

**SEX, LAWS, AND CYBERSPACE:
FREEDOM AND CENSORSHIP ON THE FRONTIERS OF THE
ONLINE REVOLUTION**

By Jonathan Wallace¹ and Mark Mangan.²
New York, N.Y.: Henry Hold and Company, Inc. 1996.
Pp. 261. \$24.95 (hard).

The 1990s have been witness to the tremendous growth of the Internet. What started off as a communications tool for defense, academic, and research applications has become accessible to thirty to forty million people in more than 160 countries. The Internet has now become a repository for a vast range of information on social and political issues, a source of entertainment, and, of late, products and services and their advertisements. The Internet and other online services are also an easily accessible source of sexually explicit and indecent material. As Internet services are now readily available in homes, schools, and public libraries across the country, concern over the prevalence of obscene and indecent material in cyberspace³ has heightened.

The concern about indecent material in cyberspace is fueled by the ability of the new technology to transform the way individuals communicate. The Internet is frightening to many because "it is a cheap, easily accessible means of communication that is almost free of social control" (p. xiii). It is a medium in which anyone with access to a computer and an Internet account can be a publisher, reader, and distributor of information. Cyberspace transcends geographic boundaries and cannot distinguish between adults and children. Regulations used to deny access to indecent material to children in the physical world are ineffective in cyberspace.⁴ Thus both government regulators and private

1. Jonathan Wallace, a graduate of Harvard Law School, is a software business executive and attorney in New York City.

2. Mark Mangan is an Internet specialist and writer. He has written frequently on technology issues.

3. The book and this review use the terms Internet and cyberspace interchangeably. Actually, the term "cyberspace" is broader and refers to the entire National Information Infrastructure ("NII"), a global network of interconnected computers and databases. The Internet is a collection of host and gateway computers that is part of the NII. See, e.g., Debra D. Burke, *Cybersmut and the First Amendment: A Call For A New Obscenity Standard*, 9 HARV. J.L. & TECH. 87, 89-90 (1996).

4. The law distinguishes between obscene and indecent material. Obscene material is not protected by the First Amendment and thus can be restricted entirely. See, e.g., *Roth v. United States*, 354 U.S. 476, 485 (1957); *Miller v. California*, 413 U.S. 15, 18-19 (1973).

citizens have attempted to broaden the reach of existing obscenity laws and draft new legislation in order to regulate online content. In *Sex, Laws, and Cyberspace: Freedom and Censorship on the Frontiers of the Online Revolution*, authors Jonathan Wallace and Mark Mangan argue that “[c]yberspace presents a new playground, a new field of endeavor, for censorship as it does for speech” (p. xiii).

Wallace and Mangan devote the majority of the book to discussing specific examples of successful and unsuccessful attempts at censorship in cyberspace. In the first chapter, they discuss the prosecution of Robert and Carleen Thomas, operators of an electronic bulletin board system (“BBS”) in California, for the interstate transport of obscene materials (pp. 1-29). Wallace and Mangan focus in another chapter on United States government restrictions on the export of encryption software (pp. 41-61). Encryption software allows parties to transfer information via public networks more securely by scrambling the data according to a mathematical key. The US government has blocked the export of encryption software by applying 22 U.S.C. § 2778, which prohibits the export of munitions without a license (p. 42). They also discuss the liability of Prodigy, an online service provider, for libelous statements posted on its bulletin board (pp. 83-99), and the efforts of Congress to restrict obscene and indecent speech on the Internet through the Communications Decency Act of 1996 (pp. 173-91).

Through discussion of these examples, Wallace and Mangan provide a good introduction to the ways in which the Internet challenges traditional legal definitions and doctrine. For instance, the lack of geographic boundaries in cyberspace raises a number of jurisdictional questions. What is the proper venue for a case involving obscene materials that can be purchased through an online service? (p. 29). Which community standards of obscenity should apply?⁵ In the *Thomas*⁶ case, the court had to decide whether to apply the standards of Tennessee, where the trial was held, those of Northern California, where the Thomases operated their BBS, or the standards of “cybercommunities”

Indecent material is protected by the First Amendment and thus cannot be restricted completely. However, the government can place restrictions on access to indecent material. Thus state and local governments can impose restrictions on where indecent material is sold and may only allow access to adults. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 749-51 (1978); *Ginsburg v. New York*, 390 U.S. 629, 636-37 (1968).

