The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway

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The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway†

Robert Cannon*

I. INTRODUCTION ........................................ 52
   A. The Problem: The Availability of Pornography ...... 53

II. THE COMMUNICATIONS DECENCY ACT ............... 57
   A. The Act as Passed .................................. 57
      1. The Defenses .................................... 59
      2. Preemption and Jurisdiction ..................... 63
   B. The Legislative History ............................ 64
      1. The Exon-Coats Revision ........................ 65
      2. The Loyal Opposition ............................ 65
      3. Victory in the Senate and the House ............ 71

III. ANALYSIS ............................................. 72
   A. Feasibility of Regulating Speech in Cyberspace .... 72


B. First Amendment Analysis

1. Obscenity and Indecency
2. Consideration of the Medium: Sable
3. Least Restrictive Means
4. Overbreadth Doctrine
5. Vagueness Doctrine
6. Conclusion: A Contest Between Censorship and Democratic Discourse

C. Public Policy Issue

1. Was New Legislation Required?
2. The CDA as a Threat to Privacy
3. The CDA as an Impediment to the Development of the Medium

IV. THE FINAL OUTCOME

V. CONCLUSION

[T]he Barbarians are at the gate!
—Senator James Exon, quoting an article from HotWired.

What they're trying to do is design a whole city to look like Disney World.
—Jerry Berman, Executive Director of the Center for Democracy and Technology.

I. INTRODUCTION

On February 1, 1995, Senator James Exon (D-Neb.) attempted to do what had never been done before—regulate speech on the Internet. Introducing the Communications Decency Amendment (CDA), Senator


Exon declared a danger to society: Barbarian pornographers are at the gate and they are using the Internet to gain access to the youth of America. Senator Exon proclaimed:

The information superhighway should not become a red light district. This legislation will keep that from happening and extend the standards of decency which have protected telephone users to new telecommunications devices.

Once passed, our children and families will be better protected from those who would electronically cruise the digital world to engage children in inappropriate communications and introductions. The Decency Act will also clearly protect citizens from electronic stalking and protect the sanctuary of the home from uninvited indecencies.\(^4\)

In a year of deregulation, Senator Exon called for more regulation. In the year when Speaker of the House Newt Gingrich placed the House of Representatives on the Internet, praising it as a landmark for democracy, Senator Exon warned America that the Internet was filled with dark places\(^5\) from which we needed government protection. In a year where Internet users were proclaiming the infinite utility of the World Wide Web, Senator Exon, who has apparently no Internet experience,\(^6\) declared a danger.

A. The Problem: The Availability Of Pornography

Senator Exon was motivated out of a concern for the proliferation of pornography and indecency on the Internet and the easy access to that material by the youth of America. Not everyone shared his belief that there existed a substantial threat where one can go "click, click, click"\(^7\) and have access to pornography.

The greatest salvo in the debate over the availability of pornography on the Internet was Marty Rimm’s study *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories (Rimm Study)*, published in the Georgetown University Law Review.\(^8\) Rimm

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6. See infra 105-18 and accompanying text.
purported to have conducted a thorough survey of the availability of pornography on the information superhighway. He concluded that pornography was rampant and freely available. In one of his most notorious statements, he concluded that 83.5 percent of the images available on the Usenet are pornographic.

The study became a front page "exclusive" in Time magazine. The ink was barely dry on the story before Senator Grassley waved a copy in front of the Senate in support of his antipornography legislation. The study became the source of endless articles and editorials. The opposition was sent scurrying, searching for ways to defend against this weapon of the censorship proponents. On-line discussion groups dedicated endless bandwidth to deliberating the merits of the study. And parents started curtailing surfing privileges of their children. When the skirmish died
down, the study had been largely discredited and Time magazine published
a follow-up article which was all but a retraction and apology for being
duped into publishing the study. 14 Nevertheless, the warning cry that the
Internet was the dark home of pornographers after the children of America
had been spread across the American psyche.

The problems of the Rimm Study were numerous. The Rimm Study was
apparently not subject to peer review. 15 Professors Donna L. Hoffman and
Thomas P. Novak criticized the study, concluding that Rimm's work was
methodologically flawed. 16 The ethics of Mr. Rimm's research procedures
were questioned. 17 He was accused of plagiarism. 18 Finally, it was discov-

See Kurtz, supra note 12, at C3 (commenting on Time's publication of Rimm Study); Meeks,
supra note 9 (criticizing Time's publication of Rimm Study); Fred H. Cate, Indecency,
Ignorance, and Intolerance: The First Amendment and the Regulation of Electronic Expres-
sion, 1995 J. ONLNE L., art. 5, para. 109 (noting Time's publication of Rimm Study); Weise,
supra note 9 (reporting Philip Elmer-Dewitt's regrets in publication of Time article). See
also Julian Dibbell, Muzzling the Internet, TIME, Dec. 18, 1995, at 75 ("Pornography in
Cyberspace? Sure, it's out there, although there is not as much of the hard-core stuff as most
people seem to think.").

15 See Post, supra note 9 ("One would have, perhaps, more confidence in the results of
the Rimm Study had it been subject to more vigorous peer review."). After its publication
the Rimm Study received rigorous peer review. See Journoporn Special Report, supra note
12 (archive of online discussion critiquing Rimm Study).

16 Donna L. Hoffman & Thomas P. Novak, A Detailed Analysis of the Conceptual,
Logical, and Methodological Flaws in the Article: "Marketing Pornography on the Informa-
tion Superhighway" (version 1.01, July 2, 1995) <http://www2000.ogsm.vanderbilt.edu-
/rimm.cgi>; See also Brian Reid, Critique of the Rimm Study <http://www2000.ogsm
.vanderbilt.edu/novak/brian.reid.critique.html> ("In summary, I do not consider Rimm's
analysis to have enough technical rigor to be worthy of publication in a scholarly journal.");
Elizabeth Weise, What a Tangled Web We Weave, ASSOCIATED PRESS (Dec. 24, 1995)
available in 1995 WL 4420752 (referring to Rimm Study as "discredited"); Andrew Kantor,
Laissez-faire, INTERNET WORLD, Jan. 1996, at 36-37 (referring to Rimm Study as a "very
questionable study"); Alan Lewine, Georgetown Law Journal Gives GULC Rimm Job, GEO
LAW WEEKLY (1995) available in (last modified Nov. 6, 1995) <http://www.dcez.com
/-alewine/NetPornindex.html> ("The article and resultant Time story are 'bogus,' a 'cyber-
hoax,' a 'gross distortion' of 'questionably validity,' 'cyberfraud,' and 'a scandal' as
described in headlines found in the San Francisco Examiner, Media Beat, The Globe and
Mail, The Press of Atlantic City, and HotWired respectively.").

<http://www.ccs.org/ht/9509/ethics.html>. The fact that the study's researchers were able
to gain access to BBSs in order to monitor user activity was seen as suspicious. See Elmer-
DeWitt, supra note 10 (stating that Rimm conducted study of BBS use with permission of
BBS operators). Normally operators wish to keep the privacy of their users strongly
protected. It was argued that Mr. Rimm was able to gain access by misrepresenting his
intentions, indicating that he was doing research to aid pornographers. Kamen, supra
note 12, at A19; Meeks, supra note 9; Brock N. Meeks, Jacking in from the "Mr. Toad's Wild

ered that he was working both sides of this issue; Mr. Rimm was also the author of *The Pornographer's Handbook: How to Exploit Women, Dupe Men, & Make Lots of Money.* In the end, even Carnegie Mellon, his graduate school, distanced itself from the *Rimm Study.* As a final salvo in the *Rimm Study* skirmish, the United States Senate decided that it no longer needed to hear what Mr. Rimm had to say about pornography and pulled him from the witness list of the July 26, 1995, hearing concerning pornography on the Internet.

Rimm proved an easy target for the censorship opponents. But criticism of the *Rimm Study* did not discount the reality of pornography on the Internet. While at the local corner store there are at least some barriers which keep thirteen-year-old boys from buying *Playboy,* there are virtually no barriers keeping those boys from surfing through the pages of the *Playboy* World Wide Web site.

The debate over the *Rimm Study* was representative of the power of the Internet in the new democracy. In cyberspace, everyone can hear you...
scream. Information flows rapidly and freely. "Netizens" are ready to examine every aspect of every event. Marty Rimm made a mistake in publishing the *Rimm Study*; he also made a mistake in thinking that he could keep his past and his methods hidden. In the information age the level of debate has been raised; more information is available and it is available faster. Democracy, which thrives on discussion, disagreement, and debate, prospered because the ability to debate and the ability to have access to information relevant to the issues was heightened. The debate over the *Rimm Study* is representative of how this new form of democratic activism can prevent distortion from controlling public policy.

II. THE COMMUNICATIONS DECENCY ACT

A. The Act as Passed

Senator Exon, believing that God was on his side, set forth to battle the pornographers by introducing the most important piece of legislation that the Senator ever believed that he had worked on. "The fundamental purpose of the Communications Decency Act is to provide much needed protection for children." He proposed to create this protection by amending section 223 of Title 47, United States Code, entitled "Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications."

The CDA, as passed, extends the antiharassment, indecency, and antiobscenity restrictions currently placed on telephone calls to "telecommunications devices" and "interactive computer services." Pursuant to the

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25. 141 CONG. REC. S8090 (daily ed. June 9, 1995) (statement of Sen. Exon, remarking "in my 8 years as Governor of Nebraska and my 17 years of having the great opportunity to serve my State in the Senate, there is nothing that I feel more strongly about than this piece of legislation").


27. 47 U.S.C § 223 (1994). This section is a part of the Common Carrier subchapter of the Wire and Radio Communications Chapter of title 47. See infra note 110 and accompanying text (discussing appropriateness of placing Internet regulation under common carrier law).

CDA, it is illegal to knowingly send to or 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 contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication.  

Violators are liable for "each intentional act of posting" and not each occasion of downloading or accessing. It is the intent of Congress that the CDA target content providers, not access providers or users.

In addition, owners of telecommunications facilities are liable where they knowingly permit their facilities to be used in a manner that violates the CDA. The penalty for violation was changed from $10,000 to fines pursuant to Title 18 of the United States Code and from a maximum of six months imprisonment to a maximum of two years.

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system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." Id. sec. 509, § 230(e)(2), 110 Stat. at 139 (to be codified at 47 U.S.C. § 230(e)(2)); See id. sec. 502, § 223(h)(2), 110 Stat. at 135 (to be codified at 47 U.S.C. § 223(h)(2)) (referring to definition at sec. 230(e)(2)).

29. Id. sec. 502(2), § 223(d)(1)(B), 110 Stat. at 134. S. 652 originally made it illegal, via a telecommunications device: (1) to create and transmit offensive material with the intent to harass, S. 652, 104th Cong., § 402(a)(2) (1995) (to amend 47 U.S.C. § 223(a)), (originally amending § 223(a)); (2) to make available obscenity, Id. § 402(a)(2); and (3) to make an indecent communication to a minor, Id. § 402(a)(2). The definition of a telecommunication device included interactive computer services.

