Policy Analysis

# Cato Institute Policy Analysis No. 232: New Age Comstockery: Exon vs. the Internet

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## Executive Summary

On June 14 the Senate voted 84 to 16 to approve the Communications Decency Act of 1995, proposed by Sen. James Exon (D-Neb.). The bill proposes 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. The measure would impose jail terms and fines on anyone who used a "telecommunications facility" to transmit any obscene information or image, or any indecent information or image to a person under the age of 18. If a similar provision is included in legislation being debated in the House of Representatives, and is signed into law by the president, it will usher in a new age of Comstockery in America.

The term "Comstockery," coined by George Bernard Shaw, refers to overzealous moralizing like that of Anthony Comstock, whose Society for the Suppression of Vice censored literature in America for more than 60 years. Under the so called Comstock laws, 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 recent law of indecency, which traces its heritage to Comstock, has been used to restrict some of the same literary works. The Exon bill would extend that repressive regime to the Internet and online services and thus threatens to undermine the promise of the emerging digital age.

## Background

In 1864 an alarmed postmaster general reported that "great numbers" of dirty pictures and books were being mailed to Civil War troops.[1] 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.[2]

That law was strengthened several years later at the insistence of Anthony Comstock, a former dry goods clerk who exerted broad influence as secretary of the New York Society for the Suppression of Vice. Under the popularly named "Comstock law," which prohibited use of the mails to send any "obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character," thousands of authors were jailed and literally tons of literature destroyed.

Fast forward to 1995: The rapidly increasing popularity of the Internet, which can be used to transmit all kinds of

information, including "indecent" digitized images and words, may spawn a new age of Comstockery.

Last February retiring Sen. James Exon (D-Neb.), along with Sen. Slade Gorton (R-Wash.), introduced S. 314, the Communications Decency Act of 1995. The bill would impose jail terms and fines on anyone who used a "telecommunications facility" to transmit any obscene information or image or any indecent information or image to a person under 18. The Exon bill was incorporated as an amendment to S. 652, a comprehensive telecommunications reform proposal that was passed by the Senate Commerce Committee in March. The Exon language was approved by the full Senate on June 14 by a vote of 84 to 16. Also in June, Sens. Robert Dole (R-Kans.) and Charles Grassley (R-Iowa) introduced legislation that would impose criminal liability on operators of electronic bulletin boards and other entities that use computers to store and deliver indecent information.

The bill would 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. The purpose of indecency regulation is to keep adult materials from falling into the hands of kids. When he first introduced a similar bill last year, Senator Exon said he was concerned that the Information Superhighway was in danger of becoming an electronic "red light district" and that he wanted to bar his granddaughter's access to unsuitable information. In support of his concerns, Exon placed several articles in the Congressional Record, including a Los Angeles Times piece entitled "Info Superhighway Veers into Pornographic Ditch." That article was more focused on security breaches at Lawrence Livermore National Laboratory than it was on smut, but that did not appear to bother the senator. The other articles were about telephone dial-a-porn.

Exon was also troubled about the law's ability to keep pace with new technology. "Before too long," he told his Senate colleagues, "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."[3] 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."[4]

Far from moving communications into the future, his proposal, if adopted, would return 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. 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 law.

To understand the effect of the legislation, 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 of children to offensive sexual materials on radio and television. Experience with those three lines of authority, taken together, provides a chilling picture of what the Exon bill may bring about.

## The Comstock Law

In 1873, the year he was named secretary of the New York Society for the Suppression of Vice, Comstock came to Washington to lobby for stronger obscenity laws. In doing so, he quite effectively employed a tactic that Jesse Helms 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," a display of materials he believed should not be available to the public.[5]

Comstock's persistence paid off. Congress adopted the proposed Law to Suppress Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use. In addition to obscene books, prints, or other publications "of an indecent character," the law prohibited the mailing of "any article or thing designed or intended for the prevention of conception or procuring of abortion."[6] Moreover, Comstock was named a special unpaid agent of the Post Office

Department and empowered to enforce the law. That enabled him to go to any post office and inspect mail that he suspected might be obscene.

