NEW AGE COMSTOCKERY

Robert Corn-Revere*

The term "Comstockery," coined by George Bernard Shaw, refers to the overzealous moralizing like that of Anthony Comstock, whose Society for the Suppression of Vice censored literature in America for more than sixty years. Under the "Comstock law," classic works by such authors as D.H. Lawrence, Theodore Dreiser, Edmund Wilson and James Joyce were routinely suppressed. Other targets of the Society's crusades included such literary giants as Tolstoy and Balzac. The more current law of indecency, which traces its heritage to Cornstock, has been used to restrict some of the same literary works. The Telecommunications Act of 1996 extends this repressive regime to the Internet and online services, and thus threatens to undermine the promise of the emerging Digital Age.¹

Although popularly described as a deregulation measure, the Telecommunications Act imposes sweeping new content regulations on electronic media. In a portion of the Act known as the Communications Decency Act, Sections 502 and 507, implement new restrictions on the transmission of obscene or indecent communication by computer or online services. Section 502 prohibits the use of any interactive computer service to "display in a manner available to a person under 18 years of age" any indecent information "whether or not the user of such service placed the call or initiated the communication." The new law also makes it a crime for any person to "knowingly permit" a computer system under his control to transmit indecent information. Violators of the section may be fined up to $250,000 or imprisoned for two years, or both.⁸

The law recognizes a number of exemptions and defenses to prosecution. Section 501(e) exempts the following activities from liability: (1) simply providing access or a connection to a computer system not under the control of the access provider, and other related activities, such as intermediate storage, access software, or other related capabilities, but not including "the creation of content of the communication," (2) employment of a person who provides prohibited access, unless the employer has knowledge of, or ratifies the conduct. The subsection denies statutory exemptions for a "conspirator" with any entity "actively involved in the creation or knowing distribution" of indecent communications, or of anyone "who knowingly advertises the availability of such communications." It also denies an exemption to access providers that are "owned or operated" by entities that make indecent information available.

Section 502(e) also provides a defense for entities that take "reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors" including "any method which is feasible under available technology," and for entities that block access until the customer uses a credit card, debit account, adult access code or adult personal identification number.⁸

Section 502(f)(2) preempts state or local regulations that would impose liability on "commercial entities, nonprofit libraries, or institutions of higher education" in a way that is "inconsistent with the treatment of those activities or actions under this section." However, nothing in the law precludes local governments from "enacting and enforcing complementary oversight, liability, and regulatory systems, procedures, and requirements" over intrastate communications that do not impose inconsistent obligations on interstate services.⁶

Robert Corn-Revere is a partner at the Washington, D.C. law firm Hogan & Hartson, L.L.P. and teaches First Amendment Law at the Communications Law Institute, Catholic University of America, Columbus School of Law. He is an adjunct scholar of the Cato Institute and is Chairman of the Media Institute, First Amendment Advisory Council. He served as Legal Advisor to FCC Commissioner James H. Quello, and was Chief Counsel in 1993 when Commissioner Quello was Interim Chairman. An earlier version of this paper was published in 1995 as a Policy Analysis by the Cato Institute.

² Id.
³ The FCC is empowered to "describe" measures it believes to be "reasonable, effective, and appropriate" to block minors' access, but not to "approve, sanction, or permit, the use of such measures." Id. § 502(c)(6).
⁴ This subsection is intended to ensure that national stan-
Section 502 grew out of a bill originally proposed by Senator James Exon of Nebraska which the Senate overwhelmingly approved last June. The bill was intended to outlaw the use of computers and telephone lines to transmit “indecent” material, a category of speech that the Supreme Court has held to be protected by the First Amendment but subject to certain types of regulation. The House bill contained no similar measure. Instead, by a vote of 420-4, the House adopted Congressmen Cox and Wyden’s “Internet Freedom and Family Empowerment Act.”

The Cox/Wyden bill was offered as an alternative to the Exon amendment, and was designed to promote development of interactive computer services, rather than to treat them as a threat. In particular, it provided that “[n]othing in this Act shall be construed to grant any jurisdiction or authority to the [Federal Communications] Commission with respect to economic or content regulation of the Internet or other interactive computer services.” Also, it made clear that an on-line provider could be penalized for “any action voluntarily taken in good faith to restrict access to [obscene, lewd, excessively violent or harassing] material.” Although the House overwhelmingly adopted the Cox/Wyden bill, a manager’s amendment to the House Telecommunications Bill included language that would provide criminal penalties for the intentional communication “by computer” of indecent material to minors.

The discrepancy between the House and Senate provisions were resolved in Conference, with significant lobbying from many sides. A coalition of online service providers, common carriers and computer companies supported a compromise bill sponsored by Congressman Rick White, based primarily on the Cox/Wyden amendment, but allowing for more targeted criminal penalties based on the speech protective “harmful to minors” standard. The Christian Coalition and other “anti-porn” groups, on the other hand, pressed for more broad law enforcement authority for “indecent” transmissions.

The Committee, in December, 1995, voted 17 to 16 to adopt an “indecency” standard for online communications instead of the less censorial “harmful to minors” standard proposed by Congressman White. After the vote, the Christian Coalition and others opposed a clarification recommended by Speaker Newt Gingrich to state that the legislation does not outlaw transmission of serious works of literature, art, science, and politics. The same organizations opposed an exemption from the legislation for non-profit libraries and schools.

The Cox/Wyden bill was retained in the final Telecommunications Act, but only as a limitation on civil liability. That is, under Section 509 of the Act, online services and access providers are shielded from civil liability for “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable whether or not such material is constitutionally protected.” The provision that prohibited FCC content regulation of the Internet was dropped from the final law. As adopted, the Act makes clear that “[n]othing in [Section 509] shall be construed to impair the enforcement of” the online indecency prohibition.

