juveniles, the protection of the privacy rights of unconsenting adults, and the protection of the public from the pandering of sexually explicit materials,<sup>85</sup> the perceived tendency of obscenity to exert a corrupting influence and lead to antisocial conduct nevertheless remains an

81. *Roth v. United States*, 354 U.S. 476, 484 (1957). "All 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 . . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Id.* at 484-85.

82. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 78 (1989) (Stevens, J., dissenting) (footnote omitted).

83. *See Roth*, 354 U.S. at 512 (Douglas, J., dissenting). Regulating lewd conduct and public indecency is within the state's traditional police power to provide for the health, safety, and morals of the public. *See generally Lewdness, Indecency, and Obscenity*, 50 AM. JUR. 2d §§ 1, 2 (1995). Sometimes, however, conduct is considered to be expressive, nonverbal symbolic speech which is entitled to First Amendment protection. *See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (burning the flag). Nude dancing can be a protected form of expression not considered legally lewd or indecent. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (plurality opinion); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (wearing black armbands); *United States v. O'Brien*, 391 U.S. 367 (1968) (destroying draft card). However, the Court in *Barnes* concluded that while nude dancing was a constitutionally protected form of expression in some circumstances, it was "within the outer perimeters of the First Amendment." *Barnes*, 501 U.S. at 566. For a discussion of *Barnes*, see Melanie Ann Martin, Note, *Constitutional Law — Non-Traditional Forms of Expression Get No Protection: An Analysis of Nude Dancing Under Barnes v. Glen Theatre, Inc.*, 27 WAKE FOREST L. REV. 1061 (1992).

84. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) (defamation case).

85. These interests can be adequately protected without suppressing the entire category of obscene speech as it is currently defined. *See infra* notes 310-47 and accompanying text.

independent justification for a complete ban.<sup>86</sup>

The Court has not required conclusive scientific proof of any causal relationship between obscene material and antisocial behavior either. This has permitted legislative bodies to act on the assumption "that such a connection does or might exist."<sup>87</sup> Indeed, there is a distinct division of thought over whether there exists either a causative or associational relationship between sexually explicit speech and socially deleterious behavior. Nowhere is that division more pronounced than in the reports rendered by two separate presidential commissions.

In 1970, the President's Commission on Obscenity and Pornography concluded that exposure to erotic materials was not a factor in the causation of sex crimes,<sup>88</sup> but that, to a degree, exposure to explicit sexual materials could be a source of adult entertainment, information, and constructive communication about sexual matters in marriage.<sup>89</sup> In stark contrast, the 1986 Commission appointed by President Reagan and headed by Attorney General Edwin Meese determined that the "no negative effects" conclusion advanced by its predecessor was no longer

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86. "The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards." *Roth*, 354 U.S. at 502 (Harlan, J., concurring in part, dissenting in part). In its brief in *Roth*, the government argued that obscene material, while not necessarily inducing immediate conduct, was likely to corrupt the morals. "It requires little judicial notice to know that one whose morals have been corrupted is likely to engage in sex (sic) conduct which society has a right to prohibit. In this slower but no less serious way, obscenity brings about immoral conduct." LMB *Roth*, *supra* note 62, at 219. The Victorian English case whose definition of obscenity, centering on the most susceptible citizens but rejected by American courts, queried "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." *Regina v. Hicklin*, [1868] 3 Q.B. 360. The Court, however, has held that there is not sufficient empirical evidence that exposure to obscene material might lead to deviant sexual behavior or crimes of sexual violence to support a ban on mere possession of obscenity. *Stanley v. Georgia*, 394 U.S. 557, 567 (1969). For a discussion of *Stanley* see *infra* notes 96-101 and accompanying text.

87. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60-61 (1973). In *Paris Adult Theatre I*, the Court opined that if one could assume that "good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character," the converse could also be assumed. *Id.* at 63. The Court also observed that legislatures act on unprovable assumptions in a variety of other public interest areas, such as protecting the environment and preserving natural resources. *Id.* at 62-63. Environmental regulations, unlike speech restrictions, do not implicate First Amendment rights, however.

88. REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 27 (1970).

89. *Id.* at 53. See also *Roth v. United States*, 237 F.2d 815 (1956).



tenable.<sup>90</sup>

To the contrary, the 1986 Commission found that sexually violent materials, and material depicting sexual activity without violence but exhibiting degradation, submission, domination, or humiliation, demonstrated negative effects and caused harm morally, ethically, and culturally.<sup>91</sup> The Commission did not limit that finding to *obscene* violent and degrading materials and rejected zoning as a solution for the materials which could not constitutionally be banned. While legislatures can completely ban obscene speech as defined by the *Miller* test, they can regulate less than obscene, sexually explicit speech by time, place, and manner restrictions based upon the "secondary effects" of the commercialization of sexually explicit speech. For example, the crime and devaluation of property which often coincides "geographically" with the operation of establishments purveying such materials.<sup>92</sup> The

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90. AG's 1986 REPORT, *supra* note 53, at 1031. At about the same time that the Commission was investigating the social effects of obscenity and pornography, some feminists were characterizing protecting pornographic speech as a violation of a woman's civil rights. Although two city councils were persuaded to redefine their law's definition of obscene speech to include material that presented women as sexual objects or in positions of sexual subordination, the legislation was later ruled to be an unconstitutional infringement upon protected speech. *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (mem.). For some seminal works on the deleterious effects that pornography has on women, see, e.g., ANDREA DWORIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); *TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY* (Laura Lederer ed., 1980); *PORNOGRAPHY AND SEXUAL AGGRESSION* (Neil M. Malamuth & Edward Donnerstein eds., 1984). Not all feminists concur in the proposition that censorship of such works is the answer to violence. See NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX AND THE FIGHT FOR WOMEN'S RIGHTS* (1995).

91. AG's 1986 REPORT, *supra* note 53, at 323-35. The Commission found a *direct* causal relationship between exposure to sexually violent materials and anti-social sexual violence in some segments of the populations, whereas exposure to some degrading but nonviolent sexually explicit materials bore *some* causal relationship to the level of sexual violence, coercion, or unwanted aggression in the exposed population. *Id.*

92. Such restrictions are constitutionally permissible so long as they are justified without reference to the content of the regulated speech, narrowly tailored to serve a significant governmental interest, and leave ample alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), *rev'g* 848 F.2d 367 (2d Cir. 1988). See, e.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), *rev'g* 518 F.2d 1014 (6th Cir. 1975) (upholding ordinance that dispersed adult establishments throughout the city); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), *rev'g* 748 F.2d 527 (9th Cir. 1984) (upholding ordinance that confined adult establishment to a given area and prohibited them from locating within a thousand feet of any dwelling, church, park, or school). See generally Comment, *Zoning, Aesthetics, and the First Amendment*, 64 COLUM. L. REV. 81 (1964) (examining the constitutionality of zoning for aesthetic purposes, the extension of the First Amendment's protection to nonverbal expression, and the methodology used by the courts in appraising the legitimacy of exercises of police power that curtail free expression).

Commission, however, determined that while zoning could lessen such secondary effects, zoning could not remedy the potentially harmful primary effects caused by sexually violent and degrading speech.<sup>93</sup> In contrast, the Commission reached no uncontroverted findings with respect to materials depicting sexual activity without violence, degradation, submission, domination, or humiliation, or with respect to nudity unaccompanied by force, coercion, sexual activity, or degradation.<sup>94</sup>

Exposure to materials depicting sexual violence or acts that degrade women may in fact cause individuals to simulate the conduct depicted and to harm others. However, even though such material may plant "ideas" about being violent or degrading towards women, it does not necessarily follow that such speech has that effect on society in general thereby justifying outright constitutional ostracism. Nor does it necessarily follow that, in general, nonviolent materials depicting explicit sexual activity or nudity somehow cause social degeneration or acts of depravity, anymore than it follows that fighting obscenity naturally leads to bank fraud, although isolated incidents can be recited.<sup>95</sup>

At any rate, the more general "tendency to deprave" justification for banning obscene speech as embraced by First Amendment jurisprudence seems undermined in part by a caveat carved by the Court which allows obscenity of any variety to be possessed in the privacy of one's home free from governmental interference. If obscenity results in immoral thoughts which cumulatively can cause antisocial conduct, why should the home be a safe harbor of gestation for such degeneration?

### C. A Constitutional Quirk: Obscenity and Privacy

In *Stanley v. Georgia*<sup>96</sup> the Court held "that the First and Fourteenth Amendments prohibit making the mere private possession of obscene

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93. See AG's 1986 REPORT, *supra* note 53, at 388-89.

94. *Id.* at 335-49. All the commissioners agreed that some materials in these latter categories may be harmful, while some commissioners agreed that some materials in this classification are not harmful. The Commission indicated that zoning could be an appropriate response for such speech. *Id.* at 389. The Commission, in concluding its charge, urged the stricter enforcement of existing criminal laws and proposed 92 recommendations. *Id.* at 433-58.

95. Charles H. Keating, Jr. was a prominent force in the 1960s war against obscenity. His Citizens for Decent Literature, Inc. filed amicus curiae briefs in landmark obscenity cases from *Jacobellis v. Ohio*, 378 U.S. 184 (1964), to *Paris Adult Theatre I. v. Slaton*, 413 U.S. 49 (1973). Keating was later sentenced to twelve years in prison for seventy-three counts of fraud and racketeering in conjunction with his role in defrauding investors in the Lincoln Savings and Loan Association. See David Corn, *Dirty Bookkeeping: Charles Keating's Porno Library*, THE NEW REPUBLIC, Apr. 2, 1990, at 14; *Beltway Bandits: People in Glass S & Ls*, THE NATION, Dec. 11, 1989, at 708.

96. 394 U.S. 557 (1969).

material a crime.<sup>97</sup> The Court reasoned that “[g]iven the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.”<sup>98</sup> The Court also concluded that while the materials at issue were devoid of ideological content, the line between the transmission of ideas and mere entertainment was too elusive to draw with respect to a citizen’s personal library. “Whatever the power of the State to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.”<sup>99</sup>

The constitutional right to privacy which is sacrosanct in one’s home was of primary importance to the Court in creating this caveat. “Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one’s own home.”<sup>100</sup> The Court recognized the power of the government to prevent the private possession of contraband, such as narcotics, firearms or stolen goods, but also recognized that the possession of these items infringed upon no fundamental liberties.<sup>101</sup>

In subsequent cases, however, the Court refused to extend this protection to embrace a correlative right to transport obscene materials. The Court held that Congress could constitutionally prohibit the mailing of obscene materials,<sup>102</sup> the interstate transportation of obscene

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97. *Id.* at 568. *Stanley* involved mere possession with no intent to exhibit, sell, or displace. Further, there was no dispute that the films in fact were obscene. *Id.* at 559 n.2.

98. *Id.* at 567.

99. *Id.* at 566. However, this right to *private* possession does not apply to child pornography because of the state’s compelling and countervailing interest in the protection of children. *Osborne v. Ohio*, 495 U.S. 103 (1990).

100. *Stanley*, 394 U.S. at 565. In a subsequent case the Court emphasized that the personal constitutional right to possess and read obscenity in one’s home did not depend on the question of whether or not obscenity is constitutionally protected because the right was “independently saved by the Constitution.” *United States v. Reidel*, 402 U.S. 351, 355-56 (1971).

101. *Stanley*, 394 U.S. at 568 n.11. Likewise, certain conduct may be proscribed in public, but not in the privacy of one’s home. *United States v. Orito*, 413 U.S. 139, 142-43 (1973). That protection, however, does not extend to all conduct, including quintessential private activities. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that state can prohibit sodomy even in the home).

102. *Reidel*, 402 U.S. at 356 (noting that the focus of the language of *Stanley* was on the freedom of mind and thought and on the privacy of one’s home, and does not require the recognition of a constitutional right to distribute or sell obscene materials).

materials,<sup>103</sup> and the international importation of obscene material,<sup>104</sup> even if the transportation or importation is for the recipient's personal use and possession.<sup>105</sup> Further, the Court refused to extend the zone of privacy to places of public accommodation. The Court in *Paris Adult Theatre I v. Slaton*<sup>106</sup> held that the zone of privacy created by *Stanley* did not follow "a distributor or consumer of obscene materials wherever he goes,"<sup>107</sup> and that nothing in the Court's decisions intimated "that there is any 'fundamental' privacy right 'implicit in the concept of ordered liberty' to watch obscene movies in places of public accommodation."<sup>108</sup>

Although it is questionable as to whether *Stanley* would have been decided the same way today,<sup>109</sup> it is an anomaly of constitutional law which poses some interesting questions for obscenity and cyberspace. If one downloads obscenity from the Internet or a BBS in the privacy of one's home, does *Stanley* apply so as to protect reading, viewing, or possessing it? Justice Harlan opined that the "'right to receive' recognized in *Stanley* is not a right to the existence of modes of distribution of obscenity which the State could destroy without serious risk of infringing on the privacy of a man's thoughts . . ."<sup>110</sup> Is digital transmission, then, a mode of distribution which the state has a right to

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103. *Orito*, 413 U.S. at 143 ("Congress may regulate on the basis of the natural tendency of material in the home being kept private and the contrary tendency once the material leaves that area . . ."), *vacating and remanding* 338 F. Supp. 308 (E.D. Wis. 1973).

104. *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) (plurality opinion), *rev'g and remanding* 309 F. Supp. 36 (C.D. Cal. 1970).

105. *United States v. 12 200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 129 (1973) ("The Constitution does not compel, and Congress has not authorized an exception for [the importation for] private use of obscene material."). See also *United States v. Pryba*, 502 F.2d 391 (D.C. Cir. 1974) (statute prohibiting interstate transportation of obscene materials is constitutional as applied to shipment of obscene film to adult for private, noncommercial exhibition), *cert. denied*, 419 U.S. 1127 (1975).

106. 413 U.S. 49 (1973).

107. *Id.* at 66.

108. *Id.* (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

109. See *United States v. 12 200-ft. Reels Super 8mm. Film*, 413 U.S. 123, 127 (1973) ("[O]ur conclusion is that *Stanley* represents such a line of demarcation; and it is not unreasonable to assume that had it not been so delineated, *Stanley* would not be the law today."). But cf. *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986) (*Stanley* is "firmly grounded in the First Amendment").

110. *United States v. Reidel*, 402 U.S. 351, 359 (1971) (Harlan, J., concurring).

prohibit as it does other forms of transportation and importation?<sup>111</sup> While the Court has sanctioned private possession but not the distribution or receipt of obscenity, it has not addressed the issue of whether or not the state can criminalize the private communication of obscenity from one consenting adult to another within the confines of a home.<sup>112</sup> Arguably, certain forms of cyber-communication, such as E-mail, IRC, and possibly some chat areas could be analogized to a virtual living room in a person's home, to which *Stanley* would apply, while others, such as BBSs, could be analogized to the places of public accommodation to which *Stanley* would not apply.<sup>113</sup> Justice Black, a First Amendment absolutist,<sup>114</sup> surmised that in the future, in light of the Court's subsequent restrictions, *Stanley* would only be good law "when a man writes salacious books in his attic, prints them in his basement, and reads them in his living room."<sup>115</sup> Cyberspace may have brought a more global application of such capability to pass, depending upon one's view of virtual reality. While *Stanley* raises interesting potential analogies appropriate for the application of First Amendment jurisprudence, no greater challenge for that jurisprudence exists than that which lies at the heart of the Court's definition of obscenity — the ubiquitous contempo-

111. "While a persons' [sic] disk drive on his or her computer is analogous to his or her home library, connecting to a computer information system can be seen as analogous to going out to a bookstore." Loundy, *supra* note 4, at 123. However, during transit and storage, the material is in an unintelligible string of 1s and 0s, as is a scrambled satellite signal. See John V. Edwards, Note, *Obscenity in the Age of Direct Broadcast Satellite: A Final Burial for Stanley v. Georgia?*, *A National Obscenity Standard, and Other Miscellany*, 33 WM. & MARY L. REV. 949, 986-92 (1992) (noting that scrambled satellite transmission of obscenity poses a threat to the existence of *Stanley* protection).