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 perceived need to protect the most impressionable members of the population. The relevant legal standard was drawn from an English 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.

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."[7] Consequently, the intended audience of a book was unimportant if a young and inexperienced person might be exposed to a corrupting influence. In addition, it was immaterial whether the book as a whole possessed literary merit. The courts focused instead on the passages they found to be most offensive to determine if a book was obscene. Indeed, some judges found that literary merit compounded the crime by "enhancing a book's capacity to deprave and corrupt."[8]

The crusades against literature were motivated largely by the belief that certain novels would inflame the passions of young women whose virtue would soon be lost. But that was not the only concern. Comstock also crusaded against "dime novels," with their sensational tales of big city detectives and wild west gunslingers. Those inexpensive books, filled with accounts of crime and violence, were denounced as "the inspiration for all of the antisocial behavior exhibited by the youth of the day." Comstock called such books "devil-traps for the young."[9]

Once he had the authority, Comstock wasted no time in cracking down on what he called "vampire literature." In the first six months of the Comstock law, he claimed to have seized 194,000 obscene pictures and photographs, 14,200 stereopticon plates, and 134,000 pounds of books, among other things.[10] He zealously pursued his mission for 42 years. Near the end of his life, Comstock wrote that he had 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." He said that he had destroyed almost 160 tons of obscene literature and 3,984,063 obscene pictures.[11] Comstock also zealously pursued early feminists, such as Margaret Sanger, since his law banned the mailing of information on contraception and abortion.

After Comstock died, his work was carried on by John Sumner, who became 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 a book was already published, to recall all copies, turn them over for destruction, and melt down the plates. By that 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 Wilson.[12] Other targets of the Comstock-Sumner crusades included such literary giants as Tolstoy, Balzac, and James Joyce. Comstock even attacked George Bernard Shaw's play Mrs. Warren's Profession because it dealt with the immoral subject of prostitution. Despite--or perhaps because of--that notoriety, the play enjoyed great success, and Shaw extracted further revenge by coining the term "Comstockery" to refer to overzealous moralizing.[13]

No case better illustrated the excesses of Comstockery (or the problems with the current law of "indecency") than the campaign to censor Ulysses by James Joyce. The first obscenity prosecution of that now-classic work resulted from publication of installments in the Little Review, a literary magazine. The publishers were arrested and prosecuted in 1920 because of the book's sexual themes. They were convicted and fined $500. But the real loss was beyond the courtroom--no American publisher would even consider printing the book for the next 11 years.[14]

That embargo ended in 1932, when an upstart publishing company, Random House, decided to make Ulysses a test case. Random House contracted with Joyce to publish Ulysses in America and sued in federal court over the seizure by U.S. Customs officials of a French version of the book. The court 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 a book must be judged as a whole, 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 [that] is obscene under any fair definition of the word." But the court found that the troublesome portions of the book were "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."[15]

The case signaled the end of the Hicklin rule in America. As a result, the sensibilities of the most tender reader were no longer the measure of the obscenity of a work of literature. Instead, the sensitivities of the average reader became the yardstick. And a 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 Chatterly's Lover, written in 1928, was not published in its unexpurgated form in America until 1959.[16] Henry Miller's Tropic of Cancer, written in 1934, was not published in the United States until 1960.[17] However, such selfrestraint began to fade as the courts started to consider the First Amendment implications of obscenity convictions.

## Modern Obscenity Law

To be sure, the Supreme Court has held consistently that the First Amendment does not apply to obscene speech. But before confining 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 1957, 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."[18] 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."[19]

A major adjustment in the Supreme Court's approach to obscenity in Miller 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, quite frankly, were tired of it. They had found it necessary on 31 occasions to review purportedly obscene material and render a judgment.