I. BACKGROUND

A. Deja Vu All Over Again

The events that led to the passage of the Communications Decency Act have a very familiar ring. In 1864, an alarmed Postmaster General reported that “great numbers” of dirty pictures and books were being mailed to Civil War troops. It seems that one of the most popular early uses of photography was the tintype version of the pinup.

As is often the case, invention became the mother of repression. Congress reacted quickly to the Postmaster’s report, passing a law in 1865 making it a crime to send any “obscene book, pamphlet, picture, print, or other publication of vulgar and indecent
character” through the U.S. mail.\textsuperscript{16}

This law was strengthened several years later at the insistence of Anthony Comstock, a former dry goods clerk, who exerted broad influence in his new role as the Secretary of the New York Society for the Suppression of Vice.\textsuperscript{17} Under the popularly named “Comstock law,” thousands of authors were jailed and literally tons of literature destroyed.\textsuperscript{18}

Fast forward to 1995, the new age of Comstockery. Retiring Senator James Exon of Nebraska introduced the Communications Decency Act in February, 1995\textsuperscript{19} because he was concerned that the information superhighway was in danger of becoming an electronic “red light district.”\textsuperscript{20} Exon was also troubled about the law’s ability to keep pace with new technology. “Before too long,” Exon told his Senate colleagues,

\begin{quote}
... a host of new telecommunications devices will be used by citizens to communicate with each other. Telephones may one day be relegated to museums next to telegraphs. Conversation is being replaced with communication and electrical transmissions are being replaced with digital transmissions ... Anticipating this exciting future of communications, the Communications Decency amendment ... will keep pace with the coming change.\textsuperscript{21}
\end{quote}

Or, as he put it in doublespeak: “The information superhighway is ... a revolution that in years to come will transcend newspapers, radio, and television as an information source. Therefore, I think this is the time to put some restrictions or guidelines on it.”\textsuperscript{22}

Far from moving communications into the future, the Communications Decency Act returns the First Amendment to those less than thrilling days of yesteryear, when publishers routinely checked with the censors in advance to determine whether a particular manuscript was acceptable.\textsuperscript{23} The law threatens to lobotomize the Internet by superimposing essentially the same legal standard that stifled the publication of literature in America for nearly 60 years under the Comstock laws.

To understand the effect of the law, it is necessary to consider the difference between modern obscenity law, under which the First Amendment protects all but the most hard-core material, and obscenity law during Comstock’s heyday, which outlawed any material that a jury believed might offend the sensibilities of the most vulnerable segments of society. In addition, it is important to examine the more recent doctrine of “indecency,” which has been employed to limit exposure by children to offensive sexual materials on radio and television.

\section*{B. The Comstock Law}

In 1873, the year he was named Secretary of the New York Society for the Suppression of Vice, Anthony Comstock came to Washington to lobby for stronger obscenity laws.\textsuperscript{24} In doing so, he quite effectively employed a tactic that Jesse Helms and James Exon would emulate over a century later: Comstock brought along a great cloth bag filled with examples of “lowbrow” publications as well as information on contraception and abortion. He set up in the Vice President’s office what came to be known as a “chamber of horrors” to display materials he believed should not be available to the public.\textsuperscript{25}

Comstock’s persistence paid off. Congress adopted the proposed law to Suppress Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use.\textsuperscript{26} In addition to obscene books, prints or other publications “of an indecent character,” the law also prohibited the mailing of “any article or thing designed or intended for the prevention of conception or procuring of abortion.”\textsuperscript{27} Moreover, Comstock was named a special unpaid agent of the Post Office Department and empowered to enforce the law.\textsuperscript{28} This authorized Comstock to inspect mail that he suspected might be obscene at any post office across the country.

Like Senator Exon’s Amendment, which was inspired by a desire to protect his granddaughter, the Comstock law—indeed, all obscenity law of the period—was predicated on a need to protect the most impressionable members of the population.\textsuperscript{29} The relevant legal standard was drawn from an English

\begin{footnotes}
\item[18] Id.
\item[21] Id.
\item[23] See generally de Grazia, supra note 17.
\item[24] Id. at 4.
\item[25] Id.
\item[26] An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, ch. 258, 17 Stat. 598-99 (1873) [hereinafter Comstock Act].
\item[27] Id.
\item[28] De Grazia, supra note 18, at 12.
\item[29] Id.
\end{footnotes}
case, *Regina v. Hicklin,* which held that the test for obscenity turned on whether the material tended
to corrupt the morals of a young or immature
person.\(^{50}\)

The courts were concerned with “those whose
minds are open to such immoral influences, and into
whose hands a publication of this sort may fall.”\(^{53}\)
Consequently, the intended audience of a book was
unimportant so long as a young and inexperienced
person might be exposed to its corrupting influence.
Additionally, it was immaterial whether the book as
a whole possessed literary merit.\(^{54}\) The courts fo-
cused instead on the passages they found to be most
offensive to determine if a book was obscene. Indeed,
some found that literary merit compounded the
crime, by “enhancing a book’s capacity to deprave and
corrupt.”\(^{55}\)

The crusades against literature were motivated
largely by the belief that certain novels would in-
flame the passions of young women whose virtue
would soon be lost, but this was not the only con-
cern. Comstock also crusaded against “dime novels”
with their sensational tales of big city detectives and
wild west gunslingers.\(^{56}\) These inexpensive books,
filled with accounts of crime and violence were de-
nounced as “the inspiration for all of the antisocial
behavior exhibited by the youth of the day.” Com-
stock called such books “devil-traps for the young.”\(^{57}\)

Once given the authority, Comstock wasted no
time in cracking down on what he called “vampire
literature.”\(^{58}\) In the first six months of the Comstock
law, he claimed to have seized 194,000 obscene pic-
tures and photographs, 14,200 stereopticon plates
and 134,000 pounds of books, among other things.\(^{59}\)
He zealously pursued this mission for another forty-
one years.\(^{60}\) Near the end of his life, Comstock wrote
that he convicted “enough people to fill a passenger
train of sixty-one coaches, with sixty of the coaches
containing sixty people each and the last one almost
full.”\(^{61}\) He said that he had destroyed almost 160
tons of obscene literature and 3,984,063 obscene pic-
tures.\(^{62}\) Comstock also zealously pursued early femi-