112. *Cinema I Video v. Thornburg*, 351 S.E.2d 305, 340 (N.C. App. 1986) (Becton, J., concurring in part, dissenting in part), *aff'd*, 358 S.E.2d 383 (N.C. 1987).

113. A single analogy is not necessarily applicable to all of cyberspace's avenues of communication. See Goldstone, *supra* note 50, at 337, 361.

114. As he said in *Smith v. California*:

Certainly the First Amendment's language leaves no room for inference that abridgements of speech and press can be made just because they are slight. That Amendment provides, in simple words, the "Congress shall make no law . . . abridging the freedom of speech, or of the press." I read "no law . . . abridging" to mean *no law abridging*.

361 U.S. 147, 157 (1959) (Black, J., concurring). See also *Mishkin v. New York*, 383 U.S. 502, 517-18 (1966) (Black, J., dissenting). Justice Douglas, as well, believed that there were no exceptions to the First Amendment. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 70-71 (1973) (Douglas, J., dissenting); Douglas believed that a Constitutional amendment was necessary in order to punish what the Court defined as obscene speech. *Miller v. California*, 413 U.S. 15, 46 (1973) (Douglas, J., dissenting); *Ginsberg v. New York*, 390 U.S. 629, 655 (1968) (Douglas, J., dissenting); *Memoirs v. Massachusetts*, 383 U.S. 413, 428 (1966) (Douglas, J., concurring); *Roth v. United States*, 354 U.S. 476, 511-12 (1957) (Douglas, J., dissenting).

115. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 382 (1971) (Black, J., dissenting).

rary community standards.

#### D. Community Standards in Cyberspace?

As previously discussed,<sup>116</sup> the first two prongs of the *Miller* test use contemporary community standards to determine whether or not a work as a whole appeals to a prurient interest in sex and describes sexual conduct in a patently offensive way. This vague test has proven to be problematic even when applied to traditional works. But the inadequacies inherent in the community standards test become even more apparent when the standard is employed in the electronic environment.<sup>117</sup>

While sensitive persons are included as a part of the relevant community for the first two prongs of the *Miller* test,<sup>118</sup> if the material is aimed at a so-called "deviant" group,<sup>119</sup> then the prurient appeal requirement must be judged in terms of the work's intended effect on that group.<sup>120</sup> Expert testimony is appropriate to determine deviant appeal.<sup>121</sup> However, no such testimony is needed to determine "normal" prurient appeal or patent offensiveness,<sup>122</sup> although such testimony can be offered.<sup>123</sup>

In particular, because community standards do not remain constant,

116. See *supra* text accompanying notes 76-80.

117. The third prong of the test, which examines whether or not the entire work lacks serious literary, artistic, political, or scientific value, is judged by a reasonable person standard. *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987). The *Miller* Court had acknowledged that freedom of serious literary, artistic, political, or scientific expression is an area in which there are few eternal verities. *Miller*, 413 U.S. at 23. The value prong, however, has not escaped criticism. Justice Brennan argued that the protections of the First Amendment should not be limited to works of serious value. *Paris Adult Theatre I*, 413 U.S., at 97 (Brennan, J., dissenting). Feminists in the 1980s questioned whether or not value should count if women were subjected to violence and degradation. Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 21 (1985).

118. See *Pinkus v. United States*, 436 U.S. 293, 298-301 (1978).

119. Characterizing a group as being deviant by definition accepts the premise that there is a norm from which the group's sexual practices depart.

120. See *Mishkin v. New York*, 383 U.S. 502, 508-09 (1966), *reh'g denied*, 384 U.S. 934. The issue was presented in an earlier case, but avoided, as the Court determined there was no prurient appeal regardless of the targeted group. *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962).

121. See *United States v. Klaw*, 350 F.2d 155, 166-67 (2d Cir. 1965); *United States v. Petrov*, 747 F.2d 824, 830 (2d Cir. 1984).

122. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 n.6 (1973).

123. See *Kaplan v. California*, 413 U.S. 115, 121 (1973); *Miller v. California*, 413 U.S. 15, 31 n.12 (1973). Evidence regarding tolerance and availability does not translate into establishing compliance with contemporary community standards, however. See *Hamling v. United States*, 418 U.S. 87, 125 (1974), *aff'g* 481 F.2d 307 (9th Cir. 1973); see also *Curran & Showers*, *supra* note 53, at 291-92.

inconsistencies may arise over time and across jurisdictions. Over time, the concept of community standards may change,<sup>124</sup> usually as social mores become more liberal. In addition, because the definitions of patent offensiveness and prurient appeal are dependent upon a jury's application, the concept of community standards may vary from place to place or even from case to case, depending on how each jury applies the test. Although in extreme cases, the Court may bridle the trial court's discretion and refuse to allow condemnation, a jury in one locale may find a work to be obscene whereas a jury in another might have found that same work to be perfectly acceptable.<sup>125</sup>

Despite these inconsistencies, the Court has refused to lay out more uniform guidelines. In *Miller*, the Court rejected the requirement of a national community standard. According to the Court, "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."<sup>126</sup> Subsequently, the Court determined that the Constitution did not mandate a statewide standard either,<sup>127</sup> and concluded that under federal law the community could be defined as being that from which the jurors

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124. See *United States v. Kennerly*, 209 F. 119 (S.D.N.Y. 1913); see also *Smith v. California*, 361 U.S. 147, 166-67 (1959) (Frankfurter, J., concurring) (arguing that there is a due process right to introduce evidence of contemporary standards); *Jacobellis v. Ohio*, 378 U.S. 184, 192-93 (1964) (plurality opinion). That what society tolerates changes over time is evident in that such literary works as Henry Miller's *Tropic of Cancer* and *Tropic of Capricorn* have been considered obscene. *United States v. Two Obscene Books*, 99 F. Supp. 760 (N.D. Cal. 1951), *aff'd sub nom. Besig v. United States*, 208 F.2d 142 (9th Cir. 1953). Lenny Bruce's performances in the 1960s would pale in comparison to those of Andrew Dice Clay in the 1990s. For a recounting of Bruce's obscenity conviction, see Hentoff, *supra* note 60, at 321-35.

125. See *Kois v. Wisconsin*, 408 U.S. 229 (1972) (per curiam) (reversing conviction for publishing nude photos because photos were rationally related to a news story and their dominant theme could not, therefore, appeal to prurient interest); see also *Jenkins v. Georgia*, 418 U.S. 153 (1974) (holding the film, *Carnal Knowledge*, not obscene). One scholar has queried how the Court could have determined that the film was not patently offensive as a matter of law without instruction on the community standards of Georgia. Frederick F. Schauer, *Reflections on "Contemporary Community Standards": The Perpetuation of an Irrelevant Concept in the Law of Obscenity*, 56 N.C. L. REV. 1, 21 (arguing for a two-prong test for obscenity that concentrates on the non-cognitive aspect of the material to judge prurient appeal and value).

126. *Miller v. California*, 413 U.S. 15, 32 (1973). Justice Brennan, writing for the plurality in *Jacobellis*, with whom only Justice Goldberg joined, concluded that the constitutional status of allegedly obscene work should be determined on the basis of a national standard. *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964). Instead, the Court opted for a geographically smaller community as advocated by Justice Warren in *Jacobellis*. *Id.* at 200-01 (Warren, C.J., dissenting).

127. See *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974).

were selected.<sup>128</sup> Although multiple standards can and do result in materials being protected in one county and prosecuted in another,<sup>129</sup> the Court has held that such different results does not necessarily mean that constitutional rights are compromised.<sup>130</sup>

This endless variety of potential outcomes fails to provide meaningful guidance for law enforcement officials or distributors of allegedly obscene materials.<sup>131</sup> This concern can be traced back to *Roth*.<sup>132</sup> Such uncertainties can also lead to a lowest common denominator approach, whereby distributors market only material that conforms to the standards of the most sensitive community — a conformity that chills protected

128. See *Hamling v. United States*, 418 U.S. 87, 105-06 (1974), *aff'g* 481 F.2d 307 (9th Cir. 1973). The Court also approved of the practice of allowing jurors to apply their own conception of community mores. *Id.* Since neither the relevant community nor its applicable mores is set, appellate review can be problematic. See Note, *Community Standards, Class Actions and Obscenity Under Miller v. California*, 88 HARV. L. REV. 1838, 1844 (1975) (urging federal class action and declaratory procedures be used to reduce the reluctance to nationally distribute works of serious value because of *Miller's* toleration for jurisdictional variations in community standards).

129. Ironically, the same materials which resulted in a conviction in Orange County in *Miller*, had resulted in a dismissal in Los Angeles County. See LMB Miller, *supra* note 74, at 135-36. Variable standards can also lead to different results in federal versus state courts. See John T. Mitchell, *An Exclusionary Rule Framework for Protecting Obscenity*, 10 J.L. & POL. 183, 193-94 (1994).

130. *Miller v. California*, 413 U.S. 15, 26 n.9 (1973). See also *Roth v. United States*, 354 U.S. 476, 492 n.30 (1957). Likewise, subjecting distributors to varying community standards in various federal judicial districts does not render a federal statute unconstitutional. *Hamling*, 418 U.S. at 106.

131. See *Miller*, 413 U.S. at 40 n.5 (Douglas, J., dissenting). See also Mitchell, *supra* note 129, at 190; Note, *supra* note 128, at 1850-51; Arnold H. Loewy, *Why the 1985 North Carolina Obscenity Law Is Fundamentally Wrong*, 65 N.C. L. REV. 793, 793-97 (1987); Joseph Spoor Turner, Note, *Assessing the Constitutionality of North Carolina's New Obscenity Law*, 65 N.C. L. REV. 400, 416 (1987).

132. Legal scholar and author Morris L. Ernst in an *amicus curiae* brief in *Roth* argued that:

[A] publisher confronted with the federal obscenity laws lacks even a remote basis for evaluating whether a work may be held obscene. There is no rational body of judicial decision; there is no basis for predicting the subjective reactions of the jury; accidents of time or geography may become determinative. He may know that certain works have been condemned in certain places. But he also knows that the same works have been cleared — in different places or at a different time. He has no means of guessing where or when his publication will be prosecuted, what the mood of the community from which a jury will be drawn may be, whether the jury will reflect what he deems to be prevailing moral standards and in any case whose moral standards they will be. In other words, he is not in a position to make even an informed guess.

LMB Roth, *supra* note 62, at 423. That same concern transcends the reforms of *Miller*.



speech.<sup>133</sup> Ultimately, an individual's constitutional rights would be subject to the community's "degree" of sensitivity to questionable material.<sup>134</sup>

Although the ambiguity surrounding the concept of community standards may have been tolerable before, it threatens to become intolerable in cyberspace.<sup>135</sup> Perhaps the greatest hurdle in applying this standard in cyberspace is determining what the relevant community should be. Local community standards would seem to be irrelevant in cyberspace, a technological expanse which transcends provincial boundaries. The appropriate community arguably should be the virtual community.<sup>136</sup> Computer technologies allow communities to be created by individuals who share similar interests and wish to communicate with each other about those interests. Members of newsgroups and BBSs, therefore, form global villages whose citizens are more connected to their electronic neighbors than to their geographic neighbors.<sup>137</sup> Given that theirs is the primary community affected,<sup>138</sup> if the topic of discussion in this virtual community involves cybersmut, the individuals who choose to communicate about that topic should be the ones to determine

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133. See *Hamling*, 418 U.S. at 144-45 (Brennan, J., dissenting). See also Edwards, *supra* note 111, at 966; Byasse, *supra* note 14, at 210; Note, *supra* note 128, at 1858.

134. This notion was rejected by the Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819) ("[A] question of constitutional power can hardly be made to depend on a question of more or less.").

135. See, e.g., Volokh, *supra* note 49, at 1845 (while casting no doubt on the basic rules of the First Amendment, computer networks cloud the concept of local community standards); Jerry Berman & Daniel J. Weitzner, *Abundance & User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1634 n.50 (1995) (national and international reach of new interactive media raises a host of questions concerning the determination of obscenity based on traditional "community standards"); Trotter Hardy, *The Proper Legal Regime for "Cyberspace"*, 55 U. PITT. L. REV. 993, 1013 (1994) (the ability to belong to a physical and electronic community simultaneously is likely to cause new problems relating to community standards).

136. Branscomb, *supra* note 38, at 1672. See also John D. Faucher, Comment, *Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases*, 26 U.C. DAVIS L. REV. 1045, 1067 (1993) (since users do not share a geographic space but a community of wires and electric pulses, choice of law rules will not work in BBS libel cases).

137. Sussman, *supra* note 23, at 59. The level of tolerance for explicit discussion indeed varies online. Catherine Yang, *Flamed with a Lawsuit*, BUS. WK., Feb. 6, 1995, at 70-71; Garreau, *supra* note 26, at A10.

138. Byasse, *supra* note 14, at 210.

when the bounds of decency have been exceeded.<sup>139</sup>

Applying conventional community standards to either the general *cybercommunity* voir dire regime or the BBS-specific voir dire regime raise difficult problems. For the latter, a select group of *cybercitizens* sympathetic to defendants will decide the majority of cases; for the former, the community will become overinclusive and, therefore, contrary to the Court's mandate in *Miller*.<sup>141</sup>

Beyond the community standards argument above, restricting access to persons living in geographic areas less tolerant of sexually explicit speech than the virtual community or the community in which the message originates may be technologically impossible.<sup>142</sup> While restricting messages sent by mail and even recorded messages transmitted by phone to certain geographic areas may be economically feasible, restricting interactive online communications would present a tremendous economic burden.<sup>143</sup> Available only on portions of the telephone service grid over which computer systems operate, call identification may not be an accurate identification of the caller's location, and may soon be undermined where it is available by portable cellular numbering systems.<sup>144</sup> As a result, a person can access cybersmut without the knowledge of a system operator, who cannot block access even if the sysop was able to accurately predict whether or not the standards of the geographic community from which the call originated would be violated.<sup>145</sup> Thus, although the law historically has adapted to technolog-

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139. Amicus Curiae Brief of the American Civil Liberties Union et al. at 21-24, *United States v. Thomas*, No. 94-CR-20019 (W.D. Tenn. 1994), *appeal docketed*, No. 94-6648 (6th Cir. Dec. 9, 1994) [hereinafter *ACLU Brief*]; Amicus Curiae Brief of the Electronic Frontier Foundation, at 12-15, *United States v. Thomas*, No. 94-CR-20019 (W.D. Tenn. 1994), No. 94-CR-6648 (6th Cir. Dec. 9, 1994) [hereinafter *EFF Brief*]. Juries can be instructed in the appropriate cybercommunity standards. Amicus Curiae Brief of the Society for Electronic Access et al. at 38, *United States v. Thomas*, No. 94-CR-20019 (W.D. Tenn. 1994), *appeal docketed*, No. 94-6648 (6th Cir. Dec. 9, 1994) [hereinafter *SEA Brief*].

141. *Miller v. California*, 413 U.S. 15, 32 (1973).

142. *ISA Brief*, *supra* note 45, at 2.

143. *Id.* at 13-14 n.30; *EFF Brief*, *supra* note 139, at 16-17. The challenge, while arguably not as great, is equally disconcerting for direct broadcast satellite systems. See generally *Edwards*, *supra* note 113.