Justice William 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."[20] After 16 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 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 Warren 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."[21]

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." But it 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.[22] Indeed, Justice Potter Stewart, famous for his statement that he could not intelligibly define obscenity but that "I know it when I see it," long maintained that a national standard could not be legally created or applied.[23] Based on that reasoning, the Court in Miller concluded that the question of "patent offensiveness" was a matter for juries, applying local community standards, to decide.

From the Court's perspective, that solution had the twin merits of avoiding a national standard for obscenity and 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 later clarified that the question of serious redeeming merit did not hinge on the vagaries of local literary tastes. Whether a work contains serious value must be judged by reference to the hypothetical reasonable person, not the reasonable resident of the community in question.[24] As a result, before a work may be condemned as obscene, the government must demonstrate that it lacks serious merit, and must do so using an objective test.

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 harmful to minors and, for example, prohibit the sale of such things as "girlie magazines" to those 16 and under.[25] 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."[26]

**The Paradox of Indecency**

If it is adopted, the Exon amendment will prohibit not just obscenity online but "indecency" as well. For the past 25 years or so the federal government has stepped up its efforts to define and enforce provisions of the U.S. Criminal Code that prohibit the transmission of indecent language by radio, television, or telephone.[27] The Supreme Court and courts of appeals have held that, unlike obscenity, 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. Think of it as obscenity lite.

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." Repeating those seven words, Carlin said, "will curve your spine, grow hair on your hands and maybe, even bring us, God help us, peace without honor."[28] 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 received a single complaint about the Carlin monologue. The Supreme Court characterized that complaint 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 15-year-old's age to the FCC. The show was 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 FCC until six weeks after the broadcast.[29]

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.[30] The Court held that broadcasters historically had 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."[31] The medium is "uniquely accessible to children, even those too young to read." In that context, the station's prior warnings could not protect the public because the broadcast audience "is constantly tuning in and out."[32]

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, except as it relates to the overall context of a broadcast, 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.[33]

Indeed, the decision appeared to be most confused 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."[34] 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.[35] But at the same time, the Court emphasized "the narrowness of our holding," stressing that the case "does not involve . . . a telecast of an Elizabethan comedy."[36]

Since the late 1980s the FCC has been engaged in continuous litigation to clarify the basic requirements of its indecency policy, and it has suffered a string of setbacks as the U.S. Court of Appeals for the District of Columbia Circuit has demanded adherence to First Amendment principles. Although the court has reaffirmed the commission's authority to enforce its indecency rules generally, it invalidated an attempt to define "children" as anyone under 18 and to set the "safe harbor" period (during which time racy programs may be shown) from midnight to 6 a.m.[37] While the FCC was conducting an inquiry to determine what the safe harbor period should be, Congress intervened and ordered the commission to ban broadcast indecency 24 hours a day. The agency opened yet another proceeding, requiring broadcasters to prepare and file extensive comments, only to conclude that--just as Congress had required--the record supported a total ban on broadcast indecency.[38] The court, however, was not impressed, finding that "neither the Commission's action prohibiting the broadcasting of indecent material, nor the congressional mandate that prompted it, can pass constitutional muster under the law of this circuit."[39]

Since then, Congress, the FCC, and the courts have sought to find a safe harbor period that, in the words of Goldilocks, is "just right." In 1992 Congress decreed that indecency would be banned from the airwaves between 6 a.m. and midnight.[40] Once again, the FCC issued the requisite order, and, once again, the court of appeals struck it down. It found "no evidence in the record that the government has taken the First Amendment interests of adults into account in advancing its compelling interests in the protection of children."[41] However, the court of appeals, sitting en banc, vacated the initial opinion, and the constitutional sufficiency of the safe harbor period remains a mystery.

Congress has also applied indecency law to other electronic technologies, although the comparison with broadcasting has been far from exact. In 1988 Congress amended the Communications Act to combat 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."[42] 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."[43] 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. The Court found that, unlike radio, 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.[44]

The efforts to draw distinctions 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 six decades ago. 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 that the government 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 FCC to consider in the case of indecency. In an obscenity trial, expert witnesses can attest to the value of the material at issue. But 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," but the commission's usual practice in such cases is to duck the question.

