

Censorship of the Internet: The First Amendment Lost in Cyberspace

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Computer technology is changing faster than the laws governing it, raising the question of whether laws formulated to address conflicts arising in the "real world" are applicable to conflicts in "cyberspace." This question is particularly relevant to the debate over sexually explicit material on the Internet. This article argues that because the Supreme Court's current approach to the obscenity is not transferable to cyberspace, a different legal framework is necessary for dealing with "cybersmut."

Largely unheard of just a few years ago, the now popular terms "Internet" and "cyberspace" refer to that "decentralized, globally networked, computer-sustained, computer-accessed, and computer-generated multidimensional, artificial, or 'virtual' reality in which 'netizens' anywhere on the planet can send and receive information almost instantly simply by 'uploading' and 'downloading' text, pictures, sounds, and video" (Schlachter, 1993, 89). Unlike traditional modes of communication, computer networks provide speed, anonymity, ease of access, and the potential to reach an immense audience to any speaker, no matter how obscure or controversial, on any topic imaginable, making the Internet, in the words of one federal judge, "a unique and wholly new medium of worldwide human communication" (*American Civil Liberties Union v. Reno*, 1996, 844). In fact, Americans now spend as much time "surfing the Net" as they do watching rented videotapes (Lewis, 1995, D5). It is no wonder that the American Library Association has called the Internet "the most important thing that has happened to communications since the printing press" (Lewis, 1996, D2).

Clearly, we are witnessing a remarkable transformation in the communication process, but where is the "information superhighway" taking us? Some see the Internet as promising a new dawn in human communication and productivity (see Gates, 1993). They emphasize not only the boundless capacity of the Internet for the unbridled transfer and receipt of information, but also its distinctively interactive character, which allows ideas to grow and evolve. Others fear that the Internet is an overhyped threat to human values (see Stoll, 1995). Erik Barnouw, a media historian skeptical of the euphoria surrounding the Internet, warns that "the lesson of history is that every new medium provides new opportunities for selling as well as for education, for monopolists as well as for democracy, and for abuse as well as for benefit" (Lohr, 1996, E1). More

information is not necessarily better information, and speedier communication does not necessarily advance a community's interests. Indeed, because technological innovation affects who wins and who loses in the struggle for power, it can alter political relationships among individuals, groups, and the state, thereby changing the very meaning of community.

Traditionally, a "community" has been understood to be a discrete geographic site inhabited by a distinctive set of people sharing certain customs and values and working together more or less cooperatively for their mutual benefit. Changes in telecommunications have brought about a new kind of association, the "cyber-community," wherein like-minded people from scattered points around the globe come together and interact with one another despite physical distance by using their computers to exchange information. Although their members lack physical proximity, cyber-communities possess the primary attribute of a community: they are societies that people join in order to pursue common interests and enjoy mutually satisfying relationships. Cyber-communities are proliferating, but all communities inevitably experience conflict, and managing conflict requires law. At issue is whether laws formulated to address conflicts arising in the "real world" are applicable to conflicts occurring in the "cyberworld." Can new wine be poured successfully into old bottles, or do changes in communication technology require significant revision of traditional frameworks for analyzing issues concerning freedom of expression?

These questions are particularly relevant to the current debate over sex on the Internet. According to a widely selling book, computers are becoming "another tool, another avenue, another forum for sex" (Robinson and Tamosaitis, 1993, xvii). One study found that because people can anonymously access "adult" Internet sites from the privacy of home, often for free, "one of the largest (if not the largest) recreational applications of the users of computer networks [is] the distribution and consumption of sexually explicit imagery" (Rimm, 1995, 1861). Opponents of "cybersmut"¹ believe that computerized erotica is abundant and can fall too easily into the hands of computer savvy children (*Time*, 1995, 38). They also fear that "on-line" communication facilitates the illicit market in "child pornography," for not only can pedophiles with computers network with one another to exchange pictures, they can also surreptitiously locate, converse with, and eventually prey upon unsuspecting children.² Consequently, they pressured Congress to enact the Communications Decency Act of 1996 (47 U.S.C.A. sec. 223, hereinafter "CDA"), which prohibited using the Internet either to transmit or to display "indecent" to minors. Yet, content regulation and censorship are concepts derived from the traditional world of print and broadcast media. Can they be transferred to an intangible and interactive dimension

like cyberspace, or must a different legal framework be developed to fit computer communication technology?

Although the Supreme Court invalidated the *indecentcy* provisions of the CDA on First Amendment grounds, it seemed to assume that traditional obscenity doctrine applies to cyber-communities in the same way that it applies to physical communities. This study argues to the contrary that the unique character of Internet communication warrants an approach to obscenity in cyberspace different from that followed by the Court for the past twenty-five years with regard to "regular space." Part I reviews the nature of cybersmut and the provisions of the CDA while Part II explains why the CDA was found to be unconstitutional. Part III shows the problems of trying to apply the Supreme Court's current obscenity framework to cyberspace. Given those problems, Part IV advocates an expansion of the notion of "community" so as to include cyber-communities as well as geographic communities. Part V presents an alternative framework for judging the permissibility of cybersmut based upon the nature of cyber-communities. Lastly, the conclusion offers some thoughts on the larger significance of this issue for freedom of expression in a democratic society. The study thus hopes to contribute not just to our understanding of evolving constitutional law, but also to the literature on the theory of freedom of speech and press.

I. Cybersmut and the Communications Decency Act

Despite the hype and hysteria surrounding the issue of cybersmut, less than 1% of material found on the Internet is sexually explicit (*New York Times*, 1995, A26), and it is dwarfed by the \$8 billion Americans spend annually on tangible forms of erotica (Harmon, 1997a, A21). Still, while the quantity of such material is often overstated, it is plentiful and readily available, extending from "the modestly titillating to the hardest-core" (*American Civil Liberties Union v. Reno*, 1996, 844). "Graphic files" are the most common form of cybersmut because "scanners" make it easy to digitize photographs into high-resolution computer images. Sexually oriented jokes and stories are available in "forums" based upon topic. "Hot chat rooms" where sexually explicit messages can be exchanged between participants in "real time" are increasingly popular. One of the largest locations of cybersmut is "Usenet," a network of more than 15,000 discussion forums known as "newsgroups" whose members daily post more than 100,000 images and messages that can be viewed, read, and responded to by other users. Sexually graphic text and images, as well as sounds and videos, are also obtainable from private "bulletin board services" (or "BBSs"), the commercial equivalent of Usenet newsgroups whose services are available only to "members" who pay a subscription fee to the service's system operator (Huelster, 1995, 872-873). Finally, thousands of both free

and commercial adult sites exist on the World Wide Web.