144. *SEA Brief*, *supra* note 139, at 28-32. Regulations of the FCC also provide that callers must be allowed to cancel this feature, if they desire. 47 C.F.R. § 64.1601(b)(1994). Further, while the more expensive 1-800 and 1-900 phone lines permit caller identification, many BBSs operate on a smaller, less expensive regular phone line. Initially, a Sysop could call the subscriber back to verify the origination of the call; however, at a later date the system could be accessed from another locale, no matter where the initial call was placed.

145. The problem is compounded further when a system is accessed through the Internet since only the location of the gateway computer system may be discernable. *SEA Brief*, at 32-34.

ical advances, cyberspace and cybersmut pose some unique problems for First Amendment jurisprudence regarding its definition and regulation of obscene material.

#### IV. FEDERAL STATUTORY PROHIBITIONS ON OBSCENE AND INDECENT SPEECH

##### A. Tangible Obscene Materials

Since obscenity does not enjoy constitutional protection, the government can prohibit its dissemination.<sup>146</sup> The federal obscenity statute contained in Title 18 of the United States Code prohibits the transportation of obscene material by mail,<sup>147</sup> common carrier,<sup>148</sup> and private conveyance.<sup>149</sup> Specifically, § 1461 passed pursuant to the postal power delegated to Congress under the Constitution,<sup>150</sup> declares “[e]very obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance . . . to be nonmailable matter.”<sup>151</sup> The cumulative list of descriptive terms has been interpreted as encompassing

146. However, that result is not required. For example, the constitution of Oregon protects obscene speech even though that protection is not mandated by the federal Constitution. OR. CONST. art. I § 8. In *State v. Henry*, 732 P.2d 9 (1987), the Oregon Supreme Court held that the state constitution protected obscenity as a form of expression.

147. 18 U.S.C. § 1461 (1994); see also 18 U.S.C. § 1463 (1994) (mailing indecent matter on wrappers or envelopes).

148. 18 U.S.C. § 1462 (1994).

149. 18 U.S.C. § 1465 (1994).

150. U.S. CONST. art. I, § 8, cl. 7. The statute was upheld against a constitutional challenge in *Ex Parte Jackson*, 96 U.S. 727 (1878).

In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals . . . [t]he only question for our determination relates to the constitutionality of the Act; and of that we have no doubt.

*Id.* at 736-37. For a discussion of the history of the statute, see *Manual Enters., Inc. v. Day*, 370 U.S. 478, 501-11 (1962) (Brennan, J., concurring). See also *id.* at 521-24. (Clark, J., dissenting).

151. 18 U.S.C. § 1461 (1994). The statute's predecessor was interpreted as not applying to sealed private correspondence. *United States v. Chase*, 135 U.S. 255, 259 (1890) (generic term “writing” not construed to encompass “letters”). Congress amended the statute subsequently so as to include private letters. The revised statute was upheld in *Andrews v. United States*, 162 U.S. 420 (1896).

the *Miller* definition of obscenity.<sup>152</sup> Likewise, § 1462 prohibits the interstate transportation by common carrier of "any obscene, lewd, lascivious or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character."<sup>153</sup> Under both sections prosecution may be brought in either the situs of transmission or receipt.<sup>154</sup> Finally, § 1465 prohibits using "a facility or means of interstate commerce for the purpose of transporting obscene material in interstate or foreign commerce."<sup>155</sup>

The violation of each of these sections carries a separate fine and term of imprisonment.<sup>156</sup> In addition, § 1467 provides that property used in the commission of an obscenity offense is subject to criminal forfeiture.<sup>157</sup> Further, the Supreme Court has held that obscenity law violations can constitutionally can serve as predicate offenses under both federal and state Racketeer Influenced and Corrupt Practices ("RICO") acts,<sup>158</sup> and subject one to the forfeiture provisions of such statutes as well.<sup>159</sup>

The federal statute requires some element of scienter. The Supreme Court has emphasized the importance of this requirement, particularly with respect to the criminalization of obscene speech. According to the

152. See *Hamling v. United States*, 418 U.S. 87, 114 (1974); *United States v. 12 200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 130 n.7 (1973). See also *Manual Enters.*, 370 U.S. at 487-88 (stating that the power of Congress in enacting the statute embraces the interdiction of obscenity as it was understood). State courts as well tend to construe their obscenity statutes as incorporating the *Miller* definition. See, e.g., *Cinema I Video v. Thornburg*, 83 N.C. App. 544 (1986), *aff'd*, 358 S.E.2d 383 (N.C. 1987).

153. 18 U.S.C. § 1462(a) (1994). Like § 1461, § 1462 apparently prohibits materials synonymous with the *Miller* definition of obscenity. See *United States v. Orito*, 413 U.S. 139, 143 (1972). Similarly, phonograph recordings, electrical transcriptions or other articles capable of producing sound are prohibited. 18 U.S.C. § 1462(b) (1994).

154. See, e.g., *United States v. Bagnell*, 679 F.2d 826 (11th Cir. 1982); *United States v. McManus*, 535 F.2d 460 (8th Cir. 1976), *cert. denied*, 429 U.S. 1052 (1977); *United States v. Slepicoff*, 524 F.2d 1244 (5th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976).

155. 18 U.S.C. § 1465 (1994). This section has also been construed as incorporating the *Miller* definition. *Marks v. United States*, 430 U.S. 188, 190-91 (1977). See *infra* notes 171-86 and accompanying text for a discussion of the application of this section to a case involving the operators of a BBS.

156. Sections 1461, 1462, and 1465 all provide for a fine of \$5,000, five years imprisonment, or both. Sections 1461 and 1462 also provide for a fine of \$10,000, ten years imprisonment, or both for subsequent convictions.

157. 18 U.S.C. § 1467 (1994). Forfeiture can be a weighty penalty for the violation of either state or federal law when computer equipment is involved in the commission of the offense. See *Ness*, *supra* note 1, at 26.

158. See *United States v. Pryba*, 674 F. Supp. 1504 (E.D. Va. 1987) (federal law); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (state law). The federal RICO statute is codified at 18 U.S.C. §§ 1961-1968 (1991).

159. *Alexander v. United States*, 113 S. Ct. 2766 (1993), *vacating and remanding* *Adult Video Assoc. v. Barr*, 943 F.2d 825 (8th Cir. 1991) (forfeiture is permissible punishment and not a prior restraint on speech).

Court, "[t]he Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."<sup>160</sup>

The leading case addressing the element of scienter in laws that criminalize the dissemination of obscenity involved the interpretation of a state law. In *Smith v. California*,<sup>161</sup> the Court held that a city ordinance violated the First and Fourteenth Amendments when it made the proprietor of a bookstore strictly liable for stocking a book later determined to be obscene.<sup>162</sup> The Court determined that such a statute must require some knowledge of the contents of the materials lest a seller restrict sales to those volumes which have been personally inspected.<sup>163</sup>

Subsequently, the Court further refined the scienter requirement. Specifically, it interpreted § 1461 of the federal obscenity law as constitutionally requiring only that the defendant have knowledge of the contents of the materials distributed, and of the character and nature of the materials, not their exact legal status.<sup>164</sup>

To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language [of the statute] nor by the Constitution.<sup>165</sup>

Thus, generally speaking, absolute liability cannot be imposed by obscenity statutes as there must be at least some imputable knowledge of the general nature of the materials so as to put one on notice of the potential criminal liability surrounding such speech.

This scienter requirement poses several interesting issues for the regulation of obscenity in cyberspace. For example, how can a recipient of cybersmut have knowledge of the content of the materials, along with their character and nature, prior to downloading? The likelihood of prurient appeal and patent offensiveness may be predictable to one *specifically surfing for smut*. But how can the value of the material be

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160. *Mishkin v. New York*, 383 U.S. 502, 511 (1966).

161. 361 U.S. 147 (1959).

162. In distinguishing strict liability criminal statutes for food distributors the Court observed that "the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller." *Id.* at 152-53.

163. *Id.* at 153.

164. *Hamling v. United States*, 418 U.S. 87, 123 (1974).

165. *Id.* at 123-24. See also *United States v. Levinson*, 790 F. Supp. 1483 (D.C. Nev. 1992); *United States v. Cohen*, 583 F.2d 1030 (8th Cir. 1978); *United States v. Germain*, 411 F. Supp. 719 (D.C. Ohio 1975).

judged according to a reasonable person standard prior to viewing? And at the point of viewing, would not *Stanley* apply? Further, is this issue of scienter as applied to cyberspace really any different from obtaining sexually explicit materials by mail or by common carrier? Another interesting question is whether or not sysops would possess the requisite scienter for materials posted by other users to their BBSs, or whether they would be analogous to the bookseller in *Smith* to whom absolute liability could not constitutionally apply.<sup>166</sup>

The second question these statutes raise when considered in the context of cyberspace is whether they were intended to apply to the conveyance of intangible electronic impulses. The Tenth Circuit has answered that question in the negative, interpreting both § 1462 and § 1465 as being limited to the transportation of tangible objects.<sup>167</sup>

To date, one cybercase<sup>168</sup> has been tried under the federal obscenity law and has tested both the scienter requirement and the tangible/intangible distinction. In *United States v. Thomas*,<sup>169</sup> the operators of the Amateur Action Bulletin Board System ("AABBS") were convicted on three counts of violating § 1462 and six counts of violating § 1465 of the federal obscenity statute.<sup>170</sup> The convictions under § 1462 involved the transportation of obscene video tapes by United Parcel Service from California to Tennessee, while the convictions under Section 1465 involved the downloading of GIFs in Tennessee, specifically thirteen of the approximately 17,000 GIFs available on the BBS.<sup>171</sup>

Mr. Thomas purchased videos in California from adult bookstores,

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166. See Naughton, *supra* note 50, at 441 (arguing that *Smith* actual knowledge standard should apply so that network operators will be held liable only for knowingly publishing obscene messages); Gilbert, *supra* note 44, at 449-50 (with respect to defamatory speech, the law should not impose a duty on Sysops to pre-screen messages). See also Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991). In *Cubby*, the court found an online commercial service not liable for a defamatory newsletter provided by another company. Of importance to the court was that CompuServe did not exercise editorial control or have reason to know of the defamatory nature of the publication. *Id.* at 140. For an overview of the case, see Robert B. Charles, *Freedom of Expression and Libel in Cyberspace*, NAT'L L.J., Dec. 12, 1994, at B10, B13.

167. *United States v. Carlin Communications, Inc.*, 815 F.2d 1367, 1371 (10th Cir. 1987).

168. A cybercase is an adjudication involving issues comprising or connected with cyberspace.

169. No. 94-CR-20019 (W.D. Tenn. 1994), *appeal docketed*, No. 94-6648 (6th Cir. Dec. 9, 1994) [hereinafter *Thomas*]. For a discussion of the case, see Byasse, *supra* note 14, at 204-07.

170. Mr. Thomas was sentenced to thirty-seven months and Mrs. Thomas was sentenced to thirty months in federal prison. Sentencing Hearing Tr. at 57-58, *Thomas*. The trial court also ordered the forfeiture of their computer equipment under 18 U.S.C. § 1467 (a)(3).

171. Trial Tr. at 574, *Thomas*.

sold them to BBS members who requested them, and created GIFs from the videos by using a scanner.<sup>172</sup> Although the trial judge characterized the material as being clearly obscene,<sup>173</sup> the San Jose Police Department had previously seized the contents of the system and the state district attorney had concluded that the materials were not obscene.<sup>174</sup> The defendants had advertised their BBS, however, as “the nastiest place on earth.”<sup>175</sup>

In response to a complaint, a United States postal inspector in Memphis became a member of the AABBS by paying a fee and completing an application form which included a statement declaring that the applicant was of legal age.<sup>176</sup> Over the course of several months, the agent ordered videos through the BBS and downloaded files. Of the 3,500 AABBS members, there was no evidence that anyone other than the postal inspector was a resident of Tennessee.<sup>177</sup> Presumably to increase membership, the Thomases urged members to “distribute freely” the available materials,<sup>178</sup> but they did not accept uploads from members.<sup>179</sup> Therefore, the files that were downloaded by the inspector had been posted by the defendants, who, thus, arguably had reason to know their contents, nature, and character. Nevertheless, even assuming that the files were obscene by the community standards commensurate with the federal court’s jurisdiction in Tennessee, and that scienter was provable, the application of § 1465 to the defendants and their BBS is still quite problematic. In particular, the trial judge failed to make any distinction between tangible and intangible communications and instead instructed the jury that the phrase “facility or means of interstate

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172. Brief for Appellant at 5, *Thomas*.

173. Sentencing Hearing Tr. at 14, *Thomas*.

174. *Id.* at 37-38. The Santa Clara County district attorney’s determination would have no legal impact on any proceedings in Tennessee. Even an adjudication in California that the materials were not obscene would not be dispositive in Tennessee since the community standard there could vary from those in California. See *United States v. Linetsky*, 533 F.2d 192 (5th Cir.), *reh’g denied*, 540 F.2d 1086 (1976). As the trial judge correctly observed, whether or not the defendants believed the material was legally obscene had “absolutely no relevancy whatsoever.” Trial Tr. at 840, *Thomas*.

175. Trial Tr. at 301, *Thomas*. The descriptions of the materials available through the BBS were quite graphic, apparently to induce purchases. See *id.* at 768-69. In fact, business was brisk; the AABBS had \$238,000 in VISA and MasterCard transactions in 1993 alone. *Id.* at 624.

176. *Id.* at 318. Mr. Thomas would then voice verify the applicant’s age by a return phone call. *Id.* at 742. GIFs could not be viewed unless one was a member of the BBS. *Id.* at 302.

177. Brief for Appellant at 8, *Thomas*.

178. Trial Tr. at 744, *Thomas*. Permitting such electronic republication might subject Sysops unknowingly to criminal liability under even stricter community standards than those of their own BBS members.

179. *Id.* at 745.

commerce" in § 1465 included *any* method of communication between different states.<sup>180</sup> This broad reading of the statute will be tested on appeal, where it will be argued that the Thomases, through their BBS, did not "transport" obscene materials under the statute,<sup>181</sup> that it was the postal inspector instead who initiated the affirmative act of pulling the files from the BBS,<sup>182</sup> and that the digital information, strings of 0s and 1s transmitted over fiber optic cables, does not constitute "materials" within the meaning of the statute.<sup>183</sup>

### B. Regulating Obscenity and Indecency in Telecommunications

Regulating material transmitted over broadcast media has met little resistance from both the Court and legislative bodies. The primary justifications that dictate constitutionally permissible broader restrictions on speech for broadcast media are the pervasive and intrusive nature of the medium and its alleged scarcity. The intrusiveness justification recognizes that broadcasts, including those containing indecent material, confront individuals in the privacy of their own homes.<sup>184</sup> The potential effect of broadcast media on children has been of particular concern.<sup>185</sup>

In *Ginsberg v. New York*,<sup>186</sup> the Supreme Court upheld the constitutionality of a New York statute which prohibited the sale to minors of material not considered obscene for adults.<sup>187</sup> The Court concluded that the statute did not invade the area of freedom of expression constitutionally secured to minors.<sup>188</sup> In effect, the Court sanctioned the concept of variable obscenity,<sup>189</sup> whereby the state can restrict a minor's access to indecent speech or sexually explicit speech, which for adults is constitutionally protected.<sup>190</sup> In restricting a minor's access to speech not

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180. *Id.* at 898.