That was most forcefully demonstrated by the commission's refusal to declare that a reading from James Joyce's Ulysses 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.

So it 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, including some of Carlin's filthy words and other choice phrases.[45] Pacifica did not immediately disclose that the quoted passages were from Ulysses, although it revealed that fact in subsequent meetings with FCC staff.[46]

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 either a eunuch or a laughingstock. Neither option was particularly attractive, so 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 content prior to broadcast."[47] That being said, the letter quoted from the 1934 Ulysses opinion and stated--not very persuasively--that nothing in the proposed Bloomsday reading was similar to broadcasts recently found by the FCC to be indecent. And after refusing to provide any further guidance, it said that the licensee must 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, the licensee's good faith belief was relevant only to the severity of the punishment.[48]

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 the FCC's professed deference to "First Amendment considerations" in its 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.'"[49] Of course, that 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. That 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 miniseries 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."[50] 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."[51] 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."[52] 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."[53] And Charles Champlin of the Los Angeles Times called it "the most potent and imaginative television I saw in all of 1988."[54]

The show was aired by various public television stations between 1988 and 1990. On New Year's 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. That 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 considered 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 allegedly 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 brief images of nudity and a short scene in which a child witnesses a nongraphic sexual encounter.

Unlike the situation in the Ulysses case, in this case 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 those months in regulatory limbo as well. It hired Washington counsel and probably spent thousands of dollars in defense of the program. The station had other matters pending at the commission and 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 it or any other station with an interest in presenting groundbreaking programming. The moral of the story for station managers was, when in doubt leave it out.

As that 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."[55] Yet that is precisely the role now assigned to the five FCC commissioners with respect to indecency, even though such speech supposedly is protected by the First Amendment.

Empowering a single federal agency with such authority unquestionably raises constitutional danger signals. That 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 Dole attacked Hollywood for undermining American values, and he has jumped on the neo-Comstock bandwagon with his own legislation. Former White House director of communications Patrick Buchanan (now 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.[56] In that type of political environment the FCC can be subjected to political blackmail. It has been suggested, for example, that former FCC chairman Mark Fowler, known for his strong deregulatory philosophy, was denied reappointment because he failed to vigorously enforce the indecency rules.[57]

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, Sens. Daniel Inouye of Hawaii, Ernest Hollings of South Carolina, Jay Rockefeller of West Virginia, and Al Gore of Tennessee grilled the nominees for two hours, paying close attention to questions 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

Gore and Rockefeller voted against the nominations. Hollings, expressing his displeasure with the FCC's "safe harbor" approach to indecency regulation, stated, "Garbage is garbage, regardless of the time of day."[58]

## The Exon Amendment: Comstockery in Cyberspace

If adopted, the Exon amendment or similar legislation would apply such sentiments (and pressures) to the Internet and online services. It would impose a fine of up to $100,000 and a possible two-year jail term--or both--on anyone who permitted a "telecommunications facility" under his control to be used for the transmission of obscene or indecent communications. Oddly, the prohibition on indecency would only bar sending salacious materials "to any person under 18 years of age." Young people presumably could transmit indecent materials with impunity to those over 18.

After an initial round of criticism, Exon added a number of defenses to his amendment. The changes would insulate from conviction those entities that merely provide "navigational tools" to users, act as passive conduits for communications, or take "reasonable steps" to provide users with a means of restricting access "to the communication specified in this section." Restrictive measures that might be considered "reasonable" to block access would be prescribed by FCC regulations.

The Exon amendment has been criticized as being both too restrictive and too lax. Civil liberties activists have opposed it as censorship. At the other end of the spectrum, the anti-pornography activists have argued that the bill would weaken existing law. Meanwhile, the Justice Department has issued a letter warning that the amendment's current provisions would "create several ways for distributors and packagers of obscenity and child pornography to avoid criminal liability." Senator Exon, undaunted by the complaints, has twice revised the bill and remains committed to its passage.[59] His second set of revisions imposed broad new restrictions on noncommercial communications.