50 3 Q.B. 360 (1868).
51 Id. at 371.
52 Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. &
53 Id.
54 DE GRAZIA, supra note 17, at 12.
56 Id.
57 DE GRAZIA, supra note 17, at 5.
58 Id. at 4.

nists, such as Margaret Sanger, since his law prohib-
itied the mailing of information on contraception and
abortion.\(^{63}\)

After Comstock died, his work was carried on by
John Sumner, who took his place as Secretary of the
Society for the Suppression of Vice. But Sumner,
like Comstock before him, did not have to rely on
convictions as the sole measure of success. He could
often persuade a publisher not to print a particular
book, or, if already published, to recall all copies,
turn them over for destruction and melt down the
plates.\(^{64}\) By this method, Sumner pressured top New
York publishers to withdraw from circulation and
destroy all outstanding copies of *Women in Love,* by
D.H. Lawrence, *The Genius,* by Theodore Dreiser,
and *Memoirs of Hecate County,* by Edmund Wil-
son.\(^{65}\) Comstock even attacked George Bernard
Shaw’s play, *Mrs. Warren’s Profession,* because it
dealt with prostitution.\(^{66}\) Despite - or perhaps be-
cause of - the notoriety, the play enjoyed great suc-
cess, and Shaw extracted further revenge by coining
the term “Comstockery.”\(^{67}\)

No case better illustrated the excesses of Com-
stockery (or the problems with the current law of
“indecency”) than the campaign to censor James
Joyce’s *Ulysses.* The first obscenity prosecution of
the classic work occurred when installments from the
book were published in a literary magazine named
The Little Review. The publishers were arrested
and prosecuted in 1920 because of the book’s sexual
themes. They were convicted and fined five hundred
dollars.\(^{47}\) But the real loss was beyond the court-
room; no single American publisher would even con-
sider printing the book for the next eleven years.\(^{48}\)

This embargo ended in 1932, when an upstart
publishing company, Random House, decided to
make *Ulysses* a test case. Random House contacted
with Joyce to publish *Ulysses* in America, and sued
in federal court over the seizure by U.S. Customs of-

59 Id.
60 Blanchard, supra note 32, at 758.
61 Id.; DE GRAZIA, supra note 17, at 5; C. G. TRUMBULL,Anthony COMSTOCK, FIGHTER 239 (1913).
62 Comstock Act, supra note 26.
63 DE GRAZIA, supra note 17, at 710.
64 Id. at 72-73, 710.
65 Blanchard, supra note 32, at 758.
66 Id.
67 DE GRAZIA, supra note 17.
68 Id. at 17.
69 United States v. One Book Called Ulysses, 5 F. Supp. 182
(S.D.N.Y. 1933).
held that the book was not obscene, and in doing so, rejected the prevailing legal test. In a decision affirmed on appeal, the court found that the book must be judged as a whole, and not by the effect that selected passages might have on vulnerable populations.

The court of appeals said it “cannot be gainsaid” that “numerous long passages in Ulysses contain matter [which] is obscene under any fair definition of the word.” The court found that the troublesome portions of the book “are introduced to give meaning to the whole, rather than to promote lust or portray filth for its own sake.” The court concluded:

We do not think that Ulysses, taken as a whole tends to promote lust, and its criticized passages do this no more than scores of standard books that are constantly bought and sold. Indeed, a book of physiology in the hands of adolescents may be more objectional on this ground than almost anything else.

The Ulysses case signaled the end of the Hicklin rule in America. As a result, the obscenity of a work of literature was determined not by the sensibilities of the most tender reader, but by those of the average reader. And the work was considered as a whole, not just by reference to the most lurid passages. Nevertheless, many publishers continued to shy away from certain books. For example, Lady Chatterley’s Lover, written in 1928, was not published in its unexpurgated form in America until 1959. Henry Miller’s Tropic of Cancer, written in 1934, was not published in the United States until 1960. However, this restrictiveness faded as the courts began to consider the First Amendment implications of obscenity convictions.

II. MODERN OBSCENITY LAW

A. The Supreme Court Defines Obscenity

Since 1957, the Supreme Court has held consistently that the First Amendment does protect obscene speech. But before it confines otherwise protected expression to constitutional purgatory, the Court has stressed that the government cannot punish speech if it has even minimal value, and that rigorous due process protections must be applied. In Roth v. United States, the Court emphasized that “[a]ll ideas having even the slightest redeeming social importance unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion have the full protection of the [First Amendment] guarantees.” Sixteen years later, in Miller v. California, the Court reformulated the test to state that obscenity “must be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which . . . do not have serious literary, artistic, political, or scientific value.”

A major adjustment in the Supreme Court’s approach to obscenity in the Miller case was its reliance on local community standards to determine which portrayals of sexual conduct “appeal to the prurient interest in sex” and consequently are “patently offensive.” In the years between Roth and Miller, the Court had become the final arbiter of what material was obscene, and the Justices evidently grew tired of it. The Court had found it necessary on thirty-one occasions to review the purportedly obscene material and render a judgment.

Justice Brennan complained that examination of the contested materials “is hardly a source of edification to the members of this Court.” Apart from his personal reactions to the works, Brennan added that the procedure of having the Court examine the materials “has cast us in the role of an unreviewable board of censorship for the 50 states.” After sixteen years of trying to apply the law, Justice Brennan, who wrote the Roth opinion, concluded that the government could not constitutionally prohibit obscenity.