Groups like the Christian Coalition, the Family Research Council, and the National Coalition for the Protection of Children and Families began lobbying Congress in 1995 to enact legislation against cybersmut. Senator James Exon (D, NB) embraced their cause, declaring that "the information superhighway should not become a red light district" (*Congressional Record*, February 1, 1995, S1953). Even though Senator Exon had little knowledge of how the Internet works, he became the chief sponsor of the CDA, two sections of which ultimately were declared unconstitutional. Section 223a, the "indecent transmission" provision, made it a felony punishable by a fine of up to \$250,000 and a prison term of up to two years to use any telecommunication device to transmit knowingly to anyone under eighteen years of age "any comment, request, suggestion, proposal, image, or other communication, which is obscene or indecent." Section 223d, the "patently offensive display" provision, applied the same punishment to the transmission or display of any communication that "depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," regardless of whether the recipient initiated the communication. The act was directed at the creators and distributors of cybersmut, not at users or access providers. In order to protect innocent third parties, it shielded commercial on-line services from liability for sexually explicit postings by their customers, and it exempted companies that merely provide transmission services, navigational tools, or intermediate storage for customers moving material from one electronic location to another.

Critics of the CDA like Jerry Berman of the Center for Democracy and Technology thought the law was trying quixotically to "design a whole city to look like Disney World" (Andrews, 1995, D7). The ability of computer users to jump quickly between thousands of different Internet sites, critics said, has blurred the distinction between sending and receiving information. They noted too that unlike television and radio the Internet is decentralized in that it has no main control point though which government could regulate content. Because the Internet can accommodate millions of speakers and publishers, as television and radio cannot, governmental control would have to be directed at an inordinate number of constantly changing BBSs, WebPages, and Usenet sites. The task of system operators trying to comply with the CDA would also be immense. The law granted them a "good faith" defense if they took "reasonable, effective, and appropriate actions" to prevent access by minors to adult material, to enable customers to block out offensive material, and to warn them about inadvertently downloading it (47 U.S.C.A. sec. 223e). Critics wondered what this nebulous standard meant and

how much Internet traffic system operators would have to examine in order to satisfy it. Even if the sheer amount of information available on the Internet did not render attempts to control it futile, they said, governmental efforts to regulate cybersmut would stifle the growth of this new medium for legitimate purposes, thereby squandering its potential for enhancing the democratic process and separating the United States from a growing global information structure.

Critics noted too that the nature of the Internet makes sexually explicit material difficult to track. Cybersmut can be disguised through a process known as "encryption" or posted through "anonymous mailers" that make it impossible to identify the sender. In any case, because the Internet is global in scope no single nation can regulate it. Much erotica is posted to the Internet from foreign countries immune from American law, and it is as available as material posted domestically. Purveyors of cybersmut based in the United States could circumvent the CDA simply by establishing Internet sites outside our borders and electronically replenish them with new material without ever leaving the country. Explains John Gilmore of the Electronic Frontier Foundation, "the Net interprets censorship as damage control and routes around it" (Lim, 1996, 319). Combating cybersmut effectively would require an international agreement (Shackelford, 1992). As Joel Perry Barlow of the Electronic Frontier Foundation concluded, the CDA was the product of "the completely clueless, trying to impose their will on a place they do not understand, using a means they do not possess" (Levy, 1995, 47). Despite these problems, Congress passed the CDA on February 1, 1996 by a vote of 414-16 in the House and 91-5 in the Senate. Seven days later, President Clinton put aside qualms about the CDA's constitutionality and signed it in an election year gesture to families concerned with protecting their children from cybersmut.

II. The Communications Decency Act and the Courts

On the same day that the CDA took effect, twenty organizations led by the American Civil Liberties Union challenged it in federal court as a facial violation of the First Amendment on the grounds that it was vague and overly broad.³ A week later, a federal judge issued a temporary restraining order against the CDA, finding its "indecentcy" provision unconstitutionally vague but upholding its "patently offensive display" section. On June 11, 1996 a special three-judge court went further and declared the CDA's "indecentcy" provision unconstitutionally overbroad under the First Amendment and its "patently offensive" standard unconstitutionally vague under the Fifth Amendment. In trying to protect children from cybersmut, the court stated, the CDA "sweeps more broadly than necessary and therefore chills the expression of adults" (*American*

Civil Liberties Union v. Reno, 1996, 854). Applying "strict scrutiny," the judges said the CDA was not the least restrictive means available to further the government's admittedly compelling interest in protecting children from cybersmut. Indeed, they feared that the law could apply to legitimate works of serious value such as films, plays, books, and art dealing with sexual themes. The judges also dismissed the CDA's supposed protection of content providers who take "reasonable, effective, and appropriate action" to restrict access to minors. There is no effective way to limit Internet sites to adults, they noted, since the ages of people on-line cannot readily be ascertained. Requiring credit cards or adult access codes in order to enter a site would impose a "significant economic cost" on non-commercial sites because they would have to pay third parties to collect and verify the information. "Tagging" indecent material would be so physically burdensome as to be cost prohibitive. Hence, content providers could avoid liability only by "constitutionally intolerable" self-censorship (*American Civil Liberties Union v. Reno*, 1996, 882).

Although Senator Exon predicted that the three-judge court's invalidation of the CDA was "so radical and so sweeping in ignoring existing laws and previous court rulings that it will crumble under Supreme Court scrutiny" (Exon, 1996, 97), the high Court unanimously⁴ affirmed it in a landmark decision on June 26, 1997. The Government had urged the justices to treat the Internet like television and radio where regulations of speech aimed at protecting children from sexually inappropriate material have been upheld. As Deputy Solicitor General Seth Waxman put it, easy Internet access threatens "to render irrelevant all prior efforts" to shield children from erotica, for with the mere click of a computer mouse any child can get "a free pass to every adult bookstore and video store" in cyberspace (Greenhouse, 1997, A1). In his opinion for the Court, Justice Stevens conceded the "legitimacy and importance of the congressional goal of protecting children from harmful material," but he emphasized that "the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity" (*Reno v. American Civil Liberties Union*, 1997, 2334 and 2347). That inquiry led him to hold that the CDA "places an unacceptably heavy burden on protected speech" because it lacks the precision required by the First Amendment when a statute regulates the content of speech (*Reno v. American Civil Liberties Union*, 1997, 2350). "In order to deny minors access to potentially harmful speech," wrote Justice Stevens, the CDA "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another" (*Reno v. American Civil Liberties Union*, 1997, 2346).