A few members of Congress showed more restraint. Sen. Patrick Leahy (D-Vt.) urged his colleagues to avoid "[h]eavy-handed efforts by the government to regulate obscenity on interactive information services [that] will only stifle the free flow of information, discourage the robust development of new information services, and make users avoid using the system." He offered a substitute bill that would direct the attorney general to study and to report to Congress on the means of controlling the flow of violent, sexually explicit, harassing, offensive, or otherwise unwanted material on interactive telecommunication systems. Among other things, the bill would direct the Justice Department to assess whether current laws are sufficient to deal with perceived problems, examine whether technology gives parents the ability to control children's access to unsuitable materials, and recommend ways to encourage the development and deployment of such technology.[60]

Senator Leahy's measured approach of having the government study the issue to determine first if a problem even exists, and how it might best be solved, is quite rational. But it lacks the demagogic appeal that drives virtually all anti-indecency crusades. Now that the House of Representatives has finished with its Contract with America checklist, the religious right has stepped forward to claim its pound of flesh as payment for its contribution to the conservative landslide. The Christian Coalition has made censoring the Internet one of the tenets of its Contract with the American Family. In the present environment, most politicians will shrink from being tarred as "pro smut," and many will actively exploit this emotional issue. Perhaps for that reason the Senate voted overwhelmingly on June 14 to reject Leahy's approach in favor of Exon's.

If the bill is adopted, it will be extremely bad news for the First Amendment. Nothing in the history of indecency enforcement suggests that the Exon amendment or any similar legislation can be made compatible with a culture of free expression, no matter how narrowly it may be tailored. 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 that body of law to cyberspace would be like unleashing a virus that could transform the essential character of the net.

Why are restrictions on the Internet 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 law to computer communications that are transmitted by telephone lines? After all, according to that line of reasoning, those communications media are licensed by the government, they bring communications into the home, and they are

accessible to children. Advocates of that position, such as Senator Exon, 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.

That view fails to take into account the different natures of the technologies involved and the information they provide, the difficulty of rational regulation, and the constitutional risks of making the attempt. 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. On the other hand, no one has complained about readings of Lady Chatterly's Lover over the telephone by late-night operators. The indecency issue with telephones has been pretty much confined to the heavy breathing of dial-a-porn. Phone sex may be a brisk business, but a narrow range of informational content is involved.

Those differences highlight the First Amendment risks of indecency regulation for online services. The Supreme Court emphasized that any such rules must be sufficiently narrow to achieve their purpose without excessively limiting speech. With dial-a-porn, the audio equivalent of girlie magazines, the courts found--after 10 years of litigation over successive attempts to write rules--that it was sufficient to restrict minors' access to the service. But with broadcasting the task has been far more complex. 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. The FCC's experience with Ulysses and The Singing Detective hardly inspires confidence that indecency rules can be implemented so as not to restrict protected speech.

That problem will be magnified, not only because of the vast array of information available online, but by the multiple functions made possible through interactivity. By mid-1995 there were more than 50,000 to 70,000 computer bulletin board systems operating in the United States, some free and others by subscription. Usenet, an international collection of bulletin board system newsgroups accessible by Internet, covers almost any imaginable topic, from the Hubble telescope to the wit and wisdom of Jerry Lewis.[61] The growth of bulletin boards was accompanied by the emergence of online services such as America Online, Prodigy, CompuServe, Delphi, GEnie, and Apple Computer's e-World. Those services, which now have approximately 7 million subscribers, can variously be characterized as providing a bookstore, a magazine stand, a news wire service, an archive, a message center, a mail carrier, a gathering place, and a publishing house. The available content and functionality of those services simply cannot be compared to either dial-a-porn or broadcast programming. That not only complicates the problem of evaluating "merit"--to put it mildly-- it makes even reviewing the myriad forms of information nearly impossible.