181. Brief for Appellant at 19, *Thomas*; *ACLU Brief*, *supra* note 139, at 7. The word "transport" arguably applies only to tangible physical objects, whereas the word "transmit" refers to the distribution of intangible items which can remain at the original location as well as the location to which they are transmitted. *Byasse*, *supra* note 14, at 213 n.76.

182. The proper analogy for criminal law purposes, then, would be to the bookseller who makes available materials to customers for them to transport. Brief for Appellant at 32, *Thomas*; *ACLU Brief*, *supra* note 139, at 18. See also *Byasse*, *supra* note 14, at 211.

183. Brief for Appellant at 19, *Thomas*; *ACLU Brief*, *supra* note 139, at 13.

184. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

185. See, e.g., Reed Hundt, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television*, 9 HARV. J.L. & TECH. 11 (1996).

186. 390 U.S. 629 (1968).

187. *Id.* at 634-35.

188. *Id.* at 637.

189. *Id.* at 635-36.

190. A rationale for the variable obscenity concept is that minors lack the full capacity for choice possessed by adults. *Id.* at 649-50 (Stewart, J., concurring).



considered obscene, however, the state must not unconstitutionally burden protected expression for adults. The Court characterized one overly eager effort to shield juvenile innocence as an attempt to "burn the house to roast the pig."<sup>191</sup>

The government interest in the well-being of its youth was a key factor relied upon by the Court in *FCC v. Pacifica Foundation*<sup>192</sup> to justify the FCC's regulation of indecent, though not obscene, speech over the airways.<sup>193</sup> The Court particularly emphasized that broadcasts are "uniquely accessible to children, even those too young to read."<sup>194</sup> The Court, however, did not authorize a ban on all indecent transmissions, but merely allowed the government to channel indecent speech, considering such variables as the time of the broadcast, and the content of the program.<sup>195</sup> The *Pacifica* Court concluded that its holding only recognized that "when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."<sup>196</sup> Recently, the D.C. Circuit allowed the pig to be channelled into the barnyard during the daylight hours, and approved a congressional ban on indecent television programming between six o'clock in the morning and ten o'clock in the evening.<sup>197</sup>

The other justification for the government exercising greater control over the broadcast media is the scarcity of the airways, a natural resource. Spectrum scarcity has been used to justify access

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191. *Butler v. Michigan*, 352 U.S. 380, 383 (1957). There is no generalized government interest in protecting adults from indecent speech. See *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc); *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995) (en banc).

192. 438 U.S. 726 (1978).

193. See *infra* note 215 and accompanying text.

194. 438 U.S. at 749.

195. *Id.* at 750.

196. *Id.* at 750-51.

197. *Action for Children's Television*, 58 F.3d at 654 (D.C. Cir. 1995) (en banc). The D.C. Circuit has wrestled for seven years with defining a safe harbor for children from broadcast indecency. See *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (invalidating administrative decision by the FCC to ban the broadcast of indecent materials from six a.m. to midnight not adequately justified); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) (holding that twenty-four hour statutory ban on indecency is unconstitutional); *Action for Children's Television v. FCC*, 11 F.3d 170 (D.C. Cir. 1993) (finding the six a.m.-to-midnight statutory ban on indecency is too broad to meet constitutional requirements), *reh'g granted*, 15 F.3d 186 (D.C. Cir. 1994), *cert. granted*, 64 U.S.L.W. 334 (Nov. 13, 1995).

requirements<sup>198</sup> and licensing policies<sup>199</sup> designed to promote diversity in programming. This scarcity rationale has recently fallen into disrepute, however, particularly in light of advances in technology,<sup>200</sup> and has not been applied to cable television.<sup>201</sup> Furthermore, since cable television requires that viewers take more affirmative steps to secure reception than does broadcasting, arguably the intrusiveness and pervasiveness rationales for stricter regulation of indecency should not apply with equal force to cable either.<sup>202</sup> The state's justified concern for the exposure of children to indecent programming remains. Although more options exist to block children's access to cable than to radio or television broadcast,<sup>203</sup> nonetheless, current federal law prohibits the transmission over "any cable system [of] any matter which is obscene or otherwise unprotected by the Constitution."<sup>204</sup>

Because indecency, like pornography, is not obscene under *Miller*,

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198. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding FCC's "fairness doctrine" requiring broadcasters to give fair coverage of public issues). The FCC subsequently abandoned the "fairness doctrine." See *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989) (holding fairness doctrine not constitutionally mandated), *cert. denied*, 493 U.S. 1019 (1990).

199. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (holding racially preferential licensing policies constitutional), *overruled by Adarand Constructors, Inc. v. Federico Pena*, 115 S. Ct. 2097 (1995).

200. See *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986) (noting that scarcity rationale does not justify treating broadcast media differently from print media under the First Amendment), *cert. denied*, 482 U.S. 919 (1987). See also Note, *supra* note 37, at 1073 (arguing that scarcity is not longer descriptively accurate with respect to availability of channels); Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 37-40 (1995) (arguing that scarcity does not justify a lower First Amendment standard of protection for broadcast media).

201. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2456-58 (1994). For a discussion of *Turner* and its implications for new technologies, see Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1765-81 (1995).

202. See *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (invalidating ban on indecent cable programming); *Community Television v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985), *aff'd*, 800 F.2d 989 (10th Cir. 1986) (mem.) (invalidating cable ban on material defined by *Miller*). See also Note, *supra* note 37, at 1079-80. For a discussion of the application of the First Amendment to cable television, see Phillip H. Miller, Note, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 FORDHAM L. REV. 1147, 1176-89 (1993).

203. The use of lock-boxes to block access to certain channels is one viable option. For a discussion of regulating obscenity and indecency on cable television, see Jason Roberts, Note, *Public Access: Fortifying the Electronic Soapbox*, 47 FED. COMM. L.J. 123 (1994).

204. 47 U.S.C. § 559 (1988). The distribution of obscene material by cable television or subscription services is also prohibited by 18 U.S.C. § 1468(a) (1994). "Distribut[ion]" is defined as including transmission by telecast, broadcast, or cablecast by wire, microwave, or satellite. 18 U.S.C. § 1468(b) (1994). For a discussion of the issues of obscenity and indecency in satellite broadcasting, see Edwards, *supra* note 111.

any means to regulate it, even for the purpose of protecting children, must be narrowly tailored so as not to unduly burden protected speech.<sup>205</sup> In *Sable Communications v. FCC*,<sup>206</sup> the Court examined the constitutionality of § 223(b) of the Communications Act of 1934 which, as amended by Congress in 1988, banned all obscene and indecent interstate telephone messages for commercial purposes.<sup>207</sup> The Court approved of the ban on obscene messages, concluding that the responsibility would lie with the providers of the so-called "dial-a-porn" services to determine and comply with the various community standards for defining obscenity pursuant to *Miller*.<sup>208</sup>

In contrast, the Court held that the total ban on commercialized indecent speech was unconstitutional. The Court recognized that the government could regulate the content of constitutionally protected speech in order to promote a compelling state interest, such as protecting minors from the influence of speech not obscene by adult standards.<sup>209</sup> However, the Court stressed that the means chosen must be *carefully tailored*, "the least restrictive means to further the articulated interest."<sup>210</sup>

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205. For example, the D.C. Circuit recently upheld § 10 of the Cable Television Consumer Protection and Competition Act of 1992, that allows a cable operator to refuse to carry indecent programming on leased access channels; directs the FCC to prescribe rules for placing all indecent programming which is carried on such channels to be blocked absent a written request for access; and requires the FCC to promulgate regulations which permit operators to prohibit public, educational, or government channels from programming obscene material, sexually explicit material, or material soliciting unlawful conduct. *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995) (en banc). A previous panel decision invalidated the FCC attempt to place all indecent programming carried on leased access channels into a single leased access channel that would be blocked absent a written request for access. *Alliance for Community Media v. FCC*, 10 F.3d 812, 815 (D.C. Cir. 1993), *reh'g granted*, 15 F.3d 186 (D.C. Cir. 1994), *cert granted*, 64 U.S.L.W. 347 (Nov. 13, 1995).

206. 492 U.S. 115 (1989).

207. *Id.* at 117. The Second Circuit had wrestled with defining a safe harbor for children from indecent *dial-a-porn* services for five years prior to Congress's enacting a total ban. See *Carlin Communications, Inc. v. FCC*, 749 F.2d 113 (2d Cir. 1984) (holding that regulation permitting access only between 9:00 p.m. and 8:00 a.m., or alternatively upon payment by credit card, is both underinclusive and overinclusive); *Carlin Communications, Inc. v. FCC*, 787 F.2d 846 (2d Cir. 1986) (holding that record did not support as the least restrictive means a requirement that access be restricted to adults with identification code or credit card); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir.) (upholding regulation which required either identification or access codes, payment by credit card, or the use of a scrambling device), *cert. denied*, 488 U.S. 924 (1988).

208. *Sable*, 492 U.S. at 126. The Court rejected any national obscenity standard for telephone messages and suggested that providers develop a system of screening and blocking calls to communities with stricter definitions of prurient appeal and patent offensiveness. *Id.* at 124-25. Such methods, however, may not be available to BBS operators. See *supra* notes 142-45 and accompanying text.

209. *Sable*, 492 U.S. at 126.

210. *Id.*

The Court concluded in *Sable* that "the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages."<sup>211</sup> Although the Court failed to articulate a definition for indecent speech, two appeals courts have subsequently endorsed the definition of the FCC, which it borrowed from the broadcast media area, finding it "is sufficiently precise to survive Constitutional scrutiny."<sup>212</sup>

In response to *Sable*, Congress amended the statute applicable to commercial providers to allow the FCC to promulgate a safe harbor from indecency which protects minors without unconstitutionally intruding on protected speech. These regulations, as adopted and upheld on appeal,<sup>213</sup> give commercial providers a defense to liability under the statute if they: notify the common carrier of the sexually explicit nature of their service so that the carrier can specifically identify any calls placed on monthly billing statements; and either (1) require payment by credit card; (2) require an authorized access or identification code prior to transmission; or, (3) scramble the message.<sup>214</sup>

### C. Applying Telecommunications Standards to Cybersmut

Even if § 1462 and § 1465 are found to be inapplicable in cyberspace, other federal statutes might cover intangible communications. For example, 18 U.S.C. § 1464 provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." Unlike other provisions of the federal obscenity law discussed above, this section embraces more than the *Miller* definition of obscenity. In *FCC v. Pacifica Foundation*,<sup>215</sup> the Court held that the statute reaches speech that is merely indecent.<sup>216</sup> Indecent speech is defined by the FCC as "language that describes, in terms patently offensive as measured by contemporary community standards for the

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211. *Id.* at 131.

212. *Information Providers' Coalition v. FCC*, 928 F.2d 866, 874 (9th Cir. 1991). See also *Dial Info. Servs. v. Thornburgh*, 938 F.2d 1535, 1540-41 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992). The FCC basically borrowed the same definition previously developed for the broadcast media and defined indecent speech as "the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium." *Information Providers' Coalition*, 928 F.2d at 869. See *infra* note 217 and accompanying text.

213. *Dial Info. Servs.*, 938 F.2d at 1540-41. See also *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir. 1991).

214. 47 C.F.R. § 64.201 (1994).

215. 438 U.S. 726 (1978); see *supra* note 192.

216. *FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978).

broadcast medium, sexual, or excretory activities and organs.<sup>217</sup> The Court also held that prurient appeal is not a necessary element in determining indecency.<sup>218</sup>

It would seem more appropriate, however, to apply the Communications Act of 1934 to computer communications.<sup>219</sup> First, on a basic physical level, networked communications use telephone lines for transmission. In addition, this section currently prohibits *any* person, not just commercial providers, from making "any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy or indecent."<sup>220</sup> Arguably, that provision could reach messages posted by anyone over the Internet or on any BBS.

Presumably to insure that some federal statute prohibits obscenity, and if possible even indecency over networked communications, Senators Exon and Gorton introduced the Communication Decency Act of 1995. This is designed to amend § 223 of the Communications Act of 1934 so as to include specifically transmittal by means of a telecommunication device.<sup>221</sup> After some modification in committee,<sup>222</sup> the Act was attached to the Telecommunications Bill,<sup>223</sup> a comprehensive reform proposal for the telecommunications regulatory framework. The House, however, passed a much milder version of the Senate Decency Act in its Telecommunications Bill, urging the computer industry to promote

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217. *Id.* at 731-32. See also *Alliance for Community Media v. FCC*, 56 F.3d 105, 129 (D.C. Cir. 1995) (cable television). The D.C. Circuit has interpreted the *Pacifica* Court's reference to the FCC's definition of indecency as an implicit ruling that the Commission's definition is not unconstitutionally vague. See *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988); *Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 914 (1992); see also *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995).

218. "Prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards or morality." *Pacifica*, 438 U.S. at 740.

219. 47 U.S.C. § 223 addresses obscenity and indecency involving communications by telephone.

220. 47 U.S.C. § 223(a). The statute applies to the transmission of messages by phone, but does not distinguish between aural and data communications. See Loundy, *supra* note 4; text accompanying notes 486-89.

221. S. 314, 104th Cong., 1st Sess. (1995). The same bill was concurrently introduced in the House by Representative Johnson of South Dakota. H.R. 1004, 104th Cong., 1st Sess. (1995).

222. The committee modified the proposed bill such that originators of the materials would be liable, but not intermediary transmitters of the material who unknowingly communicate the restricted material. See Andrews, *supra* note 26, at A1, D7.

223. S. 652, 104th Cong., 1st Sess. (1995). See Joshua Quittner, *Vice Raid on the Net*, TIME, Apr. 3, 1995, at 63.

blocking techniques for obscene and indecent speech.<sup>224</sup> At this writing, the entire Telecommunications Bill is in a joint conference committee for resolution.<sup>225</sup>

Although many legal scholars have criticized the bifurcated, even trifurcated, degree of protection given to speech depending upon its delivery system,<sup>226</sup> the Supreme Court has concluded that "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."<sup>227</sup> Networked communications may be analogized to existing forms of communications in an effort to answer the many legal questions this new medium will pose.<sup>228</sup> Nevertheless, some of the justifications behind the broad restriction on speech in the areas of broadcast media and telephone communications may not be relevant in cyberspace. For example, with respect either to the banning or channeling of indecent speech, the intrusiveness and scarcity rationales used to restrict broadcast

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224. Kevin Maney, *Tuning into Telecom Reform: Big Picture Is Filled with New Options*, USA TODAY, Aug. 7, 1995, at B1, B2. The House bill more closely resembles Senator Leahy's unsuccessful attempt to pass a bill designed to study cybersmut and potential regulatory measures in lieu of the Communications Decency Act. S. 714, 104th Cong., 1st Sess. (1995).

225. See Edmund L. Andrews, *For Telecommunications Bill, Time for Some Horse Trading*, N.Y. TIMES, Dec. 4, 1995, at D1.

226. These commentators argue for a unitary First Amendment for all media, specifically the more liberal "print model" which emphasizes the value of editorial autonomy and the dangers of official censorship. See Thomas G. Krattenmaker & L.A. Power, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719 (1995); JONATHAN W. EMORD, FREEDOM, TECHNOLOGY AND THE FIRST AMENDMENT 28 (1991); Cate, *supra* note 200, at 3; Note, *supra* note 37, at 1069-83. Professor Laurence Tribe of Harvard has proposed a constitutional amendment to insure full protection for all speech regardless of the technological medium used. See Naughton, *supra* note 50, at 411 n.18.

227. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). See also *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) ("Each method [of expression] tends to present its own peculiar problems.")

