Revisiting Miller After the Striking of the Communications Decency Act: A Proposed Set of Internet Specific Regulations for Pornography on the Information Superhighway

Jason Kipness

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REVISITING MILLER AFTER THE STRIKING OF THE COMMUNICATIONS DECENCY ACT: A PROPOSED SET OF INTERNET SPECIFIC REGULATIONS FOR PORNOGRAPHY ON THE INFORMATION SUPERHIGHWAY.*

By Jason Kipness†

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“We are willing to praise freedom when she is safely tucked away in the past and cannot be a nuisance. In the present, amidst danger whose outcome we cannot foresee, we get nervous about her, and admit censorship.”

E.M. Forester

“The first principle of a free society is an untrammeled flow of words in an open forum.”

Adlai Stevenson

I. INTRODUCTION

Communication on the Internet has provided the world with the ability to exchange information, ideas, and opinions without crossing borders or incurring major expenses. Due to the abundance of in-
formation and the minimal requirements necessary to engage in this form of communication, the Internet has become a method of communication that has the potential to permeate every aspect of peoples' lives. This new medium has experienced incredible growth and has prospered without much regulation. The Internet, unlike other forms of media, is not owned or controlled by any single entity. This allows people to communicate on the Internet using aliases, while societal barriers to information cease to exist.

3. See Cass R. Sunstein, The First Amendment in Cyberspace, 104 YALE L.J. 1757, 1758 (1995) (describing various ways the Internet could affect peoples' lives in future). Some examples of the possible impact are: being able to view art that would usually be limited to people located in a particular city, gaining access to the best schools and teachers regardless of geographic location, and being able to shop without ever leaving the house. Id.; see also Norman Redlich & David R. Lurie, First Amendment Issues Presented by the “Information Superhighway”, 25 SETON HALL L. REV. 1446, 1447 (1995) (predicting that video stores and libraries could be replaced by Internet); Shari Steele, Taking a Byte Out of the First Amendment, HUM. RTS. Q., Spring 1996, at 14 (describing the Internet as having “the potential for giving voice to the previously disenfranchised”). The Internet has been praised for “putting the ‘printing press’ in the hands of the people.” Id.

4. See Randolph Stuart Sergent, The "Hamlet" Fallacy: Computer Networks and the Geographic Roots of Obscenity Regulation, 23 HASTINGS CONST. L. Q. 671, 672 (1996) (describing growth of Internet as example of computer networks' impact on modern communication). The Internet currently has an estimated thirty million users and it is predicted its membership will reach one billion after the start of next century. Id. The number of people accessing the Internet increases by approximately 10 to 15 percent annually. Id. See Debra D. Burke, Cybersmut and the First Amendment: A Call for a New Obscenity Standard, 9 HARV. J. L. & TECH. 87, 88 (1996) (noting one thousand percent increase in growth of Internet subscribers in recent years); Shiff, supra note 1 (listing current and future growth rates of Internet users). The phenomenal success of Netscape, Inc. is indicative of the predicted growth of the Internet. Netscape, a software company that produces programs to navigate the Internet, had its initial public offering price dramatically increase from $27 to $71 in its first day of trading. Joshua Cooper Ramo & David S. Jackson, Winner Take All: An Epic Battle is Taking Place Between Microsoft and Netscape, TIME, Sept. 16, 1996, at 56.

5. See Burke, supra note 4, at 92 (explaining there is no central authority governing the Internet); Shiff, supra note 1 (explaining that the Internet is not governed by any single authority); Gallagher, supra note 1 (describing Internet as “a ‘free space’ that no one controls or owns”). Because no central authority governs the Internet, users can discuss almost any topic without fear of legal repercussions. Id. See Barbara M. Ryga, Comment, Cyberporn: Contemplating the First Amendment, 6 SETON HALL CONST. L.J. 221, 223 (concluding speech on Internet is unrestricted because there is no “regulatory body”); cf. Redlich & Lurie, supra note 3, at 1448 (explaining that “role of government (if any) in regulating such new communications enterprises has...yet to be defined”).

6. See Huelster, supra note 2, at 868 (showing that Internet has become chief mode of information exchange because it allows anonymous communication); Anne Wells Branscomb, Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces, 104 YALE L.J. 1639, 1640 (1995) (holding that communication over Internet has eradi-cated prejudices that exist in visual modes of communication). Cyberspace is an entity where “everyone is welcome, regardless of gender, age, race, or association; it is a place where both
Attempts to regulate obscene or indecent speech in this new communication forum has brought about much controversy.\(^7\) Legislators and courts have attempted to balance the constitutional right to free speech with the right of government to protect minors and non-consenting adults from indecent material.\(^8\) However, traditional ob-

\(^7\) See Allen S. Hammond, IV, *Indecent Propositions: Reason, Restraint, and Responsibility in the Regulation of Indecency*, 3 VILL. SPORTS & ENT. L.J. 259, 263 (1996) (arguing that legislation "inhibits the freedom to engage in electronic speech and association activity which technology promotes"); Beeson, supra note 6, at 10 (asserting that there has been influx of censorship legislation aimed at computer networks). During an interviewed debate with one of the authors of the CDA, a computer magazine editor argued that if permissible indecent speech is not protected, the government will begin to censor all types of speech currently protected by the Constitution. *Id.* See Lisa Granatstein, *A Battle Over Bytes: Should Cyberspace be Censored?*, TIME, Apr. 8, 1996, at 14 (quoting Emanuel Goldstein as speculating that if pornographic speech is not protected, "the next people victimized will be a little closer to home"). *But see* Hammond, supra, at 261 (stating that legislation is necessary to address public health issues like teenage pregnancy and child development). A noted columnist argues that legislation is needed because parents find themselves in a Catch-22: they buy their children computers to supplement their education, but since parents must work to pay for these electronic devices, they are unable to monitor their children’s on-line explorations. Royko, supra note 6.

\(^8\) See Burke, supra note 4, at 92 (indicating that availability of pornography to children on the Internet is a major concern of some Americans). The debate within the judiciary and legislature centers upon the inevitable fact that laws which attempt to aid parents in the protection and proper upbringing of their children can also "undermine efforts to promote and protect opportunities for free expression." Hammond, supra note 7, at 263; see Shiff, supra note 1 (noting courts have difficult task in balancing right to free speech with government interest in protecting society); cf. Dennis W. Chiu, Comment, *Obscenity on the Internet: Local Community Standards for Obscenity are Unworkable on the Information Superhighway*, 36 SANTA CLARA L. REV. 185, 186 (1995) (asserting that congressional debates over Internet regulation are preview of legal battles heading to Supreme Court). Speaker of the House of Representatives Newt Gingrich criticized Senator Exon’s proposed legislation aimed at censoring the Internet because it was "clearly a violation of the First Amendment." *Id.* at 185.
scene speech doctrines have been difficult to apply to the Internet because of the unique characteristics of the medium.9

In February of 1996, Congress enacted the Communications Decency Act ("CDA").10 The Act mandates that if a person or organization affirmatively provides obscene or indecent material to non-consenting adults or children, penalties will be imposed by fine, imprisonment for not more than two years, or both.11 This legislation was praised by family groups as providing a method to monitor the content to which their children are exposed when exploring the Internet.12 However, when the CDA was passed, a substantial public backlash ensued because many Internet users believed the Act would infringe upon areas of speech protected by the First Amendment.13

9. See Shiff, supra note 1, at 731 (noting difficulty of applying obscenity doctrines to cyberspace); see also Frederick B. Lim, Obscenity and Cyberspace: Community Standards in an On-Line World, 20 COLUM. VLA J.L. & ARTS 291, 294 (1996) (indicating that the community standard, used in current obscenity law, is problematic when applied to Internet). Two specific features of the Internet, "lack of correlation to physical space and mass distribution capabilities available to individuals," make the Internet different from all other types of communication mediums. Id. at 295. Cf. Andrew Spett, Comment, A Pig in the Parlor: An Examination of Legislation Directed at Obscenity and Indecency on the Internet, 26 GOLDEN GATE U. L. REV. 599, 617 (1996) (arguing that telephones, regulated under current obscenity doctrines, possess different operational characteristics than Internet); Kim, supra note 1, at 415 (noting that lack of physical boundaries has resulted in "both substantive and procedural legal complications"). The lack of fixed geographic sites on the Internet make it difficult to determine proper venue locations to implement a proper obscenity standard tests. Id.


11. Id.


13. See Richard N. Cogliandese, Comment, Sex, Bytes, and Community Entrapment: The Need for a New Obscenity Standard for the Twenty-First Century, 24 CAP. U. L. REV. 385, 385 (1995) (arguing that government attempts to regulate the Internet raises First Amendment issues); see also Internet Junkies Celebrate Ruling Court's Blocking of Law seen as Victory for Free Speech, S.F. EXAMINER, June 13, 1996, at A1 (arguing that wording of CDA reached ar-
Electronic publishers and other technological entities criticized the CDA as encroaching on their protected free speech rights. As a result, two lawsuits were filed against the Department of Justice claiming that the Communications Decency Act was unconstitutional because it restricted First Amendment protected communication on the Internet. In both ACLU v. Reno and Shea v. Reno two separate courts held the CDA to be unconstitutional. Therefore, both district courts issued preliminary injunctions holding that the CDA was not to be enforced.

This article argues the bases for finding the CDA to be unconstitutional. Part II will provide a historical perspective of the Internet and a brief history of obscenity regulation in the United States. Part III will explain the purpose of the Communications Decency Act and the legal basis for the subsequent judicial interpretation of the Act. Part IV will explain the difficulties in censoring speech on Internet sites that could have been labeled as indecent under the language of the CDA include topics such as AIDS or the exhibition of images from the Sistine Chapel. See also Calvin Reid, Court Ruling Awaited on Communications Decency Act, PUBLISHERS WKLY, May 27, 1996, at 12 (noting that Human Rights Watch issued documents that criticize trend toward Internet censorship). An editorial advocating the acceptance of free speech stated: "The bill of Rights has stood us well for 200-plus years. You'd think we'd have learned to trust it by now." Editorial, Internet Ruling Gives Free Speech Its Due, CHI. SUN-TIMES, June 14, 1996, at 35, 35.

14. See McKay, supra note 12, at 486 (contending that CDA is criticized because it infringes upon both First Amendment and constitutional privacy rights); Beeson, supra note 6, at 10 (arguing that CDA restricts protected speech); Philip Elmer-DeWitt, On a Screen Near You: Cyberporn, Time, July 3, 1995, at 38 (noting that CDA would "transform the vast library of the Internet into a children's reading room"); Two Federal Lawsuits Filed in Philadelphia Seeking to Overturn the Communications Decency Act, AP, June 12, 1996, available in 1996 WL 4427369 (arguing that CDA will cause government to prosecute any person who distributes materials related to sex). One of the plaintiffs in ACLU v. Reno criticized the CDA because it would prosecute people for discussing "AIDS, abortion, politics, and science." One of the plaintiffs in ACLU v. Reno criticized the CDA because it would prosecute people for discussing "AIDS, abortion, politics, and science." Id.; see also Calvin Reid, Court Ruling Awaited on Communications Decency Act, PUBLISHERS WKLY, May 27, 1996, at 12 (noting that Human Rights Watch issued documents that criticize trend toward Internet censorship). An editorial advocating the acceptance of free speech stated: "The bill of Rights has stood us well for 200-plus years. You'd think we'd have learned to trust it by now." Editorial, Internet Ruling Gives Free Speech Its Due, CHI. SUN-TIMES, June 14, 1996, at 35, 35.