The nature of online communication also makes intrusive regulations far less necessary. Computers and modems offer users (read parents) 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. In addition, 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. For example, 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 material.[62] Another new software program, SurfWatch, allows parents and educators to block unwanted Internet material.[63] Microsoft and two Internet software companies, Progressive Networks and Netscape Communications, announced in June that they are working on technology to help parents control what their children can access on the Internet. Rob Glaser, chief executive of Progressive Networks, said he envisioned perhaps several dozen tunable filters developed by "very credible" organizations that parents would trust. He 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.[64]

It has been suggested that "online systems give us far more genuinely free speech and free press than ever before in human history."[65] But that will not be true if a measure like the Exon amendment is adopted. The harsh penalties of the law, 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 make access more difficult, which affects all users, not just the young. The

defenses against prosecution that were added to the Exon amendment are effective only if there is a working definition of indecency. It is of little utility for service providers to know that they are protected if they restricted access "to communications described in this section" if no one knows for certain what that means. Such a defense might be effective in the world of dial-a-porn, where subject matter is limited. It is not at all helpful where the subject matter offered by providers is wide open but must be provided in a legal environment in which literary classics may be indecent.

In early June the U.S. Court of Appeals for the District of Columbia upheld a section of the 1992 Cable Television Act that permitted cable operators to refuse to transmit indecent programming on leased or public access channels.[66] In one important respect the decision is a First Amendment victory. Federal cable television law had taken channel capacity from cable operators and deprived them of the ability to make editorial judgments about programming. The Cable Act restored at least a measure of editorial control. But the decision is double-edged. It also upheld a requirement that operators who choose to carry indecent programming on access channels adopt measures to block children's access. Identifying such programming would not be a problem, according to the court. It noted that previous decisions had upheld the definition of indecency and that the cable operators would have the same FCC guidance as broadcasters. What a comfort. Judge Patricia Wald, writing in dissent, emphasized that the definition of indecency glossed over by the majority put serious literature at risk. She wrote, "It is these kinds of portentous decisions about art, politics, science and 'indecency' which are implicated in this case."[67] The same legal standard could be applied to the Net.

How will the Exon bill affect a service 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 that remarkable service turns up authors, such as D. H. Lawrence, who 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 in some way limit access. Even if such a thing can 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 a form . . . people can easily read, use, quote, and search."[68]

Some people doubt 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 the 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.[69] People for the American Way documented 463 challenges to books during the same school year.[70] The Exon amendment would simply move the battleground online.

In addition to that chilling scenario, the proposed legislation contains some genuine loopiness. The ability of persons under 18 to send or make available indecent messages to those over 18 could lead to bizarre results. In May 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.[71] Under the proposed law, the student would have a valid defense against 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 favorte teacher. But if he sent the same message to a classmate, he could wind up in the slammer for two years.

Finally, the proposed law would impose a single national standard on digital transmissions, with the FCC as the arbiter of decency. Assuming that could be accomplished, given the Internet's global reach, it would replicate and expand the problems experienced by broadcasters. That 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.[72]

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.[73] The case is on appeal, and unless it is reversed, Memphis, Tennessee, may define the community standard for all of cyberspace.

As important as it is to correct that precedent, the Exon bill is an unlikely solution. Federal obscenity laws are enforced by local juries using local standards, just as the Supreme Court decreed in Miller and its progeny. It is difficult to imagine Congress's consciously divesting local communities of that prerogative. A more likely--and more dangerous--scenario is that federal legislation restricting obscenity and indecency would result in the worst of both worlds: local standards governing obscenity and national standards for indecency.

There is often much complacency surrounding the net, probably because of its anarchist origins and spirit. John Gilmore has said that the Internet treats censorship as system damage and routes around it. Perhaps that is so. But censorship nevertheless causes damage, and its weight is typically borne by the individuals who are prosecuted or wind up in endless FCC proceedings. There is a societal loss as well, as everyone else becomes just a bit more cautious about what they write, say, or think. As Esther Dyson has said, "Cyberspace still exists at the pleasure of the real world." Never has that been more true.