The Government based its appeal upon several Supreme Court decisions involving children and indecency. The strongest of these, *FCC v.*

Pacifica Foundation (1978), had approved sanctions against a radio station that broadcast in the afternoon, when children were likely to be listening, a recording by the comedian George Carlin entitled "Filthy Words" that repeatedly used several common vulgarities in referring to certain sexual organs and activities. Ruling that while government may not ordinarily regulate expression based upon its content, it may regulate the "time, place, and manner" in which expression occurs, the Court found the radio program to be indecent and patently offensive since it was intrusive and easily accessible by children. It also said that the First Amendment does not prohibit content regulation in the broadcasting realm where constitutional protection is lower than it is for print media and where government has a special interest in protecting children from indecency. Justice Stevens saw sharp differences between the FCC order and the CDA. First, the FCC has long regulated a medium with historically limited First Amendment protection, whereas the CDA would not be enforced by any governmental agency having comparable familiarity with the Internet. Second, the FCC had targeted only a single broadcast that had departed dramatically from traditional program content, not banning it entirely but merely regulating the time during which it could be broadcast. Not only was the CDA vastly broader in scope, unlike the FCC order it was also punitive. Third, while the broadcast media can easily issue warnings about program content, such warnings are not feasible in the unique world of cyberspace. Finally, the special factors justifying regulation of broadcast media, such as their invasive nature and the scarcity of available frequencies, are inapplicable to the "vast democratic fora of the Internet" (*Reno v. American Civil Liberties Union*, 1997, 2343).

The Court also was unconvinced by the Government's claim that the CDA's reach was limited because it applied only to violations committed knowingly. Since most Internet forums are open to all comers, the Court reasoned, the CDA essentially allowed a heckler's veto in that a person opposed to the operation of a sexually explicit Internet forum could effectively close it down simply by having his or her child present in it. Nor was the Court reassured by the Government's declaration that legitimate sexually oriented material was outside the scope of the CDA, for the text of the law gave no such guarantee, leaving open the possibility that it could be applied to serious discussion of topics like rape, birth control, and homosexuality. Finally, like the three-judge court, the justices thought that section 225e gave less protection to Internet content providers than met the eye since "tagging" and age verification systems are either technologically ineffective or unduly costly. Since content providers cannot be sure as to whether minors are among their customers, to avoid liability they would have to refrain from offering otherwise legal material, thereby burdening communication among adults. Such a

burden is unacceptable, the Court said, if less restrictive alternatives for achieving the government's interests exist. The Court emphasized that while software allowing *content providers* to regulate the distribution of their material does not currently exist, there are programs offering *parents* a reasonably effective way to prevent their children from accessing material that parents, as opposed to government, deem inappropriate. "The interest in encouraging freedom of expression in a democratic society," Justice Stevens concluded, "outweighs any theoretical but unproven benefit of censorship" (*Reno v. American Civil Liberties Union*, 1997, 2351).

While the three-judge court and the Supreme Court invoked the unique nature of cyberspace in striking down the *indecentcy* provisions of the CDA, they expressly endorsed governmental power to prosecute Internet *obscenity*. Yet, First Amendment doctrine regarding indecency and obscenity alike rests upon certain premises about the nature of the environment in which such expression occurs. If communications technology changes that environment, thereby altering doctrine regarding the one concept, must not doctrine regarding the other concept change as well? Clues to answering this question are in Justice O'Connor's concurring opinion in *Reno* (1997). She saw the CDA as an attempt to create "adult zones" on the Internet by segregating indecent material to areas beyond the reach of children, an objective that would have been constitutional had the means chosen to achieve it not violated First Amendment rights. Adult zones work, she said, when applied to a "physical world" based upon "geography" and "identity." A child attempting to enter a nude bar, for example, would be recognized as being underage and stopped accordingly. She found the "electronic world" to be "fundamentally different," however, since speakers and listeners need not be in close physical proximity and they can mask their identities. Nonetheless, she argued that the Internet reflects a kind of geography in that sites exist at fixed locations in cyberspace around which it is possible to construct barriers, based upon some form of adult identification, and use them to screen people seeking entry to adult sites, much as a bouncer "cards" young people wanting to get into a nightclub. While Justice O'Connor thought, "the prospects for the eventual zoning of the Internet appear promising," she nevertheless concluded that technological limitations leave cyberspace "largely unzoned — and unzoneable" (*Reno v. American Civil Liberties Union*, 1997, 2354).

Justice O'Connor misunderstood the nature of cyberspace in contending that it is sufficiently akin to the physical world to be amenable to zoning. By her own admission, the anonymity and physical separation of people using the Internet dramatically alter the supervisory equation. After all, her hypothetical nightclub bouncer can readily see and thus bar underage customers, whereas a provider of adult services on the Internet cannot. Justice O'Connor's confusion notwithstanding, her distinction

between “geographic” and “virtual” worlds is useful in analyzing the impact of the Internet on obscenity doctrine. Justice Stevens revealed an awareness of “virtual reality” when he recognized that cyberspace is situated in “no particular geographic location but available to anyone, anywhere in the world, with access to the Internet” (*Reno v. American Civil Liberties Union*, 1997, 2335). Yet, he missed the implications of the communications revolution for the Court’s obscenity framework when he deplored a scenario wherein a parent who sends his seventeen year old college freshman information about birth control via e-mail is prosecuted under the CDA “even though neither he, his child, nor anyone in their home community, found the material ‘indecent’ or ‘patently offensive,’ if the college town’s community thought otherwise” (*Reno*, 1997, 2348). Justice Stevens presumably opposed such a prosecution because the geographic community containing the college had no business intruding into the transmission of the information between parent and child since the exchange was a private matter that did not affect the college community. Still, he was willing to accept the same scenario if it involved obscenity rather than indecency. Such inconsistency in dealing with the impact of the Internet on the First Amendment calls for a reconsideration of the Court’s obscenity doctrine in light of the workings of cyberspace.⁵

III. Cyberspace and the Supreme Court’s Obscenity Doctrine

Congress has long prohibited obscenity in the context of radio, television, telephones, the mail, and cable communication. Opponents of cybersmut would extend this prohibition to the Internet, but computer communication does not easily fit the framework established by the Supreme Court in *Miller v. California* (1973) for determining what constitutes obscenity. Under *Miller* (1973, 24), a jury first would have to say, “whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.” Second, the jury would have to determine “whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.” Finally, the jury would have to decide “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” Showing that “community” has multiple meanings even when understood in purely geographic terms, the Court emphasized that by “contemporary community standards” it meant those of specific local communities rather than some undifferentiated national community. It is “neither realistic nor constitutionally sound,” said the Court, “to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City” (*Miller v. California*, 1973, 32). Accordingly, local juries were empowered to deter-

mine what appeals to prurient interest and what is patently offensive because such judgments will vary from one community to another. As a result of this localized approach to obscenity, the First Amendment may protect sexually explicit material in one community but not in another.