16. Both courts declared the CDA unconstitutional because the wording of the statute was overly broad. ACLU v. Reno, 929 F. Supp. at 853-55; Shea v. Reno, 930 F. Supp. at 916. However, only the ACLU court held that the statute was too vague. ACLU v. Reno, 929 F. Supp. at 857.

and propose alternatives to regulating obscenity on the Internet other than the CDA.

II. THE FIRST AMENDMENT IN CYBERSPACE

A. The Internet: A New Medium

Understanding the characteristics of the Internet is essential to appreciate the difficulty of applying obscenity law to this unique method of communication. The Internet is an association of self-owned computer networks, which include businesses, universities, governmental bodies, and individual persons. A person interested in "Surfing the 'Net" must subscribe with a service provider. The service provider, for a monthly membership fee, will provide the curious with the ability to access the Internet. As previously noted, a person requires only a computer, modem, and telephone line to access the Internet once he or she has subscribed to a service provider.

There are four primary avenues one can take when they are communicating over the Internet. One of the most widely-used Internet services is the electronic bulletin board ("BBS"). This service received its name because it is strikingly similar to a typical bulletin board. The service provider, for a monthly membership fee, will provide the curious with the ability to access the Internet. As previously noted, a person requires only a computer, modem, and telephone line to access the Internet once he or she has subscribed to a service provider.

To illustrate the relationship of these Internet services, this hypothetical concerning obscene material will be explained. To begin, Joe Smith is surfing the Internet and enters into a BBS that is topically described as "Nude Photographs." While reading the notes posted about nude photos, Joe reads a message that is advertising the availability of nude photos. In order to gain access to these photographs, the instructions require Joe to submit an age-identifying document to an e-mail address. After Joe submits his age verification, he turns off his computer. The next day, Joe has a new e-mail message in his electronic mailbox. The message tells Joe he is of legal age to view the nude photographs. Because there is such a variety of nude photographs available, Joe must use a Telnet to access a catalog that describes and gives locations of the different types of photographs. Because Mr. Smith subscribes to the philosophy, the more the merrier, he uses a File Transfer Protocol (FTP) to locate and download thousands of his favorite nude photographs. This hypothetical illustrates a possible relationship of Internet services. It is neither exclusive nor limited to the access of photographs.

18. See Shiff, supra note 1, at 733 (describing groups of individuals that are linked together by Internet).


20. Id. at 25.

21. Id. at 19.

22. To illustrate the relationship of these Internet services, this hypothetical concerning obscene material will be explained. To begin, Joe Smith is surfing the Internet and enters into a BBS that is topically described as "Nude Photographs." While reading the notes posted about nude photos, Joe reads a message that is advertising the availability of nude photos. In order to gain access to these photographs, the instructions require Joe to submit an age-identifying document to an e-mail address. After Joe submits his age verification, he turns off his computer. The next day, Joe has a new e-mail message in his electronic mailbox. The message tells Joe he is of legal age to view the nude photographs. Because there is such a variety of nude photographs available, Joe must use a Telnet to access a catalog that describes and gives locations of the different types of photographs. Because Mr. Smith subscribes to the philosophy, the more the merrier, he uses a File Transfer Protocol (FTP) to locate and download thousands of his favorite nude photographs. This hypothetical illustrates a possible relationship of Internet services. It is neither exclusive nor limited to the access of photographs.

A BBS is "an area where messages can be posted, read, and responded to in a non-real-time discussion." Another popular service available on the Internet is electronic mail (e-mail). E-mail allows a person to instantaneously transmit typed messages, textual documents, graphics, or voice messages to other people who have an e-mail address. Along with its rapid speed of transmission, e-mail is also highly regarded because it allows its users to transmit and receive mail in privacy. Privacy is further augmented in an e-mail environment due to the fact that its senders and recipients are not required to use their real names; additionally, addresses do not reveal a physical location.

The third primary Internet service is dubbed File-Transfer Protocol ("FTP"). FTP is a service available on the Internet which al-

24. See Handleman, supra note 23 (showing that BBS, like traditional bulletin-boards, allow people to contribute text or pictures, read contributions by others, or engage in dialogue with other BBS users). For purposes of this discussion, the term "electronic-bulletin board" with be used interchangeably with Usenet. Usenet is defined as "an informal, rather anarchic, group of systems that exchange 'news'" which is "essentially similar to 'bulletin boards' on other networks." Dern, supra note 19, at 195. Electronic BBS are similar to real-life discussion groups in the sense that "an electronic BBS permits an individual to listen to a conversation, ask questions, occasionally interject small comments, or contribute lengthy statements." Dorn, supra note 19, at 196 (explaining that BBS postings are categorized by topic). The messages that are posted on BBS are organized according to topics. Id.; Chiu, supra note 8, at 200 (stating that BBS allow users to post and read messages). Other choices of communication in the discussion groups include the right to post a note for others in the BBS group to read and the ability to send messages that respond to other’s posted notes. Id. One has the ability to periodically examine the BBS to see whether new messages have been posted and, if so, to read some or all of the new postings. Id.

25. Ed Krol, The Whole Internet: User's Guide & Catalog 588 (Acad. ed. 1996); see Dern, supra note 19, at 196 (explaining that BBS postings are categorized by topic). The messages that are posted on BBS are organized according to topics. Id.; Chiu, supra note 8, at 200 (stating that BBS allow users to post and read messages). Other choices of communication in the discussion groups include the right to post a note for others in the BBS group to read and the ability to send messages that respond to other’s posted notes. Id. One has the ability to periodically examine the BBS to see whether new messages have been posted and, if so, to read some or all of the new postings. Id.

26. See Sergent, supra note 4, at 676 (1996) (identifying e-mail as a widely used Internet service).

27. See Comer, supra note 24, at 290 (clarifying how electronic mail works). Electronic mail is defined as "a service that permits one to send to another person, a group, or a computer program" and also allows a user to reply to incoming memos. Id. E-mail users have become so accustomed to the velocity of e-mail transmission, that they have begun to criticize traditional mail as being "snail-mail" because of its snail-like speed of delivery. Id.

28. See John R. Levine & Carol Baroudi, The Internet for Dummies 77 (1993) (describing privacy issues of e-mail). The only way someone can read an e-mail message is if they possess the correct password, which decrypts the encryption to readable text. Id. But see Richard Raysman & Peter Brown, Policies for Use on the Internet, N.Y. L.J., Nov. 14, 1995, at 3, 10 (discussing how corporations may reduce liability for misuse of Internet communications by implementing internal regulation).

29. See Levine & Baroudi, supra note 28, at 67 (explaining that e-mail addresses only require a name which can be fictional).
allows users to download files from one computer to another.\textsuperscript{30} After a user connects to a remote computer, he must enter a log-in name and password.\textsuperscript{31} Like a BBS or e-mail, some FTP servers allow private interaction by allowing anonymous log-in names and passwords when accessing files.\textsuperscript{32} FTP's have inherent advantages over e-mail and BBS services because they only require one person to implement the communication process; as well, they are more efficient in the transfer of voluminous amounts of information.\textsuperscript{33} An FTP eliminates the need for organizations to provide actual delivery of files or documents. It allows organizations located in different geographic areas to distribute and share the same information instantaneously.\textsuperscript{34}

The fourth service available on the Internet is telnet. Telnet is a program that allows its users to log into other computer systems using the Telnet protocol.\textsuperscript{35} Thus, it enables a person to interact with a remote computer network.\textsuperscript{36} For example, a person in Dallas could use Telnet to browse a card catalog system in a San Francisco library. Telnet virtually creates the ability to access and explore other computer networks as if that person is in the computer network's geographic location.\textsuperscript{37}

\begin{itemize}
  \item \textbf{B. Analogizing the Internet: Does Application of Existing Law Work?}
  \item The incredible popularity of the Internet, coupled with the massive amounts of pornography available online,\textsuperscript{38} has brought the
\end{itemize}

\begin{footnotes}
32. \textit{Id.}
33. \textit{See id.} at 270 (stating that FTP is "cheaper and easier" because it does not require all of its users to possess large hard drives capable of storing large files).
34. \textit{Id.} For example, an insurance corporation with its main computer in New York, could via the Internet, instantly delivery hurricane insurance applications to its Miami office. Simultaneously, the Los Angeles office could access the insurance companies' main computer in New York to download information concerning earthquake insurance. This type of information exchange is not only faster than regular mail but it also cuts overhead by eliminating the payroll of employees at corporate headquarters who must answer and fulfill requests from a corporation's branch locations.
35. \textit{See KROL}, supra note 25, at 115 (explaining how a person uses Telnet).
36. \textit{Id.} at 52.
37. \textit{Id.}
regulation of obscenity in cyberspace to the forefront of the American conscious. The method that information is disseminated over the information superhighway changes almost daily, while the laws aimed at regulating content on the Internet have been slothful in responding to this new and amorphous communication medium.39

Legislators have attempted to regulate obscene material on the Internet by analogizing it to other methods of communication.40 In order to alleviate the difficulty of analogizing the multi-functioning Internet with other communication mediums, some commentators have attempted to specify the type of service being rendered by the Internet when there is an issue of obscene speech.41

"Real-time" chat, via e-mail or BBS, could easily be compared to a telephone line because both telephone lines and Internet services are relaying messages between parties.42 Because of this functional commonality, e-mail, BBS, and telephone lines are considered sec-

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39. See Robert Corn-Revere, New Technology and the First Amendment: Breaking the Cycle of Repression, 17 HASTINGS COMM. & ENT. L.J. 247, 282 (1994) (criticizing constitutional rights in communications regulation as being "utterly unsuited to the new media environment"). The legal process and its attempt to articulate constitutional standards for new communication mediums usually takes years or decades, while communication mediums are evolving over a much shorter time period. Id.; Michael Johns, Comment, The First Amendment and Cyberspace: Trying to Teach Old Doctrines New Tricks, 64 U. CIN. L. REV. 1383, 1392-93 (1996) (noting that growth of Internet has "outstripped the ability of the law to keep pace").

40. See Zanghi, supra note 2, at 110 (stating that although obscenity regulation laws are intended for bookstores and X-rated movie theaters, some legal professionals "believe that courts could extend laws to regulate on-line obscenity"); Lim, supra note 9, at 301 (comparing similarities of Internet to publishers and speakers). The characteristics of a BBS tend to resemble both a "publisher or speaker who originates and distributes material" and in some instances a BBS resembles a "republisher or common carrier." Id.