**Notes**

[1] Edward de Grazia, Girls Lean Back Everywhere (New York:Random House, 1992), p. 4.

[2] Post Office Act, chap. 89, sec. 16, 13 Stat. 504, 507.

[3] 140 Congressional Record S9746 (July 26, 1994).

[4] Quoted in Peter H. Lewis, "Cybersex Stays Hot, Despite a Plan for Cooling it Off," New York Times, March 26, 1995.

[5] De Grazia, p. 4.

[6] Law to Suppress Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, chap. 258, sec. 2, 17 Stat. 598, 599 (1873). The law was further amended three years later to make its prohibitions unambiguous. Amendment to the Comstock Act, chap. 186, sec. 1, 19 Stat. 90 (1876).

[7] Regina v. Hicklin, 3 Q.B. 360, 371 (1868).

[8] De Grazia, p. 12.

[9] Margaret A. Blanchard, "The American Urge to Censor: Freedom of Expression versus the Desire to Sanitize Society--From Anthony Comstock to 2 Live Crew," William and Mary Law Review 33 (1992): 741.

[10] De Grazia, p. 4.

[11] Blanchard, p. 758; see also de Grazia, p. 5; and C. G. Trumbull, Anthony Comstock, Fighter (1913), p. 239.

[12] De Grazia, pp. 72-73, 710.

[13] Blanchard, p. 758.

[14] De Grazia, p. 17.

[15] United States v. One Book Named Ulysses by James Joyce, 72 F.2d 705, 707-8 (2d Cir. 1934).

[16] De Grazia, p. 94. See also Grove Press, Inc. v. Christenberry, 276 F.2d 433 (2d Cir. 1960).

[17] De Grazia, pp. 55, 370.

[18] Roth v. United States, 354 U.S. 476, 484 (1957).

[19] Miller v. California, 413 U.S. 15, 24 (1973).

[20] Paris Adult Theatre I v. Slayton, 413 U.S. 49, 92-93 (1973) (Brennan, J., dissenting).

[21] Miller, pp. 20, 30-33.

[22] Ibid., pp. 32-33, 32n. 13.

[23] Jacobellis v. Ohio, 378 U.S. 184, 197, 200 (1964) (Stewart, J., concurring).

[24] Pope v. Illinois, 481 U.S. 497 (1987).

[25] Ginsberg v. New York, 390 U.S. 629 (1968).

[26] Butler v. Michigan, 352 U.S. 380, 383-84 (1957). See also Erznoznik v. Jacksonville, 422 U.S. 205 (1975); and Interstate Circuit v. Dallas, 390 U.S. 676 (1968).

[27] 18 U.S.C. sec. 1464; and 47 U.S.C. sec. 223.

[28] FCC v. Pacifica Foundation, 438 U.S. 726, 751 (1978) (appendix to opinion of the Court).

[29] Lucas A. Powe Jr., American Broadcasting and the First Amendment (Berkeley: University of California Press, 1987), p. 186.

[30] Pacifica, p. 742.

[31] Ibid., p. 748.

[32] Ibid., pp. 748-49.

[33] Ibid., p. 732.

[34] Ibid., p. 732n. 5.

[35] Ibid., p. 741n. 16.

[36] Ibid., p. 750.

[37] Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988).

[38] Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes, Public Law no. 100-459, sec. 608, 102 Stat. 2186, 2228 (1988); and Enforcement of Prohibitions against Broadcast Indecency, in 18 U.S.C. sec. 1464, 5 FCC Rcd. 5297 (1990).

[39] Action for Children's Television v. FCC, 932 F.2d 1504, 1509 (D.C. Cir. 1991).

[40] Public Telecommunications Act of 1992, Public Law no. 102-356, 106 Stat. 949 (1992); see also 47 U.S.C.A. sec. 303 note (1993). For broadcasters who ended their broadcast dayat or before midnight, the prohibition extended from 6 a.m. to 10 p.m.

[41] Action for Children's Television v. FCC, 11 F.3d 170, 181 (D.C. Cir. 1993), vacated en banc, 15 F.3d 186 (D.C.