In attempt to make the CDA constitutional, the conference committee set restrictions on "interactive computer networks" in their own subsection and provided a definition for the offensive material, codifying the definition of indecency from FCC v. Pacifica, 438 U.S. 726, 732 (1978). H.R. CONF. REP. No. 104-458, at 188 (1996) (discussing reconciliation of CDA). See infra note 133, and accompanying text discussing definition of indecency, instead of using words like "obscenity" and "indecency."


31. See 142 CONG. REC. S687 (daily ed. Feb. 1, 1996) (statement of Sen. Coats, remarking "On-line services and access software providers are liable where they are conspirators with, advertise for, are involved in the creation of or knowing distribution of obscene material or indecent material to minors."); 142 CONG. REC. S714 (daily ed. Feb. 1, 1996) (remarks of Sen. Exon, stating "[i]n general, the legislation is directed at the creators and senders of obscene and indecent information.").

32. Communications Decency Act, sec. 502, § 223(d)(1), 110 Stat. at 133-34 (to be codified at 47 U.S.C. § 223(d)(1)). See also S. 652, 104th Cong. sec. 402(a)(2) (adding 47 U.S.C. § 223(d)-(e)).

33. Communications Decency Act, sec. 502, § 223(d)(1), 110 Stat. at 133-34 (to be codified at 47 U.S.C. § 223(d)(1)). See also S. 652, 104th Cong. sec. 402(a)(2) (originally amending 47 U.S.C. § 223(a) to increase fines from $10,000 to $100,000). The conference compromise placed enforcement of CDA under the jurisdiction of the Department of Justice.
1. The Defenses

The CDA added four defenses to section 223: protection for service providers giving "mere access," protection against respondeat superior, recognition of good faith attempts to comply with this statute as compliance with the statute, and protection against criminal and civil liability where an individual makes a good faith effort to restrict access to offending material.\(^3\)

In its original version, the CDA did not incorporate all of these defenses. This resulted in strong objections from the interactive computer service industry. The industry stated that they were subject to an impossible task: monitoring and censoring of millions of bits of information flowing across computers each day.\(^3\) As a result of the criticism received, Senator Exon incorporated the following defenses.\(^3\)

First, section 223(e)(1) provides a defense where an individual solely provides access to material not under the individual's control.\(^3\) The "access provider" defense extends to services and software which download and cache data from other computers as long as that content is not created

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\(^{34}\) H.R. CONF. REP. NO. 104-458, at 188 (discussing sec. 502, stating "[d]efenses to violations of the new sections assure that attention is focused on bad actors and not those who lack knowledge of a violation or whose actions are equivalent to those of common carriers"). These defenses as submitted to and passed by the Senate were strongly criticized by the Department of Justice. Letter of Kent Markus, Acting Assistant Attorney General, Department of Justice, to Sen. Patrick J. Leahy (May 3, 1995), reprinted in 141 CONG. REC. S8343 (daily ed. June 14, 1995) [hereinafter Markus].

\(^{35}\) See Cyberporn and Children Hearings, supra note 13, at 72-73 (prepared statement of William W. Burrington, Assistant General Counsel and Director of Government Affairs, America Online, Inc., and Chairman of the Online Policy Committee, Interactive Services Association) (stating "online service providers cannot police and be aware of the specific content of each communication, and yet they are penalized for transmitting certain communications"); Meyer, supra note 2, at 1980, 1983 n.77 (commenting on impossibility of monitoring all transmissions over server's computers, citing Catherine Yang, Flamed with a Lawsuit, BUS. Wk., Feb. 6, 1995, at 70-71 (reporting that CompuServe, Inc. and Prodigy have said they cannot police activities of their thousands of subscribers and, in Prodigy's case, read or edit the 75,000 notes transmitted daily)).


\(^{37}\) Communications Decency Act, sec. 502, § 223(e)(1), 110 stat. at 133-34 (to be codified at 47 U.S.C. § 223(e)(1)). See also S. 652, 104th Cong. § 402(a)(2). This defense in its original form was criticized by the Department of Justice as establishing "a system under which distributors of pornographic material by way of computer would be subject to fewer criminal sanctions than distributors of obscene videos, books or magazines." Markus, supra note 34. Mr. Markus went on to state that "[s]uch a defense may significantly harm the goal of ensuring that obscene or pornographic material is not available on the Internet or other computer networks by creating a disincentive for operators of public bulletin board services to control the postings on their boards." Id.
on the service provider. According to Senator Exon, this defense explicitly exempts a person who provides access to or connection with a network like Internet that is not under that person's control. Providing access or connection is meant to include transmission, downloading, storage, navigational tools, and related capabilities which are incidental to the transmission of communications. An online service that is providing such services is not aware of the contents of the communications and should not be responsible for its contents. Of course this exemption does not apply where the service provider is owned or controlled by or is in conspiracy with a maker of communications that is determined to be in violation of this statute.

This defense narrows the reach of the CDA. The conferees explicitly stated that it is the purpose of the CDA "to target the criminal penalties of new sections 223(a) and (d) at content providers who violate this section and persons who conspire with such content providers, rather than entities that simply offer general access to the internet and other online content." This defense is to be liberally applied.

The second defense is the "good faith" defense. It is a defense to prosecution if an individual takes, in good faith, "reasonable, effective"

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39. 141 CONG. REC. S8345 (daily ed. June 14, 1995). See also 141 CONG. REC. S8345 (daily ed. June 14, 1995) (statement of Sen. Coats, stating "[I]t is the intent of this legislation that persons who are providing access to or connection with the Internet or other electronic service not under their control are exempted under this legislation"); 142 CONG. REC. H1158 (daily ed. Feb. 1, 1996) (statement of Rep. Hyde, stating "the conference report expressly provides an absolute legal defense to any on-line access provider, software company, employer, and any other, 'solely for providing access or connection to or from a facility, system or network not under that person's control,' so long as that person is not involved in 'the creation of the content of the communication'"); 142 CONG. REC. S714 (daily ed. Feb. 1, 1996) (statement of Sen. Exon, stating "the telephone companies, the computer services such as CompuServe, universities that provide access to sites on Internet which they do not control, are not liable."); id. (Sen. Exon, stating "[t]he legislation generally does not hold liable any entity that acts like a common carrier without knowledge of messages it transmits or hold liable an entity which provides access to another system over which the access provider has no ownership of content. Just like in other pornography statutes, Congress does not hold the mailman liable for the mail that he/she delivers.")

40. H.R. CONF. REP. 104-458, at 190 (discussing sec. 502, stating "[t]he defense covers provision of related capabilities incidental to providing access, such as server and software functions, that do not involve the creation of content").

41. Id. (discussing sec. 502, stating "[t]he conferees intend that this defense be construed broadly to avoid impairing the growth of online communications through a regime of vicarious liability.").

42. Id. (discussing sec. 502, stating "[t]he word 'effective' is given its common meaning and does not require an absolute 100% restriction of access to be judged effective").
and appropriate" actions to prevent offensive material from being accessed by minors. Offensive material which is transmitted despite an individual's good faith efforts would not result in liability for the individual.

As a corollary to the good faith defense, individuals who make good faith efforts to implement a defense under the CDA shall be protected from other criminal or civil liability. This defense was in response to what Senator Exon felt was an absurd situation. If an Internet Service Provider (ISP) exerted no editorial control over the transmissions on its computers, it was free from liability according to the few cases that had been decided. If, however, an ISP exerts editorial control but is nevertheless unable to prevent all harmful transmissions from passing over its computers, then the ISP could be liable for the resulting harm.

*Stratton Oakmont, Inc. v. Prodigy* was the war cry of this absurdity. According to the facts of *Stratton*, Prodigy had represented itself as a family on-line service. The evidence revealed that Prodigy exercised editorial control by promulgating content guidelines which requested that users refrain from certain conduct by using "a software screening program which automatically prescreens all bulletin board postings for offensive language," by employing individuals whose duties include enforcement of the content

43. Communications Decency Act, sec. 502, § 223(e)(5), 110 Stat. at 134 (adding 47 U.S.C. § 223(e)(5)). See also S. 652, 104th Cong. sec. 402(a)(2) (adding 47 U.S.C. § 223(f)(3)). Originally, the FCC was to promulgate rules explaining what these terms might mean. Until those rules were promulgated, the regulations implementing the dial-a-porn legislation were to be used. Id. The CDA, as passed, states only that the FCC may promulgate rules explaining these terms. See infra note 56 (discussing role of FCC).

44. See also Press Release, Support Exon-Coats Computer Porn Amendment Says National Law Center for Children and Families, *reprinted at* 141 CONG. REC. S8338 (daily ed. June 14, 1995) (stating that good faith effort is all we can ask of servers at this point); *Cyberspace and Children Hearings, supra* note 13, at 71 (prepared statement of William W. Burrington) (stating that such statutory defenses serve as incentive to develop effective blocking and screening devices). Kent Markus of the Department of Justice criticized this defense, stating "this proposed defense would lead to litigation over whether such actions constitute 'good faith' steps to avoid prosecution for violating the section 402, and could thwart existing child pornography and obscenity prosecutions." Markus, supra note 34. See infra note 115 and accompanying text (elaborating criticism of good faith defense).

45. Communications Decency Act, sec. 502, § 223(f)(1) & sec. 509, § 230(c)(2), 110 Stat. at 135, 138 (adding §§ 223(f)(1), 230(c)(2)). See also S. 652, 104th Cong. sec. 402(a)(2) (adding § 223(f)(4)) (1995). Kent Markus of the Department of Justice criticized this defense for weakening an individual's right to privacy in e-mail transmissions. Since the service provider is protected from civil or criminal liability, the service provider can conduct illegal eavesdropping in the name of a good faith effort to prevent the transmission of obscenity. Markus, supra note 34.


47. Id. at *2.
guidelines, and by use of an “emergency delete function” by which the individuals employed could censor the content of the service.48

Stratton was a brokerage house in New York. An individual posted a comment on Prodigy which Stratton claimed was libelous to its reputation. Stratton sued Prodigy as a publisher of that information, demanding $200 million in damages.49 The New York court held that Prodigy was in fact liable as a publisher. The court’s holding was premised on the finding that Prodigy represented, and in fact, that it exercised editorial control over its service.50 The fact that Prodigy monitored its service only for obscenity and indecency and not defamation was of no consequence. Since Prodigy entered the role of censor, Prodigy became liable in the eyes of the New York court for everything on its service.