228. See, e.g., Sunstein, *supra* note 201, at 1799 (arguing mail is the best analogy for protecting against obscene speech); Becker, *supra* note 16, at 237 (arguing that the closest analogy for defamation liability for BBS operators is that of telephone and telegraph companies); Miller, *supra* note 202, at 1201 (arguing that electronic information services warrant the full level of First Amendment protection provided to print publishers and distributors). See also Hammond, *supra* note 36, at 223-24 (claiming that broadband communication networks deserve a new regulatory scheme); Robert Charles, Note, *Computer Bulletin Boards and Defamation: Who Should Be Liable? Under What Standard?*, 2 HARV. J.L. & TECH. 121, 150 (1987) (new negligence standard should be developed for BBS operators).

speech should not be applicable to cyberspace.<sup>229</sup> Network communication is neither scarce nor limited, and like cable television and dial-a-porn, it is invited into the home and is not an intruder. Broadcasts, however, including those containing patently offensive indecent material, may be difficult to avoid because they confront individuals in public as well as in the privacy of their homes.<sup>230</sup>

Can obscene speech be constitutionally banned in cyberspace? The clear answer is *absolutely* since obscenity is not a form of expression protected by the First Amendment: "When the Court declared that obscenity is not a form of expression protected by the First Amendment, no distinction was made as to the medium of expression."<sup>231</sup> But what of the Senate's proposed phrasing of a ban which virtually tracks the wording of § 223 of the Communications Act of 1934, prohibiting the transmission by a telecommunications device of "any comment, request, suggestion, proposal, image or other communication which is obscene, lewd, lascivious, filthy or indecent?" If a court interprets the cumulative effect of those words to be commensurate with the *Miller* definition of obscenity, as it has in other statutes with similar wording involving tangible materials,<sup>232</sup> then there should be no viable constitutional challenge to that specific phrasing.

The problem arises, however, if indecent is interpreted to mean less than obscene. Any means to regulate indecency must be narrowly tailored so as not to unduly burden protected speech. The accessibility of children to inappropriate material remains a very real concern in cyberspace as well.<sup>233</sup> While government has a valid and compelling interest in protecting children not only from obscene speech, but indecent speech as well, is there really any justification for banning either indecent, pornographic, or obscene speech, that is for banning cybersmut, from consenting adults? Such subjectively based paternalistic regulations are contrary to realizing a free market place of ideas and evidence the need for a re-evaluation of the current obscenity standard.

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229. See, e.g., Becker, *supra* note 16, at 237; Miller, *supra* note 202, at 119-92; Note, *supra* note 37, at 1088-89; Cate, *supra* note 200, at 37-43. However, recently the accelerated growth of the Internet apparently strained the system, resulting in an extremely rare occurrence — the loss of data. Snider, *supra* note 5, at D6.

230. FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978). See also CBS v. Democratic Nat'l Committee, 412 U.S. 94 (1973). For a critique of the intrusiveness rationale, see Cate, *supra* note 200, at 33-35.

231. Kaplan v. California, 413 U.S. 115, 119 (1973).

232. See *supra* notes 146-59 and accompanying text. Originally, the Communications Act of 1934 was also interpreted by the FCC as applying only to obscene phone calls. See *Pacifica*, 438 U.S., at 779 n.7 (Stewart, J., dissenting); see also *Carlin Comms., Inc., v. FCC*, 837 F.2d 546, 560-61 (2d Cir. 1988) (noting the term indecent as used in Section 223 of the Communications Act of 1934 embraces the *Miller* definition of obscenity).

233. See *supra* notes 22-35 and accompanying text.

## V. A CALL FOR THE RECONSIDERATION OF OBSCENITY LAW

### A. *Specialized Versus Generalized Harm: A Justifiable Distinction*

The new challenges for First Amendment jurisprudence presented by current communication technologies merit a reconceptualization of the obscenity doctrine.<sup>234</sup> Vast, unbounded networked communications and the present definition of obscenity make policing violations of statutory bans on obscenity<sup>235</sup> virtually impossible. Imputing the knowledge of hundreds of contemporary community standards to every network user is simply unrealistic. While such a presumption may be justifiable for users engaged in a commercial operation, given that ascertaining those multitudinous standards is expected of merchants of sexually explicit materials in a non-digitized format,<sup>236</sup> the presumption is ludicrous when applied to all users, especially those not engaged in a commercial operation<sup>237</sup> and those spatially separated from the legally relevant community.

Nearly a century ago, the Supreme Court established the presumption that every user of the mail must take notice of what is meant by decency, purity, and chastity in social life and what is deemed obscene, lewd, and lascivious.<sup>238</sup> Made in a geographically smaller and socio-culturally more homogeneous United States, the presumption seems particularly anachronistic in a modern, globally-connected country. For example, the adage that "everyone is presumed to know the law" seems acceptable with respect to the speed limits in foreign jurisdictions because those laws are easily ascertained. The information superhighway, on the other hand, has no verifiable contemporary community standard. Educated guesses may be attempted, but a wrong guess can prove to be extremely costly.<sup>239</sup>

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234. Katsh, *supra* note 53, at 181-89. See also Byasse, *supra* note 14, at 209 (arguing that legislative rationale for criminalizing the dissemination of obscene material is not applicable to cyberspace because there is no impact on the local community and the physical components of the cyberspace community, the sender and recipient, are located in their private homes).

235. See Quitner, *supra* note 223, at 63; Reske, *supra* note 1, at 40; see also Rovner, *supra* note 24 (electronic crimes generally).

236. For a discussion of the scienter element, see *supra* notes 160-66 and accompanying text.

237. In *Miller v. California*, 413 U.S. 15, 27 (1973), the Court stated in justification of its holding that "[W]e are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." (emphasis added).

238. *Rosen v. United States*, 161 U.S. 29, 42 (1896).

239. See *supra* notes 156-60 and accompanying text.



While some legal commentators have argued for a standard defined by the virtual community for unprotected expression,<sup>240</sup> such a standard would admittedly permit a refuge in cyberspace where sexually explicit materials would be unprosecutable.<sup>241</sup> Unlike a small, geographically bounded gap in the ban on obscenity, a "cyberspatial" gap could potentially envelop the whole United States. Given the prevailing "tendency to deprave" rationale<sup>242</sup> for statutory prohibitions, such a gap, accessible to all users, would undermine the entire regulatory scheme.

Modern communications technologies reveal that the crux of the problem with the current definition of obscenity lies in the generalized harm to society rationale by which it has been shaped.<sup>243</sup> For example, networked communications certainly obliterate the concerns of the secondary effects on neighborhoods caused by purveyors of sexually explicit, albeit protected, speech.<sup>244</sup> While such businesses operating in a physical realm may attract transients, adversely affect property values, cause an increase in crime, and encourage an exodus of residents and other types of business from the geographic vicinity,<sup>245</sup> cybersmut would have no comparable effects on the community of nonusers. More importantly, the notion of a generalized primary harm that has been used to justify a ban on obscenity as it is currently defined, should be questioned for three reasons.

First, no bright line separates sexually explicit speech that is *obscene* from speech that is merely *pornographic*,<sup>246</sup> in terms of its effect on the morals of society. In fact, the Court's definition of obscene speech borrows from the etymological roots of both "pornography" and "obscenity."<sup>247</sup> However, obscenity, as defined by First Amendment jurisprudence, is hardly a genus of speech "which is as distinct,

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240. See *supra* notes 135-41.

241. *ACLU Brief*, *supra* note 139, at 31 n.18.

242. See *supra* notes 81-94 and accompanying text.

243. *Id.*

244. *Id.*

245. *Young v. American Mini Theatres*, 427 U.S. 50, 54-55 (1976).

246. See Hentoff, *supra* note 59, at 320; see also ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 67 (1983) ("[T]he view that there is no objective basis for the Court to distinguish obscene from other expressions seems bound to prevail — if not the stronger Douglas view that all speech, obscene or not, is protected.").

247. The word obscenity is of Latin origin and refers to what is offensive to standards of decency. Pornography, on the other hand, is of Greek origin and refers to prostitutes, or a portrayal of sexually explicit behavior primarily for the purposes of arousal. The legal definition of obscenity combines elements of both terms. *Miller v. California*, 413 U.S. 15, 18-19 n.2 (1973) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 1969)). Justice Stewart, however, referred to unprotected speech as "hard core pornography." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

recognizable, and classifiable as poison ivy is among other plants."<sup>248</sup> Even Justice Brennan, who, in *Roth*, first attempted to define obscenity,<sup>249</sup> later abandoned any such attempt to maintain that definition.<sup>250</sup>

More than just semantically and definitionally blurred, the distinction between obscenity and pornography is also ambiguous from a causal perspective. The Report of the 1986 Presidential Commission on Obscenity and Pornography concluded that both obscene *and* pornographic sexually explicit material that depict violence, degradation, submission, or humiliation cause social harm.<sup>251</sup> As Justice Stevens poignantly observed:

[W]hatever harm society incurs from the sale of a few obscene magazines to consenting adults is indistinguishable from the harm caused by the distribution of a great volume of pornographic material that is protected by the First Amendment. Elimination of a few obscene volumes or videotapes from an adult bookstore's shelves thus scarcely serves the State's purpose of controlling public morality.<sup>252</sup>

Second, the difficulty with the current definition demonstrates that "obscenity exists only in the minds and emotions of those who believe in it, and is not a quality of a book or a picture."<sup>253</sup> At most the expression of offensive ideas, obscenity should be extended the First Amendment protection given to the expression of other ideas.<sup>254</sup> As Justice Douglas also observed: "[L]ife in this crowded modern, technological world creates many offensive statements and many offensive deeds. There is no protection against offensive ideas, only against offensive

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248. *Roth v. United States*, 354 U.S. 476, 497 (1957) (Harlan, J., concurring in part and dissenting in part).

249. *Id.* at 485. Brennan also penned the plurality opinion in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), which attempted to modify the definition of *Roth*. See *supra* notes 63-71 and accompanying text.

250. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73-74 (1973) (Brennan, J., dissenting). See also *Sable Communications v. FCC*, 492 U.S. 115, 133-34 (1989) (Brennan, J., dissenting).

251. See AG's 1986 REPORT, *supra* note 53, at 92-93; see also *supra* notes 88-94 and accompanying text.

252. *Fort Wayne Books v. Indiana*, 489 U.S. 46, 80-81 (1989) (Stevens, J., dissenting).

253. *Ginsberg v. New York*, 390 U.S. 629, 662 (1968) (Douglas, J., dissenting).

254. *Paris Adult Theatre I*, 413 U.S. at 71 (Douglas, J., dissenting).

conduct.<sup>255</sup> In order to preserve a marketplace of ideas, the traditional response to offensive ideas has not been suppression but the exposition of more ideas.<sup>256</sup> While access to newspaper and broadcast media may be limited by a scarcity of channels or funds,<sup>257</sup> cyberspace presents virtually limitless opportunities for counterspeech criticizing and rebuking cybersmut.

However, it is also argued that obscene speech does not express ideas, but rather is noncognitive in nature.<sup>258</sup> The fact that communities differ in what they consider to be cognitive beliefs such an argument. More likely, sexually explicit materials express ideas of a cognitive nature, which are merely repulsive to the contemporary community standards of some jurisdictions.<sup>259</sup> Constitutional protection of ideas stems not from their acceptability but rather, their ability to bring about political and social change.<sup>260</sup> So long as ideas, no matter how repulsive to majoritarian notions, remain ideas and are not acted upon, they should be protected.<sup>261</sup> Unfortunately, the current definition of unprotected *obscene* expression does not require any nexus to be established between

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255. *Id.* Justice Douglas also opined that "the idea that the First Amendment permits punishment for ideas that are 'offensive' to the particular judge or jury sitting in judgment is astounding." *Miller v. California*, 413 U.S. 15, 44 (1973) (Douglas, J., dissenting). See also *Loewy*, *supra* note 131, at 795 ("Punishment for thought transmission has been an anathema in this country . . . . [O]bscenity should be treated no differently.").

256. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (libel). Tolerance of offensive speech is the "price to be paid for constitutional freedom." *Young v. American Mini Theatres*, 427 U.S. 50, 88 (1976) (Stewart, J., dissenting).

257. See, e.g., *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969).

258. *Cf. Herceg v. Hustler Magazine*, 814 F.2d 1017, 1026 (5th Cir. 1987) (Jones, J., concurring in part and dissenting in part) ("[P]ornography's appeal is therefore non-cognitive and unrelated to, in fact exactly the opposite of, the transmission of ideas.").

259. Justice Stevens observed that sexually explicit materials must be a form of communication and entertainment to some members of society or they would have no value in the marketplace. *Marks v. United States*, 430 U.S. 188, 198 (1977) (Stevens, J., concurring in part, dissenting in part). Likewise, the pervasiveness of cybersmut, see *supra* notes 22-34 and accompanying text, undermines the contention that such speech has no social value as the exposition of ideas.

260. See *Miller v. California*, 413 U.S. 15, 34-35 (1973). The Court in *Miller* recognized that the sexual revolution of the 1960s removed "layers of prudery from a subject long irrationally kept from needed ventilation." *Id.* at 36. However, it immediately qualified the observation with the statement that it did not necessarily follow that regulation of "hard core" materials was not needed. "[C]ivilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine." *Id.* However, unlike "hard core" materials, the use of heroin implicates conduct, not speech. See also Carlin Meyer, *Reclaiming Sex from the Pornographers: Cybersexual Possibilities*, 83 GEO. L.J. 1969 (1995) (explaining that the Internet may allow for more diverse, open, informed, and richer sexual speech).

261. See, e.g., *Gooding v. Wilson*, 405 U.S. 518 (1972) (holding unconstitutionally overbroad a statute forbidding use of opprobrious or abusive language tending to cause a breach of the peace).

ideas and conduct before suppression is sanctioned.<sup>262</sup>

Third, the notion of a generalized harm to society that informs the current definition of obscene speech protects less-than-obscene, pornographic speech, which may, in fact, cause actual harm in some cases. The current definition of obscenity is based on the presumptions that the work's appeal to the prurient interest lacks a cognitive element and that the work lacks serious social value. Thus, it is the perceived failure to convey valuable ideas that condemns obscenity, not proof of harm.<sup>263</sup> In *Schenck v. United States*,<sup>264</sup> Justice Holmes stated that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."<sup>265</sup> Instead of merely assuming that shouting "fire" would cause a panic and prohibiting the utterance of the word, the Court expressly enunciated a nexus between the expression and the harm.<sup>266</sup> Similarly, all other less protected speech has been connected to a specific harm:<sup>267</sup> "'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace,"<sup>268</sup> words that are "directed to inciting or producing imminent lawless action,"<sup>269</sup> and defamatory statements that cause injury to a person's reputation.<sup>270</sup> While such categories of speech having less protection arguably fail to convey valuable ideas, they may also be justifiably suppressed because "any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,"<sup>271</sup> not by the interest in morality,

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262. See *Roth v. United States*, 354 U.S. 476, 513 (1957) (Douglas, J., dissenting) (noting that standard enunciated does not require any nexus between the prohibited literature and action that can be regulated).

263. See Mitchell, *supra* note 129, at 185-87.

264. 249 U.S. 47 (1919).

265. *Id.* at 52 (*emphasis added*).

266. Justice Douglas believed that the Constitution required that for speech to be punished it must be linked to some action that could be penalized. *Memoirs v. Massachusetts*, 383 U.S. 413, 426 (1966) (Douglas, J., dissenting); *Roth*, 354 U.S. at 509 (Douglas, J., dissenting).

267. Aside from obscenity, child pornography is the only unprotected speech that is linked to a generalized, not a specific harm. However, the state's compelling interest in protecting children makes the presumption of a generalized harm much more acceptable and persuasive with respect to child pornography. See *New York v. Ferber*, 458 U.S. 747 (1982).

268. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

269. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

270. See, e.g., *Gertz v. Robert Welch, Inc.*, 481 U.S. 323 (1974) (private person libel); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (public person libel); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (criminal group libel). Even libel as a class of less protected speech may be linked to its tendency to cause violence, disorder, or a breach of the peace. *Beauharnais*, 343 U.S. at 254.

271. *Chaplinsky*, 315 U.S. at 572 (*emphasis added*).

or a decent society, alone.

Although the articulation of what is currently defined as obscene expression might result in a generalized harm to society, the articulation of hate speech presents a similar threat. Nevertheless, the alleged deleterious effects of sexually explicit speech may be generalized, presumed, and attenuated<sup>272</sup> while hate speech must rise to the level of incitement before it may be criminalized constitutionally.<sup>273</sup> Further, socio-cultural heterogeneity and global connectivity make it doubtful that any generalized harm to society caused by obscenity will vary from place to place as is permitted under the current definition. It is far more likely that specific harm from sexually explicit speech will vary from incident to incident, independent of any geographic community and its norms. If obscene speech is to remain unprotected, it should be linked to harm. Furthermore, such an ostracized category of speech should be defined independent of geography and dependent upon its specific harmful effects.

*B. A New Test for Unprotected Sexually Explicit,  
Formerly "Obscene," Speech*

Consistent with the notion of protecting ideas rather than conduct, the Court in *Brandenburg v. Ohio*<sup>274</sup> held that speech inciting illegal action was not protected under the Constitution and defined such speech as "advocacy . . . directed to inciting or producing imminent lawless action and [which] is likely to incite or produce such action."<sup>275</sup> Therefore, in order for such speech to be constitutionally banned, it must

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272. Without dependable information that generalized harm even occurs, the government should side with a broader protection of speech in the first place. *Roth v. United States*, 354 U.S. 476, 511 (1957) (Douglas, J., dissenting).

273. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); see also *UWM Post v. Regents of UW Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991). For a discussion of hate speech, see generally RODNEY SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* (1992).

274. 395 U.S. 444 (1969) (per curiam).

275. *Id.* at 446. The case involved a Ku Klux Klan leader who was convicted under a state criminal syndicalism statute that prohibited the advocacy of crime to accomplish social change. The defendant specifically had stated: "We're not a revengent (sic) organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." *Id.* at 446. The Court held that the statute was unconstitutional as it punished "mere advocacy not distinguished from incitement to imminent lawless action." *Id.* at 448-49.

at least tend to *incite*<sup>276</sup> *imminent*<sup>277</sup> lawless action and not merely advocate illegal action. Certainly, sexually explicit speech can suggest, perhaps even advocate, the commission of illegal acts of violence as well as illegal sexual practices, such as sodomy, adultery, and polygamy. But can such speech *incite imminent* illegal action under *Brandenburg*? In *Herceg v. Hustler Magazine, Inc.*, the Fifth Circuit held the incitement doctrine was not applicable to an article published by *Hustler* discussing the practice of autoerotic asphyxia; plaintiffs argued the article may have led to the death of a fourteen-year-old adolescent who read the article and attempted the practice.<sup>278</sup> The court held that even assuming that the practice which could lead to suicide was illegal, "no fair reading of [the article] can make its content advocacy, let alone incitement to engage in the practice."<sup>279</sup>

Although the Fifth Circuit in *Herceg* rejected the suggestion that a less stringent incitement standard be applied in non-ideological speech cases,<sup>280</sup> a more relaxed test should be developed for "low value,"<sup>281</sup> non-ideological, and sexually explicit speech than for ideological political

276. *Herceg v. Hustler Magazine*, 814 F.2d 1017, 1023 (5th Cir. 1987) (citing *Noto v. United States*, 367 U.S. 290, 297-98 (1961)); see also *Musser v. Utah*, 333 U.S. 95, 101 (1948) (Rutledge, J., dissenting) (arguing statute proscribing agreements to advocate polygamy must draw the line between advocacy and incitement). In an earlier case, the Court had held that a state could not prohibit the advocacy of ideas, even illegal ideas such as adultery. *Kingsley Int'l Pictures v. Regents of the Univ. of State of New York*, 360 U.S. 684, 688 (1959) (plurality opinion) (involving controversial book, *Lady Chatterley's Lover*).

277. *Hess v. Indiana*, 414 U.S. 105, 109 (1973); *Herceg*, 814 F.2d at 1022; see also *City of Houston v. Hill*, 482 U.S. 451 (1987), *aff'g* 789 F.2d 1103 (5th Cir. 1986) (holding that statute prohibiting verbal challenges to police performing their duties was facially overbroad). For a discussion of the *Brandenburg* standard, see Staughton Lynd, Comment, *Brandenburg v. Ohio: A Speech Test for All Seasons?*, 43 U. CHI. L. REV. 151 (1975).

278. *Herceg*, 814 F.2d at 1017. While *Hustler* described the sexual high that accompanied the practice, it also discussed the deaths that occurred annually as a result of the practice, and warned against engaging in it. *Id.* at 1018-19.

279. *Id.* at 1023.

280. *Id.* at 1024. See also *Waller v. Osbourne*, 763 F. Supp. 1144 (M.D. Ga. 1991) (holding that no proof that subliminal messages of Ozzy Osbourne's music had incited imminent lawless activity of suicide), *aff'd*, 958 F.2d 1084 (11th Cir. 1992) (mem.), *cert. denied*, 113 S. Ct. 325 (1992); *Olivia N. v. NBC*, 178 Cal. Rptr. 888 (Cal. Ct. App. 1981) (holding that film depicting "artificial rape" did not incite children to copy depicted conduct), *cert. denied*, 458 U.S. 1108 (1982); *McCollum v. CBS*, 249 Cal. Rptr. 187 (1988) (finding no proof that Ozzy Osbourne's music was directed and intended to bring about imminent suicide of listeners or was likely to produce that result).

281. See *FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978) ("While some of these references [to excretory and sexual organs and activities] may be protected, they surely lie at the periphery of First Amendment concern."); *Barnes v. Glen Theatre*, 501 U.S. 560, 566 (1991) (finding nude dancing as a constitutionally protected form of expression is "within the outer perimeters of the First Amendment . . . and only marginally so").

speech or advocacy.<sup>282</sup> While the question of whether written material could ever constitute culpable incitement was reserved in *Herceg*,<sup>283</sup> the *Brandenburg* incitement test seems best limited to either direct confrontations,<sup>284</sup> ideological speech,<sup>285</sup> or both. A different test should be developed for non-ideological speech that can cause harm in situations other than person-to-person encounters.

Something other than an incitement requirement should be used to identify nonconfrontational, nonideological sexually explicit speech as being unprotected. Liability should attach when such speech triggers illegal action, in turn causing the actual harm. But what should be the formulation of such a test and can such a reformulation of the test for "obscenity" be justified? Courts have been reluctant to apply the lenient standard of negligence to speech resulting in harm of a physical nature.<sup>286</sup> First Amendment jurisprudence, however, has permitted negligence as

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282. For a discussion of the distinction between ideological and nonideological encouragements of crime, see KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 260-77 (1989).

283. *Herceg*, 814 F.2d at 1023. Most people have time to reflect before acting upon a written suggestion; therefore, under current law online communications are unlikely to be prosecuted successfully under the *Brandenburg* standard. See Mitchell Kapor, *Civil Liberties in Cyberspace*, SCI. AM., Sept. 1991, at 158.

284. Fighting words, as less protected speech, seem limited to one-on-one confrontations which tend to incite an immediate breach of the peace. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). Which words could cause such a violent reaction is questionable. In *Chaplinsky*, the defendant called a town marshal a "God-damned racketeer and a damned Fascist." *Id.* at 574. It is hard to imagine that such an utterance could be punishable today.

285. The *Brandenburg* test of incitement grew out of a series of cases articulating the "clear and present danger" test for illegal advocacy of political unrest. See *Yates v. United States*, 354 U.S. 298 (1957); *Dennis v. United States*, 341 U.S. 494 (1951); *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); see also *Masses Publishing v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917) (Judge Learned Hand's formulation of a constitutional test which resembles *Brandenburg*), *rev'd*, 246 F.2d (2d Cir. 1917). As such, from the inception of the "clear and present danger" test through the *Brandenburg* incitement test, the application of the constitutional doctrine typically has been to core or political speech. Steven J. Weingarten, Note, *Tort Liability for Nonlibellous Negligent Statements: First Amendment Considerations*, 93 YALE L.J. 744, 748 (1984). For a discussion of *Schenck* and its progeny, see Lynd, *supra* note 277, at 153-64; *Brandenburg*, 395 U.S. at 450-55 (Douglas, J., concurring).

286. The *Herceg* court determined that "[i]mere negligence . . . cannot form the basis of liability under the incitement doctrine any more than it can under libel doctrine." *Herceg*, 814 F.2d at 1024 (footnote omitted). See generally Vitauts M. Gulbis, Annotation, *Liability for Personal Injury or Death Allegedly Resulting from Television or Radio Broadcast*, 20 A.L.R.4th 327 (1983); Alan Stephens, Annotation, *First Amendment Guaranty of Freedom of Speech or Press as Defense to Liability Stemming from Speech Allegedly Causing Bodily Injury*, 94 A.L.R. FED. 26 (1989). Strict liability as well has been rejected as a theory of recovery. *Walter v. Bauer*, 439 N.Y.S.2d 821 (Sup. Ct. 1981) (rejecting liability for harm to a student performing science experiment published in a textbook).

the standard for recovery in libelous speech cases involving private person plaintiffs.<sup>287</sup> The application of the lenient standard can be attributed to the fact that harm to reputation from defamatory statements flows directly from publication itself and requires no intermediary to act upon the speech *and then* cause the harm.<sup>288</sup> Accordingly, something more restrictive than negligence should be applied in obscenity cases where an intermediary acts to cause a harm. Perhaps a distinction should also be made between negligent or reckless speech resulting in physical harm<sup>289</sup> and speech that causes harm as the result of the *illegal action* it espouses,<sup>290</sup> with liability attaching only to the latter category.

Certainly, "[t]he First Amendment does not sanction the infliction of physical injury merely because achieved by word rather than act."<sup>291</sup> Judge Jones, in her dissenting part in *Herceg*, argued that "the state regulation by means of tort recovery for injury directly caused by pornography is appropriate when tailored to specific harm and not

287. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). See also *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985) (holding that victim of a negligently erroneous credit report may recover damages from publisher). Strict liability, however, is not constitutionally permissible. *Gertz*, 418 U.S. at 347.

288. See Brian J. Cullen, Note, *Putting a 'Chill' on Contract Murder: Braun v. Soldier of Fortune and Tort Liability for Negligent Publishing*, 38 VILL. L. REV. 625, 626 (1993).

289. See, e.g., *Walt Disney Prods. v. Shannon*, 276 S.E.2d 580 (Ga. 1981) (denying recovery for harm caused to child who imitated demonstration featured on a television show); *DeFilippo v. NBC*, 446 A.2d 1036 (R.I. 1982) (denying liability for death of child who mimicked a stunt performed on the *Tonight Show*).

290. See, e.g., *Herceg v. Hustler Magazine*, 814 F.2d 1017 (5th Cir. 1987); see *supra* note 279; but see *Weirum v. RKO Gen.*, 539 P.2d 36 (Cal. 1975) (explaining that a negligence standard may be imposed upon radio station that sponsored contest to locate a roving disc jockey when listeners *driving recklessly* caused harm); see also Weingarten, *supra* note 285 (arguing that law of misrepresentation, not *Brandenburg* incitement doctrine, should apply to nonlibelous, negligent statements which proximately cause physical harm).

With respect to *advertisements* that negligently cause physical harm, the Eleventh Circuit in *Braun v. Soldier of Fortune*, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1028 (1993), upheld a jury award for the son of a murdered businessman who was killed by a mercenary responding to an advertisement entitled "Gun For Hire." However, ads involve commercial speech, which is entitled to a lesser degree of protection than other types of speech. See *Central Hudson Gas & Elec. v. Public Service Comm'n*, 447 U.S. 557 (1980). For a discussion of *Braun*, see Cullen, *supra* note 288, at 638-43.

291. *Weirum*, 539 P.2d at 46 (Cal. 1975) (explaining that physical assaults are not expressive conduct protected by the Constitution). See also *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993).



broader than necessary to accomplish its purpose."<sup>292</sup> In warning that the Constitution only permits the state to punish incitement, not advocacy, Justice Rutledge argued that even then, "the state's power to punish incitement may vary with the nature of the speech, whether *persuasive or coercive*, the nature of the wrong induced, whether *violent or merely offensive to the mores*, and *the degree of probability that the substantive evil actually will result*."<sup>293</sup> Those are the very factors that merit consideration in defining when sexually explicit speech that causes specific harm should be punishable.

This newly-defined category of unprotected speech should not include speech that is merely *persuasive*, encouraging, supportive, or suggestive. Rather, the category should be confined to *sexually explicit speech that proximately causes*<sup>294</sup> *physical harm through the reckless instigation*<sup>295</sup> *of illegal acts*. A formulation of the clear and present danger test<sup>296</sup> initially posited by Judge Learned Hand may lend some guidance in determining *recklessness* on a case-by-case basis, depending upon the "wrong induced . . . and the degree of probability that the substantive evil actually will result."<sup>297</sup> Judge Hand proposed that in "each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary

292. *Herceg*, 814 F.2d at 1029 (Jones, J., concurring in part and dissenting in part). Judge Jones did not fear a slippery slope would develop as a result of holding publishers liable for suicidal pornography, and reasoned that a distinction could be drawn between dangerous pornography and articles on hanggliding that might lead to accidental injury. *Id.* at 1026. Nevertheless, since no tort claim was presented on appeal and liability was denied under an incitement test, there was no recovery. *Id.* at 1020-21. See also *id.* at 1025.

293. *Musser v. Utah*, 333 U.S. 95, 101 (1948) (Rutledge, J., dissenting) (emphasis added) (discussing *Bridges v. California*, 314 U.S. 252, 262-63 (1941)).

294. The foreseeability of the harm instigated by the speech would have to be established with a reasonable degree of certainty. Evidence to that effect in cases of sexually explicit speech does exist. In *Herceg*, there was evidence that adolescents read *Hustler*, that such readers are vulnerable to mimicry, and that the warnings would be treated as invitations, not discouragements. 814 F.2d at 1026 (Jones, J., concurring in part, dissenting in part). Statistics further support the fact that hundreds of young men die annually from autoerotic asphyxia. *Id.* at 1018. See also MacKinnon, *supra* note 90, at 294 n.107. Numerous examples exist wherein specific violent pornography is responsible for assaults. *Id.* at 184-86. Sometimes the link is more direct when individuals are assaulted during the production of sexually explicit materials. *Id.* at 180. Snuff films, in which women are killed during the production, represent the most extreme instance of this. *Id.* at 272 n.56, 285 n.61.

295. Unlike incitement, instigation connotes more than just a "stirring up and urging on"; rather, it encompasses a responsibility for initiating another's action. WEBSTER'S NINTH COLLEGIATE DICTIONARY 609 (1984).