The reasons that the Court offered in *Miller* (1973) as to why obscenity is not protected under the First Amendment show that it understood a "community" to be a discrete, homogeneous, and geographically defined locality wherein sexually explicit materials can have a tangible and adverse impact. Obscenity, the Court said, "may be validly regulated by a State in the exercise of its traditional local power to protect the general welfare of its population" (*Miller v. California*, 1973, 32-33, note 13). Accordingly, sex and morality "may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places" (*Miller v. California*, 1973, 25-26). In *Paris Adult Theatre v. Slaton* (1973, 69), a companion case, the Court was even clearer in basing the power to ban obscenity on the authority of states to conclude that "public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole." Given the benefits to be gained from "stemming the tide of commercialized obscenity," the Court held that regulation of erotica is justified by "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself" (*Paris Adult Theatre v. Slaton*, 57-58). In short, the Court's obscenity cases viewed "communities" as physical territories composed of relatively homogeneous individuals sharing a common understanding of the sexual mores of their neighborhoods and fearing tangible harm to themselves and to their social and economic environments from the availability therein of obscenity.

This view of community misperceives what Justice Stevens in a later obscenity case called "our diverse, mobile, metropolitan society" (*Smith v. United States*, 1977, 314, note 10). The atomizing forces of contemporary life, including but not limited to the Internet, are undermining the basis for obscenity law by eroding the societal homogeneity fostered by physical proximity. The Internet enables people with similar interests to find each other, for physical connection no longer is necessary to initiate and maintain relationships. Computer communication brings more people into contact with one another, thereby breaking down geographic barriers and cultural homogeneity. The range of information available to people using computers is likely to surpass that available to people in physical proximity, which further changes and diversifies opinions. As intellectual interaction increases across geographic communities, tolerance within those communities for sexual expression increases too. In fact, the Internet gives people a degree of liberating anonymity unavail-

able to members of a physical community who may feel a need to conceal any unconventional beliefs they might hold for fear of adverse community reaction should those beliefs be revealed. Consequently, communicators via computer need not worry about conforming unduly to the values of those around them. In short, "as individuals have more choices and greater opportunities to develop their own tastes, tolerance for sexual expression can only become increasingly varied among the members of local geographical communities" (Sergent, 1996, 710).

The Supreme Court's narrow view of "community" also ignores the vastness of cyberspace. Adult Internet sites cannot target their services to particular geographic communities and then tailor their content to meet the various decency standards of those communities. To do so, they would either have to establish data bases of people eligible to access sexually explicit material or individually monitor each request for such material, options that would be both impractical and cost prohibitive (Kabalka, 1996). Nor can service providers know the prevailing obscenity standards of every jurisdiction in the nation that might access their products. Even if they could, it would still be impossible to determine which community's standards ought to be used to determine the permissibility of a given transmission. Unlike postal mail, computer messages are not sent to identifiable, geographically-based addresses. Service providers thus have no way of knowing where customers are because they have no control over the physical localities into which their products may wander. Even if they do know the location of receiving computers, they have no control over people who join their services in jurisdictions allowing obscenity but log in from other jurisdictions where such material is not permissible (Sergent, 1996, 710-713). As a result of these problems, service providers would have no choice but to alter the content of their sites to meet the standards of the most restrictive community having access to them. In any case, adult Internet sites administered by system operators are only one source of cyberspace. One of the biggest venues, "Usenet," has no system operators at all but simply lists addresses for postings on particular topics. The "local community standards" framework simply cannot work here.

The difficulties of applying *Miller* (1973) to cyberspace can be seen in *United States v. Thomas* (1996), which sustained the first federal prosecution of an Internet adult site for the interstate transmission of obscenity. Robert and Carlene Thomas, operators of a major sex-oriented BBS called "Amateur Action," distributed sexually explicit images from their service in Milpitas, California to thousands of customers around the world. They were indicted in Memphis, Tennessee, where an undercover postal agent had downloaded samples from their site, rather than in California because prosecutors believed that community attitudes toward obscen-

ity were more conservative in the "Bible Belt" than they were on the West Coast. The Thomases claimed that under *Miller* (1973) they should have been tried in California rather than in Tennessee because that was where the pictures came from and because the transmission was initiated by the postal agent, not them. They noted too that they had not advertised in Tennessee and had no physical presence there. The heart of their argument, though, was that because the Internet has broken down geographic boundaries, people in one community cannot dictate what is morally acceptable for those in another. The trial judge rejected these arguments, seeing no difference between the Thomases allowing customers to download erotica from their site and mailing out such material themselves. If an analogy to the physical world is to be made, however, a better one, wherein the Thomases would not have been liable, was the postal agent traveling to California where erotica was legal, making a purchase, and taking it back to Tennessee. The Thomases may have made the material available, but it was the agent who introduced it into a jurisdiction where it was illegal (Byassee, 1995, 212-216).

Furthermore, the belief that sexually explicit material can undermine the quality of life in a specific local community may make sense when such material appears in a tangible form such as magazines or videos that can be physically transported from one geographic location to another, and bought and sold in relatively open display. For instance, applying a geographic definition of "community" to physical establishments like adult theatres and bookstores seems reasonable because the spillover effects of these businesses, such as crime and reduced property values, can affect the "total community environment" and "tone of commerce" of the surrounding community. This regulatory approach makes little sense, however, when applied to individuals using computer modems in the privacy of their own homes to access sexual material located at Internet sites unrelated to the local physical community. Such material cannot affect the quality of life in the surrounding community because it never physically enters it but simply moves unobtrusively over telephone lines from one computer to another. Websites differ significantly from town theatres and bookstores in that they are not local, stationary places of public business where patrons can literally walk in, make a purchase, and walk out. Rather than sell tangible commodities, they transmit digital information that is indecipherable as it travels through the physical community and therefore cannot adversely affect that community. Only after it reaches its destination in the privacy of a purchaser's computer can it be converted into a form that can be read or viewed, at which point it is no longer *in* the physical community in the sense of being exposed to the public eye. Such material is not foisted upon the local community by intrusive providers but is pulled into private computers by willing purchasers.

Defining obscenity in terms of "local community standards" based upon a view of "community" as a discrete, physical territory is thus inappropriate for a medium where information is readily accessible from anywhere on earth. The vagaries of the idea of "local community standards," the impracticality of ascertaining them for all localities across the nation, and the impossibility of identifying either the geographic source or destination of much of the material passing over the Internet prevent consumers as well as service providers from determining what level of constitutional protection is granted to erotica. Because the Supreme Court has allowed the meaning of obscenity to vary from one locality to another, prosecutors are encouraged to engage in "forum shopping" whereby they can choose among several jurisdictions the most morally conservative one in which to initiate an obscenity case so as to increase the likelihood of obtaining a conviction. Similarly, they can prosecute a provider of sexually explicit material in several jurisdictions simultaneously without violating the constitutional prohibition against double jeopardy. Fear among service providers about the time and expense of defending against such prosecutions may have a chilling effect upon the distribution of what in many localities might be acceptable material. Afraid of risking prosecution for trafficking in obscenity, Internet users would be forced to engage in self-censorship by adapting their preferences for sexually oriented material to the most puritanical locality through which their erotic transmissions might pass. The problem with *Miller* (1973), then, was in assuming that geographically-based localities can regulate speech in their own jurisdictions without inhibiting expression elsewhere.