Congressmen on both sides of the debate found Stratton objectionable.51 Representatives of the on-line industry argued that laws like Stratton create a “Hobson’s choice” between creating “child safe” areas that expose the ISP to liability as an editor, monitor, or publisher, and doing nothing in order to protect the ISP from liability.52 In order to encourage

48. Id. at *2-*3.
49. Mark Walsh, Scientologists, Secrets, and Cyberspace, LEGAL TIMES, July 3, 1995, at 2, 8. Ultimately Stratton settled for an apology from Prodigy. Peter H. Lewis, After Apology From Prodigy Firm Drops Suit, NEW YORK TIMES, Oct. 25, 1995, at D1. Reportedly, Stratton itself came to see the Stratton lower court decision as problematic for on-line communications. Id. (“Citing the ‘best interest[ ] of . . . the on-line and interactive services industries,’ Stratton Oakmont, Inc., of Lake Success, L.I., said it would not contest a motion filed by Prodigy asking Justice Stuart L. Ain of the State Supreme Court of Nassau County to dismiss the case.”). The New York Times further reported that Prodigy had planned to raise truth as the absolute defense against libel. Id. at D5. See also Prodigy off the hook in on-line libel case, CNN—U.S. NEWS BRIEFS (Oct. 25, 1995, 1 a.m. EDT) <http://www.cnn.com/US/Newsbriefs/9510/10-24/index.html>.
50. Walsh, supra note 49, at 8.
51. See 141 CONG. REC. S8345 (daily ed. June 14, 1995) (Sen. Coats, stating “I want to be sure that the intend [sic] of the amendment is not to hold a company who tries to prevent obscene or indecent material under this section from being held liable as a publisher for defamatory statements for which they would not otherwise have been liable . . . the subsection (f)(4) defense is intended to protect companies from being put in such a catch-22 position . . . If they try to comply with this section by preventing or removing objectionable material, we don’t intend that a court could hold that this is assertion of editorial content control, such that the company must be treated under the high standard of a publisher for the purposes of offenses such as libel.”); 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (statement of Representative Cox, referring to Stratton decision as “backwards”); 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte, criticizing Stratton decision).
52. IWG Report, supra note 22 (criticizing Stratton). See also Cyberporn and Children Hearings, supra note 13, at 76, (prepared statement of William Burrington) (citing Stratton as obstacle to wide implementation of measures to block or filter out offensive materials). Justice Stuart Ain, who presided over Stratton Oakmont, Inc. v. Prodigy, anticipated this criticism. In his decision, he stated, “For the record, the fear that this Court’s finding of
ISPs to monitor their services and act in the role of censor without fear, Senator Exon provided a defense against such civil or criminal liability.\(^5\) In the Conference Report, the conferees specifically stated that they were overturning *Stratton*.\(^4\)

2. Preemption and Jurisdiction

The CDA preempts state law as it applies to commercial entities and activities, nonprofit libraries, and institutions of higher learning.\(^55\) On the federal level, the CDA provides for virtually no FCC involvement.\(^56\)

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publisher status for Prodigy will compel all computer networks to abdicate control of their bulletin boards, incorrectly presumes that the market will refuse to compensate a network for its increased control and the resulting increased exposure." *Stratton*, 1995 WL 323710 at *5.

53. This protection against liability may have, however, an unintended result. Prodigy was found liable in *Stratton* for what essentially amounted to as an omission, the failure to monitor for and remove a defamatory remark. However, the CDA gives service providers protection from affirmative acts. If a service provider violates the legal rights of users, the service provider can claim that it was seeking to restrict access to offensive material and claim immunity under the CDA. Injured individuals have potentially lost an important cause of action.


55. Communications Decency Act, Pub. L. No. 104-104, sec. 402, § 223 (f)(2), 110 Stat. at 135 (adding 47 U.S.C. § 223(f)(2)). Originally the CDA preempted state legislation only with regards to commercial entities. S. 652, se. 502, 104th Cong. (1995) (adding 47 U.S.C. § 223 (g)). See also 141 CONG. REC. S8088-89 (daily ed. June 9, 1995) (statement of Sen. Exon). The conferees responded to the calls for a uniform national standard and a recognition that the Internet is a global medium. H.R. CONF. REP. NO. 104-458, at 191 (discussing sec. 502, stating "[t]he conferees have expanded this section to provide for consistent national and State and local content regulation of both commercial and non-commercial providers"). See generally *Cyberporn and Children Hearings*, supra note 13, at 76 (prepared statement of William Burrington) (noting that five states in the past year have passed laws aimed at regulating obscenity and harassment on computer networks, and stating that where ISPs are faced with varying regulations from different states, the ISPs "would be forced to meet the content and activity standards of the most restrictive state. In this way, one state legislature, rather than the federal government, would control the content of our country's contribution to the global information superhighway."); *Coalition Letter to Telecom Conferes 2* (Nov. 9, 1995) <http://www.cdt.org/policy/freespeech /1109_iwg_ltr.html> (letter of the Internet Working Group, calling for uniform national policy). Excluded from state preemption would be noncommercial content providers.

56. Congress instructed that the FCC "may describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications under subsection (d)." Communications Decency Act, sec. 502, § 223(e)(6), 110 Stat. at 134-35 (adding 47 U.S.C. § 223(e)(6)) (emphasis added). See also 142 CONG. REC. S714 (daily ed. Feb. 1, 1996) (statement of Sen. Exon, commenting on FCC's role). Congress went on to say:

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.
Originally, enforcement of the CDA was to be under the jurisdiction of the FCC. The Conference Committee placed it under the jurisdiction of the Department of Justice (DOJ). In addition, the Conference Committee removed language instructing the FCC to report every two years on the effectiveness of the CDA. Finally, the Conference Committee retained language from a competing House amendment stating that it is the policy of the federal government "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 

B. The Legislative History

At first, support for the CDA was uncertain. Then Senator Exon unveiled his infamous "Blue Book." At the request of Senator Exon, a friend downloaded from the Internet a collection of pornography. This was gathered in a blue folder and made accessible at Senator Exon's desk on the Senate floor so that everyone could observe the "filth" that was accessible to every boy and girl in this country. The Blue Book would be repeatedly cited throughout the debate in support of the CDA. Its existence is theorized to have helped reluctant senators vote for the CDA. No senator wanted to make what could be construed as a pro-pornography vote.
1. The Exon-Coats Revision

In order to ensure passage of his amendment, Senator Exon responded to the criticism and opposition which he received. On June 9, 1995, Senator Exon introduced a revised version of the CDA that included revisions to the original defenses. Senator Exon was attempting to appease several groups simultaneously. However, DOJ reaffirmed its opposition to the amendment and organizations on the conservative right indicated displeasure with new defenses that obstructed, in their opinion, the prosecution of pornographers.

2. The Loyal Opposition

The CDA faced strong opposition in the Senate from Senator Leahy. Senator Leahy introduced a competing amendment which proposed that the federal government take no additional efforts to regulate the Internet, and, instead, conduct a Department of Justice study to determine what additional forms of legislation would be required over and above current antiobscenity and pornography law, to successfully regulate

65. 141 CONG. REC. S8088-89 (daily ed. June 9, 1995) (statement of Sen. Exon, noting that revisions were "in response to concerns raised by the Justice Department, the profamily and antipornography groups, and the first amendment scholars"). See also 141 CONG. REC. S8340 (daily ed. June 14, 1995) (statement of Sen. Leahy, noting "[T]he revisions made by Senator Exon reflect a diligent and considered effort by him and his staff to correct serious problems that the Department of Justice, I and others have pointed out with this section of the bill."); 141 CONG. REC. S8334 (daily ed. June 14, 1995) (statement of Sen. Feingold, noting "[H]is efforts to accommodate his colleagues only underscore his commitment to the welfare of our children.").


69. Other statements of senatorial opposition can be found at 141 CONG. REC. S8346 (daily ed. June 14, 1995) (statement of Sen. Levin); id. at S8345 (statement of Sen. Biden); id. at S8334 (statement of Sen. Feingold).
on-line communications.\textsuperscript{70}

The Leahy Amendment was, in Senator Exon's opinion, an attempt to punt by conducting a federal study achieving nothing.\textsuperscript{71} Senator Leahy responded that it was in fact Senator Exon who was proposing the punt, that individuals phobic of on-line pornography wanted to pass the buck of responsibility of protecting our children on to the FCC.\textsuperscript{72} Senator Leahy argued that it was a punt to pass legislation out of fear without considering whether that legislation would be constitutional or even successful.

Attacks within the Senate came not only from those who believed that regulation premature and imprudent, but also arose from those who believed that the CDA was too liberal, permitting loopholes through which pornographers could slither. The conservative opposition introduced alternative legislation which would censor the Internet without defenses.\textsuperscript{73}

The reception which the House of Representatives gave to the CDA was frigid. The Speaker of the House, Newt Gingrich, who had only that year proudly launched the House of Representatives into cyberspace with

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\textsuperscript{70} S. 714, 104th Cong. (1995) reprinted at 141 CONG. REC. S8389-90 (daily ed. June 14, 1995). In introducing the amendment, Sen. Leahy stated "I am trying to protect the Internet, and make sure that when we finally have something that really works in this country, that we do not step in and screw it up, as sometimes happens with Government regulation." 141 CONG. REC. S8331 (daily ed. June 14, 1995). \textit{See also} 141 CONG. REC. S5548 (daily ed. Apr. 7, 1995) (statement of Sen. Leahy discussing S. 714).


\textsuperscript{72} 141 CONG. REC. S8342 (daily ed. June 14, 1995) (statement of Sen. Leahy). The CDA in its original form would have been under the jurisidiction of the FCC. \textit{See supra} note 56 and accompanying text. Sen. Leahy argued that Sen. Exon says his amendment takes the same approach as the dial-a-porn statute. \ldots On dial-a-porn, it took 10 years of litigation for the FCC to find a way to implement the dial-a-porn statute in a constitutional way. That is why I say his amendment punts to the FCC the task of finding ways to restrict. \textit{See supra} note 56 and accompanying text. \textit{See also} 141 CONG. REC. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Cox, noting that converting the Federal Communications Commission into Federal Computer Commission, as would be required by CDA, is impractical); \textit{id.} at H8470 (statement of Rep. Wyden, noting "we believe that parents and families are better suited to guard the portals of Cyberspace and protect our children than our Government bureaucrats."); 171 CONG. REC. H8287 (daily ed. Aug. 2, 1995) (statement of Rep. Wyden, noting "this idea of a Federal Internet censorship army would make the Keystone cops look like Cracker Jack crime fighters").

the Thomas system, rejected Senator Exon’s attempt to sterilize electronic space. On June 20, 1995, Speaker Gingrich pronounced that the CDA is clearly a violation of free speech and it’s a violation of the right of adults to communicate with each other. I don’t agree with it and I don’t think it is a serious way to discuss a serious issue, which is, how do you maintain the right of free speech for adults while also protecting children in a medium which is available to both?

He went on to say that the reason why it had passed the Senate was that it was “seen as a good press release back home so people voted for it.”

When the House voted on its version of the telecommunications bill, the House gave what appeared to be a resounding rejection of the CDA and any attempt to meddle with the Internet. The younger House, having more experience with the Internet, wanted nothing of the CDA and sought to distance itself from the appearance of a regulatory-hungry federal government ready to trample the prized freedoms found in cyberspace. In opposition to the CDA, Representatives Cox and Wyden introduced the Family Empowerment Amendment, which proclaimed an Internet free of government interference. This amendment was attached to the House’s telecommunications bill in a virtually unanimous 420 to 4 vote.