296. See cases cited *supra* note 285.

297. *Musser*, 333 U.S. at 101 n.6 (Rutledge, J., dissenting) (quoting Judge Hand in *Masses Pub. Co. v. Patten*, 294 F. 535, 540 (1917)).

to avoid the danger.<sup>298</sup> While such a test may chill speech not chilled under the current definition of obscenity, it will only chill speech believed to actually cause specific harm, not speech which generally may corrupt the morals of society. While a state may choose not to prohibit this new category of speech, the Constitution should not preclude such a prohibition.<sup>299</sup>

While such a reformulation of the test for unprotected sexually explicit speech may be argued independent of technological developments, these developments have clearly rendered the current definition of obscenity, which focuses on geographic boundaries, antiquated and passé. This specific harm obscenity standard would transcend geographic constraints and grant the state discretion to mute sexually explicit speech that recklessly instigates harmful illegal actions. Although proximate cause will always be the *legal* standard, policed by judges, line-drawing will necessarily involve juries who must apply this standard to the facts of the individual case. Nevertheless, it seems preferable to allow the jury to assess the nexus between the alleged obscenity and the physical harm rather than to instruct them to determine whether their community would find the material to be patently offensive and appealing to prurient interest. Further, the recommended test does not fully preclude the government from regulating sexually explicit speech which does not recklessly cause harmful illegal action. Where the government has a compelling interest, speech can be regulated even on the basis of its content.

Applying this new test specifically to cyberspace, cybersmut would only result in tort liability in those particular cases where it proximately causes physical harm through the reckless instigation of illegal actions. Although criminal liability would not necessarily be eliminated by the proposed test, civil actions may be preferable in most cases involving harmful sexually explicit speech, in order to compensate the victim economically and deter the pornographer financially.

According to Catharine MacKinnon, "[d]epriving the pornographers

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298. *Dennis v. United States*, 183 F.2d 201, 212 (1950), *aff'd*, 341 U.S. 494 (1951). Although Chief Justice Vinson quoted this test in *Dennis*, there was no majority opinion. See *Dennis*, 341 U.S. at 510 (plurality opinion). *Accord Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976) (prior restraint); *Einman v. Soldier of Fortune Magazine*, 880 F.2d 830, 835 (5th Circuit 1989), (using risk-utility test to deny publisher liability in murder for hire case); see also *Braun v. Soldier of Fortune Magazine*, 968 F.2d 1110, 1119 (11th Cir. 1992) (finding similar risk utility balancing test supports no liability for publication of an ad posing an unreasonable risk of harm to the public). Both *Einman* and *Braun*, however, involved commercial speech.

299. See *Herceg v. Hustler Magazine*, 814 F.2d 1017, 1030 (5th Cir. 1987) (Jones, J., concurring in part and dissenting in part) (arguing that *Brandenburg* does not exclude the possibility of the state regulating suicidal pornography directed at children).

of profits by empowering those whom they exploit to make them, directly counteracts one reason pornographers engage in the exploitation at all, in a way the potential incarceration does not.<sup>300</sup> The harm MacKinnon would compensate, however, differs from the harm covered by the proposed standard.<sup>301</sup> MacKinnon's broadly defined, highly subjective harm categorization has exposed it to objections based on First Amendment jurisprudence and, ironically, the feminist critique.

Although MacKinnon has argued that her standard survives First Amendment analysis,<sup>302</sup> it ran into constitutional difficulty in a 1985 Seventh Circuit case.<sup>303</sup> Indianapolis enacted a statute modelled after MacKinnon's general physical and psychological harm standard in which only pornography that portrayed women in a sexually subordinated manner was censored.<sup>304</sup> Pornography that did not sexually subordinate women was exempt no matter how sexually explicit. Writing for the Seventh Circuit, Judge Easterbrook quoted Justice Jackson's famous defense of individual liberty: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters."<sup>305</sup> In effect, MacKinnon's statute was viewed as thought control.

Additionally, some feminists argue that MacKinnon's standard is over-inclusive in two ways.<sup>306</sup> First, it may eliminate sexually explicit materials that feminists value. Second, it undermines an underlying principle of any egalitarian system that requires trust in the public's ability to "accept or reject attitudes presented in pornography."<sup>307</sup>

The standard proposed in this article escapes First Amendment difficulty and degrading paternalism. Sufficient proof must be presented to show that a given material was the cause of a *specific* harm. Material

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300. See MacKinnon, *supra* note 90, at 283 n.52.

301. Catharine A. MacKinnon, *Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace*, 83 GEO. L.J. 1959, 1966 (1995) (pornography's harms are its "harms to the equality of women").

302. See Amy Miles, *Feminist Theories of Interpretation: The Bible and the Law*, 2 GEO. MASON L. REV. 305, 324 (1995). MacKinnon feels her standard evades First Amendment difficulty because the First Amendment assumes people are autonomous, freely acting, equal individuals — qualities that pornography undermines.

303. *American Booksellers v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (mem.).

304. See generally Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

305. *Hudnut*, 771 F.2d at 327-28 (quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943)).

306. Miles, *supra* note 302 (citing John F. Wirenius, *Giving the Devil the Benefit of the Law: Pornographers, The Feminist Attack on Free Speech and the First Amendment*, 20 FORDHAM URB. L.J. 27, 32 (1993)).

307. *Id.*

that is censored or found liable under the new standard may have some value to a group of individuals, but that group will be denied access to it or have to pay in order to gain access to it only *after* a finding that it caused a harm. This provides for further debate on the merits of these works thereby contributing to the market of ideas. The new standard also operates under a presumption of autonomy and free will by allowing all viewers to decide for themselves to react or remain indifferent.

The Court has repeatedly enunciated three compelling state interests that could justify the regulation of sexually explicit speech which, under the new test, would be protected: (1) the privacy interests of unconsenting adults; (2) the protection of juveniles; and (3) the protection of the public from the pandering of sexually explicit materials.<sup>308</sup> Likewise, cybersmut could be regulated to protect the interests of unconsenting adults and juveniles and to prevent its commercial exploitation.

### *C. Permissible Regulation of Cybersmut That Does Not Cause Specific Harm*

#### 1. The Privacy Interests of Unconsenting Adults

The state "has a legitimate interest in protecting the privacy of the home against invasion of unsolicited obscenity."<sup>309</sup> In other words, the state may shield *unconsenting* adults from the intrusion of obscenity into their homes. In *Rowan v. Post Office Department*<sup>310</sup> the Court upheld a statute allowing individuals to prevent unsolicited erotically arousing or sexually provocative advertisements from being mailed to their

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308. See, e.g., *Miller v. California*, 413 U.S. 15, 18-20 (1973); *United States v. Reidel*, 402 U.S. 351, 357 (1971); *Stanley v. Georgia*, 394 U.S. 557, 567 (1969); *Redrup v. New York*, 386 U.S. 767, 769 (1967); see also *Fort Wayne Books v. Indiana*, 489 U.S. 46, 72 (1989) (Stevens, J., dissenting) (arguing for only regulation of sexual misconduct, offensive advertising, children's access, and the forcing of messages upon unwilling recipients); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 106-07 (1973) (Brennan, J., dissenting); *State v. Henry*, 732 P.2d 9 (Or. 1987) (allowing regulation in the interests of unwilling viewers, captive audiences, minors, and beleaguered neighbors).

309. *Roth v. United States*, 354 U.S. 476, 502 (1957) (Harlan, J., concurring in part dissenting in part). *But see Fort Wayne Books*, 489 U.S. at 71 (Stevens, J., dissenting). As one commentator has noted, the problem with obscenity as it is presently defined is that the law is not designed to protect those to whom obscenity is unappealing since those individuals most likely will avoid it; furthermore, individuals who find it appealing need no protection from its offensiveness, as obviously they wish to be offended in such a manner. "Thus, the only persons protected by obscenity laws are those who fear that others enjoy obscene materials." Mitchell, *supra* note 129, at 195.

310. 397 U.S. 728 (1970) (unanimous opinion).

homes.<sup>311</sup> The Court concluded that "nothing in the Constitution compels us to listen or view any unwanted communication whatever its merit."<sup>312</sup>

Even outside the home, a government may have an interest in protecting unconsenting adults from having speech thrust upon them where they are a captive audience, unable to avert their eyes and ears.<sup>313</sup> Nonetheless, in situations where unconsenting adults are outside the home and are not captive, "the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away."<sup>314</sup> It is not readily apparent how the government's interest in regulating the exposure of unconsenting adults to sexually explicit speech would become a potential issue.

In *Sable Communications v. FCC*, the Court rejected both the captive audience and intrusiveness/pervasiveness arguments with respect to *dial-in* phone services because the medium requires the listener to affirmatively seek the message.<sup>315</sup> Those arguments are similarly inapplicable to cyberspace<sup>316</sup> where adults are able to *control* what speech they access.<sup>317</sup> The greater the ability of users to control the material they access, the lesser the need for government regulation to protect privacy interests.<sup>318</sup>

311. The current version is codified at 39 U.S.C. § 3008 (1994). Once notified of the recipient's wishes, under the Act, the sender is not sanctioned unless a prohibitory order is violated. *Rowan*, 397 U.S. at 738-39. Thus, as the Court noted, the statute protects privacy while avoiding unbridled discretion being vested in postal officials. *Id.* at 737. *But cf.* *Bolger v. Youngs Drug Prod.*, 463 U.S. 60 (1983) (finding total ban on the mailing of unsolicited advertisements for contraceptives unconstitutional).

312. *Rowan*, 397 U.S. at 737.

313. *See, e.g., Kovacs v. Cooper*, 336 U.S. 77 (1949) (sound truck); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (political advertising on city transit system).

314. *FCC v. Pacifica Found.*, 438 U.S. 726, 749 n.27 (1978). *See also, e.g., Bolger*, 463 U.S. at 72; *Erznoznik v. City of Jacksonville, Florida*, 422 U.S. 205, 213-14 (1975); *Cohen v. California*, 403 U.S. 15, 21-22 (1971); *Public Utilities Comm'n v. Pollack*, 343 U.S. 451, 463-65 (1952).

315. 492 U.S. 115, 127-28 (1989). For a discussion of the pervasiveness rationale as it applies to broadcasting, see *supra* notes 186-97 and accompanying text.

316. *See supra* notes 226-30 and accompanying text; *see also Cate, supra* note 200, at 42; *Jensen, supra* note 44, at 239; *Kapor, supra* note 283, at 162.

317. *See Information Providers' Coalition v. FCC*, 928 F.2d 866, 878 (9th Cir. 1991) ("[R]equesting access to dial-a-porn programs is conceptually no different from requesting access to a periodical by subscription, requesting admittance at a box office to an adult movie or requesting a copy of an adult magazine kept under the counter in a plain brown wrapper at the convenience store."). Interactive media may allow users to exercise greater control than can be exercised with telephone and audiotext technology. *Berman & Weitzner, supra* note 135, at 1634.

318. *See generally* Note, *supra* note 37, at 1077-95. Further, user control is preferable to government control. *Berman & Weitzner, supra* note 135, at 1634-35.

Admittedly, this proposition assumes that individuals are aware of the nature of the beast. In most cases, cybersmut is appropriately labeled as such, providing advance warning about the nature of the material. In *United States v. Thomas*,<sup>319</sup> for example, the Amateur Action Bulletin Board was advertised as the "nastiest place on earth" and posted introductory explicit and basically accurate descriptions of the GIFs stored on the system.<sup>320</sup> With respect to adults, the only appropriate regulation of non-obscene cybersmut would be to require advanced warnings that accurately and truthfully describe the nature of the material.<sup>321</sup> The remedy for those users who inadvertently wander into hot chat rooms of BBS's properly labeled as such should be to avert their eyes, thereby limiting their exposure to material they deem offensive.<sup>322</sup>

With minimal regulation imposed by the government, market-driven forces may assist users in selecting the service most appropriate to their needs. Contractual agreements between the service providers and users represent a flexible, decentralized way in which cybersmut can be self-regulated.<sup>323</sup> User agreements between sysops or Internet-access

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319. No. 94-CR-20019 (W.D. Tenn. 1994), *appeal docketed*, No. 94-6648 (6th Cir. Dec. 9, 1994).

320. *SEA Brief*, *supra* note 139, at 5-6. Adult subscribers who paid money for their membership privileges were well aware of what they were purchasing. *See also* Rimm, *supra* note 30, at 1865 (examples of descriptions for images and stories studied).

321. *EFF Brief*, *supra* note 139, at 18. *See also* Berman & Weitzner, *supra* note 136, at 1632-33. The Motion Picture Association of America uses a ratings system to advise potential viewers of the content of films so that an educated choice can be made with respect to viewing protected, but explicit, material.

322. *See* *FCC v. Pacifica Found.*, 38 U.S. 726, 765-66 (1978) (Brennan, J., dissenting) (arguing that minimal discomfort to radio listener who inadvertently tunes in to offensive broadcast can be remedied by switching the station). *See also* *Action for Children's Television v. FCC*, 11 F.3d 170, 176 (D.C. Cir. 1993) ("Occasional exposure to offensive material in scheduled programming is of roughly the same order that confronts the reader browsing in a bookstore."). Likewise, if a *Rowan*-like blocking of unrequested cybersmut E-mail cannot be achieved technologically, the appropriate response might be to hit the delete button. *See* Julian Dibbell, *A Rape in Cyberspace*, *VILLAGE VOICE*, Dec. 21, 1993, at 39 (arguing that the appropriate response for violent graphic language is the delete button, not official censorship). Most likely a software program can be used to filter incoming messages. *See* Lounchy, *supra* note 4, at 152.

323. *See* Hardy, *supra* note 135, at 1054 (arguing that contracts should form the basic control mechanism for much of cyberspace activity). With respect to cybersmut, however, contracts, a self-help form of regulation, would only be effective if no externalities are caused by cybersmut, that is, if there is no generalized harm that flows to society from cybersmut. *Id.* at 1027-28. *See also* Henry H. Perritt, Jr., *Dispute Resolution in Electronic Network Communities*, 38 *VILL. L. REV.* 349, 352-53 (1993) (arguing that most matters involving network participants can be handled appropriately through contract law models); David R. Johnson & Kevin A. Marks, *Mapping Electronic Data Communications onto Existing Legal Metaphors: Should We Let Our Conscience (and Our Contracts) Be Our Guide?*, 38 *VILL. L. REV.* 403, 490 (1993) (arguing that cyberspace should be ruled mostly by contract free of any particular, soon-to-be outmoded, legal metaphor).

providers can contractually limit what is permissible speech.<sup>324</sup> For example, CompuServe's user agreement requires members to agree not to publish "any information which would be abusive, profane or sexually offensive to an average person"<sup>325</sup> or face service termination. Thus, consumers may shop for a service provider that best suits their needs: one that regulates speech<sup>326</sup> or one that imposes virtually no restrictions on the speech of users.<sup>327</sup> Since neither sysops nor Internet access providers have been characterized as common carriers, they would be legally permitted to terminate service pursuant to the terms of the agreement, even if the reason for termination goes to the content of the users' speech.<sup>328</sup>

## 2. The Protection of Children

For parents, content restrictions and the options available for blocking access to cybersmut may influence the choice of providers. The state also has a compelling interest in protecting children not only from obscene speech as it is currently defined, but from indecent speech as

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324. See generally Tolhurst, *supra* note 4, at 161. Software allows providers to filter some messages. Monitoring allows operators to delete offensive messages after the fact. See Charles, *supra* note 228, at 125-26.

325. CompuServe Information Service Operating Rules, (available by FAX at (614) 538-1004). Some companies that allow Internet access to their employees often adopt appropriate usage policies as well. Mitch Betts & Ellis Booker, *Firms Draft Cyber-Safeguards*, COMPUTERWORLD, Mar. 6, 1995, at 1, 12.