IV. From Geographic Communities to "Cyber-Communities"

The problems in trying to apply established obscenity doctrine to cyberspace suggest a need to expand our understanding of the term "community." Like the Supreme Court did in its obscenity cases, we generally think of a community as an association whose members share membership, participate in communal affairs, imbue the collective with their moral values, and feel a commitment toward one another as parties in a common enterprise. Moreover, like the Court, we tend to equate communities with particular physical locations having discrete geographic boundaries such as cities, states, and even nations. To be sure, physical place stimulates, shapes, and sustains a geographic community because the close physical proximity of the community's members necessitates much face to face interaction, which not only imbues the communing parties with a keen sense of common purpose and identity, but also promotes informed decision-making due to the extensive deliberation that inevitably accompanies sustained personal interchange. In addition to these physically situated associations, however, there are also tightly knit non-

geographic communities whose unity is based upon factors other than shared geographic location such as ethnicity, kinship, religion, language, and profession. Examples of non-geographic communities include African-Americans, Roman Catholics, political scientists, and Karl Marx's "workers of the world." Although members of such communities do not necessarily share physical propinquity, they are bonded together by the key element of any community: a sense of fellowship based upon shared values and interests. A group of people joined together in a common enterprise need not be geographically based before it can be called a "community" so long as it possesses the essential attributes of a community.

Does cyberspace constitute a "community," or is it merely a vast computerized marketplace for the acquisition and distribution of sterile information? Some see the Internet as "no more than a library, entertainment center, and telephone all wrapped up into one," making cyberspace not a community at all but "simply a huge and heterogeneous group of people accessing the Internet for an endless variety of reasons" (Heumann, 1995, 208). Cyberspace may not be a community in the traditional, physical sense, but it does possess the defining element of a community: it is composed of groups of like-minded people coming together and interacting based upon shared interests and a desire to establish mutually satisfying relationships. Howard Rheingold (1993, 1, 5) calls these groups "virtual communities," which he defines as "computer-mediated social groups" that emerge "when enough people carry on...public discussions long enough, with sufficient human feeling, to form webs of personal relationships in cyberspace." People in virtual communities "do just about everything people do in real life," Rheingold argues, "but we leave our bodies behind." E-mail, discussion groups, and the World Wide Web have created countless "cyber-communities" whose members may spend more time with people far away than they do with those in their own backyards. Whether they are on-line debating public issues, sharing an interest in a hobby, or providing support for friends with various physical or emotional problems, members of these cyber-communities have a commitment to one another and thus act as good neighbors do in traditional geographic communities. The only thing missing, but apparently not really necessary for forging a strong sense of community, is physical proximity for the cyber-community's members.

Of course, cyberspace is not monolithic. It is best understood as a loose federation of many different and often competing communities rather than as some unified empire. Some cyber-communities are open to anyone, whereas others restrict membership on some particular basis. Hence, their orientations differ, some being professional or business-like, others more casual or family focused. Says one observer, "the immediacy and continuity of the content, as well as the informality of the exchanges

and the common interest in the subject matter, tend to reveal the personalities of the senders and to foster a sense of shared experiences and shared goals. When these interactions reach critical mass, communities are created" (Byassee, 1995, 202). Cyber-communities are thus provisional. Those able to sustain themselves prosper, perhaps splitting into subcommunities with more particularized interests and identities, while those unable to maintain their cohesion wither away (Dyson, 1995, 27). Cyber-communities lack geographic boundaries, yet they are distinguishable jurisdictions unto themselves in that they consist of people from all over the globe who have chosen to join by voluntarily logging on. The speed with which Internet users can exchange information over vast distances obviates the need for physical proximity. Although they are separated spatially, their high level of interaction gives members of cyber-communities the sense that they share the same place. As Internet communication continues to expand, says Mike Godwin of the Electronic Frontier Foundation, thinking of "local community standards" only in a geographic sense will become increasingly "philosophically bankrupt" to members of cyberspace, for "where these people's mental space is, is not geographical at all. It is communities of interest — virtual communities" (1994, 8).

If a particular group of "netizens" constitute a cyber-community wherein sexually explicit materials are not thought to be offensive, must traditional geographic communities grant them the right to send and receive such material? While this cyber-community would not be offended by computerized erotica, the larger geographic community of which they are a part might be. In the event of an obscenity prosecution, which "community standards" ought to apply: those of the geographic community or those of the cyber-community through which the material is obtained? Do the moral standards of geographic communities trump those of cyber-communities, which by their very nature transcend the boundaries of all physical jurisdictions? The answer to these questions depends upon whether the abstract, digital dimension of cyberspace is simply an extension of concrete, geographic communities. If it is, then prohibiting obscenity in cyberspace is permissible; if it is not, then such prohibition not only is unconstitutional but also seriously misguided. Invasion of substantial communal interests is necessary before expression can be punished, but the separation of Internet communication from physical communities essentially eliminates any danger to those interests by allowing opponents of cybersmut to avoid exposure to it. Computer users have considerable control over the content, receipt, and ultimate destination of material transmitted through cyberspace. If members of cyber-communities knowingly distribute objectionable material to their surrounding geographic communities, holding them liable may be appropriate. Otherwise, the ability of the geographic locale to avoid

unwanted erotica would seem to negate its interest in proscribing obscenity.

These issues are complicated by *Stanley v. Georgia* (1969), wherein the Supreme Court recognized a right to possess sexually explicit materials within the confines of one's home as opposed to more public places. "Whatever the power of the state to control *public* dissemination of ideas inimical to the *public* morality," said the Court, "it cannot constitutionally premise legislation on the desirability of controlling a person's *private* thoughts" (*Stanley v. Georgia*, 1969, 566, emphasis added). The Court saw no danger that erotica in a private home would be viewed by minors or unwilling citizens as could happen in public places. Indeed, the Court viewed the home as a sanctuary separate from public places. Computer communication is eroding the distinction between private homes and public places, however, by making the world an extension of the home in that material can travel into homes via the "information super-highway" without having to pass through outside markets. Downloading an obscene video from the Internet is similar to purchasing one by mail: a customer places an order, an attempt is made to ensure that the customer is an adult, and the order is sent from one place to another. The difference is that the Internet customer buys nothing tangible, uses no public conduit such as the postal service in procuring the order, and never contributes to any possible deterioration of the surrounding geographic community by patronizing a local retailer of adult products. Does *Stanley* (1969) protect such transactions, or can local communities shield themselves from erotica sent over the Internet? The logic of *Stanley* (1969) suggests granting autonomy to cyber-communities, but conclusions are difficult since the Court has obscured the scope of this decision, holding that while the First Amendment allows people to control the flow of information into their homes, states can regulate the distribution of obscene materials.