A majority of the Court agreed with Justice Brennan’s reasoning but not his conclusion. Reviewing the “somewhat tortured history of the Court’s obscenity decisions,” it found that “[p]eople in different States vary in their tastes and attitudes, and this

---

60 Id. at 184.
61 United States v. One Book Called Ulysses, 72 F.2d 705, 706 (2d Cir. 1934).
62 Id. at 706-07.
63 Id. at 707.
64 Id. at 707-08.
65 DE GRAZIA, supra note 17, at 94. See also Grove Press, Inc. v. Christenberry, 276 F.2d 433 (2d Cir. 1960).
66 DE GRAZIA, supra note 17, at 55, 370.
diversity is not to be strangled by the absolutism of imposed uniformity. As a result, there cannot be "fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' Chief Justice Burger emphasized that "our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation, assuming the prerequisite consensus exists.

The Court noted that the First Amendment does not require "that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City." The Court also acknowledged the converse proposition that community reactions to literature in, say, rural Georgia or Tennessee, should not dictate what is acceptable in urban centers. Indeed, Justice Stewart, famous for his statement that he could not intelligibly define obscenity but "I know it when I see it," long maintained that a national standard could not be legally created or applied. Based on this reasoning, the Court in Miller concluded that the question of "patent offensiveness" was a matter for juries to decide, applying local community standards.

From the Court's perspective, this solution had the twin merits of avoiding a national standard for obscenity while at the same time freeing the Justices from their uncomfortable role as critics of last resort. But it created the risk that the test for serious literary, artistic, political or social value would be set by the most reactionary community. Accordingly, the Court in Miller concluded that the question of "patent offensiveness" was a matter for juries to decide, applying local community standards.

While the prevailing concern of modern obscenity law is the effect of the material on the average person rather than the most sensitive, the law does recognize some added protections for children. The Supreme Court has held that the government may designate some sexually oriented material as being harmful to minors and to, for example, prohibit the sale of such things as "girlie magazines" to those sixteen and under. But such restrictions must be carefully limited. The Supreme Court has held that it will not tolerate vague, open-ended restrictions on speech not even for the benefit of minors and that the government cannot "reduce the adult population... to reading only what is fit for children."

B. The Paradox of Indecency

The Communications Decency Act prohibits not just obscenity online, but indecency as well. For the past twenty-five years or so, the federal government has stepped up its efforts to define and enforce provisions of the United States Criminal Code that prohibit the transmission of "indecent" language by radio, television or telephone communications. Unlike obscenity, the Supreme Court and Courts of Appeals have held that indecent speech is protected by the First Amendment. But, because indecency deals with sexual matters, courts also have held that the government may regulate it in certain circumstances.

The law regulating indecency is best known as a result of the George Carlin monologue, Filthy Words, which he described as the "words you couldn't say on the public airwaves." The seven words were those which Carlin said "will curve your spine, grow hair on your hands and maybe, even bring us, God help us, peace without honor." The Carlin routine was broadcast by Pacifica radio during a program about society's attitude toward language. Before the show the station had issued a warning that the program contained "sensitive language which might be regarded as offensive to some."

The Federal Communications Commission ("FCC" or "Commission") received a single complaint about the Pacifica program, which the Su-

---

68 Id. at 33.
69 Id. at 30.
70 Id. at 20, 30-33.
71 Id. at 32.
72 Id. at 32-33, n.13.
74 Miller, 413 U.S. at 31-32.
The Supreme Court characterized as coming from "a father who heard the broadcast while driving with his young son." In fact, the complaint came from a Comstock wannabe, John R. Douglas, a member of the national planning board for Morality in Media, who did not disclose his fifteen-year-old son's age to the FCC. The broadcast aired at 2 p.m. on a school day, and there is considerable doubt whether the concerned father or his "young son" actually was in the audience. The complaint did not reach the Commission until six weeks after the fact.

The FCC found that the program violated the indecency rules, and the case made its way to the Supreme Court. Limiting its holding to the question of whether the FCC "has the authority to proscribe this particular broadcast," the Court upheld the Commission's censure of the Pacifica station. It held that broadcasters historically have received less constitutional protection than the traditional press, and that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans." As the medium is "uniquely accessible to children, even those too young to read" and the broadcast audience "is constantly tuning in and out," the station's prior warnings could not protect the public.

The Court also approved the FCC's legal definition of indecency, which focused on "the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience." The Court did not directly confront the question of literary merit, and it did not ascribe any significance to the fact that the Carlin monologue was part of a larger program that was a serious study of language.

The decision was not entirely coherent on the question of redeeming social value as a defense to an indecency complaint. The Court cited, seemingly with approval, an FCC suggestion that "an offensive broadcast [that] had literary, artistic, political, or scientific value [that was] preceded by warnings . . . might not be indecent in the late evening, but would be so during the day, when children are in the audience." It also referred to a 1960 FCC pronouncement indicating that the words or depictions of sexual activity in Lady Chatterly's Lover would raise indecency questions if broadcast on radio or television. But, at the same time, the Court emphasized "the narrowness of [its] holding," stressing that the case "does not involve . . . a telecast of an Elizabethan comedy."

Since the late 1980's, the FCC has been engaged in continuous litigation to clarify the basic requirements of its indecency policy. In 1992, Congress decreed that indecency would be banned from the airwaves between 6 a.m. and midnight. The D.C. Circuit recently affirmed the FCC's broadcast indecency rules adopted pursuant to the statute, but narrowed the restricted period from 6 a.m. to 10 p.m. The court confirmed that such rules must balance the government's interest in protecting children with "the adult population's right to see and hear indecent material" while tailoring its conclusions to the unique attributes of the broadcast medium.