The opposition proclaimed that the Cox/Wyden Amendment would


76. MacNeil/Lehrer Transcript, supra note 7 (remarks of Speaker of the House Newt Gingrich).

77. One Congressman after another proceeded on the floor of the House to declare their support of the Cox/Wyden Amendment. See 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (statements of Reps. White, Markey, Goodlatte, and Fields); id. (statement of Rep. Lofgren, remarking that Exon Amendment is a misunderstanding of technology); id. at H8470 (statement of Rep. Wyden, arguing that parents are better suited to protect children from on-line obscenity than government bureaucrats and that the Cox/Wyden Amendment stands in sharp contrast to CDA); id. (statement of Rep. Wyden, arguing that parents are better suited to protect children from on-line obscenity than government bureaucrats and that the Cox/Wyden Amendment stands in sharp contrast to CDA); id. (statement of Rep. Barton, noting that the Cox/Wyden Amendment is a much better approach than CDA); id. (statement of Rep. Danner); id. at H8649 (statement of Rep. Cox).


block the CDA in conference. In truth, the Cox/Wyden Amendment was far from a victory. The Cox/Wyden Amendment specifically and curiously stated that "[n]othing in this section shall be construed to impair the enforcement of section 223 of" Title 47, the very statute that the CDA sought to amend. As a result, the House and Senate amendments were described as fitting together "like a hand in a glove."

The opposition proclaimed that the Cox/Wyden Amendment forbade FCC regulation of the Internet; it did not. The opposition claimed that it preempted state regulation of the Internet; it did not. The only thing that the amendment in fact did was to overrule Stratton by protecting from liability on-line services that make a good faith effort to restrict access to offensive material. This one affirmative act was, in fact, consistent

82. See Letter from Sen. Leahy to Sen. Pressler and Sen. Hollings (Nov. 8, 1995) (commenting on how the Cox/Wyden Amendment does not apply "to the section of the Communications Act of 1934 that the 'Communications Decency Act' seeks to amend"); Comm. Daily Notebook, COMM. DAILY, Nov. 13, 1995, at 6, 6 (stating that Sen. Leahy "was concerned conference panel would take 'the easy compromise' by combining 2 provisions, which fit 'like a hand in a glove.' Leahy noted that Cox-Wyden doesn't apply to sections of Communications Act that Exon-Coats seeks to amend.").
83. See supra note 79.
84. 141 CONG. REC. H8468-69 (daily ed. Aug. 4, 1995). Although the language of the amendment itself promised that it would prohibit any interference of the Internet by bureaucrats, it did not. The amendment stated that it would be the policy of the federal government to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by State or Federal regulation." Id. at H8469 (§ 104(b)(2) of the amendment). "Policy" is not the same as law. In addition, a section heading in the amendment was titled "FCC REGULATION OF THE INTERNET AND OTHER INTERACTIVE COMPUTER SERVICES PROHIBITED." Id. (§ 104(d) of the amendment). However, the actual language of the section merely directed that "[n]othing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to content or any other regulation of the Internet or other interactive computer services." Id. See also NORMAN J. SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION §§ 47.03, 47.14 (5th ed. 1992) (stating that where language of statute is clear, section heading has no bearing). However, even though the language of the Cox/Wyden Amendment was weak, it did have some influence over the final version of the CDA. See supra note 59 and accompanying text.
85. See supra note 78.
with the provisions of the CDA. The Cox/Wyden Amendment was described as a bill without a verb. In response to a growing on-line opposition movement, congressmen were able to declare their allegiance to the First Amendment and cyberspace without actually committing themselves to legislation of significance. The victory was hollow.

In the midst of the hoopla over the imaginary victory, something was snuck through the back door of the House version of the telecommunications bill. Representative Bliley, on the day of the vote on the telecommunications bill, introduced the “Manager’s Amendment.” Item 41 of the Manager’s Amendment, known also as the Hyde Amendment, extended the federal obscenity laws to cover interactive computer services.

The Manager’s Amendment as a whole received little press. Representative Bryant stated that the amendment was created in darkness without input from the public or from Congress. He argued that the amendment appeared out of nowhere and the House was forced to vote on it without having the opportunity to review its terms. He and others argued that the Manager’s Amendment, which altered the telecommunications bill from the form that was voted on and passed from the Commerce and Judiciary Committees, was a last minute creation in order to appease the interests of big business. Thoughout the debate, however, (concerning the Manager’s Amendment on the day of the House vote on the telecommunications bill) the Hyde Amendment, censoring the Internet, was not mentioned or discussed.

The Administration, through Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce, voiced its opposition to the CDA. The Department of Justice issued statements

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89. See supra note 45 and accompanying text.
90. Chris McLean, Address at the Federal Communication Bar Association Seminar (October 18, 1995) (stating that CDA and Cox/Wyden were consistent); H.R. CONF. REP. 104-458 at 188, 193 (1996) (discussing sec. 502, stating that there was no provision in House related to CDA, and discussing sec. 509, stating that there was no provision in Senate related to Cox/Wyden Amendment).
96. Id. at H8425-507.
denouncing the amendment and declaring that it, in fact, weakened their ability to prosecute on-line obscenity.\textsuperscript{98} Reed Hundt, chairman of the FCC, also spoke up in his opposition to the amendment.\textsuperscript{99}

Cyberspace itself rose up in strong opposition to the CDA. Although public opposition to legislation normally may not get significant coverage in legal analysis or the courtroom, opposition to the CDA is fascinating in the way in which it was the epitome of one of its own strongest arguments.\textsuperscript{100} The opposition heralded the Internet as a boon for democratic process and responsive representation. With the increased availability of information, ease of organization, and improved ability to contact one's congressional representatives, the opposition saw the Internet as something to be cherished; any attempt to infringe on its unique empowerment of free speech and democratic debate was to be warded off with vigilance. The opposition was the very proof of its own argument. A portion of the community was able to rise up, become quickly and highly educated, and convey its views to the governing body. The governing body, in turn, was able to quickly become aware of the positions of its constituents and respond. Democratic process was heightened. The essence of our democratic society—the free exchange of ideas and the belief that out of the cacophony of views we can reach reasonable and enlightened principles to guide our society—was improved. In his attempt to curtail some voices on the Internet, Senator Exon caused other voices to mature.

Instead of reveling in this revitalization of democracy, Senator Exon saw the on-line movement as a threat. He criticized the on-line movement, characterizing it as a bunch of First Amendment belly-achers.\textsuperscript{101} Senator

\textsuperscript{98} See supra notes 34, 37, 44-45, 65.

\textsuperscript{99} Benjamin Wittes, \textit{Interview: Reed Hundt Picks His Battles}, \textit{LEGAL TIMES}, Sept. 4, 1995, at 10, 12.

\textsuperscript{100} Public support for the CDA came from groups including the National Law Center for Children and Families, the “Enough is Enough!” Campaign, and the National Coalition for the Protection of Children and Families. As of the time of writing this article, web pages were not found for these organizations.

\textsuperscript{101} See \textit{Internet Mess: Return to Sender}, \textit{WASH. POST.}, Dec. 15, 1995, at A24 (stating that demonizing Congressional opposition as “ACLU types” had become strong part of conferee negotiations). In an attack on the Electronic Frontier Foundation (EFF), Sen. Exon accused the EFF of, on the one hand, advocating parental control of a child’s access to the Internet through software blocks, and, on the other hand, posting on-line pamphlets explaining how to beat those blocks. 141 CONG. REC. S8344 (daily ed. June 14, 1995). EFF denied Sen. Exon’s allegations concerning the pamphlet. E-mail from Mike Godwin, Staff Attorney for EFF, to Robert Cannon (Sept. 5, 1995) [hereinafter \textit{Godwin e-mail}]. EFF did note, however, that the pamphlet to which Sen. Exon referred was published as footnote 21 of the \textit{Rimm Study}, repeatedly used in support of the CDA. \textit{Id. See supra} notes 9-22 and accompanying text (concerning \textit{Rimm Study}). EFF confessed that “the Martin Rimm/
Exon complained that the opposition had more concern for protecting pornographers than cooperating with his office.\textsuperscript{102}

3. Victory in the Senate and the House

On June 14, 1995, Senator Exon saw his attempt to protect the minds of the youth of America meet with victory. The CDA was successfully added to the Senate version of the telecommunications bill of 1995.\textsuperscript{103} On
June 15, 1995, the Senate Telecommunications Competition and Deregulation Act, S. 652, passed the Senate. The House would soon thereafter pass its version of the telecommunications bill along with both the Cox/Wyden Amendment and the Manager's Amendment. The battle ground was laid out for a confrontation in the conference committee.

III. ANALYSIS

Criticism of the amendment can be broken down into three general areas: (1) infeasibility; (2) constitutional deficiency; and (3) against public policy.

A. Feasibility of Regulating Speech in Cyberspace

The first area of criticism—that the regulation which Senator Exon proposes is infeasible—starts with the criticism that Senator Exon fundamentally misunderstood the medium which he sought to regulate. At no time did Senator Exon ever profess personal experience on the Internet. His staff indicated that he had no first-hand Internet experience.

The material that Senator Exon presented from the Internet to the Senate was always downloaded by someone other than himself. Senator Exon’s Washington, D.C., offices had no e-mail address and had no office hook-up to the Internet. This begs the question of how a senator with of House and 46% of senators had e-mail addresses).}

of House and 46% of senators had e-mail addresses).  
105. Jerry Berman, Executive Director of the CDT, stated that with the CDA, Sen. Exon was attempting to overlay an old paradigm on a new paradigm. Jerry Berman, Address at the Federal Communication Bar Association Seminar (Oct. 18, 1995).
106. Sen. Exon’s only professed familiarity with the Internet was “[a]s a member of the Senate Armed Services Committee, I have been involved in the development of the Internet from its beginning.” Exon Letter, supra note 5.
107. Chris McLean, Sen. Exon’s staff person assigned to the CDA, stated that Sen. Exon has no first-hand Internet experience. McLean, supra note 90. He stated that Sen. Exon understood the need to protect children and comprehension of the medium is unnecessary.
108. Sen. Exon raised issue with the comment “the barbarians are really at the gate,” see supra note 101, which was not downloaded by Sen. Exon. He raised issue with the Frequently Asked Question pamphlet (FAQ) concerning how one beats blocks to pornography; Sen. Exon did not himself download this FAQ and he misidentified the source. See CONG. REc. S8344 and Godwin e-mail supra note 101. The infamous Blue Book, was downloaded by someone other than Sen. Exon. See supra note 61 and accompanying text; Elmer-DeWitt, supra note 10. Repeatedly his office was asked to explain from where the images in his famous Blue Book were acquired, suggesting that the servers very easily could be out of the jurisdiction of the United States and his proposed amendment. See MacNeil/Lehrer Transcript, supra note 7 (remarks of Jerry Berman, Executive Director of the CDT). This author never observed Sen. Exon being able to answer that question.
no technical knowledge of the medium can draft language which regulates it.\footnote{110}{One fundamental characteristic which Senator Exon did not account for is the immensity of the medium. The Internet is composed of hundreds of thousands of computers with millions of users growing at a tremendous rate. The Internet spans the globe and transmissions are in hundreds of languages. The volume of transmissions is incomprehensible,\footnote{111}{beyond the ability for a host to monitor.}\footnote{112}{without an e-mail address). Mr. McLean explained Sen. Exon’s inexperience by stating that Sen. Exon was a 72-year-old man. Another indicator of Sen. Exon’s offices lack of comprehension of the medium was the perpetual use of analogies to technologies as a way of explaining and justifying the CDA. McLean, \textit{supra} note 90 (comparing Internet to Old Wild West; comparing Internet to streets and stating that we need stop signs, yield signs, and speed limits; making analogies to bookstores and movie theaters, access to which is controlled by front door).}

Sen. Exon appeared to be attempting to fit a square peg into a round hole. Eventually this ambiguity was recognized and the final version of the bill clearly stated “nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers.” Communications Decency Act of 1996, Pub. L. No. 104-104, see. 502, § 223(e)(6), 110 Stat. 133, 134 (to be codified at 47 U.S.C. § 223(e)(6)).