For example, in *Rowan v. United States Post Office Department* (1970), the Court upheld a federal law prohibiting the mailing of sexually oriented advertisements to people who specifically indicated that they did not wish to receive them. The court stressed the privacy interest of homeowners in deciding what material would enter their homes. The Court later invalidated a federal law banning the mailing of unsolicited advertisements for contraceptives on the grounds that people have a right to decide what mail to accept and that "the level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox" (*Bolger v. Youngs Drug Products Corp.*, 1983, 74). These cases emphasized the right of people to control the flow of mail into their homes. The same principle ought to apply to material entering via the Internet, for prohibiting the transmission of erotica denies people the option of

receiving it. In *United States v. Reidel* (1971), however, the Court refused to extrapolate from the right of an individual to possess obscenity within the home a right under the First Amendment for a purveyor of such material to sell it to the homeowner. Drawing a distinction between private possession in the home and regulation of external speech, the Court similarly ruled in *United States v. Orito* (1973) that the right to possess erotica within one's home does not include a right to get it there via the postal service. Finally, the Court made an exception to *Stanley* (1969) in *Osborne v. Ohio* (1990), holding that government's compelling interest in combating child pornography extends not just to the production and distribution of such material but also to its possession and use, even in the privacy of one's home. In short, because *Stanley* (1969) rested more upon the right to privacy than upon the First Amendment, people have a right to possess most kinds of erotica at home but may have trouble getting such material there in the first place.

Ultimately, applying a geographic understanding of "local community standards" to cyber-communities violates the logic of *Miller* (1973). As the Court noted, "different States vary in their tastes and attributes, and this diversity is not to be strangled by the absolutism of imposed uniformity" (*Miller v. California*, 1973, 33). Since the Internet crosses state lines, allowing juries to use local community standards means that computer-transmitted erotica will be judged by the standards of the most conservative geographic localities. If there is a clear likelihood of cybersmut harming a physical community, such as when children are used to produce obscenity, then application of a geographic community's standards is appropriate. If, however, regulation is intended either to protect unwitting passersby or to prohibit obscenity in a community that does not want it, then the standards of the geographic community are inapposite inasmuch as cybersmut generally is circulated only electronically within groups of consenting adults. The geographic locales in which these "netizens" happen to reside simply are not part of the "community" in which cybersmut is exchanged and are not affected by it. As sexually explicit material continues to move from the open marketplace to private computers, "traditional concerns about obscenity, such as accessibility to children, sensibilities of the general public, and secondary effects on the neighborhood surrounding the point of distribution" will continue to lose their relevance (*Harvard Law Review*, 1994, 1094). With regard to cybersmut, then, the "local community standards" framework ought to be replaced with a "cyber-community standard." Under such a standard juries would be drawn neither from computer users in general nor from devotees of cybersmut in particular. Indeed, there would be no juries because in cases of sexually explicit material confined to cyber-communities there would be no offense.

V. Adapting the First Amendment to Cyber-Communities

In expanding our understanding of "community" so as to adapt traditional First Amendment values to changing technology, two principles are crucial. First, an open and decentralized "marketplace of ideas"⁶ must be maintained. As the Supreme Court said in *Associated Press v. United States* (1945, 20), the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." The mass media constitute a closed system because even with cable television offering hundreds of channels, the number of forums is limited and not all views are heard since availability is a function of what sells. Moreover, system dynamics essentially make network owners information gatekeepers. Their control over access and distribution significantly burdens smaller, independent programmers who must negotiate expensive carriage agreements with large network operators. By contrast, open access networks like the Internet can accommodate an unlimited number of information providers and users, thus ensuring a variety of cyber-communities. Furthermore, because the Internet is decentralized, there is no single point for origination of content and no need for special arrangements with network operators to send information to other people using the system. Lower barriers to entry for independent information providers is especially desirable since they are more likely to reflect a diversity of opinions than are large media conglomerates and they are more difficult to control by the dominant forces in the media industry (Berman and Weitzner, 1995, 1622-1624). Special solicitude for the Internet might even reverse the trend in recent years toward ever-greater concentration of the mass media.

The second principle necessary for adapting the First Amendment to cyber-communities is to ensure their members control over information content. The Supreme Court has emphasized that "at the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence" (*Turner Broadcasting System v. Federal Communications Commission*, 1994, 641). Lack of effective user control over "indecent" radio broadcasts largely explains the Court's support for the FCC's ban on risqué recordings during times when children could be listening (*Federal Communications Commission v. Pacifica Foundation*, 1978). By contrast, it invalidated the FCC's ban on "dial-a-porn" telephone services on the grounds that "placing a telephone call is not the same thing as turning on a radio and being taken by surprise by an indecent message" (*Sable Communications v. Federal Communications Commission*, 1989, 189). Telephone users are less a "captive audience" than are radio listeners. There are no captive audiences in cyberspace inasmuch as gaining access to Internet sites requires people voluntarily to take affirmative steps

involving more technical savvy than does turning on a radio or a television. Also, unlike broadcast viewers and listeners who are not necessarily aware of content to come and may be offended by it, customers of adult sites on the Internet know what to expect because such sites warn about their content before granting access. As interactive media continue to supplement traditional media, the very nature of communication in cyber-communities will highlight the inappropriateness of governmental regulation of information based upon its content (Berman and Weitzner, 1995, 1632-1634).

How do these two principles for protecting First Amendment values in the face of changing communications technology apply to governmental attempts to control cybersmut? Clear and narrowly drawn content regulation may be permissible, depending upon the nature of the material regulated and how computer users obtain or send it. For example, government ought to be free to prosecute the intentional distribution of actual obscenity to minors, unconsenting adults, or cyber-communities that do not wish to receive it. Attempts to ban "indecentcy," however, inevitably present problems of vagueness and overbreadth, as the Court held in *Reno* (1997). In any case, invasion of substantial privacy interests is necessary to limit cybersmut, but the interactive nature of the Internet greatly reduces these privacy concerns by allowing computer users to avoid unwanted communications. Restrictions on the knowing receipt of erotica by adult members of cyber-communities have little justification, for when computer users control the information they receive governmental regulation is not necessary to protect their privacy interests. When they cannot block undesired information, regulation may be valid, preferably in a way designed to restore their control. A moderate course of action thus seems sensible for regulating obscenity in cyberspace. In the words of one observer, "the information superhighway should neither force the electronic media into the fold of the highly protected print media, nor should it leave them exposed to the same types of regulations as broadcasting. Rather, careful attention to the underlying interests in viewpoint diversity and user control requires a balanced approach" that may serve First Amendment values in cyber-communities better than does the *Miller* (1973) framework (*Harvard Law Review*, 1994, 1096).