Congress also applied indecency law to other electronic technologies, although the comparison to broadcasting has been far from exact. For example, in 1988 Congress amended the Communications Act to combat the phenomenon of "dial-a-porn." The change imposed a blanket prohibition on indecent as well as obscene telephone messages. But upon review by the Supreme Court, all nine Justices agreed that sexual expression that is "indecent but not obscene is protected by the First Amendment." The Court held that the government may regulate indecent
speech to protect children, but “it must do so by narrowly drawn regulations . . . without unnecessarily interfering with First Amendment freedoms.” The opinion described Pacifica as “an emphatically narrow holding,” and distinguished the radio broadcast in that case from the telephone communications covered by the law. Unlike radio, the Court found that dial-it services require the audience to take affirmative steps to receive the indecent messages and that “callers will generally not be unwilling listeners.” It concluded that telephone communications are “substantially different” from over-the-air broadcasts.0

These efforts over the years underscore the central paradox of indecency law. Unlike obscenity, indecent speech is protected by the First Amendment, yet it is subject to a legal standard very similar to what the courts rejected for obscenity more than six decades ago.0 That is, indecency doctrine borrows from the discredited Hicklin rule, focusing solely on the effect of speech on children, not the average audience member. And there is no requirement for the government to evaluate works “as a whole.” In deciding indecency complaints, the FCC focuses primarily on the salacious portions of programs, and provides only cursory review of the full context.

In practice, context is not all that important to the nebulous world of indecency law. Although serious literary, artistic, political or scientific value of a work is a complete defense to an obscenity prosecution, merit is simply a factor for the regulatory body to consider in the case of indecency. In an obscenity trial, expert witnesses can attest to the value of the material at issue. Conversely, when the FCC considers indecency complaints, it is for that agency alone to determine the extent to which merit is relevant. The FCC’s official position is that the context in which words or images are presented must be examined to determine whether the expression is “patently offensive.” In practice, the FCC typically ducks the question of context in such cases.

This was most forcefully demonstrated by the Commission’s refusal to declare that a reading from James Joyce’s Ulysses over the airwaves would be permissible because of its literary merit. The request was made in May 1987, shortly after the FCC had announced a new “get tough” approach to indecency in which it cited three radio stations and one amateur radio operator for violating the law. One of those stations, KPFK-FM in Los Angeles, was owned by Pacifica Foundation, which had long been known for its provocative programming (such as the George Carlin monologue). Given its historic connection to the FCC’s indecency enforcement efforts, Pacifica had reason to be concerned about its annual “Bloomsday” reading from Ulysses on WBAI-FM in New York.

Consequently, Pacifica sought guidance from the FCC staff, asking for a declaratory ruling to clear the long planned broadcast. Pacifica informed the Commission that it intended to transmit a program of “substantial literary and cultural value” at 11 p.m. on June 16, 1987. The request said that Pacifica would precede the broadcast with appropriate warnings, but that the program would contain “salty” language. Pacifica did not immediately disclose that the quoted passages were from Ulysses, although it revealed that fact in subsequent meetings with FCC staff.

The request presented the FCC with a dilemma. If it permitted the broadcast, it might create a huge loophole in the indecency policy. But if it did not, it would suppress a classic of literature that courts had freed from censorship in a landmark 1934 case. In short, the Commission’s choice was to declare itself to be either a eunuch or a laughingstock. Neither option being particularly attractive, the FCC forged a third alternative — it declined to issue a ruling.

A letter from the FCC’s Mass Media Bureau informed Pacifica that “because of the first amendment considerations that are involved, the Commission must be especially cautious in exercising its authority to issue declaratory rulings with respect to program

104 Id. at 127. Courts have since upheld FCC rules that limit children’s access to dial-a-porn by requiring, inter alia, that customers request such service in writing before a common carrier may provide access. Information Providers’ Coalition for Def. of the First Amendment v. FCC, 928 F.2d 866 (9th Cir. 1991).
105 United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705 (2d Cir. 1934).
107 Id.
108 Id. (citations omitted).
109 Id.
111 See id.
113 United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705 (2d Cir. 1934).
114 Letter from James C. McKinney, Chief, FCC Mass Media Bureau, to counsel for Pacifica (June 5, 1987) [hereinafter Pacifica Complaint Reply].
content prior to broadcast.” In support of this, the Bureau quoted from the 1934 Ulysses case and stated - falsely - that nothing in the proposed Bloomday reading was similar to broadcasts recently found by the FCC to be indecent. Accordingly, after refusing to provide any further guidance, the FCC instructed the licensee to rely on its own judgment as to whether or not to transmit the program.  

The Commission’s deference to the good faith judgment of the broadcast licensee served its institutional purpose in permitting it to avoid making a decision on the Pacifica petition for a declaratory ruling. But the agency has otherwise shown little inclination to trust those who must make risky programming decisions. Just a few months after taking a pass on the Ulysses request, the FCC ruled that the question of indecency did not depend on the reasonableness of the broadcaster’s judgment. That is, even if a broadcaster reasonably believed that a certain program had literary merit and could support that belief with expert opinion, the FCC remained the final arbiter of whether the program was indecent. Where the government’s aesthetic judgments differed from that of the broadcaster, the licensee’s good faith belief was relevant only to the size of the punishment.  

Broadcasters generally have shown great reluctance to find out if their literary inclinations match those of the bureaucrats. Despite a few notable exceptions, most steer a wide berth around the FCC’s rules. But the prospect that broadcasters are censoring themselves finds few sympathetic ears among those in government, notwithstanding any professed concern for “first amendment considerations” in the FCC’s nonresponse to Pacifica. In fact, the Commission has stated that “to the extent a broadcaster is ‘chilled’ from airing indecent programs when there is a reasonable risk that children may be in the audience, that is not an ‘inappropriate chill.’” Of course, this begs the central question: what is indecent?  

Apart from the circularity of the government’s position and the disregard it exhibits for the constitutional obligations of public servants, it utterly ignores the problem of indecency law for programming in which literary merit is the dispositive issue. It also is the reason why you are unlikely to see many programs like The Singing Detective on American broadcast TV.  