111. According to a report created at the request of Sen. Leahy, the Internet and other interactive communications media are fundamentally decentralized media. Unlike centralized broadcast radio and television services, there are no central control points through which either a single network operator or government censors can control particular content. On the Internet there are literally millions of speakers and publishers. This proliferation of individual speakers stands in sharp contrast to broadcast television or even cable television, where one may count five, ten, or perhaps one hundred speakers, each of whom controls a channel. Federal broadcast content regulators can direct their regulations at the operators of a particular channel in order to enforce their regulations. However, content control on the Internet would have to be targeted at each and every one of the millions of U.S. citizens and international users that speak daily on-line. Any attempt to impose centralized content control in a bureaucratic manner on this fundamentally decentralized medium is bound to stifle the growth of the medium, squander the democratic potential of the Internet, and may even cut the United States off from the growing global information infrastructure. IWG Report, \textit{supra} note 22 at 6.

112. \textit{See Cyberporn and Children Hearings, supra} note 13, at 74 (prepared statement of William Burrington, stating that on-line service providers cannot possibly police and be
The job of an on-line host attempting to comply with the CDA would be immense. Senator Exon sought to protect the providers by giving them the good faith defense. The good faith defense requires that hosts take "reasonable, effective and appropriate" action to prevent access to offensive material by minors. This begs the question of what fraction of an infinite number of transmissions must a host monitor in order to be taking "reasonable" action. How many of an ever growing number of newsgroups with a tremendous volume of traffic must a host examine? How many of a tremendous number of ever-changing World Wide Web pages must the host inspect? Could Senator Exon even give the slightest clue? No, because he had no idea. He had to, as Senator Leahy stated, punt to the executive branch to determine that which cannot be determined. In an environment which is potentially without boundaries and without limits, delineating "reasonable" monitoring conduct is ludicrous.

Further making the job of compliance with the CDA impossible for

aware of each communication on their network); Meyer, supra note 2, at 1980 (stating that it is "virtually impossible for SYSOPs to police the imagery and text posted to their systems"); Yang, supra note 35, at 70, 71 (reporting that CompuServe, Inc. and Prodigy have said they cannot police activities of their thousands of subscribers and read or edit 75,000 notes transmitted daily); Letter from Small Businesses to Telecommunication Deregulation Conference Committee (Nov. 6, 1995) <http://www.vtw.org/cdaletter/> [hereinafter Small Business Letter] (stating that small businesses and ISPs "are at some risk of violating the [CDA], simply because we cannot police every page that comes across our channels"); Return of the Cyber-Censors, WASH. POST, Nov. 8, 1995, at A16; Cate, supra note 14, para. 97.

113. See supra note 45 and accompanying text.
116. In the Senate version of the amendment, until the FCC defined "reasonable action," the dial-a-porn regulations would have applied to the Internet. It took ten years of litigation before the FCC was able to promulgate dial-a-porn regulations which were not declared unconstitutional. See Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 119, (1989) (commenting on length of litigation involved with dial-a-porn); Markus, supra note 35; Cyberporn and Children Hearings, supra note 13, at 124 (testimony of Jerry Berman, Executive Director, Center for Democracy and Technology). The opposition argued that applying regulations from one medium onto computer transmissions is guaranteed to bog the CDA down in years of litigation. See 141 CONG. REC. S8345 (daily ed. June 14, 1995) (statement of Sen. Biden, noting "[I]f the Exon-Coats provision passes, we will have mountains of litigation over its constitutionality, dragging on for years and years—and all the while, our kids will be doing what they do best: finding new and better ways to satisfy their curiosity."). The Conference Committee relieved the FCC of the burden of attempting the impossible and gave this task to the DOJ. See supra note 57 and accompanying text. How switching an impossible task from one agency to another improves the situation is unclear.
the service provider is the growth of encryption capabilities. As more aspects of computer communication become secure, the service provider is increasingly unable to monitor these transmissions. If the service provider is unable to monitor transmission, the provider cannot comply with the CDA. Arguably, this would be accounted for in the definition of the reasonable action which the service provider must take. However, since the service provider could take no action concerning encrypted material, any significant meaning to the term "reasonable action" as used by the CDA is further eroded.

Another characteristic for which Senator Exon does not account is the unique relationship of on-line communications to jurisdiction. The Internet was designed to route around obstruction. Censorship is merely an obstruction to be routed around. If the CDA were fully enforced in the United States, content providers could move questionable material or activity outside of the United States and outside the reach of the CDA. The final result would be that the material which Senator Exon sought to ban would remain available to users.

B. First Amendment Analysis

One of the largest battlefields was the First Amendment. It was a weakness that the cybercensors were well aware that they had to defend against. Aware of the vulnerability, the conference committee took great strides to restructure the CDA so that it that it could pass constitu-

117. See Internet Providers and Sen. Exon, WASH. POST, Dec. 2, 1995, at A20 (discussing problem of jurisdiction). See also supra note 108 and accompanying text (discussing Sen. Exon's inability to clarify from where material from his "Blue Book" was downloaded or whether it would be within jurisdiction of his amendment).


119. See Elmer-DeWitt, supra note 10 (quoting Harvard Law Professor Laurence Tribe as stating that the CDA is "a frontal assault on the First Amendment"); Cate, supra note 14 (reviewing CDA in light of First Amendment).

120. See H.R. CONF. REP. No. 104-458, at 188-89 (1995) (discussing sec. 502, arguing at length that CDA does not violate First Amendment); 141 CONG. REC. S8088 (daily ed. June 9, 1995) (statement of Sen. Exon, stating concern that revised version of amendment not be declared unconstitutional); 141 CONG. REC. S8330 (daily ed. June 14, 1995) (statement of Sen. Exon, stating "[t]he modification now before the Senate further clarifies that the proposed legislation does not breach constitutionally protected speech between consenting adults nor interfere with legitimate privacy rights."); id. at S8332 (statement of Sen. Coats, stating "[o]bviously, it is a difficult task, balancing First Amendment rights with protections that go toward placing restrictions, in reasonable ways, so that particularly children are not recipients of obscene or indecent material."). See also 141 CONG. REC. S7922 (daily ed. June 7, 1995) (statement of Sen. Grassley, stating "I have carefully drafted this bill [S. 892] so that it will withstand the inevitable court challenge.").
The problem which the supporters of the CDA faced was the uniqueness of the emerging medium. The Supreme Court held in *Sable Communications of California, Inc. v. FCC* that indecency law and the First Amendment cannot be uniformly applied across the board to all communication media. The unique attributes of each medium must be understood and accounted for. The technical capacity of the medium to achieve the compelling government interest must be considered. Regulations which may be constitutional when applied in one medium may not be constitutional when applied to another.

Originally the CDA lumped all "telecommunication devices" together and made the transmission of offensive material over these media illegal. In order to shore up the constitutionality of the CDA, as it applies to on-line services, the conference committee made three changes. First, the committee removed "interactive computer services" from the definition of "telecommunication devices," placing "interactive computer service" restrictions in its own subsection. This appears to avoid the legal problem of applying the same indecency restrictions to different media. Second, instead of using the word "indecency," which could be vague, the conference committee replaced it with the definition of "indecency" in *Pacifica*.

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123. *Sable*, 492 U.S. at 130-31 (stating "[f]or all we know from this record, the FCC’s technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people would manage to secure access to such messages. If this is the case, it seems to us that § 223(b) is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages."). See also 141 CONG. REC. S8334 (daily ed. June 14, 1995) (remarks of Sen. Feingold, noting that "[w]here alternative means are available to block access by minors to these [indecent] services, those methods must be implemented rather than denying adults their constitutionally protected right to such material.").
124. S. 652, 104th Cong., sec. 402 (amending 47 U.S.C. § 223(a)).
125. Communications Decency Act of 1996, Pub. L. No. 104-104, sec. 502, § 223(a), (d), (h), 110 Stat. 133, 133-36 (to amend 47 U.S.C. § 223 (a), (d), (h)).
126. FCC v. Pacifica Foundation, 438 U.S. 726 (1978). The CDA as passed defines the offensive material as "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by
Supreme Court had already upheld that definition, the Supreme Court would uphold it as used in the CDA.\footnote{127} Finally, the conference committee clarified that the CDA targeted content providers.\footnote{128} This was an attempt to respond to the fear that the CDA would penalize on-line services for the transmission of material of which they did not create nor of which did they have knowledge.

1. Obscenity and Indecency

Senator Exon attempted to make the transmission of both obscenity and indecency illegal.\footnote{129} The terms are not synonymous. Obscenity is defined as material, when taken as a whole, which the average person, applying contemporary community standards, would find as appealing to the prurient interests and lacking serious educational or artistic value.\footnote{130} The Supreme Court has determined that obscenity is one of those rare forms of speech which is not protected by the First Amendment.\footnote{131}

Indecency is defined as "language or material that, in context, depicts or describes, in terms patently offensive\footnote{132} as measured by contemporary community standards for the broadcast medium, sexual or excretory..." Communications Decency Act, sec. 502, § 223(d)(1)(B), 110 Stat. at 133-34 (to amend 47 U.S.C. § 223(d)(1)(B)); H.R. CONF. REP. No. 104-458, at 188 (stating "[n]ew section 223(d)(1) codifies the definition of 'indecency' from FCC v. Pacifica Foundation, 438 U.S. 726 (1978)").

\footnote{127} H.R. CONF. REP. No. 104-458, at 189-90 (discussing sec. 502).
\footnote{130} Miller v. California, 413 U.S. 15, 24 (1973); Alliance for Community Media v. FCC, 56 F.3d 105, 113 n.4 (D.C. Cir. 1995); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504-05 (1985) (obscenity must appeal to "shameful or morbid" sexual desires, not merely "normal interest in sex").
\footnote{132} According to the Conference Report:

\[T\]he patent offensiveness inquiry involves two distinct elements: the intention to be patently offensive, and a patently offensive result. In the Matter of Sagittarius Broad. Corp. et al., 7 FCC Rcd. 6873, 6875(1992); In the Matter of Audio Enterprises, Inc., 3 FCC Rcd. 930, 932 (1987). Material with serious redeeming value is quite obviously intended to edify and educate, not to offend. Therefore, it will be imperative to consider the context and the nature of the material in question when determining its "patent offensiveness."

activities or organs." 133 Indecent speech is protected by the Constitution. 134 Regulation of this form of speech must be by the least restrictive means possible in order to further a compelling government interest. 135 The regulation must "do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." 136 In so regulating indecent speech, "the government may not 'reduce the adult population . . . to . . . only what is fit for children.'" 137

133. In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, Report and Order, 8 FCC Rcd. 704, 705 n.10, 71 Rad. Reg.2d (P & F) 1116, rev'd on other grounds sub nom., Action for Children's Television v. FCC, 11 F.3d 170 (D.C. Cir. 1993); see also 47 C.F.R. § 76.701(g) (1995) (defining indecent programming on cable television). In explaining the difference between indecency and obscenity, Judge Wald explained:

"Indecency" is not confined merely to material that borders on obscenity—"obscenity lite." Unlike obscenity, indecent material includes literarily, artistically, scientifically, and politically meritorious material. Indeed, by definition, it includes all "patently offensive" material that has any of these kinds of merit, and cannot be branded as obscene under the standard established by the Supreme Court in Miller v. California.