41. See Lim, supra note 9, at 301. (subjecting BBS users to "First Amendment standards, depending upon types of services offered and constitutional standards applicable to each").

42. See Phillip H. Miller, New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services, 61 FORDHAM L. REV. 1147, 1190 (1993) (comparing Internet services with telephone services because both systems communicate over phone lines). But see Lim, supra note 9, at 301 (arguing that a common carrier such as a telephone does not act as a "perfect metaphor" for comparison to the Internet). The first reason why the Internet is different from the telephone is the fact that telephones are legally required to offer its services without discrimination, whereas the Internet voluntarily offers its services without discrimination. The second reason is that even though Internet does not intentionally discriminate against its users, due to the price of computers and modems, an economic discrimination does in fact occur. On the contrary, telephone lines are regulated as public utilities and as such, they are reasonably affordable by people of all different levels of income. Id.
Another Internet service that can be associated with the telephone is Telnet. The similarity exists because both communication mediums can assist the user in locating information. A telephone line has directory assistance that provides its user with the phone number of specific individuals. Similarly, telnet provides its user with the exact location of specific information. However, Internet services differ drastically from telephone services because a BBS “do[es] not own or control transmission channels.” The BBS only controls the actual services which are carried over phone lines that are owned by other entities.

Some people have attempted to associate e-mail with the postal service, its “land-based counterpart.” Analogies to other communication mediums seem difficult to ascertain. The comparison of Internet services to broadcasters is nebulous because a BBS does not “transmit signals over public airwaves, and they are not required to operate under a government license.” Because Internet services do not require licenses to operate, they escape the Federal Communication Commission’s (“FCC”) right to regulate “broadcasters or common carriers.” Others have advocated analogizing the Internet to print publishers. They claim that there is a close fit because Internet services resemble electronic publishers by “providing subscribers with information in text and graphic form.” Despite these attempts to analogize, traditional media distinctions used to formulate different levels of constitutional protection to obscene speech are ineffective when applied to the Internet.

43. See Lim, supra note 9, at 301. Secondary publishers have typically operated under a lesser standard of liability for the material that they transport. Id. The standard of liability is “know or have reason to know.” Id.

44. See Miller, supra note 42 (identifying similarities of Internet services and telephones).

45. Id.

46. Id.

47. Id.


49. Miller, supra note 42.

50. Id.

51. Id.

52. See Kim, supra note 1, at 435 (opining that Supreme Court has made distinctions among media “to confer various levels of constitutional protection to pornographic or indecent
C. The First Amendment in Cyberspace

The First Amendment guarantees that "Congress shall make no law ... abridging the freedom of speech." However, this right is not absolute. There is no right to engage in obscene speech or communication; with the caveat that speech, which rises to the level of indecent, lies within the protection of the First Amendment. Thus, indecent versus obscene speech is a critical distinction in the constitutional analysis regarding the protection of free speech.

In the twentieth century, the Supreme Court has assumed the predominant role in determining what constitutes obscene speech, however, the Justices have debated among themselves the proper ap-
approach to be taken to define what constitutes obscenity. In 1948, the Court first ruled, albeit without significant comment, on the constitutionality of legal restraints on obscene speech in *Doubleday & Co. v. New York.* Doubleday & Co. was charged and found guilty under a New York criminal obscenity statute for publishing *Memoirs of Hecate County,* which contained vivid descriptions of sexual experiences. The Supreme Court upheld the obscenity statute in a 4-4 decision without opinion.

In 1957, the next major case involving the issue of obscene speech, *Roth v. United States,* reached the Court. A New York bookseller was convicted for using the U.S. mail to sell and transport obscene material. Justice Brennan, writing for the majority, identified the key issue as "whether obscenity is utterance within the area of protected speech and press." The Court first held that obscenity did not reside within the area of constitutionally protected speech, then proceeded to distinguish obscene speech from speech that

58. See *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 704-705 (1968) (Harlan, J., concurring and dissenting) (holding that attempts to separate obscene speech from other types of sexual speech that received First Amendment protection resulted in divergent views "unmatched in any other course of constitutional adjudication."); *Jacobellis v. Ohio,* 378 U.S. 184, 197 (1964) (Stewart, J. concurring) (describing difficulty of articulating a clear definition of obscenity). In describing the difficulty in defining obscenity Justice Stewart stated: "I shall not today attempt to define the kinds of material I understand to be embraced within that shorthand description [of obscenity]; and perhaps I could never succeed in intelligibly doing so. But I know when I see it." *Id.*


61. *Doubleday v. New York,* 335 U.S. 848, 848 (1948). It seems evident that the Court avoided the chance to articulate an obscenity definition by issuance of a per curiam decision. A per curiam opinion is defined as "an opinion of the court in which the judges or justices are all of one mind and the question involved is so clear that the opinion is not elaborated by an extension of the supporting reasons." *Ballantine's Law Dictionary* 932 (3d ed. 1969). It seems the justices were more in unanimity in being reluctant to articulate a clear definition of obscenity rather than the book in question being clearly obscene. Justice Frankfurter did not participate in the decision because he was a close friend of Edmund Wilson. Tribe, *supra* note 60.


65. Roth, 354 U.S. at 485.
merely involves sex. The Court formulated the test for identifying obscene speech as: “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.” In articulating this standard, the Court intended to provide lower courts with a guide by which they could evaluate obscenity. Thus, states could not ban speech unless it satisfied the Roth standard.

In the 1966 term, the Court revisited its obscenity formula in A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General of Massachusetts (“Memoirs”). In Memoirs, the Court overturned the Massachusetts Supreme Court’s holding that the character of the novel was obscene because it appealed to the prurient interest. In so doing, the Memoirs Court expanded its prior definition in Roth to state that government can only regulate the distribution of material if it is able to establish three factors:

(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.

The Memoirs Court’s expansion of the obscenity definition is illustrated in the implementation of “contemporary community standards” and “redeeming social value” as factors relevant to constitutionality. Despite its attempt to create a uniform standard, the test set forth in Memoirs was never applied with consistency or agreed upon by a majority of the Court in subsequent cases.

66. NOWAK & ROTUNDA, supra note 63.
67. Roth, 354 U.S. at 489. The Court defined prurient as “material having the tendency to excite lustful thoughts.” Id. at 487.
68. Id. at 477.
69. See id. (stating that standards of obscenity are needed to protect freedom of speech).
72. Id. at 418.
73. Id. at 418-419. Justice Brennan delivered the opinion of the Court but he was only joined by Chief Justice Warren and Justice Fortas. The plurality agreed on the result but sought a different test. Id. at 414.
74. Compare Jacobellis v. Ohio, 378 U.S. 184, 192-195 (1964) (Brennan, J., Goldberg, J.) (advocating use of national community standards) with id. at 201-02 (Warren, C.J., Clark, J.
In *Miller v. California*, the Court revisited the standards developed in *Roth* and *Memoirs.75* The Supreme Court in *Miller* produced a majority opinion that agreed upon what constitutes obscene and pornographic material:76

(a) whether the 'average person applying contemporary community standards' would find 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.77

The relationship between *Roth*, *Memoirs*, and *Miller* lies in the evolution of the term "utterly worthless."78 In *Roth*, obscene speech could be regulated because it was utterly worthless. In *Memoirs*, obscenity was unprotected if utterly worthless. Finally, in *Miller*, obscene speech could be regulated even if not utterly worthless.79 The test delineated in *Miller* is essentially the modern formula that is used today to adjudicate obscenity regulation cases.80

The obscenity doctrine is a product of the Court’s attempt to simultaneously ensure the rights of adults to view pornography in privacy while protecting children from the purported harmful affects of pornography. Congress was mindful of this balancing of adult pri-
vacy rights and protection of minors when it passed the CDA. These competing issues play a major role when the Supreme Court determines the constitutional validity of the CDA. The exposure of children to pornography is one of the rationales for the creation of the CDA.81 Stanley v. Georgia82 and Ginsberg v. United States83 provide illustrations of how the Court applies its obscenity doctrine when addressing the competing issues of adult privacy and child protection.

As exemplified in Ginsberg, the Court has developed parts of the obscenity doctrine to give states additional authority in the protection of minors from pornography.84 The reason for this additional authority is that minors are susceptible to coercion to participate in sexual roles in pornographic pictures and movies. The additional authority granted to the states is based on the idea that it is dangerous for minors to be exposed to pornographic materials.85 In Ginsberg, a person was convicted for selling nude magazines to a sixteen-year-old boy.86 The Court upheld the conviction, ruling that a state is allowed to prohibit the distribution of pornographic materials to minors, even though these materials would not be considered pornographic if sold to adults.87

Stanley v. Georgia88 also bears a relationship to the CDA. In Stanley, the Court held that "mere private possession of obscene matter" by an adult may not be criminal.89 The Court opined that a person's right not to have his thoughts controlled outweighed the right of the state to "protect the individual's mind from the effects of

81. See The Citizen Empowerment Coalition Page, Statement by President Clinton in reaction to Court Decision (visited Oct. 31, 1996) <http://www.ciec.org/decision_PA/960612_Clinton_stmnt.html> (describing President Clinton's reaction to ACLU v. Reno in which the President stated, "I remain convinced, as I was when I signed the bill, that our Constitution allows us to help parents by enforcing this Act to prevent children from being exposed to objectionable material transmitted through computer networks").
84. See Ginsberg v. New York, 390 U.S. 629, 630 (1968) (holding that states have a legitimate interest to regulate obscenity if it concerns well-being of its children residents).
85. Id. at 636.
86. Ginsberg, 390 U.S. at 629.
87. See id. (holding that publications are "not obscene for adults and [Ginsberg] is not barred from selling them to persons 17 years of age or older").
89. Id. at 568.
obscenity."\textsuperscript{90} However, the Stanley holding has been read very narrowly in subsequent obscenity cases taking place outside of one’s home.\textsuperscript{91} Thus, Ginsberg and Stanley illustrate the dichotomy of constitutional standards regarding pornography depending on the possessor’s age. Through the passage of the CDA, Congress attempted to appease the opposing, constitutional rights articulated by the Court in Stanley and Ginsberg.

III. CONGRESS INTERVENES: THE COMMUNICATIONS DEGENCY ACT OF 1996

\textit{A. Legislative and Social Impetus}

Historically, the government has successfully argued that regulation of obscenity is constitutional if it is designed to protect children from “potentially deleterious material.”\textsuperscript{92} In response to citizens’ beliefs that the Internet is saturated with pornography, Congress enacted the Communications Decency Act (CDA).\textsuperscript{93} The CDA was created to “ensure that some federal statute prohibits obscenity, and, if possible, even indecency over networked communi-
The Communications Decency Act of 1996 was signed into law by President Clinton on February 8, 1996. The CDA was infused into previous legislation by amending Section 223 of the Communications Act of 1934. Although it addresses a broad range of communications, it’s most controversial section provides jail time and/or steep fines for persons who intentionally or knowingly pass obscene or indecent materials to either minors or non-consenting adults over the Internet. Senator Exon, sponsor of the CDA, stated that the purpose of the CDA was to “assure that the information highway does not turn into a red light district.” The CDA has been praised for providing protection to children from exposure to pornography on the Internet.


96. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified in 47 U.S.C. 223 (a)-(h)). The Communications Act of 1934 was amended to include communication that was “transmitted by means of a telecommunication device”.

97. Id.

98. 140 CONG. REC. S9746 (daily ed. July 20, 1994) (statement of Sen. Exon). Senator Exon attempted to validate the CDA by stating “the information superhighway... will transcend newspapers, radio, and television as an information source... [t]his is the time to put some restrictions or guidelines on it.” Id. Senator Leahy, in hopes of preserving the development of the information superhighway, attempted to pass a competing bill that would refer the issue of obscenity on the Internet to the Justice Department, who would use current laws (as opposed to the new CDA) to prosecute violators. 141 CONG. REC. S8330, S8331 (daily ed. June 14, 1995) (statement of Sen. Leahy); Dominic Andreano, Note and Comment, Cyberspace: How Decent is the Decency Act?, 8 ST. THOMAS L. REV. 593, 600 (1996) (criticizing Senator Exon for his belief that Internet context is similar to broadcast media). Broadcast media is different because access to it is simple as opposed to the Internet which requires multiple steps before one can explore the information superhighway. Id.

99. See Hammond, supra note 7, at 281 (stating goal of CDA is to protect children, who explore Internet, from obscene materials). The concern for children’s safety has increased because of the increasing number of AIDS victims, teenage pregnancies, and sexual abuse of children. Id.; Cate, supra note 92, at 45 (noting that parents say it is difficult to monitor what children access on Internet because minors are more computer literate than their adult guardians); James E. Meadows, The Telecommunications Act of 1996: Rules of the Road for the New Highways, THE COMPUTER LAW., Mar. 1996, at 1, 8 (noting CDA provisions were enacted to reduce children’s exposure to pornography); Andrew Spett, Comment, A Pig in the Parlor: An Examination of Legislation Directed at Obscenity and Indecency on the Internet, 26 GOLDEN GATE U. L. REV. 599, 613 (1996) (stating Senator Exon’s belief that CDA would enable children to be protected from obscenity); Andreano, supra note 98, at 602 (noting that family and religious groups support the CDA because it attempts to protect children from pornography); cf. id. (stating that CDA will deter “potential harrassers” from “cluttering up the victim’s e-mail with annoying, unwanted material”). Senator Coats attempted to explain that the CDA, although restricting access to pornography by children, would not prevent consenting adults
B. Controversy Over CDA’s Effects and Meaning

The CDA has been subject to extensive criticism and critique both prior to and after its enactment into law. Before the CDA became law, it received heavy criticism because of its potential to encroach on areas of protected speech. Senator Daniel Moynihan commented that “to say that everyone is going to be held to the standard of my neighbor’s seven-year-old is wrong and is going to cripple the Internet.” One of the primary criticisms of the CDA is that it incorrectly compares the Internet with other types of media. Thus, critics argue, that the CDA fails to recognize the unique characteristics of the Internet. Publishers have criticized the CDA because its enforcement could classify material as obscene even though...
if the same information was published in different media contexts, it
would be protected by the First Amendment.103

The CDA has been denounced by others who believe punish-
ment by imprisonment is too severe for using obscene language on
the Internet.104 In an attempt to minimize the necessity of the CDA,
many of its opponents have advocated the use of computer software
censoring applications.105

In conclusion, the flaws of the CDA censors otherwise constitu-
tionally protected speech and the punishments [imprisonment] have
no correlation to the crime committed [transmission of obscene lan-
guage]. In other words, the punishment does not fit the crime.

C. Judicial Interpretation: Unconstitutional, but for Different
Reasons

1. ACLU v. Reno

Two cases, ACLU v. Reno106 and Shea v. Reno,107 have chal-
enged the constitutionality of the CDA. In ACLU, a collection of

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103. See Filtering News, NAT'L L.J. Apr. 17, 1995, at A20 (discussing liabilities of pub-
lished articles disseminated on Internet). The National Law Journal provides an example to
explain their assertion by stating that: “trial testimony often contains passages that, taken out
of text, could be classified as ‘obscene.’” Id. Thus, publications would be in the odd position
of being able to distribute materials on paper via sidewalk newsstands, yet be put at risk for
posting the very same material via the Internet. Id.

104. The opposition to jail time is exemplified in a House of Representative’s companion
bill which excluded jail as a form of punishment for violating the CDA. H.R. 1555, 104th
Cong. (1995). Even the Justice Department, which is directed by the defendant in ACLU v.
Reno and Shea v. Reno, admitted that the CDA will “criminalize constitutionally protected
speech.” Schwartz, supra note 101.

105. See Kevin Maney, Tuning into Telecom Reform: Big Picture is Filled with New Op-
tions, USA TODAY, Aug. 7, 1995, at 63 (discussing need of Internet industry to offer devices
for obscenity regulation). The House of Representatives tried to prevent jail-time punishment
by attempting to persuade the Internet industry to aggressively advertise and promote their
software devices that shielded Internet users from obscenity. Id.; Cate, supra note 92, at 45
(noting that technology used for intellectual property protection can be used to control minor’s
access on Internet). But cf. id. (arguing that courts will not investigate “availability of reme-
dial steps” [self-censorship] when examining obscenity regulation in Internet context); Ryga,
supra note 5, at 248 (discussing available content regulation software programs available from
Internet industry). Ms. Ryga points out that there are many computer software programs that
can adequately assist parents in regulating what their children may see while exploring the
Internet. Id. Ms. Ryga also advocates the implementation of a ratings system for material on
the Internet. Id. at 249.

S.Ct. 2329 (1997) (holding that Section 223 violated First Amendment).
educational organizations, businesses, and not-for-profit organizations filed suit against the Department of Justice in the United States District Court for the Eastern District of Pennsylvania, challenging provisions of the CDA that censored non-obscene and non-child pornography over the Internet.\(^\text{108}\) The plaintiffs specifically challenged two provisions of § 502 of the CDA, which outlawed indecent\(^\text{109}\) and patently offensive\(^\text{110}\) speech on the Internet, claiming that the provisions were constitutionally overbroad and vague. Both of these provisions can “subject violators to substantial penalties” including fines and imprisonment for a maximum of two years.\(^\text{111}\)

In *ACLU v. Reno*, the Pennsylvania District Court\(^\text{112}\) first wrestled with the applicable standard of review.\(^\text{113}\) The court determined strict scrutiny to be the appropriate standard because “the CDA is patently a government-imposed content-based restriction on speech.”\(^\text{114}\) Strict scrutiny requires that there be a compelling government interest to implement the CDA in which the means by which the statute is implemented are narrowly tailored.\(^\text{115}\) In order for the provisions in question to be upheld as constitutional, the benefit gained by a content-based restriction “must outweigh the loss of constitutionally protected rights.”\(^\text{116}\) The court explained that strict scrutiny was proper because the unique characteristics of the Internet were more closely related to the telephone media rather than the


\(^{108}\) ACLU v. Reno, 929 F. Supp. at 824. At the outset of the case, the plaintiffs emphasized they were not challenging the regulation of material that was deemed to be obscene or child pornography because both of these groups are excepted from protection by the First Amendment. Id. at 853.


\(^{110}\) Id.

\(^{111}\) Id.

\(^{112}\) 47 U.S.C.A. § 223. If action was taken to challenge the constitutionality of the CDA, Section 561 calls for a judicial review consisting of a panel of three judges. Id. A subsequent appellate review, bestows upon the parties involved, a right to directly appeal their case to the Supreme Court. Id. At this time, the Supreme Court has noted probable jurisdiction for *ACLU* but has not decided on the Department of Justice’s petition for certiorari regarding *Shea*. ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), Aff’d, Reno v. ACLU, 115 S.Ct. 2329 (1997); Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996), Aff’d, Reno v. Shea, 115 S.Ct. 1501 (1997).

\(^{113}\) ACLU v. Reno, 929 F. Supp. at 851.

\(^{114}\) Id. at 851.

\(^{115}\) Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989).

\(^{116}\) Id. (quoting Elrod v. Burns, 427 U.S. 347, 363 (1976)).
broadcast media. The essential reason for this comparison is that users of both the telephone and the Internet must "act affirmatively and deliberately to retrieve specific information on-line." This requirement is distinguishable from the broadcast media, because users in the broadcast media context play a passive role in the communication process.

The court acknowledged that the government has a compelling government interest in preventing minors from viewing either obscene or indecent material when exploring the information super-highway. However, the district court cited the Supreme Court stating that "if the means it [government] has chosen sweeps more broadly than necessary and thereby chills the expression of adults, it has overstepped onto rights protected by the First Amendment." In order to explain its vagueness holding, the ACLU court provided examples to illustrate the detrimental effects of the CDA. The court hypothesized situations where topics such as AIDS and rape, which are unequivocally important issues to teens, would be sanctioned by the CDA as indecent, and therefore, prohibited material on the Internet. Because the vagueness of the CDA swallowed speech that was not only protected by the First Amendment, but also beneficial to society, the CDA was not "narrowly tailored" to meet the government's objective. The vagueness lies in the fact that Internet users have no guidelines on which to determine if their communications would violate the CDA. However, the court concluded that the CDA reached areas of adult-protected speech and, as a result, for-

117. Id. The broadcast media receives the least constitutional protection because of its pervasive presence in people's lives. Broadcast media can easily reach children by way of turning on the television or radio. Therefore, regulation becomes more strict and the only possible way to limit material in the broadcast media is to "place restraints on its transmission. See Miller, supra note 42, at 1151 (discussing how characteristics of broadcast media influenced the Pacifica decision). While the broadcast media fails to "provide the recipient" with "no meaningful opportunity to avoid" its transmission, the telephone media necessitates a more relaxed method of regulation because it requires the receiver of the communication to take affirmative actions to receive the information. Id. In conclusion, it seems that the court in ACLU decided the telephone was a more appropriate media metaphor to the Internet because both communication devices require affirmative action as opposed to the passive recipient behavior seen in the broadcast media.