The Singing Detective, a seven-hour Peabody Award winning mini-series produced by BBC, has been praised as one of the finest television programs in history. Critics were unanimous in calling the production a masterpiece. Steven Bochco, who created Hill Street Blues and NYPD Blue called it “seven of the best hours I have ever seen on a television set.” Marvin Kitman of Newsday wrote that The Singing Detective is “the most incredible TV program ever made.” He called it “the kind of program that once in a generation or two comes along and permanently changes the boundaries of TV. It extends the parameters of what TV drama can do and reclaims TV as a creative medium.” Vincent Canby of the New York Times said “it is better than anything I’ve seen this year in the theatre (live or dead). [It] set[s] a new standard for all films.” John J. O’Connor, also of the Times, wrote that the program “opened up the boundaries of TV drama, making the special form as challenging and compelling as the very best of film and theatre.” And Charles Champlin of the LA Times called it “the most potent and imaginative television I saw in all of 1988.”  

The show was aired by various public television stations between 1988 and 1990. On New Years Day 1990, KQED in San Francisco presented The Singing Detective in its entirety, starting at 11 a.m. and ending at 6 p.m. One viewer complained to the FCC, and he sent crude videotapes of the five minutes or so that he claimed were indecent. This triggered an investigation that lasted more than a year and led to discussions at the agency’s highest levels. Staff members of all five Commissioners watched the tape, and then met to discuss the fate of KQED.  

Dismissing the complaint should have been a simple matter. To the extent the FCC seriously consid-
ered merit as an important factor in making indecency determinations, The Singing Detective did not present a close case. The critical acclaim, the Peabody Award, and the serious content should easily have outweighed the few assertedly offensive moments in the seven-hour production. But the FCC did not consider the program as a whole. Indeed, the Commission did not even know what the show was about. Its review was riveted on images of brief nudity and a short scene in which a child witnesses a non-graphic sexual encounter.

Unlike the Pacifica request regarding Ulysses, the FCC could not point to a court decision that affirmed the program's literary value. Even with a judicial seal of approval, the Commission had declined to rule on the decency or indecency of Ulysses. So in the case of The Singing Detective, the agency was paralyzed. The matter languished for months and finally was forgotten. No order was ever issued by the FCC.

KQED spent this time in regulatory limbo as well. It hired Washington counsel, and probably spent thousands of dollars in defense of the program. With other matters pending at the Commission, the station could not afford the black mark of an indecency fine. KQED ultimately was let off the hook, but the long investigation served as an object lesson for any stations with an interest in presenting groundbreaking programming. The moral of the story for station managers was, when in doubt leave it out.

As this example suggests, indecency law establishes the FCC as a national censorship board. Before the Supreme Court came to rely on local community standards for obscenity determinations, Justice Brennan complained that the Court had become a "board of censorship for the 50 states." When the Court made such judgments, Justice Brennan noted that "[o]ne cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so." Yet that is precisely the role now assigned to the five FCC Commissioners with respect to indecency, even though such speech is protected by the First Amendment.

Empowering a single federal agency with such authority unquestionably raises constitutional danger signals. This is particularly true where, as is the case with the FCC, the agency's members are politically appointed and may be susceptible to political pressures.

Such pressures abound. In announcing his most recent presidential bid, Senator Robert Dole attacked Hollywood for undermining American values. Former White House Director of Communications Patrick Buchanan (recently a perennial presidential contender), urged President Reagan in 1987 to get more directly involved with the FCC and demand that it "begin pulling the licenses of broadcasters [who transmit] this garbage." Such a move, Buchanan argued, would reestablish Republican ties to the religious right. In such an environment the FCC can be subjected to political blackmail. For example, efforts reportedly were made to deny reappointment to former FCC Chairman Mark Fowler because of charges that he failed to vigorously enforce the indecency rules.

Such pressures are by no means confined to those on the political right. In 1989 confirmation hearings for FCC Chairman Al Sikes and Commissioners Sherrie Marshall and Andrew Barrett, Democratic senators led the charge on indecency. In particular, Senators Daniel Inouye, Ernest Hollings, Jay Rockefeller and then-Senator Al Gore grilled the nominees for two hours, paying close attention to the question of broadcast content. Senator Gore, whose wife Tipper had gained notoriety attacking lewd rock lyrics, was particularly concerned about Barrett's statement that indecent broadcasts exist because "there is a market for indecency out there... in America." Although Barrett's statement was unquestionably true, both Senators Gore and Rockefeller voted against the nominations. Senator Hollings, expressing his displeasure with the FCC's safe harbor approach to indecency regulation, stated: "Garbage is garbage, regardless of the time of day."

---

122 Id.
125 Id.
126 Crigler & Byrnes, supra note 113.
129 Congress Asserts, supra note 133.
131 Congress Asserts, supra note 133.
III. COMSTOCKERY IN CYBERSPACE

The Communications Decency Act applies such sentiments (and pressures) to the Internet and online services. As a result, it is extremely bad news for the First Amendment. Nothing in the history of indecency enforcement suggests that this law can be made compatible with a culture of free expression. Indecency rules are based on the central assumptions of obscenity law as it existed under Anthony Comstock’s reign, when great works of literature were suppressed routinely. Applying this body of law to cyberspace is like unleashing a virus that could transform the essential character of the internet.

But why is this so different from prior restrictions, such as the limits on dial-a-porn? If Congress may apply indecency rules to certain telephone transmissions, why should it not also apply the same law to computer communications that are transmitted by telephone lines? After all, according to this line of reasoning, communications media are licensed by the government, bring communications into the home, and are accessible to children. Advocates of this position maintain that computer communications may provide an even more compelling case for government control because of the wide array of resources that can be accessed over the Internet.

But this view fails to take into account the differing natures of the technologies involved and the information they provide, the difficulty of rational regulation and the constitutional risks involving the government in a dynamic new medium. Compare broadcasting and telephone communications, for example. Radio and television stations transmit entertainment and informational programs that may touch on adult themes ranging from the satire of Howard Stern, to brief nudity on NYPD Blue to news reports on the photographs of Robert Mapplethorpe.138 With telephone communications, the indecency issue has been confined to the heavy breathing of dial-a-porn.139 No one has complained about readings of Lady Chatterly’s Lover by late night telephone operators. Phone sex may be a brisk business, but a narrow range of informational content is involved.