Alliance for Community Media, 56 F.3d at 130 (Wald, J., dissenting) (citations omitted). See also FCC v. Pacifica Foundation, 438 U.S. 732 (1978); Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991). Much was made about the vagueness of the term indecency. However, First Amendment cases usually turn on issues other than the vagueness of this term. As Sen. Grassley pointed out, "the Supreme Court has never—not even once—ruled that the indecency standard is unconstitutional." 142 CONG. REC. S687 (daily ed. Feb. 1, 1996).


135. Sable, 492 U.S. at 126.

136. Id. at 126 (citing Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978)); Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980). See also Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 540 (1980); See Alliance for Community Media, 56 F.3d at 124 (stating that balancing analysis must be conducted between compelling state interest of protecting children from indecency and "interest of adults in having access to such material"). "Supreme Court precedent certainly rejects the notion that a content-based regulation of speech will survive regardless of the burden on speech simply because it is the most effective means to achieve a compelling state interest." Id. at 136 (Wald, J., dissenting).

137. Sable, 492 U.S. at 128 (citing Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 73 (1983); Butler v. Michigan, 352 U.S. 380, 383 (1957)). According to the Conference Report, the government may, however, force adults to change the way in which they communicate with each other:

[P]rohibiting indecency merely focuses speakers to re-cast their message into less offensive terms, but does not prohibit or disfavor the essential meaning of the communication. Pacifica, 438 U.S. at 743, n.18. Likewise, requiring that access restrictions be imposed to protect minors from exposure to indecent material does not prohibit or disfavor the essential meaning of the indecent communication, it merely puts it in its appropriate place: away from children.

2. Consideration of the Medium: *Sable*

Although the protection of children is agreed as a legitimate governmental interest,138 it is not agreed that the recognition of this danger "at our gates" calls for a ban on the offending material. Such a reaction, the opposition argued, fails to account for the nature of the medium as required by *Sable.*139 Old methods of regulation and the rationales that accompanied them are not applicable to the emerging medium of "interactive computer services."

Regulation of indecency has been found by the courts to be appropriate, given the unique characteristics of the medium in question. When considering the printed press, regulation of content has largely not been tolerated by the courts. However, this changed with broadcast. Due to the "pervasive" nature of the broadcast and the possibility that a listener, in his or her car or home, might stumble upon an offensive broadcast as he or she spins down the dial, restrictions on the broadcast of indecency have been upheld by the Supreme Court.140 Again, technology changed with the creation of dial-a-porn and, again, the old law was not permitted to be applied to the new medium. The pervasiveness of the broadcast medium was seen as irrelevant to dial-a-porn. New restrictions appropriate to the new medium had to be promulgated by the FCC.141

The Internet, the opposition argues, is unique. There is no scarcity of

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139. *Sable*, 492 U.S. at 115. *Compare* Bruce A. Taylor, President and Chief Counsel, National Law Center for Families and Children, Smithsonian Lecture Series: Frontiers in Cyberspace: Censorship and the First Amendment in Cyberspace (Washington, D.C., Nov. 8, 1995). Mr. Taylor suggested that the CDA does not alter the laws of obscenity or indecency. All that it does is overlay and extend the current law to a new medium.

140. *Pacific*, 438 U.S. at 726.

141. It took ten years of litigation before the FCC was able to promulgate regulations which were acceptable to the courts. See *Alliance for Community Media*, 56 F.3d at 124 (recounting history of indecency law in light of differences in medium; analyzing constitutionality of permitting cable companies to censor leased accessed channels, taking into account unique features of cable). See generally IWG Report, supra note 22, at 22. *Compare* Taylor, supra note 139; Letter from Bruce Taylor to the Honorable Larry Pressler (Nov. 2, 1995). Mr. Taylor and the organizations which he represents attempted to argue that extending the provisions to the current indecency law, as set forth in the dial-a-porn statute (47 U.S.C. § 223), presents no constitutional difficulty. Mr. Taylor argued that since the indecency law had been found to be constitutional, and since the CDA made no change to that previously found constitutional law, extension of that law to the Internet could not possibly present a difficulty.
spectrum. There is no central control or monopolies.\textsuperscript{142} Unlike broadcast, the Internet is not pervasive.\textsuperscript{143} The user is not likely to stumble upon the offensive.\textsuperscript{144} The Internet requires that the user seek out the information the user desires. The Internet gives the user a full range of options for blocking out material not acceptable to the user.\textsuperscript{145} The user can determine and control what data the user will be exposed to. The user does not need a paternalistic government determining what is appropriate to view.\textsuperscript{146}

Another fundamental characteristic of on-line communication which sets it apart from other forms of communication is the general inability of the communicator to select its audience. Aware that a message may offend the community standards of a particular jurisdiction, a communicator using traditional forms of communication has been able to choose the community which will be the communicator's audience.\textsuperscript{147} This is not true of on-line communications. The communicator generally does not control which jurisdictions receive the communicator's message. Once a message is placed on the Internet, it can be accessed anywhere. The result of the CDA would be that the most easily offended community on the Internet would control what material is openly placed on the Internet. In order to protect against liability, an individual would have to apply the standards of the most conservative and restrictive jurisdiction in the nation. The opposition argued that this would reduce the discourse on the Internet to the level of

\textsuperscript{142} See generally Cate, supra note 14, para. 54 (discussing unique nature of Internet).

\textsuperscript{143} But see 141 CONG. REC. S7922 (daily ed. June 7, 1995) (statement of Sen. Grassley, noting "[a] medium, like computers, which has 'a unique pervasive presence in the lives of all Americans' and is 'uniquely accessible to children' can be regulated to protect children").

\textsuperscript{144} The opposition frequently argued that a user could not stumble upon that which the user did not seek. Berman, supra note 105. This, however, is not entirely true. From the accidental, where the user loads a search pattern which accidently causes the user to download an offensive WWW page, to the intentional, where the creator of the data purposefully mislabels it in order to attract "hits," it is conceivable that surfers will stumble on sites that could be considered indecent. See generally Anne Branscomb, Research Associate, Harvard University Program on Information Resources Policy, Smithsonian Lecture Series: Frontiers in Cyberspace: Censorship and the First Amendment in Cyberspace (Washington, D.C. Nov. 8, 1995) (relaying story of how, while giving course on use of Internet, she accidently downloaded and displayed indecent image to her audience).

\textsuperscript{145} See infra note 151-56 and accompanying text (discussing technological alternatives to government intervention).

\textsuperscript{146} IWG Report, supra note 22, at 8 (stating that the "[a]bility of users and parents to control the material to which they have access places constitutional limits on the degree to which the government can censor material based on its content").

\textsuperscript{147} The ability of the phone company to control the audience which received dial-a-porn was fundamental to the Sable decision. Sable, 492 U.S. at 125 (stating "Sable is free to tailor its messages, on a selective basis, if it so chooses, to the communities it chooses to serve").
Interactive computer services" is a unique and emerging medium of communication. The opposition argued that the failure of Congress to appreciate this emerging technology led to a constitutionally offensive statute.

3. Least Restrictive Means

In order for the government to act on its compelling interest, the government must use the least restrictive means in order to minimize the detrimental effect on the First Amendment. The opposition argued that, given the nature of the medium, the CDA did not present itself as the least restrictive means possible for protecting children against indecency. The opposition argued that the technological alternatives to government censorship present themselves as far more effective than government censorship, far less obstructive of First Amendment rights, and far more flexible in meeting the standards of a particular community.

The opposition pointed to new, affordable software packages...
available on the market which include "Surfwatch" and "Net Nannie." This software is written by groups who surf the net hunting for offensive material. Databases are built into the software. When access to an on-line service is activated, this software blocks access to inappropriate sites. These software programs can be installed into computers by parents, so that the parents are empowered and determine what is appropriate for their children to view according to that family's beliefs and values.

The opposition further pointed to actions taken by major access providers and browsers. Providers such as America OnLine, CompuServe and Prodigy are providing software built into their package which permit parents to control what parts of the commercial service and the Internet their children could access.

acquire a computer, software, and an on-line service for family, a parent is forced under this solution to shell out additional money to prevent that family from being exposed to offensive material. Sen. Exon pointed out that this solution makes the parents liable instead of making the offender responsible for the material he or she introduces into our society. Sen. Exon found this outrageous. 141 CONG. REC. S8344 (daily ed. June 14, 1995).

The software to which Sen. Exon referred, however, is not the economic burden that he portrays. Many services are providing the software for free. The software on the shelf in stores run approximately $50, probably affordable for the individual which just shelled out a few thousand for a computer. Additionally, it is likely that it is cheaper for the user to purchase or acquire the software desired than it is for the government to set up a platoon of cybercops roaming cyberspace in search of indecency. In addition, the government cost is guaranteed to increase as it is forced to defend a flood of legal challenges to the constitutionality of the CDA. See 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden).

Finally, Sen. Exon's office admits that technology which he criticizes is a necessary part of the solution. McLean, supra note 90. Since the CDA would only be effective against material located within the jurisdictional reach of the CDA, the software would still be required to stop materials outside the jurisdiction of the CDA.

Jared Sandberg, New Software Filters Sexual, Racist Fare Circulated on Internet: Surfwatch Program Addresses Renewed Cyberspace Fears Following Oklahoma Blast, WALL ST. J., May 15, 1995, reprinted at 141 CONG. REC. S8335 (daily ed. June 14, 1995); Cyberporn and Children Hearings, supra note 13, at 75 (prepared statement of William Burrington);
IWG Report, supra note 22.


154. IWG Report, supra note 22; An Electronic Sink of Depravity, supra note 74; Cyberporn and Children Hearings, supra note 13, at 74-75 (prepared statement of William Burrington) (detailing methods of monitoring and restricting access by minors to on-line services); Letter from Robert W. Crandall, Robert Corn-Revere, Jeffrey Eisenach and others to The Honorable John McCain (Nov. 7, 1995) (noting America Online's screening software
Towards the end of the debate over the CDA, yet another technological solution was proposed. The opposition pointed to the Platform for Internet Content Selection (PICS), yet another technology that empowers user control over content received. PICS is described as establishing standard protocols for anyone to set up rating services like Surfwatch. Any segment of society can adjust its filters pursuant to the parameters of PICS, creating its own determination of what should be accessed.

These software packages present themselves as potentially more effective than government regulation for a number of reasons. First, the United States government does not have jurisdiction over a significant portion of the Internet; it does not reach computers located outside of the territorial United States. The purveyors of offensive material could provide their product as readily as before by simply moving the data offshore. Government regulation can do nothing to stop this. Software can effectively block sites regardless of location.