118. Miller, supra note 42, at 1151.


120. Id. at 854.

121. Id. (quoting Sable Communications v. FCC, 492 U.S. 115, 131 (1989)).

122. Id. at 853.

123. Id.
feit any chance of being a constitutionally viable "means" of achieving its compelling governmental interest.  

2.  *Shea v. Reno*

In *Shea v. Reno*, a publisher of an on-line magazine filed suit in the United States District Court for the Southern District of New York against the Justice Department to enjoin the enforcement of the CDA. Shea claimed § 223(d) of the CDA, which outlawed the transmittal of patently offensive speech, was unconstitutional because it restricted areas of protected speech. The *Shea* court agreed with the ACLU court and ruled that strict scrutiny should be the proper standard of review since § 223(d) involved a "content-based regulation of speech." The plaintiff, Shea put forth two arguments in his claim that § 223(d) restricted protected speech: first, the CDA reached an area of speech "with serious literary, artistic, political, or scientific value and that the government cannot demonstrate any compelling interest" to abrogate the free speech rights associated therewith; and second, that the CDA was not narrowly tailored because "it fail[ed] to preserve for adults the ability to engage in certain constitutionally protected communication." The district court, however, refused to address the first argument. The *Shea* court, like the ACLU court, assumed that the government possessed a compelling interest in "restricting minors access to all 'patently offensive' material." Having satisfied this element, the court then focused its examination on whether § 223(d) was narrowly tailored to achieve this compelling government interest. The government conceded and the court agreed that § 223(d) was unconstitutional on its face. However, § 223(d) is accompanied by § 223(e), which

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126.  Id. at 939.
127.  Id. at 940.
128.  Id. The court found it unnecessary to address Shea's first argument because it held that regardless of the value of the material censored by the CDA, the Act was an obvious "broad restraint on protected communication between adults." *Id.*
130.  Id.
131.  Id. at 941.
132.  Id. The court explained that the benefit of preventing minors access to indecent speech does outweigh the burden of restricting free speech rights of adults. *Id.* at 941.
provides affirmative defenses. The government asserted that the affirmative defenses in § 223(e), when paired with § 223(d), enable the CDA to be a constitutionally viable means of protecting minors from indecent material while allowing adults to “transmit constitutionally protected communications to adults.”

The CDA’s affirmative defenses provide that a person has not violated the CDA if he or she is able to prove:

1. that he or she has in good faith, taken reasonable measures to prevent minors from accessing indecent material, and
2. he or she has restricted access to [covered] communication[s] by requiring the use of a verified credit card, debit account, adult access code, or adult personal identification number.

The court rejected this argument, by holding that the affirmative defenses, coupled with § 223(d), were not “narrowly tailored to achieve the government’s interest in restricting minors access to indecent material” because available technology provided “no feasible means for most content providers to avail themselves of the two affirmative defenses.”

Although both ACLU and Shea agree that § 223(d) is overbroad because it acts as a “ban on constitutionally protected indecent communication between adults,” the two courts are in disagreement as to whether § 223(d) is constitutionally vague — ACLU holds it to be vague whereas Shea does not. The void-for-vagueness doctrine requires all criminal laws to provide notice to the public that identifies those activities that are considered criminal by the statute in question. In order for free-speech legislation to survive a vagueness challenge, it must be tailored to the least-restrictive means of regulating free speech.

The difference in judicial opinions between ACLU and Shea focuses on the distinctions in the definition of indecency. In ACLU, the court concluded that the CDA’s definition of indecency is vague because it fails to explain the community standards for the medium in question — the Internet. In Shea, the court concluded that no
available authority required statutes to define indecency according to the community standards of the medium in question. Thus, the judges in Shea concluded that the lack of a medium-specific reference in the definition of indecency in § 223(d) does not render the statute unconstitutionally vague.

D. The Supreme Court Protects Free Speech on the Internet

The Supreme Court term that ended June 1997 was one of the most noteworthy terms in recent years. Arguably one of its most important decisions was its ruling concerning free speech on the Internet. In Reno v. ACLU, the Supreme Court affirmed the lower court's decision in favor of the ACLU and other free speech advocates. The Supreme Court began its decision by summarizing the relevant and stipulated facts concerning the Internet, sexually explicit material, and age verification. The Court then briefly described the Communications Decency Act and the prior judicial history of the case.

In its argument for reversal, the petitioner presented three prior decisions that they believed would uphold the constitutionality of the CDA. The Court distinguished the CDA from its upholding of the statute in Ginsberg v. New York because the Ginsberg statute applied only to commercial transactions, allowed parents to make the decision on what their children could read, and lastly, that the wording of the statute adequately defined what is "indecent." In contrast, the Court held that the CDA was limitless in its application, encroached on a parent's right to decide what his or her children could view on

142. Id.
144. See Savage, supra note 143 (opining that the Internet free speech case was the highlight of the Court's term).
146. Id. at 2334.
147. Id. at 2337-42.
148. Id. at 2341.
149. Id. at 2341. (Ginsberg v. New York, 390 U.S. 629 (1968)).
the Internet, and failed to define "indecent" and "patently offensive."¹⁵⁰

In its response to petitioner's argument that FCC v. Pacifica supports upholding the CDA, the Supreme Court noted that the CDA's all-encompassing prohibitions were "not dependent on any agency familiar with the unique characteristics of the Internet" and that unlike the radio, the Internet did not have history of government regulation.¹⁵¹

Finally, the Supreme Court dismissed any similarities between the CDA and the statute in Renton v. Playtime Theatres¹⁵² by deciding that the CDA was a "content-based blanket restriction on speech" and thus could not be analyzed with Renton, which involved a "time, place, and manner regulation."¹⁵³ The Supreme Court opined that that these three cases actually heightened the constitutional concerns of the CDA.¹⁵⁴

In addressing the unique characteristics of the Internet, the Supreme Court stated that because mediums are different, they each require different levels of regulation.¹⁵⁵ Justice Stevens distinguished the Internet from other communication mediums such as radio and television by noting that the Internet does not have a history of regulation, is limitless in terms of available frequencies and does not possess an invasive nature.¹⁵⁶ The Court then went on to discuss the vagueness of the CDA provisions.¹⁵⁷ The Supreme Court points out the CDA's lack of explanation and inconsistent use of the words

¹⁵⁰.  Id.
¹⁵¹.  Id. at 2342. (FCC v. Pacifica Foundation, 438 U.S. 726 (1978)).
¹⁵³.  ACLU, 117 S.Ct. at 2343-44 (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46 (1986)).
¹⁵⁴.  Id. at 2341.
¹⁵⁵.  Id. at 2343 (recognizing that "[e]ach medium of expression . . . may present its own problems") (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)).
¹⁵⁶.  Id. at 2343-44.
¹⁵⁷.  Id. at 2344-45 (indicating concern for vagueness of the CDA because it provides criminal penalties for violations and its "obvious chilling affect on free speech"). The Court also stated that even though a statute is enacted to protect children from sexually explicit materials, one must still engage in a First Amendment inquiry of the statute. Id. at 2346. The power of the government to protect children from obscene speech shall not occur unchecked and this power must yield to the right of adults to engage in protected speech. Id. at 2346-47. The Court explained this assertion by providing examples of speech that may be sexual in nature but not obscene or pornographic. Id. Some example are discussions on the Internet concerning AIDS and birth control.
"indecent" and "patently offensive." The Court reasons that these discrepancies fail to provide Internet users with any kind of standard in which to base their communications in cyberspace. The CDA is then compared with the Miller obscenity standard and the Court explains that the CDA is unconstitutional because its provisions apply to activities beyond "sexual conduct" such as "organs" and "excretory activities." More importantly, the Court points out that the prohibited speech in the CDA can be compared to any "applicable state law." Thus, the paramount flaw of the CDA exposed by the Court is that it is impossible to determine a local community standard in cyberspace.

The remaining portions of the Court's analysis focus on the affirmative defenses in the CDA. The first proffered defense brought forth by the petitioner is that the Internet users can "tag" their communications so others with appropriate software could block their reception. The Court dismisses this defense by noting that this type of software product does not even exist in the marketplace. The second and third defenses are that an information provider can require verification, via credit cards, before allowing that person to download his information. Although verification software is available on the market, the Supreme Court noted that it is only affordable to commercial providers, and thus unfairly suppresses the speech of non-commercial providers. In its conclusion, the Supreme Court noted that it was concerned that the CDA would stunt the explosive growth of the Internet. Based on history, the Supreme Court stated that government regulation is more likely to "interfere with the free exchange of ideas" and that freedom of expression outweighs "any theoretical but unproven benefit of censorship."

IV. Analysis and Proposals

158. Id. at 2344.
159. ACLU, 115 S.Ct. at 2344.
160. Id. at 2345.
161. Id.
162. Id. at 2349.
163. Id.
164. Id.
165. Id.
166. Id. at 2352.
167. Id.
A. The Obscenity Doctrine

1. Is It Time to Abandon the Obscenity Exception?

Due to the difficulties of applying current obscenity standards to material in cyberspace, some commentators, as well as a former Supreme Court Justice, have proposed abandoning the obscenity exception to free speech.168 This is not an altogether new proposal. One of the most influential Supreme Court justices had long advocated the abolition of the obscenity exceptions.169 Two primary arguments provide the impetus for abdicating the obscenity exceptions. First, throughout history, there has been a liberal interpretation of the First Amendment, including the protection of obscenity.170 Second, and perhaps more importantly, is that critics of the obscenity exception to free speech argue that juries are unable to decide what constitutes local or national standards.171 This indecisiveness on the part of juries arises because the Court has been unable to provide a clear and precise definition of obscenity. Due to the inherent vagueness in the definition of obscenity, it is seemingly impossible to establish a uniformly applicable standard by which to judge obscene material. Nonetheless, it is unlikely that the Supreme Court will ever abandon the obscenity exception to free speech, despite its "'somewhat tortured history' in dealing with obscenity cases."172 Although the

168. Huelster, supra note 2, at 882.
169. See Paris Adult Theatre v. Slaton, 413 U.S. 49, 70-73 (1973) (Douglas, J. dissenting) (arguing that the First Amendment should protect obscenity); Miller v. California, 413 U.S. 15, 40-47 (1973) (Douglas, J., dissenting) (asserting that restraints of free speech such as the obscenity exception, should be promulgated not by judicial activism, but by constitutional amendment”). But see Huelster, supra note 2, at 883 (discussing abolition of obscenity exception to First Amendment protection). However, the exoneration of the obscenity exception from free speech seems an implausible scenario because it would require the Court to “overturn decades of jurisprudence exempting obscenity from First Amendment protection to make such a decision.” Id.
170. See Coglianese, supra note 13, at 414 (noting that Thomas Jefferson criticized any form of censorship and that Benjamin Franklin composed sexually-explicit materials).
171. See Chiu, supra note 8, at 212 (noting optimism of idea that juries can decipher standard to be used in adjudicating obscenity).
172. Id. at 212; see Lim, supra note 9, at 318 (discussing difficulties of regulating Internet). Internet experts have concluded that any type of censorship on the information superhighway is an unrealistic goal. Id.; Carlin Meyer, Reclaiming Sex from the Pornographers: Cybersexual Possibilities, 83 Geo. L.J. 1969, 1980 (1995) (noting censorship and prosecution as unsuccessful attempts at obscenity regulation). The author notes the futility of obscenity regulation on the Internet by arguing whether “[i]n this time of deficit anxiety and social and
members of the Court have vigorously debated "the standards for judging" obscenity, they have rarely disagreed that obscene material is excepted from First Amendment protection.\textsuperscript{173}

2. A New Obscenity Test Tailored to the Internet

Because of the global nature of communication on the Internet, the local community-standards test enunciated in \textit{Miller} is ill-suited to apply to obscenity regulation on the information superhighway. Therefore, some commentators have advocated the implementation of dicta from \textit{Stanley v. Georgia}\textsuperscript{174} as a means of addressing the unique issues raised by Internet regulation.\textsuperscript{175} In \textit{Stanley}, the Supreme Court held that the government could not regulate obscenity if it is viewed in the privacy of one's home.\textsuperscript{176} Thus, the analogy can be drawn between the viewing of obscene materials, such as books or movies in the home with the exploration of obscenity on the Internet in a person's private residence.\textsuperscript{177} Under this proposal, the viewing of pornography in a public computer forum, such as a university computer lab, would be prohibited. A person using his own laptop computer could also be prevented from viewing pornography on the Internet if this activity occurred in public areas such as airport terminals or shopping malls.