Proponents of the Communications Decency Act blithely applied indecency precedents across the various technologies as if they were interchangeable. In introducing S. 892,140 a bill similar to the Communications Decency Act, Senator Grassley simply asserted, quoting the Pacifica dictum describing radio, that “computers [have] ‘a uniquely pervasive presence in the lives of all Americans,’” are “uniquely accessible to children,” and “can be regulated to protect children.”141 However, merely lifting phrases from a Supreme Court case does not make them applicable to the technology in question. Unlike radio and television, which are universally available to American homes, less than seven percent of U.S. households are on-line.142 Additionally, only about six percent of children between the ages of two and eighteen have access to the Internet.143 Judicial decisions regarding indecency regulation of broadcast versus cable television make clear that such rules cannot simply be transplanted from one technology to another. For example, the most recent D.C. Circuit opinion upholding a “safe harbor approach to regulating broadcast indecency emphasized that its conclusion was predicated upon “the unique context of the broadcast medium.” The court stressed that “traditional broadcast media are properly subject to more regulation than is generally permissible under the First Amendment;” that “broadcasting is uniquely accessible to children;” and that “prior warnings cannot completely protect the listener or viewer from unexpected program content.” The court made clear that broadcasting cannot be compared to a situation in which a recipient “seeks and is willing to pay for the communication.”144

For this reason, courts have always treated cable television differently than over-the-air broadcasting under the indecency rules. Decisions have consistently struck down indecency regulations directed at cable programming because many of the programming services are available by subscription and because parents have the option of using a “lock box”

138 Robert Mapplethorpe was an accomplished and respected photographer who died in April 1989 from AIDS. Mapplethorpe was well known for both his celebrity photographs and his controversial and sexually explicit photographs that created a furor in Congress over grants from the National Endowment for the Arts. See Suzanne Mucnic, Mapplethorpe Works Draw Top Dollar, L.A. TIMES, Nov. 3, 1989, at F1; Alan G. Arnter, The Eye of the Storm: Mapplethorpe’s Unblinking Vision Sparked a Continuing Battle Over Art, CHI. TRIB., Dec. 31, 1989, at C4; Mapplethorpe Photos Ruled Not Obscene, ST. PETERSBURG TIMES, Oct. 6, 1990, at A1.

139 See Sable, 492 U.S. at 115.


141 CONG. REC. S7922 (June 7, 1995).


144 Action for Children’s Television v. FCC, 58 F.3d 654, 660 (D.C. Cir. 1995)(quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989)).
to preclude access to selected channels.\textsuperscript{146} Thus, the \textit{Pacifica} precedent for regulating broadcast indecency does not support content control of cable television — a strikingly similar technology.\textsuperscript{146} Indeed, in June the D.C. Circuit upheld a Cable Act provision that empowers cable television operators to refuse to accept indecent programming on leased access channels.\textsuperscript{147} In upholding the rule, however, the court emphasized that if the government had sought to regulate indecency on access channels directly, “the Commission and the United States would be hard put to defend the constitutionality of these provisions.”\textsuperscript{148}

The differences that separate constitutional from unconstitutional regulation of indecency are particularly relevant to online services, which have far more in common with cable television than with broadcasting. The Supreme Court has emphasized that indecency rules must be sufficiently narrow to achieve their purpose without excessively limiting speech.\textsuperscript{149} After ten years of litigation over successive attempts to write rules regarding dial-a-porn — the audio equivalent of girlie magazines — the courts upheld only very narrow restrictions on access by minors to the service.\textsuperscript{150} In the case of cable television, indecency rules were struck down altogether.\textsuperscript{151} Meanwhile, the task has been far more complex with broadcasting. Not only have the FCC and the courts wrestled over setting a constitutionally-permissible safe harbor, they also have struggled with trying to apply the indecency standard to works of genuine merit.\textsuperscript{152} In this regard, the FCC’s experience with \textit{Ulysses} and \textit{The Singing Detective} does not inspire confidence.

In the online context, the censorial effect of indecency restrictions is magnified. This is true because of the vast array of information available online, and the multiple functions made possible through interactivity. By mid-1995, there were more than fifty to seventy-thousand computer bulletin board systems ("BBS") operating in the United States, some free and others by subscription. Usenet, an international collection of BBS newsgroups accessible by Internet, covers almost any imaginable topic, from the Hubble Telescope to the wit and wisdom of Jerry Lewis.\textsuperscript{153} This growth was accompanied by the emergence of online services such as America Online, Prodigy, CompuServe, Delphi, GEnie and Apple Computers e-World. These services, now with approximately seven million subscribers, can variously be characterized as providing a bookstore, magazine stand, news wire service, archive, message center, mail carrier, gathering place and publishing house. The available content and functionality of these services simply cannot be compared to either dial-a-porn or broadcast programming. This not only complicates the problem of evaluating merit, to put it mildly, it makes even reviewing the myriad forms of information nearly impossible.

Perhaps more importantly, the nature of online communication also makes such intrusive regulations far less necessary. Computers and modems offer users a much greater degree of control over what may be accessed than ever imagined for a telephone or television. To begin with, computers require a basic skill literacy that is not a prerequisite for the other communications appliances. Additionally, software may be configured to screen-out unwanted services. Online services such as Prodigy and America Online already provide software tools that allow parents to control their children’s access. To obtain access to Usenet newsgroups, Prodigy requires activation by the household account holder (who must have a credit card, and presumably is an adult). Siecom, Inc., an Internet access provider that serves elementary and secondary schools, restricts access to questionable newsgroups and provides the option of scanning e-mail to screen objectionable mate-

\textsuperscript{146} See generally ACLU v. FCC, 823 F.2d 1554 (D.C. Cir. 1987); Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986); Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985).
\textsuperscript{148} Alliance for Community Media v. FCC, 56 F.3d 105 (D.C. Cir. 1995)(en banc).
\textsuperscript{149} Id.
\textsuperscript{151} See, e.g., Sable, 492 U.S. at 115.
\textsuperscript{152} See supra notes 147, 148 and accompanying text.
\textsuperscript{154} See generally HARLEY HAHN & RICK STOUT, THE INTERNET YELLOW PAGES (Berkeley: Osborne McGraw-Hill, 1994).
Other software providers have developed services to allow parents to block access to various Internet resources, including the World Wide Web. For example, SurfWatch blocks access to USENET newsgroups, the World Wide Web, gopher and FTP sites, and automatically updates the list of blocked Internet sites. Another service, Cyber Patrol blocks access to locations on the Internet by key word or by using a list of identified sites. Cyber Patrol allows parents to screen out some or all of twelve content categories.