Cir. 1994).

[42] Sable Communications of California v. FCC, 492 U.S. 115, 126 (1989).

[43] Ibid. (citations omitted).

[44] Ibid., p. 127. Courts have since upheld FCC rules that limit children's access to dial-a-porn by requiring, interalia, that customers request such service in writing before a common carrier may provide access. Information Providers' Coalition for Defense of the First Amendment v. FCC, 928 F.2d 866 (9th Cir. 1991).

[45] Petition for Declaratory Ruling of Pacifica Foundation, FCC reference no. C5-574, filed May 22, 1987.

[46] For a full discussion of this case written by counsel for Pacifica, see John Crigler and William J. Byrnes, "De cency Redux: The Curious History of the New FCC Broadcast Indecency Policy," Catholic University Law Review 38 (1989): 329.

[47] Letter from James C. McKinney, chief, FCC Mass Media Bureau to counsel for Pacifica, June 5, 1987.

[48] Infinity Broadcasting Corp. of Pennsylvania, Reconsideration Order, 3 FCC Rcd. 930, 933 (1987).

[49] Ibid., p. 937n. 45.

[50] Quoted in Stephen Farber, "They Watch What We Watch," New York Times, May 7, 1989.

[51] Marvin Kitman, "The Best Unwatched Show Ever," Newsday, January 21, 1988, p. 15; see also Marvin Kitman, "Riding Potter's Express," Newsday, February 17, 1989. [52] Vincent Canby, "Is the Year's Best Film on TV?" New York Times, July 10, 1988.

[53] John J. O'Connor, "TV View," New York Times, December 25, 1988.

[54] Charles Champlin, "Critic at Large," Los Angeles Times, February 18, 1989.

[55] Paris Adult Theatre, pp. 92-93 (Brennan, J., dissent ing).

[56] Patrick Buchanan, "A Conservative Makes a Final Plea," Newsweek, March 30, 1987, p. 23, 26.

[57] Crigler and Byrnes.

[58] Quoted in "Congress Asserts Its Domination over FCC," Broadcasting, August 7, 1989, p. 27.

[59] Benjamin Wittes, "Internet Obscenity Bill Loses Support," Legal Times, May 22, 1995, p. 2.

[60] Statement of Sen. Patrick Leahy, introducing S. 714, the Child Protection, User Empowerment, and Free Expression in Interactive Media Study Bill, April 7, 1995.

[61] See generally Harley Hahn and Rick Stout, The Internet Yellow Pages (Berkeley, Calif.: Osborne McGraw-Hill, 1994).

[62] Lewis.

[63] "SurfWatch Blocks Internet Pornography, Breakthrough Product Ships Today," news release, SurfWatch Software, Inc., Los Altos, Calif., May 15, 1995.

[64] Elizabeth Corcoran, "3 Firms Developing Anti-Smut Software," Washington Post, June 13, 1995, p. D1.

[65] Lance Rose, Netlaw (Berkeley, Calif.: Osborne McGraw-Hill, 1995), p. 4.

[66] Alliance for Community Media v. FCC, ___F.4d___, 1995 WL 331052 (D.C. Cir. 1995) (en banc).

[67] Ibid. (Wald, J., dissenting).

[68] http://jg.cso.uiuc.edu/pg_home.html.

[69] American Library Association Office of Intellectual Freedom, 1994 Banned Books Resource Guide (Chicago: Julin, 1994).

[70] People for the American Way, Attacks on the Freedom to Learn (Washington: PAW, 1994).

[71] Melanie J. Mavrides, "Youth's Parody on the Internet Brings Punishment and a Free Speech Fight," New York Times, May 28, 1995.

[72] Rose, pp. 254-55.

[73] United States v. Thomas, CR-94-20019-G (W.D. Tenn. Dec. 13, 1994) (conviction and forfeiture order), appeals docketed, no. 94-6648 and no. 94-6649 (6th Cir. Dec. 21, 1994).