The weakness in using \textit{Stanley} as a basis for regulating obscenity in cyberspace is that the Supreme Court has refused to protect any avenues that are used to bring pornography into one's home.\textsuperscript{178} How-

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\textsuperscript{173} See Meyer, supra note 172, at 1980 (noting Court's disagreement on obscenity standard instead of non-existence of obscenity).


\textsuperscript{175} See Coglianese, supra note 13, at 419 (advocating that "only acceptable solution for erotica on BBS is for Supreme Court to breath new life into \textit{Stanley}")}. Coglianese notes that regulating obscenity on the Internet under the \textit{Miller} standard permits the government to decide what a person can see on the Internet while in the privacy of his or her home. \textit{Id.} at 420.


\textsuperscript{178} See Stanley v. Georgia, 394 U.S. at 557 (failing to extend protection beyond one's personal residence). In \textit{Stanley}, the Supreme Court noted that its holding "does not require that we fashion or recognize a constitutional right . . . to distribute or sell obscene materials." \textit{Id.} at 356; \textit{U.S. v. Reidel}, 402 U.S. 351, 351 (1971) (upholding conviction for mailing obscene materials to consenting adults); \textit{U.S. v. Twelve 200-Foot Reels}, 413 U.S. 351, 351 (1973) (refusing to recognize right to import obscene materials for one's personal use); Paris Adult
ever, the Court has yet to rule on whether the government can crim-
inalize transportation of obscenity between adults while both of them
are residing in their homes.\textsuperscript{179} One can criticize the Court for its nar-
row holding in \textit{Stanley} because it is illogical that one can possess and
view obscenity in a private abode, but the supplying of such obsceni-
ties to consenting adults is illegal.\textsuperscript{180} Perhaps it is time for the Su-
preme Court to broaden its holding in \textit{Stanley} in order to re-ignite
and bring to life its statement that "the Constitution protects the right
to receive information and ideas."\textsuperscript{181}

3. Local vs. National Community Standard

The Court in \textit{Miller v. California} held that "obscenity is to be
determined by applying "contemporary community standards."\textsuperscript{182}
The issue of community standards has caused much constitutional
debate.\textsuperscript{183} The Court has defined contemporary as meaning local.\textsuperscript{184}

\begin{footnotesize}

\textsuperscript{179} See Burke, supra note 4, at 107 (arguing that certain forms of Internet communication are similar to actual communications taking place in one’s private residence). It is possible that certain types of Internet communication could be “analogized to a virtual living room in a person’s home.” \textit{Id.;} Valkenburg, \textit{supra} note 1, at 327 (asserting that because downloading occurs in one’s residence, government is limited in its ability to prohibit what is downloaded). \textit{But see Kay, supra} note 48, at 381 (noting that “while a person’s disk drive on his or her computer is analogous to his or her home library, connecting to a network such as the Internet could be seen as analogous to ‘leaving’ the zone of privacy to enter a public space”).

\textsuperscript{180} See \textit{Marks} v. \textit{U.S.}, 430 U.S. 188, 198 (1977) (Stevens, J., concurring in part and dis-
senting in part) (illustrating constitutional inconsistencies of allowing one to possess obscenity but making it criminal to “providing another with material he has a constitutional right to pos-
sess”). Justice Black criticized the post-\textit{Stanley} holdings by writing that “\textit{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.’” \textit{United States v. Thirty-Seven Photographs}, 402 U.S. 363, 382 (1971) (Black, J., dissenting). The rationale for allowing regulation of obscenity outside of the home is found in the state’s regulatory power. \textit{NOWAK & ROTUNDA, supra} note 63, at 1146.

\textsuperscript{181} \textit{Stanley} v. \textit{Georgia}, 394 U.S. at 564.


\textsuperscript{183} See Burke, supra note 4, at 109 (criticizing Supreme Court for refusal to provide uniform obscenity guidelines). The debate is exemplified in the variety of community definitions articulated throughout the United States. \textit{Id.;} Coglianese, \textit{supra} note 13, at 417 (noting spectrum of community definitions). \textit{But see Miller, 413 U.S.} at 32 (stating that “[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people in Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City”). The Court acknowledged that different results in different areas does create a compromise of constitutional rights. \textit{Id.} at 26 n.9 (Douglas, J., dissenting).

\textsuperscript{184} See \textit{Miller}, 413 U.S. at 30 (discussing heterogeneous characteristics of Nation). Chief Justice Burger, in delivering the opinion of the Court, stated: “[o]ur Nation is simply too
In the past, the Court has applied its community standard definition of obscenity to cases involving telephones, radio, print, broadcast television, and cable — media that are quite dissimilar to the Internet.\textsuperscript{185} Does the community standards test adequately address obscenity claims stemming from the information superhighway, which has no readily identifiable community?\textsuperscript{186}

When establishing “community standards,” courts are prohibited from infringing upon any “area of expression that is protected by the [federal Constitution].”\textsuperscript{187} Local community standards are inadequate when addressing obscenity in mediums other than the Internet because the test erroneously assumes that all “local” communities are homogenous.\textsuperscript{188} This flaw is magnified when the local commu-
nity standard test is used in the Internet context, as illustrated in United States v. Thomas.189

In Thomas, a San Francisco couple was convicted for violating federal obscenity statutes.190 The couple, Mr and Mrs. Thomas, had set up a pornographic BBS in their Bay Area home.191 A postal inspector paid for and downloaded pornographic images to a computer terminal located in Memphis, Tennessee.192 Rather then being tried in San Francisco, they were tried and convicted in Memphis, where the postal inspector downloaded the images.193 The pornography at issue in Thomas would have been protected as "indecent" speech in San Francisco but was considered unprotected and "obscene" speech in Memphis.194 The Sixth Circuit upheld the couple's conviction by holding that it was permissible to prosecute obscenity cases at the place where the downloading computer terminal was located or the place where the images were downloaded from.195 In essence, the judge was giving zealous prosecutors freedom to choose the community standard that "holds true in the most conservative jurisdic-

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189. United States v. Thomas, 74 F.3d 701, 701 (6th Cir. 1995); see Huelster, supra note 2, at 877 (stating that courts have to decide "which party's community standard the jury should apply to determine whether materials are obscene"); Ryga, supra note 5, at 250 (predicting that courts will conclude that local community standard does not work on information superhighway). The difficulty lies in choosing the community out of: the place where the person downloaded the pornography, the place where the pornography was downloaded from, or the place where the BBS operator is located. Id.; McKay, supra note 12, at 487 (noting that critics of CDA believed using community standards to address Internet pornography may be difficult.) The critics contend a hardship exists because cyberspace lies outside any traditional geographic boundaries and that cyberspace itself is an entire community unto itself. Id. The locality of the community could be describe as a virtual community.; Coglianese, supra note 13, at 415 (stating that the Internet does not fall in traditional sense of community). For example, a person in Las Vegas can post pornography on his BBS. People in Milwaukee can then download this pornography on their computers located in Wisconsin. It is possible that the pornography when viewed in Las Vegas could be seen as indecent, and thus protected as free speech. But in Milwaukee, the pornography could be seen as obscene, and thus would not protected as free speech.


191. Id. at 705.

192. Id.

193. See, Jeffrey E. Faucette, Note, The Freedom of Speech at Risk in Cyberspace: Obscenity Doctrine and a Frightened University's Censorship of Sex on the Internet, 44 DUKE L.J. 1155, 1167 (1995) (stating that people using traditional methods to distribute pornography can avoid shipping their materials to communities where they could face prosecution).

194. See Thomas, 74 F.3d at 711 (stating that access to Thomas's BBS was available to communities that were less tolerant of obscenity).

195. Id. at 716.
tion." This statement by the court implies that there is really no such thing as "community standards," but rather a choice of communities depending on which community the prosecutor perceived to be the least tolerant of obscene material. This decision illustrates the inequity of local standards in cyberspace. The use of local community standards in determining obscenity on the information superhighway will encourage forum shopping, as seen in Thomas.

Another flaw in using community standards on the Internet is that it will ignore one of the assumptions used in Miller. The as-

196. Faucette, supra note 193, at 1169.


198. See Burke, supra note 4, at 110-11 (arguing that local community test forces people to tailor their products so as not to violate strict, conservative standards). The unfairness is in the imposition of "the lowest common denominator approach, whereby distributors market only material that conforms to the standards of the most sensitive community — a conformity that chills protected speech." Id.; Burke, supra at 112 (noting that person can access Internet pornography even without BBS' operator's knowledge). Thus, the BBS cannot block access even if he or she "was able to accurately predict whether or not standards of the geographic community from which the call originated would be violated." Id. Some commentators have argued that not only the receiver or disseminator of the BBS in question forms two choice of communities but that because a BBS can be accessed from all over the world, the community is in essence a global one. Id.; Huelster, supra note 2, at 876 (noting that entire group of BBS users form community). Assume that the postal worker from Memphis travels to San Francisco and purchases the pornography from the Thomas' adult-book store. The postal worker than returns home to Memphis with his nude magazines in hand. In this case, the postal worker would be in possession of and responsible for bringing in materials that according to local, Memphis community standards were obscene and thus not protected as free speech. In this case, it seems logical not only to prosecute the postal inspector, not Mr. and Mrs. Thomas, and also to prosecute in Memphis, rather than San Francisco. This hypothetical can accurately be compared to the facts in the actual Thomas case. Mr. and Mrs. Thomas provided an electronic bookstore a.k.a. BBS. The postal worker rather than flying to San Francisco, electronically visited the City by the Bay via his computer and modem and obtained pornography. Instead of physically bringing back the pornographic sources, the postal worker downloaded the pornography on his computer. It seems that Mr. and Mrs. Thomas could only violate the local standards in Memphis, if they operated their pornography service in Memphis, whether it be a bookstore or a BBS. In reality, Mr. and Mrs. Thomas, operated this service in a community that found there literature to be indecent and not obscene.

199. Shiff, supra note 1, at 746. Local standards will give prosecutors the ability to switch from either the BBS site or the downloading computer terminal site, depending on which local area has a more conservative standard regarding what is obscenity. Id. It seems very possible that if the downloading computer was in San Francisco and the BBS terminal was in Memphis, that the prosecutors would not pick the downloading terminal but rather the BBS terminal because it is located in a more conservative community.