Technology exists that would allow people to block cybersmut from their computers (*American Civil Liberties Union v. Reno*, 1996, 839-842). Conservatives consider technology to be an inadequate response to the problem of cybersmut. Libertarians fear that it would simply replace governmental censorship with private censorship, which while technically raising no First Amendment problems would still threaten freedom of expression by inhibiting the free flow of information in cyberspace (Weinberg, 1997, 453-482). Screening can be overly broad, blocking out

legitimate discussion of sexual topics as shown by the decision of "America On-Line" to ban the word "breast" from its "chat rooms," a move that dismayed breast cancer patients participating in on-line support groups (Andrews, 1997). Even constitutionally protected speech could be forbidden. A discussion group on First Amendment issues, for example, could be banned from using the vulgar reference to the military draft that appears in *Cohen v. California* (1971). Nor do computer users necessarily know which sites get blocked or why. Many are blocked simply because overburdened software filters have not reviewed them, a particular problem for small, non-commercial sites which are likely to be rated late in the process, if at all (Harmon, 1997b). Finally, the sheer size of cyberspace makes it difficult to regulate. With more than 50 million Internet users and hundreds of thousands of information transfers a day, thousands of screeners would be necessary, thereby delaying communication and undercutting the system's utility. As one skeptic concludes, trying to rid cyberspace of erotica "is like trying to shoot an ICBM at a gnat; it can't be done without the absolutely most Draconian methods being used" (Lewis, 1994, 34).

Even more troubling than the practical problems of blocking software are the political implications for a society based upon the free exchange of ideas. In the physical world, opposing interests confront one another more or less openly in the political arena where their voices are readily heard as they make their arguments. We may not like what one side or another has to say, but in a relatively open political system, we have little choice but at least to listen. In cyberspace, by contrast, the right to speak does not necessarily guarantee a right to be heard. Blocking software can undercut a communications medium that promises the average person the broadest degree of speech yet known. Ironically, then, self-regulation may pose a more potent threat to freedom of expression in cyberspace than governmental censorship under the CDA ever could have done. The danger is that people may use technology to create "virtual gated communities" from which they can screen out expression they think inappropriate. As Andrew L. Shapiro of Harvard Law School's Center for the Internet and Society warns, "democracy doesn't work if you can turn off anyone you don't want to hear from" (Harmon, 1997b, D6). Just as the CDA threatened to throw the proverbial baby out with the bathwater, so too might the alternative of blocking software. Lawrence Lessig refers to this growing dependence of constitutional values upon the capabilities of computer software as the "tyranny of code," whereby program designers acquire the power to grant liberties or take them away (Harmon, 1997c, E1). Given the control over blocking technology enjoyed by such gatekeepers of the Internet as Microsoft, Netscape, and "America On Line," "tyranny" is not too strong a word.

Although problematic, the best way to deal with cybersmut is to fine tune blocking software so as to permit informed self-regulation in a largely free market. Let those who want computerized erotica have it, so long as those who do not are able to avoid it. In this way, "the programming tastes of the many need not be held hostage to the particular sensibilities of the few, or vice versa" (*Harvard Law Review*, 1994, 1095). This approach is preferable to governmental censorship because it can be tailored to the values of individual families. Besides, censorship is at best an after-the-fact response to cybersmut, whereas blocking software reduces the risk of seeing it in the first place. Since these programs can block material coming from anywhere in cyberspace, they are to that extent more effective than governmental censorship, which cannot reach foreign-based Internet sites. By focusing on the voluntariness of the user rather than on the mores of the user's geographic community, service providers would no longer have to guess the "community standards" prevailing in the user's locale. A technological approach would thus "provide important protection for those creating 'virtual' communities dispersed across wide geographic areas by giving them the ability to define their 'boundaries' free from the harassment of individual juries in distant locales" (Sergent, 1996, 724). Just as an on-line group of "cyber-evangelists" could set the standards for their virtual community, so too could a bevy of "cyber-libertines" do so for theirs. By following the preferences of cyber-communities rather than those of geographic communities, a "virtual community standard" would "preserve the framework and tradition of obscenity law, while adapting to the challenges created by cyberspace" (Egan, 1996, 152).

Conclusion

The Internet is rapidly becoming a vital tool not only for personal and professional correspondence, but also for banking, commerce, education, recreation, politics, and the dissemination of news and other information. Like every new technology, however, the Internet presents problems as well as opportunities, especially with regard to freedom of expression. Does the revolution in computer communications require significant revision of traditional First Amendment principles first developed in the simpler context of print and broadcast media? The fundamental tenets of freedom of expression ought not be jettisoned just because communications technology changes, yet it is difficult to imagine the First Amendment continuing to exist unmodified as the Internet inexorably transforms the communications process. In grappling with the problem of cybersmut in particular, the judiciary will, in the words of Jerry Berman of the Center for Democracy and Technology, "decide the limits of free speech for the 21st century," but "if the judges don't understand the Internet, they may pick the wrong paradigm" (Lewis, 1996, D2).

In striking down the CDA, the Supreme Court showed an appreciation for the dynamics of the Internet against a governmental attempt to ban indecency in cyberspace. On the other hand, by assuming that the obscenity paradigm it established in *Miller v. California* (1973) remains undisturbed by the telecommunications revolution, the Court revealed the limitations of its understanding of the significance of cyber-communities.

Internet users operate in a realm largely independent of physical world jurisdictions. Because cyber-communities essentially are self-contained associations, the norms of the physical world do not readily fit them. Forcing those norms to fit could limit the growth of evolving information technologies and quash the new social structures to which they are giving rise. Regulation of cyberspace may be unnecessary anyway since cyber-communities continually monitor themselves and have adopted an informal code of their own called "netiquette" (Rheingold, 1993, 64). When necessary, cyber-communities can enforce their own standards of conduct as, for example, when members of an unruly Usenet newsgroup decide to appoint a moderator, or when members of a "listserv" discipline or even exile an aberrant fellow member. Such informal self-regulation by cyber-communities is possible with regard to more serious matters such as cybersmut. These new associations ought to be given a chance to develop and test their own rules and sanctions before government attempts to impose what may be less appropriate ones. "An exploration of the culture of cyberspace," writes Ethan Katsch (1995, 1692), "may suggest as much about the future role of the First Amendment as an analysis of cases and doctrine. At the very least, experiences in cyberspace, and the expectations and values fostered by this new environment, should be examined along with judicial assessments of the relevance of past decisions and experiences."