Second, the government faces a constitutional task of defining appropriate material. The software, which is not state action, does not face a constitutional challenge. The software company, using its own set of criteria, can judge sites by those sets of values; if the public objects, the public can opt either not to use the software or to use someone else's software and values.

This leads into the next advantage which is that the software can be more flexible and responsible to the values of the community. Databases can be developed based on the values of the most conservative to the most progressive parts of our society. The Christian Coalition, the Mennonites, pacifists, and feminists could all develop their own databases which would block material they deem inappropriate for their communities. The selection can be tailored to fit the desires of the user. This removes a paternalistic government from such a determination and replaces it with the community and the individual, consistent with the underpinnings of our democracy.

In addition, the CDA is an after-the-fact remedy, whereas the blocking

provided at no additional cost to customers).


156. See MacNeil/Lehrer Transcript, supra note 7 (remarks of Jerry Berman, stating "[o]nly technology could have any effect on screening out pornography from outside the jurisdiction of the United States. The Exon amendment would have no effect on such foreign sources"); IWG Report, supra note 22.
software prevented exposure to offensive from taking place in the first place. The CDA imposes sanctions after individuals either upload or download materials; the event which the amendment seeks to criminalize would have already taken place. The blocking software prevents access to the offensive material from occurring in the first place. Senator Herb Kohl, making this argument, stated that “[e]very parent in America would rest easier knowing that action is being taken to prevent a crime against their children, rather than simply devising a solid penalty after the fact.”

In light of the advantages which the technological solutions offer, the opposition argues that government regulation of the content of on-line communications would fail the constitutional scrutiny of the least restrictive means requirement. When technology presents a solution, that solution must be selected against government intrusion. According to the Interactive Working Group Report to Senator Leahy, “The principle that each person should decide for him or herself the ‘ideas and beliefs deserving of expression, consideration and adherence’ lies at the heart of the First Amendment.” Instead of punting to the federal government the responsibility for determining what is morally acceptable, the responsibility is on the individual and the citizen. It is the choice of empowerment of the individual over dependency upon the bureaucracy.


158. Sable Comm. of California, Inc. v. FCC, 492 U.S. 115, 130-31 (1989). Supporters of federal legislation argued that since children are usually more sophisticated computer users than adults, children will be able to defeat an attempt by an adult to block access to material on the Internet. Parents do not have the time to monitor their children nor the computer sophistication to ensure that software is effectively preventing access to offensive material on the net. See 142 CONG. REC. S687 (daily ed. Feb. 1, 1996) (statement of Sen. Grassley). Daniel Wietzner of the CDT referred to this as the “I can't program my VCR” argument. Wietzner, supra note 155. Mr. Wietzner suggested that parents who make the commitment to invest in a computer, software, a modem, and an on-line service ought to make the commitment to ensuring that the equipment is used by their children in a way which is consistent with their values. Mr. Wietzner suggested that the bureaucrats in Washington who would otherwise be left to the task are no more competent in programming their VCRs than parents. Further, Mr. Weitzner suggested that parents monitor their credit cards and check books to ensure that these are not being used to pay for any unacceptable on-line services. Finally, the opposition suggested that parents should place the family computer in a common room of the house, such as the family room, where the parents can monitor the usage by their children.

159. IWG Report, supra note 22, at 8 (quoting Turner Brdsct. v. FCC, 114 U.S. 2445 (1994)).

160. 141 CONG. REC. S8330 (daily ed. June 14, 1995) (statement of Sen. Leahy, remarking “[w]e have software that can allow parents to know what their children see on the Internet. Maybe some day we will accept the fact that there is some responsibility on the part of parents, not on the part of the U.S. Congress to tell children exactly what they should do and read and see and talk about as they are growing up.”).
4. Overbreadth Doctrine

The opposition argued that the CDA was not narrowly drawn in order to achieve the compelling government interest, and that it was overbroad, censoring and chilling a wide range of speech. Senator Leahy pointed out that there are a number of projects on the net which seek to provide public access to literature. A great deal of this literature, including the works of Charles Dickens, Geoffrey Chaucer, or D. H. Lawrence, could offend the contemporary standards of conservative communities in the United States and therefore violate the CDA. Other areas of speech which would be censored could include "online discussions of safe sex practices, of birth control methods, and of AIDS prevention methods." Since the amendment is vastly overbroad, the opposition


162. Sen. Leahy pointed out that one filtering software program used to make the Internet safe for children had blocked out a site which had a picture of two couples together. The Internet site was the White House and the two couples were the Clintons and the Gores. Sen. Leahy questioned, "Will Federal Government censors do any better when they dictate blocking technologies?" 142 CONG. REC. S694 (daily ed. Feb. 1, 1996).


164. Cyberporn and Children Hearings, supra note 13, at 10 (statement of Sen. Leahy). See also 141 CONG. REC. S8340-41 (daily ed. June 14, 1995) (statement of Sen. Leahy, suggesting that Lady Chatterly's Lover and Newt Gingrich's science fiction novel 1945 would likewise not be permitted on the Internet pursuant to CDA). Daniel Weitzner suggested that the seminal decision, Pacifica v. FCC, which reprints the George Carlin monologue at issue in that case, would itself be found to be indecent because of the monologue. It would therefore be a violation of the CDA if "published" on the Internet. Weitzner, supra note 155.

165. 141 CONG. REC. S18,098 (daily ed. Dec. 6, 1995) (statement of Sen. Leahy, criticizing actions of House Members on telecommunications bill conference who voted in favor of the amendment censoring Internet); 142 CONG. REC. H1173 (daily ed. Feb. 1, 1996) (statement of Rep. Pelosi, criticizing chilling effect of discussion of HIV-related issues); 141 CONG. REC. S8334 (daily ed. June 14, 1995) (remarks of Sen. Feingold, suggesting that groups discussing topics such as trauma of sexual and physical abuse, sexually transmitted diseases, and topics of a mature nature, would be banned pursuant to CDA). Nongovernmental entities attempting to regulate content were experiencing the difficulty of overbreadth during the Congressional debate. America Online, in an attempt to crack down on vulgar online language, filtered for the word "breast" and deleted files containing it. A breast cancer patient in Vermont with an AOL account found that her files had been deleted, and when she attempted to create a new file, AOL "flashed her a message that she could not use vulgar words." Names & Faces, WASH. POST, Dec. 2, 1995, at C3 ("'Breast' Reconstruc-
argued that it was unconstitutional.

Supporters of the CDA viewed this as an "unjustified hue and cry." They believe that the definition of indecency, taken from Pacifica, was sufficiently narrowly drawn to pass constitutional scrutiny. Their answer to the overbreadth argument is that Pacifica stands for the proposition that material must be considered in context. The context of Catcher in the Rye is that it is literature. The literary value of this book places it outside of the definition of indecency and outside the scope of the CDA. Therefore, the supporters argued, there would be no chilling effect on free speech because these materials are clearly not covered under the CDA.

5. Vagueness Doctrine

Another challenge is that the CDA is vague. In light of the unique nature of the medium, the terms of the CDA and of traditional indecency law become increasingly vague. A determination of what "indecency" means in the context of this medium will be fraught with difficulty. As stated in the Interactive Working Group Report to Senator Leahy,

Neither the Congress nor the Supreme Court have ever established a single definition for what constitutes "indecent" material. The FCC has offered different definitions for indecency depending on the communications medium. Embarking on such a process for interactive media would be fraught with Constitutional disputes and challenges in court. Efforts to ban indecency on dial-a-porn services lead to ten years of constitutional litigation, thus delaying the enforcement of those regulations considerably.

The ability to come to a clear understanding of indecency is aggravated by the vagueness of the term community. The definition of

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166. See 141 CONG. REC. S18,098 (daily ed. Dec. 6, 1995) and 142 CONG. REC. S694 (daily ed. Feb. 1, 1996) (statements of Sen. Leahy, noting America Online incident as example of chilling effect that pending legislation was having on on-line service providers).

167. See 141 CONG. REC. S18,098 (daily ed. Dec. 6, 1995) and 142 CONG. REC. S694 (daily ed. Feb. 1, 1996) (statement of Sen. Leahy, noting America Online incident as example of chilling effect that pending legislation was having on on-line service providers).


169. See 141 CONG. REC. S18,098 (daily ed. Dec. 6, 1995) and 142 CONG. REC. S694 (daily ed. Feb. 1, 1996) (statement of Sen. Leahy, noting America Online incident as example of chilling effect that pending legislation was having on on-line service providers).

indecency is dependent upon the "community" in which the indecency occurs. But, as Senator Feingold stated:

> It is unclear what would constitute a community standard for indecency? Whose community? That of the initiator or that of the recipient? Will all free speech on the Internet be diminished to what might be considered decent in the most conservative community in the United States?\(^1\)

If a user in San Francisco uploads data to a server in Sweden, which is then downloaded by a user in Tennessee, whose community standard is at issue?\(^2\) Does the user in San Francisco deliver the material to Tennessee? Does the user in Tennessee cause the material to be brought into Tennessee by going to Sweden? Is the community where the information is stored operative? Or is there another community altogether, an on-line community, separate from the physical world, by whose standards the material should be judged? Whatever community is selected will effect the determination of whether the material is decent. If the operative community is the situs of the uploading of the data, the purveyors of indecency will select the most liberal of communities, permitting the "barbarians" to roam free. If the operative community is the situs of the downloading, the opponents of offensive material will select the most conservative of communities to challenge the material, reducing the level of discourse.\(^3\)

In addition, a court would have to struggle with many of the other terms in the CDA, including "good faith"\(^4\) and "annoy."\(^5\) There are so many terms which, given the medium, are vague that the reasonable person will be unable to determine whether that person is in compliance with the law. The only alternative for the individual is to have speech chilled to protect against an unknown liability.

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171. 141 CONG. REC. S8335 (daily ed. June 14, 1995) (statement of Sen. Feingold). See also 142 CONG. REC. S687 (daily ed. Feb. 1, 1996) (statement of Sen. Leahy, commenting on problem of varying community standards, stating "In some areas of the country, a copy of Seventeen Magazine, could be viewed as indecent because it contains information on sex and sexuality. Indeed, this magazine is among the 10 most frequently challenged school library materials in the country.").

172. See U.S. v. Thomas, 74 F.3d 701 (6th Cir. 1996) (holding that community of recipient of material is appropriate for determining obscenity and indecency standards where bulletin board service (BBS) operator was fully aware of location of recipient).

173. See Meyer, supra note 2, at 1992; 142 CONG. REC. S694 (daily ed. Feb. 1, 1996) (statement of Sen. Leahy, remarking that Internet discussion will be reduced to the level appropriate for kindergardeners).

174. See supra note 45 and accompanying text.

175. The CDA makes it illegal to transmit offensive material over a telecommunications device with intent to annoy. See ACLU Analysis of Exon (June 21, 1995) (arguing definition of "annoying" is unconstitutionally vague and overbroad).
6. Conclusion: A Contest Between Censorship and Democratic Discourse

Senator Exon's attempt to curtail on-line dialogue violates the essence of our democracy. Our democracy is premised on the idea that out of the cacophony of ideas, truth will arise. Without discussion, dissent, and even "flames," democracy collapses. Free speech is institutionalized revolution, given to us by the Founding Fathers. It is the ability to tear down governments gone astray without bloodshed.