326. CompuServe and America Online restrict access to areas on Usenet which deal with sexuality in an "objectionable manner." See Ness, *supra* note 159, at 25. Prodigy terminated a file in 1989 entitled "Health Spa" which included frank discussions concerning gay sexual practices. See W. John Moore, *Taming Cyberspace*, NAT'L J. 748 (1992). Monitors from the companies frequently peruse chatrooms to check for violations of the terms of service agreements. See Kiss, *supra* note 27; see also Peter Eisler, *Alert Center Keeps Prodigy Users in Line*, USA TODAY, Sept. 5, 1995, at 1A, 2A (describing a commercial provider's monitoring activities).

327. For example, "The Well" (the Whole Earth Electronic Link) adapts such a hands-off approach. See Moore, *supra* note 326, at 748.

328. See *Carlin Comm. v. Mountain St. Tel. & Tel.*, 827 F.2d 1291, 1297 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988) (finding that providers contractually may refuse to carry dial-a-porn and that such refusal does not constitute state action). However, exercising editorial discretion may increase their potential liability. See *Cubby, Inc. v. CompuServe*, 776 F. Supp. 135 (S.D.N.Y. 1991); see also Daniel Pearl, *Government Tackles a Surge of Smut on the Internet*, WALL ST. J., Feb. 8, 1995, at B1; Charles, *supra* note 166, at B10, B13. Regulation by private operators, however, may result in more censorship of material than if the government exercised control. See, e.g., *Goldstone*, *supra* note 50, at 344-49; *Gilbert*, *supra* note 44, at 447; *Perritt*, *supra* note 15, at 132-33.

well.<sup>329</sup> Technologically, it may be easier to safeguard that compelling state interest without unnecessarily censoring protected speech available to adults in cyberspace. Given that variable obscenity has been a recognized principle in First Amendment jurisprudence,<sup>330</sup> cybersmut can be protected speech under the proposed definition so long as it does not recklessly instigate physical harm while some material remains inappropriate for children. Unlike the broadcast media, cyberspace allows children and adults to be more effectively segregated.

Commercial providers currently offer parental control features giving parents the option to restrict access to certain areas on the Internet.<sup>331</sup> Existing software also permits parents to block access to sexually explicit sites.<sup>332</sup> Concededly, these solutions to the concerns raised by cybersmut require parents to assume a degree of responsibility for supervision.<sup>333</sup> Nevertheless, the Constitution requires that the least restrictive means be implemented to protect children from inappropriate speech, so that adults are not unduly denied access to protected speech.<sup>334</sup> Provider options and filtering software could be complemented by requiring sysops to: verify the age of users beyond a mere call-back voice verification procedure;<sup>335</sup> take payment only by credit

329. See *supra* notes 184-97 and accompanying text. The state also has an interest in assisting parents with the instruction of their children. *Ginsberg v. New York*, 390 U.S. 629, 640 (1968); *Action for Children's Television v. FCC*, 58 F. 3d 654, 661-63 (D. C. Cir. 1995) (en banc).

330. See *Ginsberg*, 390 U.S. at 635-36.

331. See *Barbara Kantowitz et al., Child Abuse in Cyberspace*, NEWSWEEK, Apr. 18, 1994, at 40; *Teach Your Children Well*, U.S. NEWS & WORLD REP., Jan. 23, 1995, at 60; *Prodigy to Check You Out Before Letting You Chat*, USA TODAY, Sept. 29, 1994, at 7D; Miller, *supra* note 33, at A2.

332. For example, Surfwatch is a software program that prevents computer users from reaching a defined list of sexually explicit sites; the list can be updated monthly. The current Macintosh and Windows versions, however, require direct access to the Internet, not through a commercial service interlink such as Prodigy. The software covers World Wide Web, Gopher, Telnet, Newsgroups, and IRC channels. Information on Surfwatch is available at <http://www.surfwatch.com>. See also Bruce Haring, *Efforts to Police Internet*, USA TODAY, June 14, 1995, at 1D.

333. The National Center for Missing and Exploited Children publishes a pamphlet on child safety on the information highway, which lists suggestions as to how parents can protect their children online. The pamphlet is available from the center at 2101 Wilson Blvd. Suite 550, Arlington, VA 22201-3052.

334. *Sable Comm. v. FCC*, 492 U.S. 115, 126 (1989). See *supra* notes 206-14 and accompanying text. Of course the least restrictive means must be effective as well. *Dial Info. Servs. v. Thornburgh*, 938 F.2d 1535, 1541-42 (2d Cir. 1991), cert. denied, 112 S. Ct. 966 (1992). While the currently available software may not be sufficiently effective, the rate at which cyberspace technology is developing suggests that sufficiently effective software should be available in the near future.

335. A simple voice-call-back procedure was used by the AABBS in *United States v. Thomas*, No. 94-CR-20019 (W.D. Tenn. 1994), appeal docketed, No. 94-6648 (6th Cir. Dec. 9, 1994). See *supra* note 176 and accompanying text.



card; and mandate that users enter an individual password for access. These safeguards could be further complemented by a requirement that Internet access providers that allow the posting of cybersmut register with the FCC and identify the nature of their services. The listing would then be made available to software developers to assist them in updating their kill files and to parents who choose to exercise greater control over their children's online activities. A more onerous burden, but not necessarily overly restrictive, would be to require either providers or computer manufacturers to provide blocking software.<sup>336</sup>

### 3. Regulating the Pandering of Cybersmut

Finally, given that commercial speech<sup>337</sup> is afforded less protection under the Constitution than non-commercial speech,<sup>338</sup> the pandering of cybersmut may be subject to regulatory controls. The pandering, or commercial exploitation, of sexually explicit speech has been frowned upon by the Court.<sup>339</sup> In *Ginzburg v. United States*,<sup>340</sup> for example, the Court held that in close cases the manner of promotion or dissemination could be considered in determining whether the material in question was legally obscene.<sup>341</sup> The Court held that evidence of pandering could support a finding of obscenity even though the material otherwise would not be considered obscene.<sup>342</sup> Nevertheless, some justices have questioned the soundness of condemning material simply because it

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336. While such software is not prohibitively expensive, it seems that the better solution for protecting children without unduly burdening protected speech would be to shift responsibility to households with children to purchase the software or a computer with the software loaded on it, or to subscribe to an Internet access provider which offers blocking.

337. Commercial speech is defined as that which is designed to propose a commercial transaction. *Board of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989); *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 340 (1986). See generally EDWIN P. ROME & WILLIAM H. ROBERTS, *CORPORATE AND COMMERCIAL SPEECH* (1985).

338. See, e.g., *Cincinnati v. Discovery Network*, 113 S. Ct. 1505 (1993); *Central Hudson Gas & Elec. v. Public Service Comm'n*, 447 U.S. 557 (1980); *Ohralik v. Ohio St. Bar Assoc.*, 436 U.S. 447 (1978); *Virginia Bd. of Pharmacy v. Virginia Consumers Council*, 425 U.S. 748 (1976).

339. In *Miller v. California* alone, the Court referred three times to the *commercial exploitation* of obscene materials as being totally unrelated to what the First Amendment was designed to protect. 413 U.S. 15, 34-36 (1973). See also *Roth v. United States*, 354 U.S. 476, 496 (1957) (Warren, C.J., concurring) (arguing that state and federal governments can constitutionally punish the commercial exploitation of the morbid and shameful craving for materials with prurient effect). Chief Justice Warren believed that the test for obscenity should, in fact, consider the suppliers' conduct in marketing the materials.

340. 383 U.S. 463 (1966).

341. *Id.* at 465-66, 474.

342. *Id.* at 475-76. See also *Pinkus v. United States*, 436 U.S. 293 (1978); *Splawn v. California*, 431 U.S. 595 (1977); *Hamling v. United States*, 418 U.S. 87 (1974).

truthfully discloses its sordid nature,<sup>343</sup> a viable concern since truthful commercial speech is now constitutionally protected.<sup>344</sup>

Nonetheless, it may not be wise to include evidence of pandering as part of the definition of a category of unprotected speech.<sup>345</sup> Instead, the pandering of protected sexually explicit speech, that is, speech that does not recklessly instigate physical harm, should be regulated to serve compelling state interests. In other words, pandering should not result in all erotica or cybersmut being categorized as unprotected speech; however, pandering should be curbed in order to protect unconsenting adults or juveniles.<sup>346</sup> Thus, descriptions of cybersmut, available to all potential users, should strike a balance between the need for truthful labeling which warns the unwary user and the state's interest in protecting unconsenting adults and juveniles from being bombarded with solicitations of sexually explicit material.

## VI. CONCLUSION

To revisit the hypothetical originally posited in the Introduction, could our net surfer students posting and receiving pornographic pictures be subject to criminal liability under current federal law? The answer is probably yes for both the poster and the recipient. Section 223 of the Communications Act, which prohibits obscene phone messages, could be used to prosecute the poster; nothing in the statute suggests that a gratuitous poster on the Internet could not be covered. The standards of either the community of transmission or receipt could be applied to judge the material's constitutional status. Prosecutors would have the option of picking the jurisdiction where the material is more likely to be found

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343. See *Splawn*, 431 U.S. at 604 (Stevens, J., dissenting) ("I would not send Mr. Splawn to jail for telling the truth about his shabby business.") (footnote omitted). See also *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 249 (1990) (Stevens, J., concurring in part, dissenting in part); *Memoirs v. Massachusetts*, 383 U.S. 413, 427 (1966) (Douglas, J., concurring); *Ginzburg*, 383 U.S. at 482 (Black, J., dissenting).

344. See, e.g., *Rubin v. Coors Brewing Co.*, 63 U.S.L.W. 4319 (U.S. Apr. 19, 1995) (unanimous decision); *Ibanez v. Florida Dept. of Bus. & Prof. Reg.*, 114 S. Ct. 2084 (1994); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

345. Under the proposed test, only the pandering of materials as encouragements to commit violent sexual acts could impact the definition of recklessness, not pandering for their erotic value.

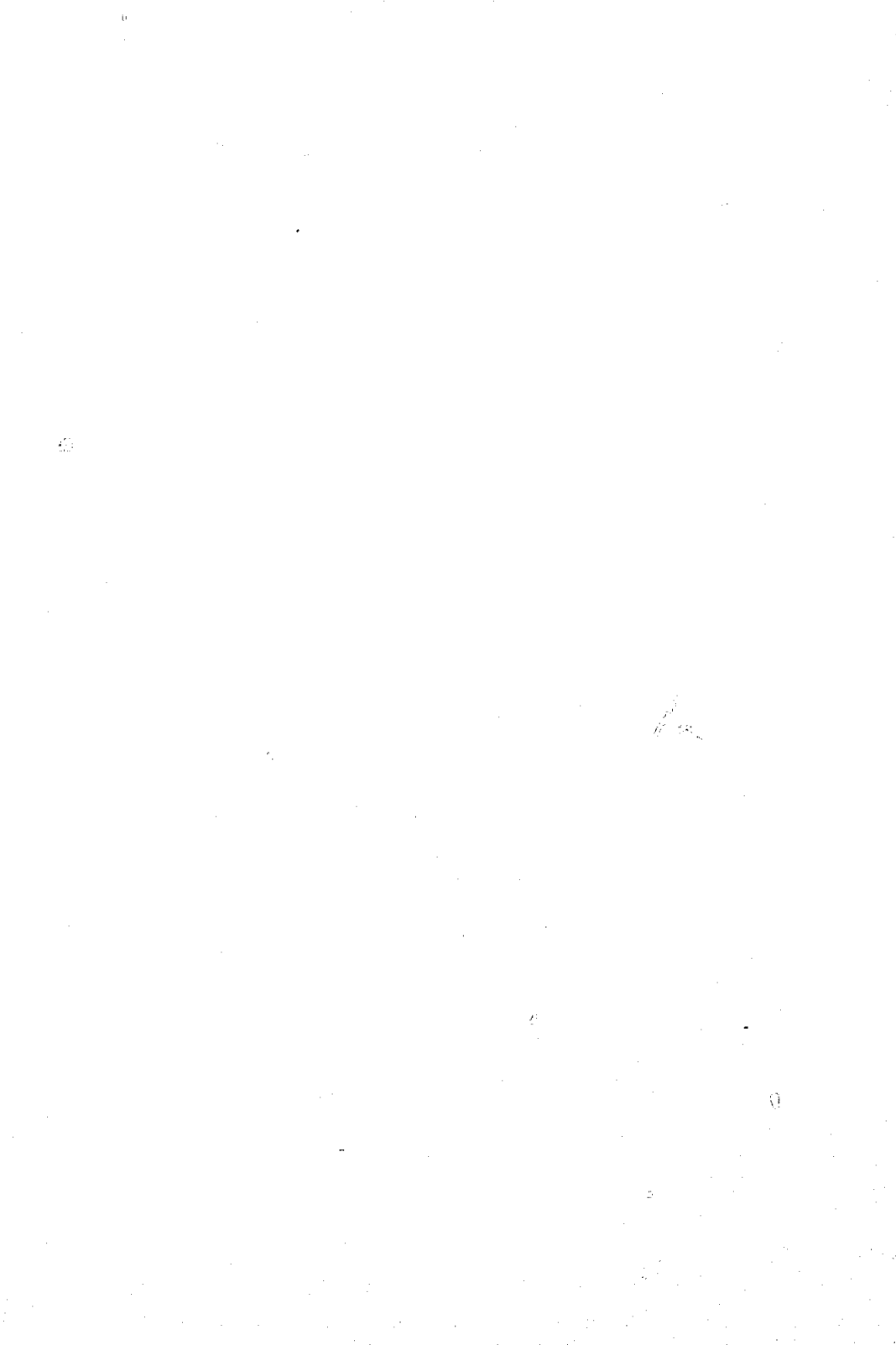
346. There is no doubt a legitimate state interest in stemming the commercial exploitation of sexually explicit materials. *Young v. American Mini Theatres*, 427 U.S. 50, 68-69 (1976); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 62-63 (1972). See also *Ginzburg*, 383 U.S. at 494 (Harlan, J., dissenting) (arguing state has right to enact panderer statute under its police power); *Ginsberg v. United States*, 390 U.S. 629, 674-75 (1968) (Fortas, J., dissenting) (arguing that statute punishing panderers is a legitimate exercise of the state's police power to protect parents and children from public aggression).

obscene. While *Stanley* creates a zone of privacy in the home, that right of possession probably does not encompass methods of distribution such as computer transmission. In addition, the recipient may have less of a privacy interest because the materials in question were distributed on Usenet, which in cyberspace could be thought of as public.

On the other hand, if the new definition of obscene speech proposed in this article were applied to the hypothetical, neither student would be subject to liability. The allegedly obscene message transmitted would be considered nonpunishable protected speech unless and until it proximately caused harm to another individual by recklessly instigating illegal acts. Recklessness would be judged by weighing the potential gravity of the harm against the improbability of its occurrence, as in Judge Learned Hand's formulation of what evolved into the clear and present danger test. Although protected, the speech could still be regulated if the government chooses the least restrictive means of furthering a compelling state interest. For example, regulations that prescribe labelling for, but do not prohibit adult access to newsgroups where pornography appears could be upheld. While avoiding the inconsistencies and arbitrariness of the *Miller* test, the specific harm standard would still allow legislative regulation of sexually explicit speech for audiences such as children, who might be exposed to the material inadvertently.

In sum, the current legal definition of obscenity is increasingly less relevant with the development of cyberspace. The obscenity definition proposed, in contrast, would make the relevant inquiry a question of specialized harm.

Though perhaps unlikely, the proposed definition could make more speech punishable by civil fines than is currently the case. At last, however, the punishment for speech could be made to fit the actual harm imposed and the interpretation of the First Amendment's meaning updated to prepare for the twenty-first century.



**SECRET PRIOR ART —  
GET YOUR PRIORITIES STRAIGHT!**

*C. Douglass Thomas\**

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