Both SurfWatch and Cyber Patrol use a communications standard developed by the World Wide Web Consortium. The standard, called the Platform for Internet Content Selection (“PICS”), defines the method by which content ratings can be utilized by screening software. The PICS standard allows third party organizations (whether a nudist society or the Christian Coalition) to rate on-line content according to criteria employed by each organization. End users may select the screening program designed by the organization with which they feel the greatest affinity.

Rob Glaser, chief executive of Progressive Networks, said he envisioned just such a system. Perhaps several dozen tunable filters can be developed by “very credible” organizations that parents would trust. Glaser cited the National Education Association as an organization that parents might rely on for a stamp of approval; other parents might prefer the Christian Coalition, the Institute for Objectivist Studies, or the Children’s Defense Fund.

It has been suggested that “online systems give us far more genuinely free speech and free press than ever before in human history.” But not under the regime of the Communications Decency Act. The harsh penalties imposed, including possible jail terms, ensure that those placed at risk will err on the side of exclusion. At the very least, the law will force content providers to restrict, or delete entirely anything that is even questionable. This affects all users, not just children.

Consider the effect Communications Decency Act will have on a program such as Project Gutenberg, which makes electronic texts of books freely available on the World Wide Web. Even a cursory examination of the books provided by this remarkable service turns up authors, such as D.H. Lawrence, that are likely to lead to trouble, just as they did under Anthony Comstock. The only option under the law may be for services like Project Gutenberg to screen their materials and to sharply restrict access. Even if such a thing could be accomplished, it defeats the purpose of Project Gutenberg, which was created “to make information, books and other materials available to the general public in forms . . . people can easily read, use, quote, and search.”

Some discount the prospect that such an unquestionably meritorious venture as Project Gutenberg could be at risk. After all, they say, the days of the book burners are past. But they are wrong. Each year the American Library Association and American Booksellers Association compile a list of attempts to restrict access to books in libraries or bookstores in the United States. In East Hampton, New York, for example, the children’s book Where’s Waldo? was banned because part of a tiny drawing shows a woman lying on the beach wearing a bikini bottom but no top. The ALA’s 1994 Banned Books Resource Guide lists 800 titles that were challenged in 1993-94. Similarly, People for the American Way documented 463 challenges to books during the same school year. The new law simply moves this battleground online.

In addition to this chilling scenario, the legislation contains some genuine loopiness. For example, persons under eighteen retain the ability to send or make available indecent messages to those over eighteen, which could possibly lead to some bizarre results. In May, 1995, the New York Times reported the story of a Bellevue, Washington high school honors student who was punished for putting a satirical home page lampooning his school on the World
Wide Web. The page contained hypertext links to other Internet sites that offer sexually explicit material. Under the proposed law, the student would have a valid defense from prosecution so long as he employed FCC-approved procedures to restrict access to his home page. He could even send some of the material by e-mail to an adult, such as a favorite teacher. But if he sent the same message to a classmate, he could wind up in the slammer for two years.

Finally, the law imposes a single national standard on digital transmissions, with the government as the arbiter of decency. This might not be all bad, according to some observers, because the law also governs obscenity and a national standard could possibly prevent the most restrictive communities from creating a lowest-common-denominator standard.

The potential for such a problem has been vividly demonstrated by the conviction of a California couple whose restricted, adults-only bulletin board was accessed by a postal inspector in Tennessee. The postal inspector, using an assumed name, paid a subscription fee to join the bulletin board and downloaded digital images of sexual activity that did not violate the community standards of California. But a jury in Tennessee found their sensibilities were violated and voted to convict. On appeal, the Sixth Circuit upheld the conviction, raising the possibility that Memphis Tennessee may define the community standard for all of cyberspace. As important as it is to correct this precedent, the Communications Decency Act is no solution. Federal obscenity laws are still enforced by local juries using local standards, just as the Supreme Court decreed in Miller v. California and its progeny. The Communications Decency Act is no solution.

Federal obscenity laws are still enforced by local juries using local standards, just as the Supreme Court decreed in Miller v. California and its progeny. The Communications Decency Act is no solution. Federal obscenity laws are still enforced by local juries using local standards, just as the Supreme Court decreed in Miller v. California and its progeny. The Communications Decency Act is no solution.

The courts also should conclude that the full First Amendment protections continue to pass measures to regulate sexually-oriented regulation is any guide, such rules will rematerialize in another form. The lessons of broadcast regulation and dial-a-porn rules suggest that Congress will continue to pass measures to regulate sexually-oriented speech until it finds a formulation that courts will accept.

It is vitally important, therefore, that judicial decisions apply the appropriate First Amendment test in these initial cases. This means recognizing that the Pacifica rationale is a limited exception to traditional First Amendment doctrine. The courts also should conclude that the full First Amendment protections apply to new media unless there is some compelling justification to apply some lesser standard. No such showing has been made in the case of on-line com-

---

167 Id.
168 Telecomm Act, supra note 2, § 502.
169 Rose, supra note 160, at 254-55.
171 See Telecomm Act, supra note 2, § 509.
173 John Gilmore is an internet pioneer. On a Screen Near
munications. The individualized level of control that is possible over computer communication undermines any potential justification for more intrusive regulation, and supports a finding that the greatest level of constitutional protection should apply.