Properly understanding the Internet is vital because "the shape and character of our nation's communications infrastructure is critical to our democratic values" (Berman and Weitzner, 1995, 1635). Early in our history, newspapers and the mail system helped to unite the nation. Later, television and radio brought Americans closer together. Today this role is being played by computers. Communication in cyberspace differs from traditional modes of communication in that the Internet gives individuals an opportunity to be both producers and receivers of information. Whereas the mass media are a single source of information going to multiple receivers, and common carriers are a single source of information going to either single or multiple receivers, the Internet permits communication from the many to the many, thereby blurring the distinction in the communication process between reader and reporter. Furthermore, because the Internet is a means of communication cheap enough to allow access to virtually anyone, the influence of users is based not

upon their wealth or status, as is so often the case in the physical world, but upon their ability to make and disseminate reasoned arguments. The Internet thus offers citizens an opportunity to realize the democratic ideal of the town hall meeting by providing what could become a model of "civil and thoughtful discourse leading to consensual governance" (Branscomb, 1995, 1670). In this way, the Internet holds promise for correcting some of the market failures of democracy, for democracy cannot function effectively without citizens who are informed and independent yet also connected to their fellow citizens. These are precisely the qualities that cyber-communities foster.

Perhaps the most significant aspect of cyber-communities for democratic politics is that they can shield people from the tyranny of democratic majorities and the governments representing them. James Madison and Alexis de Tocqueville recognized long ago that minorities are vulnerable in majoritarian democracies. In cyberspace, however, minorities are free to form their own enclaves operating in anonymity outside the boundaries of physical jurisdictions, thus leading to a "world of self-contained communities that cater to their own members' inclinations without interference with anyone else's" (Dyson, 1995, 27). Cyber-communities are becoming the key mediating institution of the computer age, providing a counterweight to and a check upon the power of terrestrial societies and governments. In addition, the loyalties fostered by cyber-communities may help to restore the core notion of community in a world where physical proximity, familial relationships, and associational institutions like churches and work groups no longer easily forge bonds among people. As one defender of this new order puts it, "we now have within our grasp a technology designed to bring together like-minded individuals, regardless of where they live, work, or play, to engage in the creation of a new type of democratic community: a community unbounded by geographical, temporal, or other physical barriers" (Branscomb, 1995, 1640). While there is no guarantee that new communications technology will continue the advancement of democratic values, *because of the Internet we are closer than ever before to having a truly open, diverse, and user controlled "marketplace of ideas."*

As with any market, of course, some of the Internet's products, such as cybersmut, may not be considered desirable by all of the market's customers, but banning them would not be worth the price paid in harm to First Amendment values as well as to the increasingly beneficial uses of computer communications. Achieving the Internet's full democratic potential requires judging it in the context of cyberspace rather than in the context of paradigms from the past, such as geographic communities or print and broadcast technology. Traditional First Amendment doctrine must not be applied peremptorily to cyber-communities because

cyberspace is not simply an electronic version of "regular space." Admittedly, "local community standards" ought to be enforced with regard to Internet obscenity, but these standards ought to be defined by cyber-communities themselves, not by geographic communities that are essentially removed from and little affected by the problem. Since established modes of analysis are not readily transferable to cyberspace, more appropriate models must be found. Doing so requires reading the First Amendment in light of what Justice Louis Brandeis called "the progress of science" (*Olmstead v. United States*, 1928, 474), for in the words of Thomas Jefferson, our greatest defender of democracy, "laws and institutions must go hand in hand with the progress of the human mind....As new discoveries are made...institutions must advance also, and keep pace with the times" (Jefferson, 1905, 12). By thinking about the First Amendment in new ways for a new age, we can save it from being lost in cyberspace.

Notes

1. Censorship involves two main categories of sexually explicit material: *obscenity* and *indecentcy*. Obscenity is legally punishable, whereas indecency generally is constitutionally protected. When for purposes of clarity these two categories need to be differentiated, this study will do so. Otherwise, it will use the rubric "cybersmut" to refer to a wide array of erotic products and services made available on the Internet with the intention of sexually arousing either their provider or those persons gaining access to them.

2. Neither the First Amendment nor the right of privacy protects "child pornography" (see *New York v. Ferber*, 1982; and *Osborne v. Ohio*, 1990). Because the Supreme Court's reasons for allowing the punishment of such material differ from its reasons for allowing the punishment of obscenity generally, child pornography is not relevant to this study.

3. A *vague* law is unclear about what it reaches; an *overbroad* law reaches too much. A law will be invalidated on grounds of *vagueness* if persons of "common intelligence must necessarily guess at its meaning and differ as to its application" (*Connally v. General Construction Company*, 1926, 391). Under the *overbreadth* doctrine governmental objectives "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms" (*NAACP v. Alabama*, 1958). Rather, government must use narrow, carefully tailored means to achieve its objectives.

4. Justice O'Connor filed a concurring opinion, joined by Chief Justice Rehnquist. Although she agreed that section 223d of the CDA was overly broad, she believed that section 223a could be applied constitutionally in cases of deliberate transmission of indecent material to minors where no adults are among the recipients.

5. Hoping to address the Court's objections to the CDA, Congress

enacted in October 1998 the Child Online Protection Act (47 U.S.C.A. 231), which made it a crime for commercial Internet sites to make available to those under age seventeen material deemed "harmful to minors." This law was clearer and more narrow than the CDA in that it did not apply to all Internet users and targeted obscenity rather than mere indecency. Nevertheless, a federal judge blocked its enforcement on the grounds that like the CDA it had a "chilling effect" on constitutionally protected expression since the difficulty of verifying patrons' ages would force many non-obscene yet sexually frank Internet sites to censor themselves rather than risk prosecution (*American Civil Liberties Union v. Reno II*, 1999). This ruling is currently pending before the Third Circuit Court of Appeals.

6. The cornerstone of modern First Amendment theory, the marketplace metaphor posits that free expression is valuable more for its societal benefits, such as the search for truth and the process of self-government, than for its intrinsic worth to individual speakers. It assumes that truth will be most easily identified and falsehood most easily rejected if government stays out of the marketplace (see Milton, 1951; Mill, 1956; and the dissenting opinion of Justice Oliver Wendell Holmes in *Abrams v. United States*, 1919). Despite its prominence, the marketplace idea has its critics (see Schauer, 1982; and Ingber, 1984).

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