The Internet is the nirvana of the founders of our democracy. It is a "never-ending worldwide conversation." It is the opportunity for all citizens to have a voice. It is the fulfillment of the adage that the solution to bad speech is more speech. All views can be spoken and all views can be heard. The value of this invigoration of our democracy far outweighs the danger that offensive some speech may bring to some individuals.

C. Public Policy Issue

In addition to the above legal challenges to the CDA, there were also several public policy arguments.

1. Was New Legislation Required?

The opposition questioned the need for additional legislation, arguing that current law is sufficient to fend off the attack of pornographers.  

176. A "flame" is a heated discussion on the Internet, which tends towards a lack of civility and an inclusion of hyperbole.


It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen. The plaintiffs in these actions correctly describe the democratizing effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche. More mundane (but from a constitutional perspective, equally important) dialogue occurs between aspiring artists, or French cooks, or dog lovers, or fly fisherman.

178. 141 CONG. REC. S15,152 (Oct. 13, 1995) (statement of Sen. Feingold); The IWG pointed to 18 U.S.C. §§ 1462, 1464, 1466 (trafficking in obscenity), 18 U.S.C. § 2252 (child pornography), 18 U.S.C. § 875(c) (harassment), 18 U.S.C. § 2423(b) (illegal solicitation or luring of minors), and 18 U.S.C. § 875(c) (threatening to injure someone) as examples of weapons in the government's arsenal against pornography. IWG Report, supra note 22, at 3. See also Trueman, supra note 68 (stating that current laws are sufficient); Cyberporn and
They pointed to several widely publicized arrests made of individuals transmitting offensive material on on-line services as proof of the ability of current law to respond to the need.\textsuperscript{179} DOJ stated that current law was sufficient and that the CDA would only interfere and weaken laws currently in place.\textsuperscript{180} Many members of Congress agreed with this point of view.\textsuperscript{181} Since existing law was sufficient, the CDA was not needed and was not prudent. Why risk trampling on the Constitution, interfering with cyberspace, and increasing government regulation when law enforcement agencies were already successfully making arrests?

2. The CDA as a Threat to Privacy

The CDA also raises concerns with regard to the right to privacy. The CDA makes a server liable for data being transmitted between users. If offensive material is transmitted, and the ISP negligently fails to attempt to prevent that the transmission, the ISP can be liable. The CDA places the ISP in the position of traffic cop (or Big Brother), responsible for watching all transmissions. The opposition argued that this infringes on the right of privacy of users.

A significant portion of Internet traffic is in open forums. WWW pages, USENET groups, public IRC rooms, public listservers, and anonymous ftp sites are all open forums. When an individual places material in an open domain, the individual has no claim to privacy. No privacy rights would be violated in this context.

The other concern is e-mail. E-mail is protected by federal law. No person other than the intended recipient may intercept the e-mail transmission.\textsuperscript{182} The CDA does not effect or change the protection of e-mail.
privacy. ISPs will not be able to intercept e-mail in order to monitor for content under the current law.

The ability of the government and of organizations to gather information on and monitor individuals has dramatically increased in the new information age. The privacy concerns of netizens are real. It is unclear, however, how the CDA itself erodes that right.

3. The CDA as an Impediment to the Development of the Medium

Another argument relates to the development of the medium. The Internet, heretofore, has been permitted to develop at a speed limited only by technological capabilities. Government involvement in the Internet was in the form of support, not regulation. Those individuals developing the medium were technologically sophisticated individuals with an interest in advancing the medium. The opposition’s argument is that to punt regulation of the Internet to a government bureaucratic entity having no particular familiarity or expertise in the medium would stifle the development of that medium. The speed of development would be reduced to the lowest common denominator—bureaucratic contemplation—as opposed to the limits of technology. As our society increasingly turns to the Internet as a valued source of communication and information, the suggestion that this


184. See Letter from Senator Leahy to Senator Pressler and Senator Hollings (Nov. 8, 1995) ("Putting the FCC in charge of, and imposing a rigid government standard for, such technology would stifle the ongoing efforts by industry to make effective blocking technologies available to parents, schools and others who wish to control the information transmitted to them over computer lines."); IWG Report, supra note 22, at 4 ("Such extension of FCC control over new media will create unnecessary bureaucratic intrusions that hinder the development of new interactive media and private sector screening options."). Reed Hundt, Chairman of the FCC, also agreed that the FCC should not intervene in the Internet. Wittes, supra note 99; See also 141 CONG. REC. S15,152-53 (daily ed. Oct. 13, 1995) (statement of Sen. Feingold, noting "the Exxon-Coats amendment . . . will have a chilling effect on further economic and technological development of this exciting new form of telecommunications.").
resource be limited by the speed of Washington, D.C. was disdained. The Internet is the telecommunications means for the common person; bogging it down while deregulating and freeing the hands of huge telecommunications giants is offensive.

**IV. THE FINAL OUTCOME**

The outcome of the CDA in the Telecommunications conference committee was determined in October of 1995 when the conferees were named. Members of the conference committee included Senator Exon and Senator Gorton, co-sponsors of the CDA, and Representative Hyde, sponsor of House censorship language. Absent from the conference committee were Senator Leahy, Representative Cox, and Representative Wyden, the leading opponents to the CDA. Also absent was any Senator who voted against the CDA. The one opportunity for the opposition lay in conference committee member Representative White, a co-sponsor of the Cox/Wyden Amendment.\(^\text{185}\)

The opposition movement made a last ditch effort to stop the CDA.\(^\text{185}\) Congress was determined, however, to protect the minds of the youth of America.\(^\text{187}\) Representative White\(^\text{188}\) proposed a compromise

\(^{185}\) See Conferees Named for Federal Online Indecency Legislation, ACLU CYBER-LIBERTIES UPDATE (Oct. 25, 1995). The ACLU made the following additional observations:
- All the Senate conferees voted for the CDA.
- All the House conferees voted for the Cox/Wyden Amendment.
- All the House conferees also voted for the Exon-like indecency amendments to federal obscenity laws.

\(^{186}\) Members of Congress continued to voice their opposition to the CDA. 142 CONG. REC. H1145 (daily ed. Feb. 1, 1996) (statements of Reps. White, Woolsey, Pelosi, Eshoo, and Goodlatte); id. at S687 (statement of Sen. Leahy and Sen. Feingold). See also Letter from Robert W. Crandall, Senior Fellow, Brookings Institution; Robert Corn-Revere, Adjunct Scholar, CATO Institute; Jeffrey Eisenach, Ph.D., President, the Progress & Freedom Foundation to the Honorable John McCain (Nov. 7, 1995) reprinted at <http: //www.cdt.org/ policy/freespeech/cons_110795_ltr.html> (encouraging conferees to embrace Cox/Wyden Amendment); Small Business Letter, supra note 112 (encouraging conferees to embrace Cox/Wyden Amendment, stating belief that amendments penalizing ISPs for the transmission of indecency will cause substantial economic damage and cause many businesses to go out of business); Return of the Cyber-Censors, supra note 112, at A16. The opposition mounted an on-line day of protest, flooding Congress with e-mail and faxes opposing the CDA. Heather Irwin, Geeks Take to the Street, HOTWIRED (Dec. 20, 1995) <http://vip.hotwired.com/special/indecent/rally.html>; Internet Day of Protest, CAMPAIGN TO STOP THE NET CENSORSHIP LEGISLATION IN CONGRESS (Voters Telecommunications Watch e-mail newsletter), Dec. 13, 1995.

amendment, using a “harmful to minors” standard in place of indecency. This compromise was passed and undone in the blink of an eye. At about that time, Senator Leahy stated his fear that the conferees would take the easy way out and incorporate both the Cox/Wyden Amendment and the CDA into the final version of the Telecommunications Act. That is exactly what happened. With minor adjustments, the Cox/Wyden Amendment was exposed for the nonevent so many had said that it was and Senator Exon stood proud knowing that his fight was near victory.

On February 1, 1996, one year after the CDA was introduced, Congress passed the Telecommunications Act of 1996 including, as recommended by the conference committee, the CDA, the Cox/Wyden Amendment, and the Hyde Amendment. On February 8, 1996, President Clinton signed into law the most comprehensive reform of telecommunications law since 1934, bringing deregulation to most telecommunication media. The most significant changes in the CDA in its final form included: (1) virtually eliminating FCC jurisdiction over the content of on-line computer communications, (2) replacing the word “indecency” in the CDA with the definition of indecency from Pacifica, (3) couching the language aimed at the Internet in its own subsection governing “interactive computer services,” and (4) specifically targeting the CDA at content providers.

V. CONCLUSION

With the passage of legislation censoring the Internet, the battle to stop


190. Comm. Daily Notebook, COMM. DAILY, Nov. 13, 1995, at 6 (stating that Sen. Leahy “was concerned conference panel would take ‘the easy compromise’ by combining 2 provisions, which fit ‘like a hand in a glove.’ Leahy noted that Cox/Wyden doesn’t apply to sections of Communications Act that Exon-Coats seeks to amend.”)

191. See supra note 84 and accompanying text.

the barbarian at the gate has only just begun. The purveyors of offensive material will continue their quest to make their material available; in all likelihood the CDA will prove to only be a minor inconvenience. The opponents of on-line censorship have moved on to the next battle field, the court room. The only one leaving the field of battle will be Senator Exon, who announced, prior to introducing his CDA, that he would be among the stampede of Democrats retiring from the Senate this year.

The debate of Senator Exon's Communications Decency Amendment was a clash of competing visions of this emerging medium. One saw the Internet as an old barbarian in new clothing. The Internet was merely a new medium threatening to bring the same old patently offensive material through the door of our homes. Uncontrolled, it would harm our society. Left on their own, users would be harmed. Thus, it was necessary for the central government to protect the little people from a harm from which they could not protect themselves.

The other vision was one of opportunity and empowerment. The Internet was seen as a medium unlike any other before. Any application of old rules to this unique forum was bound merely to reveal ignorance. The Internet amplified the exchange of information, improving the quality of our society and democracy and giving the opportunity for anyone, regardless of size, wealth, or opinion, to present and debate his or her views. A part of this vision is the empowerment of the individual, the belief that individual does not need a central government stepping in and determining what values are appropriate. Paternalism is rejected in favor of responsibility; regulation is rejected in favor of decentralization and self-determination; censorship is rejected in favor of democratic discourse.

The passage into law of the Exon Amendment is far from the end of debate. Nevertheless, the debate itself has gone far in steering the course of the Internet. Fear of the CDA has been a significant motivating force in the development of blocking software, PICS, and attempts by on-line services to monitor for offensive material. States have also attempted to regulate the content of the Internet. Internet Service Providers and content providers


194. See Mark Eckenwiler, States Get Entangled in the Web, LEGAL TIMES, Jan. 22, 1996, at 10, 12.
have taken steps to restrict access to offensive material and protect themselves from liability. Even if the CDA is declared unconstitutional by the U.S. Supreme Court, Senator Exon has succeeded in battling the barbarian at the door.