5. The Supreme Court in *Miller v. California* held that in determining whether material was obscene the jury should use contemporary community standards. See *Miller*, 413 U.S. at 31.

6. *Thomas v. United States*, 74 F.3d 701 (6th Cir. 1996).

rather than geographical communities (pp. 31-33).⁷ Wallace and Mangan believe that national, and ultimately international, standards of obscenity will probably be required in order to provide stability and predictability to this area of law (p. 254). More importantly, they argue that the "application of obscenity laws to cyberspace is an opportunity to reexamine the legal and moral underpinnings of these laws" (p. 33). They urge reconsideration of the societal interests sought to be advanced through obscenity laws and whether it is really possible to define obscenity in such a way as not to restrict constitutionally protected speech (pp. 254-55).

Another critical issue raised by the authors is the liability of online service providers for libelous or obscene material posted on their service. In the traditional print world, liability hinges on classification as a publisher or distributor of material. While publishers are presumed to know the contents of what they publish and thus can be held liable for any libelous statements or obscenity contained therein, distributors are not presumed to know the contents of all the publications they sell (p. 85). Courts have been confused as to the appropriate analogy to apply to online services. Wallace and Mangan review the two major cases in this area, *Stratton Oakmont v. Prodigy Services Company*,⁸ in which a New York state court granted partial summary judgment against Prodigy based on a finding that the defendant was a publisher, and *Cubby v. CompuServe*,⁹ in which a federal district court granted summary judgment to CompuServe on the theory that it was a distributor (pp. 85-96). Wallace and Mangan argue in favor of the court's approach in *Cubby* because "[a]n on-line service is analogous to a bookstore or newsstand and should not be held responsible for illegal material of which the service is not aware" (p. 98). What they see as even more crucial is the chilling effect that decisions like *Stratton Oakmont* may have on the willingness of online service providers to make even protected speech available to their users (p. 99).

In their last chapter, Wallace and Mangan state that they will attempt to provide a "compass for cyberspace," which they define as a "moral, political, and legal framework for the decisions that must now be made by Congress and the courts" (p. 193). They argue that current attempts

7. These issues become even more complicated when considered within a global framework. For example, the authors ask "[w]ill Iran extradite Europeans for posting parts of *Satanic Verses* to a newsgroup? Will China shut down servers in Asia that offer material that sympathizes with Tibet?" (p. 39).

8. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). The *Stratton Oakmont* case was ultimately settled in September 1995. The parties asked the court to vacate the summary judgment motion but the judge denied their motion, citing the need for a precedent in this area of the law (p. 96).

9. 776 F. Supp. 135 (S.D.N.Y. 1991).

to censor content in cyberspace are similar to the response of previous generations to earlier communications media. They note that "[t]hroughout history, each major innovation in communications technology has caused distress and confusion similar to what society is experiencing today about the Internet. The introduction of writing, the printing press, the telegraph, the telephone, the radio, and the television all raised similar issues" (p. 194). Wallace and Mangan urge restraint in drafting new regulations to control communications in cyberspace. They contend that current laws which apply to printed publications can be effectively adapted to the online context (p. 252) and argue for a regime of strong First Amendment protection for online communication (p. 253).

Wallace and Mangan conclude with some recommendations for "judges and legislators who are making decisions affecting cyberspace" (p. 253). They urge restraint in enacting new regulations specifically for the Internet (p. 256), and argue emphatically against any stringent broadcast-type regulation that restricts the content that can be made available on the Internet (p. 255). Instead, they favor the use of screening technology that would allow parents to choose the information that their children can access within the home (pp. 258-59). Ultimately the authors caution potential regulators:

Avoid double standards and knee jerk reactions. Ask yourself whether you would react differently to the same speech in a different medium. If the material you are ruling or basing legislation upon would be First Amendment-protected if disseminated in a book or magazine, there is no rationale for treating it differently on the Internet (p. 253).

Though *Sex, Laws, and Cyberspace* addresses the major First Amendment issues raised by the application of existing regulations to cyberspace, the reader looking for in-depth legal analysis will likely be disappointed. Wallace and Mangan employ a journalistic style that is better suited to a lay audience or one with little background in First Amendment jurisprudence. The authors at times devote more attention to the personalities involved in the cases than to the legal issues raised. For example, in the chapter on the prosecution of the Thomases, Wallace and Mangan describe in detail the techniques the Tennessee postal inspector used to investigate the case and how the attorneys structured and presented their arguments at trial (pp. 1-29). They also devote an entire chapter to a description of Marty Rimm, a college student who authored a study of pornography in cyberspace that played an influential role in the passage of the Communications Decency Act (pp. 125-52).

Though the questions raised by the authors about the substantive conclusions of Rimm's study are interesting, many of the other details in this chapter seem irrelevant. While their approach is at times entertaining and sheds light on the driving forces behind judicial decisions and legislative actions, it unfortunately may leave the reader remembering a series of anecdotes rather than a coherent framework for thinking about First Amendment issues in cyberspace.

Wallace and Mangan have strong views about how each case should be decided and their views pervade the book. This creates the disquieting impression that the authors chose examples not so much for the issues they raise but for how well they support the argument against any type of censorship in cyberspace. They also tend to portray all proponents of restrictions as reactionaries standing in the way of progress. They focus on actors such as David Dirmeyer, a postal inspector who was "out trolling for pornographers" in an attempt to impose Tennessee standards on the rest of the country (p. 1); the Church of Scientology, which has used copyright laws to restrict the publication of material that criticized their religion (pp. 101-24); and Senator Exon, who campaigned to restrict indecent speech on the Internet through the Communications Decency Act (which the authors compare to Senator McCarthy's efforts to root out Communism in the United States during the 1950s) (pp. 173-74).

These intrusive efforts to restrict speech in cyberspace are relatively easy to condemn. However, what about the parents who do not want their children to have access to sexually explicit material? In the "real" world, these children could not legally purchase such material, but in cyberspace there is little to prevent them from accessing it. It is more difficult to dismiss all efforts to regulate the Internet when this is the factual context one has in mind. Wallace and Mangan have a strong argument that it is highly dangerous to start down the path of restricting speech protected by the First Amendment, but this does not excuse failure to thoroughly consider both sides of the issue.

Wallace and Mangan's analysis and recommendations seem to be premised on a view of the Internet as a "wild frontier of ideas" (p. xv) and as a "pluralistic world of small communicators" (p. 260). Though this view of the Internet may have been accurate a few years ago, it is unclear that it is a true picture of the Internet today, or as it will be a few years from now. The Internet is increasingly becoming a commercial tool used to access information and transact business.¹⁰ A set of

10. See, e.g., Sarah L. Roberts, *Internet Gets the Business*, PC MAG., Mar. 25, 1997, at 42 (discussing the growth of business to business transactions using the infrastructure of the Internet); Michael Krantz, *The Web's Middleman Mogul-In-Exile Barry Diller Bets That Web-Based "Deep Interviews" Will Change The Way We Shop*, TIME, Feb. 17, 1997,

unwritten rules of conduct that worked well in the context of a small group of users may no longer be sufficient as the Internet becomes a truly national and global network. Though the First Amendment is undoubtedly still applicable, courts and policymakers as well as service providers are faced with the difficult task of balancing these rights with other societal interests, such as the protection of children. Wallace and Mangan's book provides an enjoyable glimpse at some of these difficult issues but does not, in the final analysis, provide a sufficiently balanced discussion on which to base a comprehensive framework for thinking about First Amendment issues in cyberspace.

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