200. See Shiff, supra note 1, at 748 (explaining physical differences between information transmitted through Internet and mails).
sumption being that children or non-consenting adults could be confronted by the physical presence of pornography.\textsuperscript{201} In \textit{Miller}, the Court articulated the community standards test to allow such communities to protect themselves. However, people cannot be confronted by pornography when it is traveling in cyberspace. Unlike the mail, bookstores, or movie theaters, which have the potential to exhibit obscenity to an unwilling or underage public, the transmission of obscenity over the Internet is merely "electrical impulses requiring computer software to decode them."\textsuperscript{202} Allowing local community standards to be used in obscenity regulation on the Internet will unfairly force a BBS to monitor the possibly millions of locations that can access their BBS.\textsuperscript{203} This unjust activity will result in BBS operators incurring major costs for "acquiring the sophisticated technology necessary to determine what information each subscriber requests, and from what location he accesses it."\textsuperscript{204} Rather than going to these financial extremes to ensure the legality of one's BBS, it seems possible that the number of available BBSs will decline dramatically. Regardless of whether BBS operators are punished financially by being required to set up extensive monitor systems, BBS operators will be forced to tailor their sites to the "most sensitive or puritanical locality."\textsuperscript{205} This is unconstitutional because it would permit a community to suffocate types of speech that would be per-

\textsuperscript{201} See Shiff, \textit{supra} note 1, at 748 (noting that local standards test would allow communities to "insulate themselves from such materials"); Kim, \textit{supra} note 1, at 442 (advocating governmental interest in protecting non-consenting recipients of pornography because there are no "unwilling recipients" exposed to such material").

\textsuperscript{202} Shiff, \textit{supra} note 1, at 748.

\textsuperscript{203} See Huelster, \textit{supra} note 2, at 878 (noting the great burden of requiring BBS operators to monitor all possible sites that could access their service).

\textsuperscript{204} Id. This result is precisely what the ACLU court found to be an impermissible burden when it considered the available affirmative defenses. \textit{Compare} ACLU v. Reno, 929 F. Supp 824, 855 (finding that "defenses are not technologically or economically feasible for most providers), \textit{with} Sable Communications v. FCC, 492 U.S. 115, 125 (1989) (stating that dial-a-porn telephone services "may be forced to incur some costs in developing and implementing a system for screening . . . and there is no constitutional impediment to enacting a law which may impose such costs on a medium providing these messages").

\textsuperscript{205} Sergent, \textit{supra} note 4, at 701; see Huelster, \textit{supra} note 2, at 878-79 (discussing consequences of developing a BBS for least tolerant communities). Tailoring the BBS to the most conservative community will result in maintaining obscenity standards for locales that in all honesty will probably never access the BBS site. Id. The imposition of the most conservative community standards dictating to the rest of the country what is obscene has been chastised because "it is futile to have each Hamlet in the country decide what it finds acceptable on the Internet and resolve the question in favor of the most repressive answer." Coglianese, \textit{supra} note 2, at 417.
mitted by either the Constitution or more tolerant communities. This result would indirectly stunt the growth of the Internet and prevent people from exercising their right to speak on topics that would be constitutionally permissible in other mediums. The arrival of the Internet as the future’s chief mode of communication may force the Court to abandon the community rule set forth in Miller.

Some have advocated not an abandonment of community standards, but rather a move to a national standard, as an attempt to accommodate the pervasively national aspects of the Internet. However, commentators are reluctant to endorse a national standard because of the concern that people will be forced to accept materials they deem obscene, and it is also feared that the most conservative opinion of obscenity will determine what is obscene for the entire nation.

Both before and after Miller, some members of the Court have supported use of a national standard to determine whether speech is obscene. As well, numerous commentators have advocated the

206. See Huelster, supra, note 2, at 878 (arguing that expensive censoring systems will force BBS service out of a market).

207. See Chiu, supra note 8, at 209 (noting that the Miller test was designed to address small rural communities). The author suggests a more national standard because these same communities now receive a pervasive national influence due to the information superhighway. Id.

208. See Lim, supra note 9, at 321 (positing that national standard will aid the individual BBS operator who does not possess the resources to investigate multitude of local community standards that currently exist); Chiu, supra note 8, at 210 (stating that information superhighway has created world where “no community exists as an island unto itself, able to maintain its own set of morals completely separate from those of other communities”). Commentators have argued that, in designing a national standard, courts should follow the standard of the most tolerant community. Id. However, this approach is flawed in the same way as a national standard following the least tolerant community because both ways will subjectively permeate or exclude materials in communities with differing views on morality. Cf. Huelster, supra note 2, at 880 (discussing advantages and disadvantages of least and most tolerant community standards). But see Sergent, supra note 4, at 715 (arguing that changing standards from local to national will not necessarily prevent censorship of protected speech); Meredith Leigh Friedman, Note, Keeping Sex Safe on the Information Superhighway: Computer Pornography and the First Amendment, 40 N.Y.L. Sch. L. Rev. 1025, 1046 (1996) (arguing that a national standard is not feasible because “residents in the fifty states have such different tastes and attitudes that a national standard would strangle these differences by the ‘absolutism of imposed uniformity’”).

209. See Chiu, supra note 8, at 211 (discussing concerns of national obscenity standard).

210. See Jacobellis v. Ohio, 378 U.S. 184, 193 (1964) (advocating that local community standards test when used to determine obscenity cannot exceed protections provided by constitution); Hamling v. United States, 418 U.S. 87, 151 (1974) (Brennan, J., dissenting) (arguing that local standards may violate First Amendment). Some commentators predict that the
modification of the community standard to make it a more all-encompassing standard. Their approaches do not attempt to literally form an obscenity standard that the entire community of the United States will find constitutionally permissible. Rather, these approaches purport to remove the subjectiveness associated with different local communities and replace it with a more objective standard, regardless of where the trial is taking place. One approach is to provide the jury with the instruction: "[d]oes the pornography depict 'explicit harm?'" A second approach to obscenity is that the jury will be asked to determine if the material was produced in an illegal manner. The third suggestion which emphasizes "consent of the audience" addresses the concern that provided the impetus for enacting the CDA; that is, insulating non-consenting adults and minors from indecent material. This approach would instruct juries that speech could be obscene if it was exhibited to a "captive, unwilling, or unconsenting" audience. Implementation of the "consent" approach addresses the medium characteristics of the Internet by recognizing that people downloading pornography are taking affirmative and presumptively consenting actions to obtain these materials.

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211. Huelster, supra note 2, at 880. To answer this question the jury would have to answer in the affirmative: 1) whether the material depicts one person inflicting serious bodily harm on another; 2) whether a participant did not consent before the production of the material; and 3) whether a participant in the production of the material was a minor." Id. The third element is consistent with one of the premises behind the CDA, which is the protection of minors from obscene material. Id.

212. Id. This once again pertains to minors because involving minors in pornography is without doubt a forbidden activity. Id.

213. See Pope v. Illinois, 481 U.S. 497, 513 (1987) (Stevens, J., dissenting) (opining that, "absent some connection to minors, or obtrusive display to unconsenting adults," speech should not be criminalized as obscene); Sable Communications, Inc. v. FCC, 492 U.S. at 119 (arguing that "exaction of criminal penalties for the distribution of obscene materials to consenting adults is constitutionally intolerable"); Huelster, supra note 2, at 879 (arguing that courts should limit obscene speech only when a non-consenting audience exists). The Internet is a place where "people must choose to become part of the Internet" and each person "has to decide which site she will visit." Id. Thus, a person wanting to view pornography via the Internet must take the initial step forward and solicit their desired information. Id.; Coglianese, supra note 13, at 416 (describing affirmative actions one must employ to access Internet sites).

214. See Huelster, supra note 2, at 881 (noting that "users initiation of communication with the service shows intentional and willing access to the information"). The application of a "consent" standard seems to be more economically viable method than the affirmative defenses provided in the CDA. Rather than forcing BBS providers to spend enormous amount of money to identify and investigate users of their BBS.
The consent method extinguishes the need for Miller's local community standards because, once again, it rebuts one of Miller's primary arguments for its obscenity test — the need to protect unwilling participants.215 The logic in the "consent" approach is so evident because the terms "consenting" and "unwilling" are mutually exclusive. This approach is also consistent with the premise in Stanley; that is, protecting the actions of adults in the privacy of their homes, because most computer terminals are located in personal residences.

B. Self-Regulation: Can It Work for the Internet?

Rather than rely on the government to regulate the Internet, computer enthusiasts have proposed self-regulation as a means of controlling pornography on the Internet.216 Persons in high-technology industries believe the government is inept and ill-equipped to regulate the Internet.217 There are two basic non-

215. See Coliganese, supra note 13, at 416 (emphasizing that unwilling recipients on Internet seem impossible).

216. See id. at 414 (characterizing government regulation of Internet communications as not only violative of First Amendment but also "knee-jerk response"); Friedman, supra note 208, at 1050 (noting that Internet industry has proposed many ideas and attempts at self-regulation). The desire to control material downloaded from the Internet has given birth to an entire new software industry. Id.; see also Stacey J. Rappaport, Note, Rules of the Road: The Constitutional Limit of Restricting Indecent Speech on the Information Superhighway, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 301, 343 (1995) (arguing that parents, as opposed to government, should select appropriate material for children to explore on Internet); Internet Ruling Gives Free Speech Its Due, CHI. SUN-TIMES, June 14, 1996, at 35 (advocating that government should seek "combination of industry self-control and parental involvement to control children's access").

217. See Robert F. Goldman, Note, Put Another Log on the Fire, There's a Chill on the Internet: The Effect of Applying Current Anti-Obscenity Laws to Online Communications, 29 GA. L. REV. 1075, 1116 (1995) (noting that Congressional bills illustrate problems that occur when government attempts to regulate obscenity); Rappaport, supra note 216, at 342 (noting that technology companies, favoring defeat of government censorship, have begun to organize and develop "standards to filter offensive material from the Internet"); Joshua Quittner, How Parents Can Filter Out the Naughty Bits, TIME, July 3, 1995, at 45 (stating that Internet hackers are developing self-regulation programs because they are "fearful that Congress will try to stifle cyberspace with overly broad anti-smut laws"). The CEO of a company that sells screening software believes the position of censor should be held by parents or whoever controls the computer but not the government. Id. But see Beeson, supra note 6 (asserting self-regulation is inconsistent by listing titles that were and were not censored). For example, the author points out that the title "Spring Semester" was censored but the title "Blond Lovers" was not censored. Id.; Friedman, supra note 208, at 1052 (illustrating mistakes of self-regulation by pointing out that "alt.sex.bestiality.banney." site was censored even though it was actually a BBS for a children's television cartoon character.) On a more serious note, an
legislative solutions that can be implemented to regulate obscenity on the Internet. The first solution is software programs that enable people to control what materials a particular computer can access on the Internet. These screening software programs are multi-functional. Some products allow users to prevent access to certain Internet sites based on the words describing the content of the site. Other means of regulating obscenity include a list of sites that are automatically deemed obscene by the software manufacturers. This system facially addresses the most pressing Internet concern — harm to children. Software programs avoid the legal discord and debate over the effectiveness of community standards in regulating obscenity.

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218. See Spett, supra note 99, at 623 (explaining available actions to monitor content on Internet). The two measures are “software with built-in ‘filter’ products” and “self-imposed BBS rating system.” Id.

219. See Goldman, supra note 217, at 1117 (noting desire of Internet industry to self-regulate in hopes of avoiding government censorship). The use of these software programs is preferred within the industry because it prevents the government from censoring communication over the Internet. Id.; Doug Abrahms, Eeon Move on Internet Porn Grabs Lawmakers, THE WASH. TIMES, July 19, 1995 at B7 (discussing devices available to parents for regulating content seen on Internet by children). Even on-line providers such as Prodigy provide its users with control devices that allow parents to monitor what their children may explore while on the Internet. Id. But see Meyer, supra note 172, at 1982 (stating that “the overbroad regulation of speech necessitated by software screening not only captures nonobscene protected speech, but chills system operators and citizens from engaging in protected speech”).

220. See Joe Abernathy, Net Censorship: Alternatives Gain Momentum, PC WORLD, Sept. 1995, at 54 (noting some software programs regulate by examining types of words used in BBS titles).

221. See id. (discussing software manufacturers list of obscene BBS); Raysman & Brown, supra note 28 (describing usefulness of passwords). If one wants to access this list of Internet sites, while still policing their children’s interests, a person can install passwords that enable that person to access the adult-only sites. Id. But see Meyer, supra note 172, at 1989 (positing that blocking access on Internet is futile because it was “designed to provide multiple access routes; if any one connection is destroyed, the severed link can be replaced simply by rerouting”). Computer experts frequently comment on this ability by stating that “for every roadblock, there is a detour.” Id.

222. Meyer, supra note 172, at 1989. Parents are able, without much hassle or Internet expertise, buy, install, “and even customize these preventive products.” Spett, supra note 99, at 623; Leslie Helm, Decision on Internet Decency Basically Upholds the Status Quo, L.A. TIMES, June 13, 1996, at D1 (stating that Internet industry has developed programs that will enable “religious groups to develop content ratings systems that reflect their values”).

223. See Goldman, supra note 217, at 1118 (noting that software programs allow “more flexibility over control at the most local level”). The author identifies an asset in the software programs as permitting its user to conceive not local community standards but local (home) standards on deciding what is obscene. Id.
The other means of implementing self-regulation is the creation of industry-wide ratings and standards. These ratings, similar to motion picture ratings, could identify obscene networks or Internet files. This mode of self-regulation is a practical alternative because the Internet is such a difficult concept to grasp. Some people have argued that if the government is “getting out of the network business” in terms of funding, then why should Net surfers have to follow its rules? Computer competent individuals are arguably the only people qualified to design regulatory methods that do not violate areas of protected speech; courts and legislators, thus, should defer to the computer industry to address the complex issues raised by the Internet in a similar way as the courts use the business judgment rule in corporate law. Internet experts, by being allowed to implement self-regulation devices, are not imposing their moral judgments but are merely providing devices that enable parents or whoever is in charge of the computer terminal to decide what is permissible viewing while exploring the information superhighway. These high-tech geniuses of the Internet industry are the best compromise to ensure

224. See Spett, supra note 99, at 624 (explaining rating system could categorize Internet sites “based upon their theme and language”). The people who download material onto the Internet would be required to obey the rating guidelines and be responsible for determining the appropriate rating of their site. Id. The ratings system would implement regulatory actions such as “compiling a list of BBS services nationwide, monitoring these services, and enforcing the regulations imposed.” Friedman, supra note 208, at 1051. Proponents of self-regulation believe their system will bring control away from the government and back to the family. Id.; Ryga, supra note 5, at 249-50 (comparing Internet censorship with movie ratings which are based on age). For example, the classifications would be:

- Over 0 - information accessible to all ages;
- Over 13 - would be similar to “PG-13”;
- Over 17 - would be similar to “R”, and
- Over 21 - would be similar to “X”. Id.

Quittner, supra note 217 (stating that consortium of Internet magnates, like Netscape, have been developing ratings system that should be working by year’s end). But see Friedman, supra note 208, at 1051 (discussing difficulties of employing ratings system). However, many computer enthusiasts believe a self-imposed ratings system would be “unorganized, ‘more work than it’s worth,’ and ‘an attempt to regulate and censor the free flow of information between members of the general population.’” Id.

225. Krol, supra note 25, at 45.

226. See How Parents Can Filter Out the Naughty Bits, Time, July 3, 1995, at 45 (noting that such Internet giants as Microsoft and Netscape have announced plan that will “give responsible parties more specific guidance about which Internet material is appropriate and which is not”). But see Meyer, supra note 172 (stating Internet cannot be regulated because of technological reasons). Meyer notes that it is likely that the computer experts who are employed to design regulation systems are probably the “very persons who have been posting and encoding sexual imagery in the first place.” Id.
the protection of children from obscenities, while protecting the privacy rights of adults.227

V. CONCLUSION

The Internet is rapidly becoming the principal medium that will enable the world to exchange information and communicate in unprecedented numbers. Because of its innovative characteristics, the law has experienced difficulty in its attempts at regulating this unique communication medium. Courts and legislators have endeavored to analogize the Internet with other conventional communication mediums in their attempts to regulate or prohibit types of speech that occur over the Internet.

The Communications Decency Act is the first legislation directly aimed at regulating the areas of obscene and indecent speech occurring over the Internet. Although its intent to protect minors and unconsenting adults from exposure to pornography is certainly a legitimate governmental interest, this legislation is an inadequate solution to address the cyberspace pornography dilemma. The CDA fails to recognize the unique characteristics of the Internet and thus, was properly found unconstitutional by the federal district courts in ACLU and Shea for infringing upon areas of free speech. A judicial modification of the obscenity doctrine, such as expanding the home privacy right articulated in Stanley or changing the Miller community standard test from a local to a national standard, is more adept at addressing obscene and indecent speech that occurs on the information

227. See Spett, supra note 99, at 623 (asserting that "alternatives exist which, if adopted would simultaneously accomplish the government's interest in preventing exposure of offensive material to children, while maintaining First Amendment protections"); Rappaport, supra note 218, at 343 (asserting that self-regulation technology "provides a 'clean' version of the Internet to younger users... while allowing adults to access their choice of material"); cf. Internet Ruling Gives Free Speech Its Due, CHI. SUN-TIMES, June 14, 1996, at 35 (noting that controlling what children view on Internet is parental choice, not governmental directive); Two Federal Lawsuits Filed in Philadelphia Seeking to Overturn the Communications Decency Act, AP, June 12, 1996, available in, 1996 WL 4427369, (these suits note that parents, not government, should decide for their children "what material should come into their homes based on their own taste and values"). But see Meyer, supra note 172, at 1981 (arguing that neither Internet ratings systems nor software programs can successfully screen out pornography without restricting access to indecent images). In a more constitutional analysis, Meyer believes self-regulating measures are unable to "distinguish texts or images which appeal solely to prurient interest" or "assess whether they violate particular community standards." Id. Meyer argues that allowing self-regulated censorship will most likely result in the "overzealous suppression of sexual conversation and imagery, and create complex and costly constitutional litigation." Id.
Another plausible alternative is for the Supreme Court to either create an obscenity test specifically tailored for Internet speech or allow self-regulation orchestrated by the more qualified experts within the Internet industry. The allowance of ill-suited legislation, such as the CDA, will unfortunately delay the arrival of the Internet as the essential medium that simplifies the ability of the world to freely and inexpensively exchange information and ideas.
APPENDIX A

Title V—OBSCENITY AND VIOLENCE
Subtitle A—Obscene, Harassing, and Wrongful Utilization of Telecommunications Facilities

SEC. 501 SHORT TITLE
This title may be cited as the “Communications Decency Act of 1996”

SEC. 502 OBScene OR HARASSING USE OF TELECOMMUNICATIONS FACILITIES UNDER THE COMMUNICATIONS ACT OF 1934.

Section 223 (47 U.S.C. 223) is amended
(1) by striking subsection (a) and inserting in lieu thereof:
(a) Whoever
(1) in interstate or foreign communications
(A) by means of a telecommunications device knowingly
(i) makes, creates, or solicits, and
(ii) initiates the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person:
(B) by means of a telecommunications device knowingly
(i) makes, creates, or solicits, and
(ii) initiates the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;
(C) makes a telephone or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications;
(D) makes or causes the telephone of another repeatedly or continuously to ring with intent to harass any person at the called number; or
(E) makes repeated telephone calls or repeatedly initiates communications with a telecommunications device, during which conver-
sation or communication ensues, solely to harass any person at the
called number or who receives the communication; or

(2) knowingly permits any telecommunications facility under
his control to be used for any activity prohibited by paragraph (1)
with the intent that it be used for such activity, shall be fined under
title 18, United States Code, or imprisoned not more than two years
or both.; and

(2) by adding at the end the following new subsections:

(d) Whoever

(1) in interstate or foreign communications knowingly

(A) uses an interactive computer service to send to a specific
person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner
available to a person under 18 years of age, any comment, request,
suggestion, proposal, image, or other communication that, in context,
depicts or describes, in terms patently offensive as measured by con-
temporary community standards, sexual or excretory activities or or-
gans, regardless of whether the user of such service placed the call or
initiated the communication; or

(2) knowingly permits any telecommunications facility under
such person's control to be used for an activity prohibited by para-
graph (1) with the intent that it be used for such activity,

shall be fined under title 18, United States Code, or imprisoned
not more than two years, or both.

(e) In addition to any other defenses available by law:

(1) No person shall be held to have violated subsection (a) or (d)
solely for providing access or connection to or from a facility system,
or network not under that person’s control, including transmission,
downloading, intermediate storage, access software, or other related
capabilities that are incidental to providing such access or connection
that does not include the creation of the content of the communica-
tion.

(2) The defenses provided by paragraph (1) of this subsection
shall not be applicable to a person who is a conspirator with an entity
actively involved in the creation or knowing distribution of commu-
nications that violate this section, or who knowingly advertises the
availability of such communications.

(3) The defenses provided by paragraph (1) of this subsection
shall not be applicable to a person who provides access or connection
to a facility, system, or network engaged in the violation of this section that is owned or controlled by such person.

(4) No employer shall be held liable under this section for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such conduct, authorizes or ratifies such conduct, or (B) recklessly disregards such conduct.

(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d), or under subsection (a)(2) with respect to the use of a facility for an activity under subsection (a)(1)(B) that a person

(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

(6) The Commission may describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications under subsection (d). Nothing in this section authorizes the Commission to enforce, or is intended to provide the Commission with the authority to approve, sanction, or permit, the use of such measures. The Commission shall have no enforcement authority over the failure to utilize such measures. The Commission shall not endorse specific products relating to such measures. The use of such measures shall be admitted as evidence in good faith efforts for purposes of paragraph (5) in any action arising under subsection (d). Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers.