Burning the Village to Roast the Pig: Congressional Attempt to Regulate "Indecency" on the Internet Rejected in ACLU v. Reno

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BURNING THE VILLAGE TO ROAST THE PIG: CONGRESSIONAL ATTEMPT TO REGULATE "INDECENCY" ON THE INTERNET REJECTED IN ACLU V. RENO

I. INTRODUCTION

This Congress is poised on the brink of not merely infringing but willfully and deliberately violating the basic intent of the First Amendment, which is that public, noncommercial speech about our lives and our world can and will not be screened, examined and even prosecuted. The greatness of the American system is founded on the belief, so severely being tested yet again, that any speech which does not cause direct, provable harm (such as direct incitement to riot) cannot be restricted. Who among us thinks they know so well what is best for our people, our nation, our world that they would restrict the ability of others to speak and be heard? The zealots among us will. They are calling us, reluctant as we are, to debate and decide whether our ability to communicate with each other is not a fundamental right of our existence.¹

Can Congress regulate communications over the Internet that might be deemed "indecent" or "patently offensive" for minors? On June 11, 1996 the United States District Court for the Eastern District of Pennsylvania answered this question with a resounding no.² Holding that certain provisions of the 1996 Communications Decency Act ("CDA") are unconstitutional, the court enjoined "Attorney General Janet Reno, and all acting under her direction


and control ... from enforcing, prosecuting, investigating or reviewing any matter premised upon ..." the challenged provisions of the CDA.³

Besides the obvious importance of this decision for holding that key provisions of the CDA are unconstitutional, other aspects of this opinion are significant. The court’s detailed analysis of the creation and nature of the Internet, which resulted from extensive evidentiary hearings, will likely be frequently cited to as the authoritative definition of this new and evolving method of communication.⁴ This fact finding was instrumental in developing the court’s recognition of the Internet as a unique medium worthy of the highest level of First Amendment protection.

The Government appealed to the Supreme Court for review of the ACLU v. Reno decision, and the Court has granted certiorari.⁵ When this case is reviewed by the Court, the Eastern District of Pennsylvania’s decision should be affirmed because the CDA is an unconstitutional infringement on free speech. While the Government clearly has an interest in protecting children from some online material, the CDA is unable to pass constitutional muster because it is overly broad, vague and not narrowly tailored. Further, the negative impacts from restricting indecent speech are too severe to ever be outweighed by countervailing Government interests under a constitutional balancing analysis.

³ Id. at 883. A separate challenge to the CDA, filed in the Southern District of New York, also resulted in a preliminary injunction on July 29, 1996. See Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996) (holding that § 223(d) is an overbroad ban on constitutionally protected communications among adults but declining to hold that the provision is void for vagueness).


⁵ Direct appeal to the Supreme Court is available through § 561(b) of the CDA, which provides in part: “Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court ... holding this title or an amendment made by this title, or any provision thereof, unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court.” Communications Decency Act, Pub. L. No. 104-104, § 561(b), 110 Stat. 133, 143 (1996).
A. FACTUAL HISTORY

The Communications Decency Act\(^6\) was signed into law by President Clinton on February 8, 1996. On the day the CDA was signed, the American Civil Liberties Union ("ACLU") and the American Library Association, joined by numerous individuals and organizations associated with the computer and communications industries, filed suit against Attorney General Janet Reno and the United States Department of Justice (collectively "the Government") to enjoin enforcement of certain provisions of the CDA.\(^7\) Judge Ronald L. Buckwalter of the Eastern District of Pennsylvania granted the ACLU a limited temporary restraining order on February 15, 1996.\(^8\)

On the day the temporary restraining order was issued, Chief Judge Dolores K. Sloviter of the United States Court of Appeals for the Third Circuit convened a three-judge panel pursuant to section 561(a) of the CDA\(^9\) at the request of the parties and the district court.\(^10\) The panel consisted of Judge Sloviter, Judge Buckwalter and Judge Stewart Dalzell of the Eastern District of Pennsylvania.\(^11\)

The parties subsequently entered into a stipulation with the court that the Government would not initiate any prosecutions for alleged violations of the challenged provisions until the ACLU's motion for preliminary injunction was decided upon.\(^12\) This

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\(^6\) 47 U.S.C.A. § 223 (West Supp. 1996). The CDA will eventually be codified at 47 U.S.C. §§ 223(a) through (h). For purposes of this Recent Development, the CDA provisions will be referred to as they will ultimately be codified in the United States Code.


\(^8\) Id.


\(^10\) ACLU, 929 F. Supp. at 827.

\(^11\) Id.

\(^12\) Id.
commitment was qualified to the extent that the Government retained full authority to investigate or prosecute any violation of the challenged provisions occurring at any time after the enactment of these provisions, including the time period to which the parties' stipulation applied, in the event that the preliminary injunction was denied.\textsuperscript{13}

Focusing their challenge on 47 U.S.C. section 223(a) (the "indecency provision")\textsuperscript{14} and 47 U.S.C. section 223(d) (the "patently offensive provision"),\textsuperscript{15} the ACLU contended that these provisions infringed upon rights protected by the First Amendment and the Due Process Clause of the Fifth Amendment. The ACLU based their facial challenges to the disputed provisions of the CDA on the grounds of vagueness and overbreadth.\textsuperscript{16} The ACLU made it clear

\textsuperscript{13} Id.
\textsuperscript{14} The indecency provision provides in part:

\begin{verbatim}
Whoever
(1) in interstate or foreign communications . . .
   (B) by means of a telecommunications device knowingly
      (i) makes, creates, or solicits, and
      (ii) initiates the transmission of, any comment, request,
           suggestion, proposal, image, or other communication which is
           obscene or indecent, knowing that the recipient of the commu-
           nication is under 18 years of age . . . ; or
   (2) knowingly permits any telecommunications facility under his control
       to be used for any [such] activity . . . shall be fined . . . or imprisoned not
       more than two years, or both.
\end{verbatim}


\textsuperscript{15} The patently offensive provision provides in part:

\begin{verbatim}
Whoever
(1) in interstate or foreign communications knowingly
   (A) uses an interactive computer service to send to a specific
       person or persons under 18 years of age, or
   (B) uses any interactive computer service to display in a
       manner available to a person under 18 years of age, any
       comment, request, suggestion, proposal, image, or other
       communication that, in context, depicts or describes, in terms
       patently offensive as measured by contemporary community
       standards, sexual or excretory activities or organs, regardless
       of whether the user of such service placed the call or initiated
       the communication; or
   (2) knowingly permits any telecommunications facility under such
       person's control to be used for [such] an activity . . . shall be fined . . . or
       imprisoned not more than two years, or both.
\end{verbatim}


that they did not challenge the CDA to the extent that it covers obscenity or child pornography, which federal statutes already proscribed prior to the adoption of the CDA.\textsuperscript{17} Rather, the ACLU based their suit on their belief that the CDA's attempt to regulate "indecency" reached much further than obscenity or child pornography and infringed upon protected constitutional rights. In addition, the ACLU challenged one other provision of the CDA, but that provision did not become an issue in this case.\textsuperscript{18}

Conversely, the Government argued that the CDA passed constitutional muster because the Government has a compelling interest in protecting minors from indecent material on the Internet.\textsuperscript{19} Further, the Government maintained that the challenged provisions were narrowly tailored, and in support of its argument the Government cited the defenses available in the CDA's "safe harbor provision" in 47 U.S.C. section 223(e).\textsuperscript{20}


\textsuperscript{18} ACLU, 929 F. Supp. at 829. The ACLU also challenged a provision of the CDA criminalizing Internet transmissions communicating information about abortions or abortifacient drugs and devices. \textit{Id.} The Department of Justice indicated that such provisions are unconstitutional and will not be enforced, and that President Clinton and Attorney General Reno have ensured that no one will be prosecuted under this provision. \textit{Id.} at 829 n.7. The ACLU subsequently stated in a post-hearing brief that in view of these statements they would not seek a preliminary injunction against the enforcement of this provision. \textit{Id.} at 829.

\textsuperscript{19} \textit{Id.} at 852.

\textsuperscript{20} \textit{Id.} at 855. The safe harbor provision provides in part:

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

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

(5) It is a defense to a prosecution . . . that a person—

(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent
B. THE COURT'S ANALYSIS

Granting the requested preliminary injunction, the court held that the ACLU had established a "reasonable probability of eventual success" on the merits by demonstrating that 47 U.S.C. sections 223(a)(1)(B) and (2) are facially unconstitutional to the extent that they reach indecency and that 47 U.S.C. sections 223(d)(1) and (2) are facially unconstitutional. Additionally, the court concluded that the ACLU had demonstrated that they would suffer irreparable injury if injunctive relief was not granted, that no party had any interest in the enforcement of an unconstitutional law, and that the public interest would therefore be served by granting the preliminary injunction. Each member of the three-judge panel wrote a separate opinion, and they disagreed on some key points in their analyses.

1. Judge Sloviter. Holding that the challenged provisions are too broad and vague and therefore unconstitutional, Judge Sloviter began her analysis by setting forth the proper standard for issuance of a preliminary injunction. For a preliminary injunction, a plaintiff must show a likelihood of success on the merits and that they will suffer irreparable harm if denied injunctive relief. Additionally, the court must decide whether the granting of an injunction is in the public interest. Sloviter found that there was a threat of irreparable harm and stated that "[s]ubjecting speakers to criminal penalties for speech that is constitutionally protected in itself raises the spect[er] of irreparable harm." Further, granting injunctive relief would be in the public interest.

access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or (B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.


22 Id.
23 Id. at 851.
24 Id.
25 Id.
as the "public interest weighs in favor of having access to a free flow of constitutionally protected speech."\(^{26}\) The only remaining requirement, therefore, was that the ACLU establish a likelihood of success on the merits.

Beginning her analysis of the ACLU’s potential for success in the litigation, Sloviter recognized that the CDA is a content-based restriction on speech.\(^{27}\) Because of this, she stated that the statute should be subject to strict scrutiny, and “will only be upheld if it is justified by a compelling government[al] interest and if it is narrowly tailored to effectuate that interest.”\(^{28}\) The Government was given the burden of establishing that it had a compelling interest and that the statute was narrowly tailored.\(^{29}\)

Attempting to establish a compelling interest, the Government asserted that the goal of protecting minors from access to indecent materials on the Internet justified the challenged CDA provisions.\(^{30}\) In support of its argument, the Government cited two Supreme Court decisions and an opinion from the Third Circuit.\(^{31}\) Sloviter did not find these cases persuasive since they dealt with pornographic material, while some of the information subject to the indecency and patently offensive provisions may include literary, artistic or educational material.\(^{32}\) While Sloviter was not certain that the Government had established a compelling interest justifying regulation of indecent speech on the Internet, she did acknowledge that there is a substantial governmental interest in shielding minors from some Internet material.\(^{33}\) Declining to decide whether the Government had demonstrated a compelling interest, Sloviter instead based her decision on other grounds.

In the next section of her opinion, Sloviter analyzed the reach of

\(^{26}\) ACLU, 929 F. Supp. at 851.

\(^{27}\) Id.

\(^{28}\) Id. (citing Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989)).

\(^{29}\) ACLU, 929 F. Supp. at 851.

\(^{30}\) Id. at 852.


\(^{32}\) Id.

\(^{33}\) Id.
the challenged provisions. "Whatever the strength of the interest the government has demonstrated ... if the means it has chosen sweeps more broadly than necessary and thereby chills the expression of adults, it has overstepped onto rights protected by the First Amendment." Referring to the court's findings of fact, Sloviter noted that it may be impossible for many individuals and organizations to comply with the mandates of the CDA without seriously hampering their dissemination of material on the Internet. Most content providers cannot determine the age and identity of each individual user who accesses their material. Since it is not feasible for content providers to screen for age, they would have to restrict their dissemination of material to that which is appropriate for children in order to comply with the CDA.

Sloviter recognized that the reach of the challenged provisions is therefore too broad as it would restrict adults from material, indecent or not, that they are constitutionally entitled to access. Regardless of any compelling reasons Congress had for enacting the statute, Sloviter decided that the reach of the challenged provisions swept more broadly than necessary and therefore infringed upon First Amendment rights. The scope of the CDA is not confined to obscene material or material that has a prurient appeal. Rather, Congress reached too far by attempting to legislate "indecent" material.

Sloviter next addressed the Government's position that the challenged provisions are not overly broad because they are narrowly tailored. The Government relied on the statutory defenses enumerated in 47 U.S.C. section 223(e) for this argument, but Sloviter was not persuaded for several reasons. First, Sloviter found it difficult to view the statute as narrowly tailored in light of the criminal sanctions potentially imposed on an Internet

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54 ACLU, 929 F. Supp. at 854.
55 Id.
56 Id.
57 Id.
58 Id.
59 ACLU, 929 F. Supp. at 855.
60 Id.
61 See supra note 20 and accompanying text.
62 ACLU, 929 F. Supp. at 855-56.
content provider. Further, Sloviter noted that the credit card and adult verification services referred to as "defenses" in section 223(e)(5)(B) are not "technologically or economically feasible for most providers." For similar reasons, Sloviter found that the "good faith" defense available under section 223(e)(5)(A) failed to restrict the scope of the statute as no technology currently exists for providers to restrict or prevent access by minors to indecent material on the Internet. Because of the possibility of criminal sanctions and the failure of section 223(e) adequately to restrict the scope of the CDA, Sloviter concluded that the challenged provisions were not narrowly tailored.

In conjunction with her analysis of whether the CDA is narrowly tailored, Sloviter addressed the vagueness issue since "the viability of the defenses is intricately tied to the clarity of the CDA's scope." Sloviter concluded that the statutory defenses in section 223(e) do not provide sufficient protection from the unconstitutional reach of the statute because "indecent" and "patently offensive" are inherently vague terms. "Indecent" and "patently offensive" material could arguably include award winning plays, films, books, artwork and information on prison rape or AIDS. These terms are especially vague because of the Government's failure to establish by whose community standards the material is to be judged.

Completing her analysis of the issues raised in this case, Sloviter concluded that the ACLU would likely prevail on the merits of their

43 Id.
44 See supra note 20 and accompanying text.
45 ACLU, 929 F. Supp. at 856.
46 See supra note 20 and accompanying text.
47 ACLU, 929 F. Supp. at 856.
48 Id.
49 Id.
50 Id. at 852-53. The Broadway play Angels in America, which broaches such topics as homosexuality and AIDS, won two Tony awards and a Pulitzer prize, yet it would arguably fall within the scope of the CDA. Id. at 853. Photographs from National Geographic magazine and a statue from India of couples copulating are other non-obscene materials that could be considered indecent. Id. Additionally, material available on the Internet regarding prison rape and AIDS, which may be critical to imprisoned minors, could possibly be deemed indecent and banned from the Internet. Id.
51 Id. at 856. While the material presented in Angels in America might be acceptable according to New York City standards, it might be far less acceptable in the smaller communities of the United States. Id. at 852-53.
argument that the CDA's indecency and patently offensive provisions are facially invalid under both the First and Fifth Amendments. 52

2. Judge Buckwalter. Judge Buckwalter agreed with Judge Sloviter that the reach of the challenged provisions is too broad, that the terms “indecent” and “patently offensive” are vague, and that the CDA is not narrowly tailored since current technology is inadequate to provide a safe harbor for most speakers on the Internet. 53 While he concluded that the challenged provisions are unconstitutional, Buckwalter expressly restricted the scope of his opinion. Stating that it is premature to conclude that other attempts to regulate protected speech on the Internet would fail a constitutional challenge, Buckwalter specifically refused to hold that “any and all statutory regulation of protected speech on the Internet could not survive constitutional scrutiny.” 54 Buckwalter thus left the door open to the possibility of future government regulation that might be able to withstand a constitutional challenge.

Unlike Sloviter, whose opinion focused on the overbreadth of the challenged provisions, Buckwalter chose to center his opinion around the vagueness issue. Buckwalter began his vagueness analysis by stating: “[i]f the Government . . . intrude[s] upon the sacred ground of the First Amendment and tell[s] its citizens that their exercise of protected speech could land them in jail, the law . . . must clearly define the prohibited speech not only for the potential offender but also for the potential enforcer.” 55 The Government’s position was that while “indecent” was not expressly defined in the CDA, it was intended to have the same meaning as “patently offensive,” which was defined in the CDA. 56 Buckwalter did not agree that this conclusion was supported by a reading of the CDA. He stated “[i]f ‘indecent’ and ‘patently offensive’ were intended to have the same meaning, surely section (a) could have

\[52\] ACLU, 929 F. Supp. at 857.
\[53\] Id. at 858.
\[54\] Id. at 859.
\[55\] Id. at 860.
\[56\] Id. Congress enacted § 223(a) “without any language confining ‘indecent’ to descriptions or depictions of ‘sexual or excretory activities or organs,’ language it included in the reference to ‘patently offensive’ in [section] 223(d)(1)(B).” Id. at 860.
mirrored section (d)'s language. Indecent in this statute is an undefined word which, standing alone, offers no guidelines whatsoever as to its parameters.\textsuperscript{57} Buckwalter went on to state that even if one conceded that the terms were synonymous, this would provide no better guidance to a speaker on the Internet trying to comply with the mandates of the CDA.\textsuperscript{58}

Buckwalter conceded that several courts have upheld the use of the term “indecent” in statutes regulating various media.\textsuperscript{59} In these cases, however, the courts have defined “indecent” by reference to contemporary community standards for that particular medium.\textsuperscript{60} In the CDA, there was no attempt to set forth what community standard would be applied to cyberspace.\textsuperscript{61} The Government tried to justify the lack of a specified community standard for indecency by claiming that that CDA is intended to establish a uniform national standard for all communities.\textsuperscript{62} Buckwalter responded to this by stating that the nation’s communities are too numerous and varied for a definition of “indecency” or “patently offensive” to be established in a single standard for all communities.\textsuperscript{63} One is therefore ultimately unable to discern the relevant community standard to follow in order to comply with the CDA, thus causing individuals to be more cautious than if the applicable community standard were clearly defined.\textsuperscript{64} Buckwalter concluded that “[t]he chilling effect on the Internet users’ exercise of free speech is obvious.”\textsuperscript{65}

Finally, Buckwalter addressed the Government's argument that pornographic materials would be the target of prosecution under the CDA rather than works with serious value.\textsuperscript{66} Buckwalter did not share the Government’s faith in prosecutors to prosecute only that material that would be considered indecent or patently offensive in all communities. He stated, “[t]he hazard of being

\textsuperscript{57} ACLU, 929 F. Supp. at 861.
\textsuperscript{58} Id. at 862.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 862-63.
\textsuperscript{62} Id. at 862-63.
\textsuperscript{63} ACLU, 929 F. Supp. at 863.
\textsuperscript{64} Id. (quoting Miller v. California, 413 U.S. 15, 30 (1973)).
\textsuperscript{65} ACLU, 929 F. Supp. at 863.
\textsuperscript{66} Id.
prosecuted...nevertheless remains.... Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law. 76

3. Judge Dalzell. Judge Dalzell wrote the third and final opinion for the panel. While Dalzell did not believe that the challenged provisions were unconstitutionally vague, he did agree that the overbreadth of the CDA renders it unconstitutional. 78 He issued a much more expansive opinion, however, by holding that "any regulation of protected speech on this new medium" would be unconstitutional. 79

With regard to the issue of vagueness, Dalzell reviewed the CDA's legislative history and the case law that Congress considered before enacting the CDA. 70 Dalzell noted that the legislative history of the CDA indicates that Congress intended "that the term indecency...ha[ve] the same meaning as established in FCC v. Pacifica Foundation." 71 "[S]ince the definition of indecency arose from the Supreme Court itself in Pacifica, we may fairly imply that the Court did not believe its own interpretation to invite 'arbitrary and discriminatory enforcement' or 'abut upon sensitive areas of basic First Amendment freedoms.' "72 In light of this jurisprudence and legislative history, Dalzell concluded that the ACLU's challenge on vagueness grounds would not likely succeed on the merits and therefore was not deserving of injunctive relief. 73

Dalzell's analysis of the reach of the challenged provisions led him to a much broader holding than Judge Buckwalter. While Buckwalter left open the possibility of future legislation regulating indecency on the Internet, Dalzell decided that any regulation of

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67 Id. at 864 (quoting Baggett v. Bullitt, 377 U.S. 360, 373-74 (1964)).
68 ACLU, 929 F. Supp. at 867.
69 Id.
70 Id. at 869 n.7.
71 Id. at 869. See FCC v. Pacifica Found., 438 U.S. 726 (1978). The FCC codified the meaning of "indecent programming" relying on the Supreme Court's decision in Pacifica, as "programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." ACLU, 929 F. Supp. at 868 (quoting Alliance for Community Media v. FCC, 56 F.3d 105, 112 (D.C. Cir. 1995), cert. granted, 116 S. Ct. 471 (1996) (citing what is now 47 C.F.R. § 76.701(g))).
72 ACLU, 929 F. Supp. at 869 (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)).
73 ACLU, 929 F. Supp. at 869.
protected speech in cyberspace would be an unconstitutional violation of the First Amendment.

Dalzell began by recognizing that the Internet is an entirely new medium of mass communication. He further noted that "the analysis of a particular medium of mass communication must focus on the underlying technology that brings the information to the user." Although the Internet developed without any content-based considerations, Dalzell recognized that "[a]fter the CDA . . . the content of a user's speech will determine the extent of participation in the new medium." Dalzell concluded that "[i]f a speaker's content is even arguably indecent in some communities" the speaker will either censor her speech so that it is acceptable in all communities or "decline to enter the medium at all." A speaker would be forced into such a decision because, unlike with other forms of media, there is no technologically feasible way for the speaker to limit the dissemination of her speech over the Internet.

It was thus clear to Dalzell that the CDA would "without doubt, undermine the substantive, speech-enhancing benefits that have flowed from the Internet." The CDA would "diminish the worldwide dialogue that is the strength and signal achievement of the medium." Dalzell's examination of the special characteristics of communication over the Internet led him to conclude that the Internet is worthy of the broadest possible protection from government-imposed, content-based regulation. While he recognized that the government has a compelling interest in shielding minors from pornographic material, Dalzell cautioned that regulations that restrict certain views from society for the benefit of children risk ruining the very society that the children will eventually inherit.

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74 Id. at 872.
75 Id. at 876.
76 Id. at 877.
77 Id. at 877-78.
78 ACLU, 929 F. Supp. at 878.
79 Id.
80 Id. at 879.
81 Id. at 881.
82 Id. at 882.
III. APPLICABLE STANDARD OF REVIEW

One of the most significant aspects of *ACLU v. Reno* is the court's conclusion that the CDA's attempt to regulate indecent speech on the Internet must be subject to a strict scrutiny standard of review. "Nearly fifty years ago, Justice Jackson recognized that ['t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each . . . is a law unto itself." 83 This essentially means that different forms of communication may receive different levels of First Amendment protection. The level of First Amendment protection afforded to a particular type of speech will determine how closely courts will scrutinize attempts to regulate that speech.

A short history of free speech regulation provides insight as to the proper level of scrutiny that should be applied to regulation of indecent speech on the Internet. In *FCC v. Pacifica Foundation*, 84 the Supreme Court held that a broadcast that is indecent, but not obscene, could be regulated by the government. 85 The broadcast at issue was a radio broadcast of George Carlin's "Filthy Words" monologue. 86 The Court stated that Carlin's "filthy words" were of "such slight social value . . . that any benefit . . . derived from them is clearly outweighed by the societal interest in order and morality." 87 The Court distinguished print media, where any attempt to regulate indecent speech would be unconstitutional, from broadcasting because the broadcast media has "a uniquely pervasive presence in the lives of all Americans" and "is uniquely accessible to children, even those too young to read." 88 The key to the *Pacifica* decision was the Court's characterization of a radio broadcast as a type of "intruder" that not only confronts citizens in public but also in the privacy of their own homes. 89 The Court

85 Id. at 727.
86 Id. at 729-30.
87 Id. at 746 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).
88 *Pacifica*, 438 U.S. at 748-49.
89 Id. at 748.
concluded that an individual's right to be left alone in the privacy of her own home clearly outweighed an "intruder's" First Amendment rights.° Employing a less than strict scrutiny standard of review, the Court upheld the FCC's regulation of broadcast indecency.

The reach of the Pacifica opinion has been eroded by subsequent opinions including Bolger v. Youngs Drug Products. In Bolger, the Supreme Court held that a federal law prohibiting the unsolicited mailing of contraceptive advertisements was an unconstitutional restriction on commercial speech. Declining to extend the rationale of Pacifica to Bolger, the Court reasoned that the receipt of mail is less of an intrusion into the home than broadcasting. Parents generally exercise substantial control over the disposition of mail delivered to their home. Conversely, broadcasting is readily accessible to children, and because listeners are constantly tuning in and out, prior warnings cannot completely shield the audience from undesired program content. A measure of control over the mail that comes into the household affords parents a better opportunity to shield their children from material that they do not want them to view. As the Court stated, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."

In Sable Communications, Inc. v. FCC, the Supreme Court again limited the Pacifica decision by holding that a statutory prohibition on indecent as well as obscene "dial-a-porn" telephone messages was unconstitutional. Rejecting the government's argument that Pacifica was controlling, the Court emphasized that Pacifica did not mandate a total ban on indecent communications. The Court recognized that there is a distinct difference between a broadcast that intrudes in the privacy of one's home and a medium that requires the listener to take active steps to receive

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90 Id.
92 Id.
93 Id. at 74.
94 Id.
96 Id.
97 Id. at 127.
the communication.\footnote{Id. at 127-28.} Knowingly placing a telephone call to listen to a sexually-oriented pre-recorded telephone message is manifestly different from turning on a radio and being surprised by an indecent program.

Finally, in \textit{Turner Broadcasting System v. FCC},\footnote{114 S. Ct. 2445 (1994).} the Supreme Court refused to extend \textit{Pacifica}'s less rigorous standard of scrutiny for broadcast indecency to cable television.\footnote{Id. at 2457.} At first glance, it would appear that \textit{Pacifica}'s rationale should have applied to \textit{Turner} because of the similarities between cable television and radio broadcasting. With both mediums, a passive viewer or listener receives broadcast information.\footnote{ACLU, 929 F. Supp. at 876.} However, "the analysis of a particular medium of mass communication must focus on the underlying technology that brings the information to the user" rather than on the end product that the viewer receives.\footnote{Id.}

In examining the underlying technology that brings cable television and radio broadcasts to a user, it is clear that cable television is less of an intruder into the household than broadcast radio. To receive broadcast radio in the home, a homeowner merely needs to possess a functional receiver. On the other hand, mere possession of a television is not enough to bring cable television into the household. A homeowner must pay for the service of receiving cable television. Additionally, a homeowner may choose what cable channels are available for viewing on her television and therefore has more control over what is broadcast into her home. As cable television is a much less intrusive presence in the household, the decision not to extend the \textit{Pacifica} rationale to \textit{Turner} was sound.

Following the reasoning of the aforementioned Supreme Court decisions, it is clear that the CDA's attempt to regulate indecent speech on the Internet should be subject to strict scrutiny. The Internet is a unique medium distinct from existing modes of communication. It developed as a giant network interconnecting small groups of networks with no centralized control point for
communications.\textsuperscript{103} This unregulated connection of networks allows tens of millions of people worldwide to share diverse information through different methods of communication like e-mail, “chat rooms,” and distributed message databases at very low cost.\textsuperscript{104} The system’s “open, distributed, decentralized nature stands in sharp contrast to most information systems that have come before it.”\textsuperscript{105} The Internet is thus “a unique and wholly new medium of worldwide human communication” separate from existing technology.\textsuperscript{106}

Reception of communications over the Internet requires active participation by the user, unlike reception of broadcasting, which requires only a passive receiver. As the court stated in its findings of fact, “it takes several steps to enter cyberspace.”\textsuperscript{107} At the very least, a user must have access to a computer that can reach the Internet. Further, the user must have the ability to use the computer to “surf” the Internet for information.\textsuperscript{108} This requires the user to have a certain amount of knowledge, but more importantly requires that the user actively take steps to obtain the desired information. This active participation by the Internet user stands in stark contrast to an individual passively listening to a broadcast. Individuals have more control over what they are exposed to on the Internet than what they hear broadcast over the radio. “Communications over the Internet do not ‘invade’ an individual’s home or appear on one’s computer screen unbidden.”\textsuperscript{109}

As the world’s largest form of mass communication, the Internet is more like a giant town meeting than a method of broadcasting. Because of the distinct differences between broadcast speech and speech on the Internet, the reasoning in \textit{Pacifica} that led to regulation of broadcast indecency should not be extended to \textit{ACLU v. Reno}. To the extent that the Court in \textit{Pacifica} evaluated the FCC’s regulation of broadcast indecency under a lesser standard of

\textsuperscript{103} Id. at 830-32.
\textsuperscript{104} Id. at 831-34.
\textsuperscript{105} Id. at 838.
\textsuperscript{106} ACLU, 929 F. Supp. at 844.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
review, there is no reason to employ a lower standard in ACLU v. Reno. Strict scrutiny is therefore the appropriate standard for judicial review of the CDA. "As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion."

IV. CRITICAL ANALYSIS

Society clearly has an interest in generally maintaining civilized discourse and in protecting children from some of the on-line material that motivated Congress to enact the CDA. On the other hand, the benefits of preserving the right to free speech cannot be disputed. Whatever compelling interests the Government has in attempting to regulate indecent speech, the CDA does not pass constitutional muster. The CDA is unconstitutional because it is overly broad, vague and not narrowly tailored.

A. THE REACH OF THE CDA

The overbreadth doctrine serves to invalidate legislation that sweeps within its ambit of allowable proscriptions other constitutionally protected rights of free speech, press or assembly. A law sweeps too broadly when a protected activity is a substantial part of the law's target, and there is no way to sever the law's constitutional applications from its unconstitutional applications.

The CDA fails both parts of the overbreadth test. First, since the aim of the CDA is to regulate "indecent" speech on the Internet, a protected activity, free speech, is a substantial part of the law's target. Second, it is impossible to separate the law's constitutional applications from its unconstitutional applications. Clearly, an individual who knowingly transmits pornographic material to a child could be prosecuted under the CDA without violating the Constitution. What about a museum curator who posts a photo of a nude statue on a museum's Web page so that individuals who

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110 Id. at 883.
cannot afford to travel to the museum in person can go on a virtual tour? What about a librarian who, in response to an e-mail request, transmits to a minor portions of John Steinbeck’s *Of Mice and Men*, J.D. Salinger’s *The Catcher in the Rye*, or Mark Twain’s *The Adventures of Tom Sawyer*, books that individuals have attempted to ban in schools and public libraries across the United States. Because the CDA broadly proscribes indecency, the curator or the librarian could arguably be prosecuted as easily as the sexual predator. Depending on the proclivities of an individual prosecutor, “indecency” could include a broad range of material that individuals are constitutionally entitled to access. Contemporary literature, films, plays, art and photographs showing or describing nude bodies or sexual activity could be considered indecent in some communities. Similarly, free information on rape, pregnancy, sexually transmitted diseases or prophylactics could be viewed as indecent and banned from the Internet. In seeking to control smut on the Internet Congress has proscribed too much. The CDA sweeps too broadly because it restricts adults from material that they are constitutionally entitled to access.

The Government argued that the challenged provisions are not broad because the Department of Justice will “limit the CDA’s application in a reasonable fashion that would avoid prosecution for placing on the Internet works of serious literary or artistic merit.”[13] This would place a great deal of trust in prosecutors across the country who come from different backgrounds and who likely have very different views about what is “indecent.” “[T]he First Amendment should not be interpreted to require us to entrust the protection it affords to the judgment of prosecutors.”[14] Failing both parts of the overbreadth test, it is clear that the challenged provisions sweep more broadly than necessary and unconstitutionally infringe upon rights protected by the First Amendment.

B. THE CDA IS VOID FOR VAGUENESS

A law is void for vagueness when reasonable people must necessarily guess as to the meaning of the law or its applica-

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[14] Id.
Laws that are void for vagueness are unconstitutional because they are so obscure that a reasonable person cannot determine from a reading of the statute what the law purports to command or prohibit. Vague laws not only fail to provide fair notice or warning to the public about what the law allows or forbids, they also fail to provide prosecutors and judges with administrable standards, thus creating the potential for arbitrary enforcement. Criminal statutes like the CDA should especially be scrutinized for clarity because "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." This is especially true of laws "having a potentially inhibiting effect on speech...."

The indecency provision is void for vagueness because the CDA fails to define the term "indecent." As previously noted, the Government's position was that "indecent" was intended to have the same meaning as "patently offensive," which was defined in the CDA. The Government's attempt to clarify the meaning of "indecent" in section 223(a) by linking it to the definition of "patently offensive" in section 223(d) fails in light of the rule of statutory construction. This rule states that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Since Congress declined to insert language which would give "indecent" the same definition as "patently offensive," it can be presumed that Congress intended for the words to have different meanings. Further, section 223(a) pertains to "telecommunications devices" while section 223(d) applies to "interactive computer services." The fact that these sections

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116 Id.
117 Id.
119 Hynes, 425 U.S. at 620 (internal quotation marks omitted) (quoting Smith v. California, 361 U.S. 147, 151 (1959)).
121 ACLU, 929 F. Supp at 861 n.5.
apply to different technologies adds further weight to the view that "indecent" and "patently offensive" are not to be given the same meaning.\textsuperscript{122}

Although Congress failed to mirror section 223(d)'s language in section 223(a), the legislative history of the CDA does suggest an intention to give "indecency" the same definition as "patently offensive."\textsuperscript{123} Even if section 223(a) was amended to mirror the definition of patently offensive from section 223(d), this would not completely cure the vagueness problem because the CDA fails to set forth the relevant community standard for determining what amounts to "patently offensive" or "indecent" speech on this new and unique medium. If the CDA is meant to set forth a uniform national standard of indecency on the Internet, it is unlikely that such a standard could be established since "our nation is simply too big and too diverse . . . to reasonably expect that such [a] standard[,] could be articulated for all 50 states in a single formulation. . . ."\textsuperscript{124} A uniform national standard could reflect the tolerance of an urban community. However, this would allow individuals from New York City to communicate over the Internet with individuals from a rural community using speech that individuals from the rural community might consider indecent. The urban residents would be free from prosecution so long as they complied with New York City standards of indecency. Congress clearly did not intend for this to be the result. Conversely, a single national standard could reflect the standards of the more conservative communities in the United States. However, this would mean that individuals communicating with each other in New York City could be prosecuted for speech that neither regarded as indecent.

If the CDA is meant to rely on local community standards to define indecent speech, a speaker would have no way of knowing which local community to look to for the proper standard. Information on the Internet can be disseminated widely without the

\textsuperscript{122} Id.

\textsuperscript{123} Id. at 861. The legislative history of the CDA indicates that the drafters intended the term "indecency" to have the same definition as that established in \textit{FCC v. Pacifica Foundation}, and that § 223(d) codified the definition of "indecency" from \textit{Pacifica}. Id. Thus if "indecency" in § 223(a) is to have the same meaning as that established in \textit{Pacifica}, it would also have the same definition as "patently offensive".

\textsuperscript{124} Miller v. California, 413 U.S. 15, 30 (1973).
content provider knowing who will access their information. A Web page created in a particular community can be visited by users from anywhere in the country, and the content provider has no way to determine the geographic origin of those users. In order to insulate themselves from prosecution under the CDA, all Internet speakers would have to conform their speech to the standards of the least tolerant community in the United States. This chilling effect on speech would clearly be unconstitutional. Any attempt to formulate an administrable standard by which to judge indecent speech on the Internet will have to take into account the unique pervasiveness of this new medium. For now, Congress's failure to articulate the proper standard for indecent speech on the Internet renders the CDA void for vagueness.

C. THE CDA IS NOT NARROWLY TAILORED

The CDA is at heart a government imposed restriction on free speech. As previously noted, the CDA's attempt to regulate indecent speech should be subject to strict scrutiny. Under a strict scrutiny analysis, the CDA "will only be upheld if it is justified by a compelling government interest and if it is narrowly tailored to effectuate that interest."125

Even though the Government's interest in shielding minors from some on-line material is compelling, the CDA is unconstitutional because it is not narrowly tailored to effectuate the Government's asserted interest. The Government relies on the defenses enumerated in section 223(e) for its argument that the CDA is narrowly tailored.126 However, a review of the statutory defenses makes it clear that this legislation fails a strict scrutiny analysis because the defenses fail adequately to narrow the CDA's scope.

Section 223(e)(5)(B) provides a defense for a user who has restricted access to his communication through use of a verified credit card or an adult verification service.127 These defenses do not effectively restrict the CDA, however, since they are not

126 ACLU, 929 F. Supp. at 855.
127 See supra note 20 and accompanying text.
Credit card verification is not available for Web sites that offer free access, since credit card companies will not verify a card number unless there is a commercial transaction. Even if credit card companies did offer verification services for free Web sites, the charges incurred by the Web site for the service would discourage many content providers from establishing Web sites. Similarly, requiring content providers to use age verification technology could drive many speakers from the marketplace. "To require non-commercial speakers to begin to charge for their speech in order to verify age would violate the mission of many ... to provide free information." Finally, the Government has provided no evidence that credit card or adult verification services could ensure that the individual providing a credit card number or adult user password is in fact over eighteen. Additionally, section 223(e)(5)(A) offers a defense to a user who has used good faith efforts to restrict access by minors to his communications. This also fails to narrow the scope of the CDA because there is no technology currently available that enables content providers to restrict minors' access to their communications. Individuals who communicate with other speakers in "chat rooms" have no way of knowing whether all participants are adults. Further, it is impossible for speakers in "chat rooms" and other Internet media to segregate their conversations such that certain speech would be unavailable to minors. "[A]s the government concedes, for the vast majority of applications and services available on the Internet, a user has no way of communicating ... with certainty that the content will not reach a person under eighteen. ..."
The Government argued that blocking technology will soon be available that will allow individuals to control access to their communications, but there are “few arguments less likely to persuade a court to uphold a criminal statute than one that depends on future technology to cabin the reach of the statute within constitutional bounds.” Additionally, it is hard to see how a statute that fails to define a broad and vague term like “indecent” could be viewed as narrowly tailored. It is thus clear that the CDA is not narrowly tailored to effectuate the purposes of the statute.

V. CONSTITUTIONAL BALANCING ANALYSIS

The benefit gained from regulating indecent speech should outweigh the negative consequences of restricting this constitutionally protected right. Upon weighing the benefits gained from the CDA against the chilling effect on free speech, it is apparent that the negative consequences of such regulation clearly outweigh any benefits.

Society certainly has an interest in generally maintaining civilized discourse and shielding children from potentially offensive material. However, society can capture any benefits from regulating indecent speech, without incurring the restrictions of the CDA, through substantially more effective and less restrictive methods that are currently available. First, legal safeguards already in existence prohibit much of the material that Congress was concerned about when it enacted the CDA from being distributed on the Internet. A decision that the CDA is unconstitutional does not mean that children will now be bombarded by obscene pornographic material over the Internet. Even without the CDA, minors still have protection from being exposed to unsuitable material on the Internet. Judge Sloviter stated for example that “[v]igorous enforcement of current obscenity and child pornography laws should suffice to address the problem the government identified in

139 ACLU, 929 F. Supp. at 857.
140 Id. at 851 (citing Elrod v. Burns, 427 U.S. 347, 363 (1976)).
court and which concerned Congress." Further, before Congress enacted the CDA, the Justice Department expressed its view that the legislation was unnecessary since the Justice Department would continue to prosecute child pornography and on-line obscenity using currently existing laws. Judge Dalzell agreed that the **ACLU v. Reno** holding "does not deprive the Government of all means of protecting children from the dangers of Internet communication." Children can still be protected through continued enforcement of existing obscenity and child pornography laws.

Additionally, the availability of technology that allows parents to restrict minors’ access to on-line material offers further protection to children. The court identified a variety of currently available user-based features that enable parents to restrict access to unwanted on-line material. The court first examined user-based software such as Cyber Patrol and SurfWatch, which actually offer more comprehensive protection for children from on-line material. Unlike the CDA, the software programs identified by the court are able to block unwanted material originating from outside the United States. Almost one-half of the information available on the Internet originates from foreign sites. Despite the CDA, minors could continue to access any indecent material posted outside the United States as foreign residents have little incentive to comply with the mandates of the CDA. Because these software programs are able to restrict minors’ access to foreign as well as domestic on-line material, they serve as more effective screening devices than the CDA.

The court next reviewed parental control technology offered free of charge to subscribers of on-line services such as AOL, CompuServe and Prodigy. AOL offers a “Kids Only” parental control

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142 Id. at 856-57.
143 Id. at 857.
144 Id. at 883.
145 Id.
146 **ACLU**, 929 F. Supp. at 838-42.
147 Id. at 839.
148 Brief of Appellees at 18, **ACLU** (No. 96-511).
149 Id. at 34.
150 Id. at 17.
151 **ACLU**, 929 F. Supp. at 842.
feature, while CompuServe and Prodigy offer subscribers the ability to block access to "chat rooms" or other specific media within their networks. 152 "The market for this type of software is growing, and there is increasing competition among software providers to provide [such] products." 153 In light of the technological protections offered by on-line services and the legal safeguards already in existence, it is clear that the CDA's regulation of indecency is unnecessary.

While the benefits of legislatively regulating indecent speech are small given the existence of parental control technology and existing obscenity and pornography laws, the negative consequences of restricting speech on the Internet through the CDA are enormous. If the Court was to uphold the indecency and patently offensive provisions of the CDA, the Internet as we know it would be forever changed. The strength of the Internet lies in its diversity of content due to a large number of participants from a variety of backgrounds with easy access to the Internet. Censorship laws like the CDA strike at the very heart of the Internet, its diversity. "Laws of this sort pose the inherent risk that the Government seeks . . . to suppress unpopular ideas or information . . . . rais[ing] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." 154

By upholding the challenged provisions as constitutional, the judiciary would, in effect, force speakers fearing prosecution to restrict the content they provide on the Internet to that which is acceptable for a child. This deprives adults of materials that they have a constitutional right to access. The chilling effect on the exercise of free speech is obvious. The number of speakers on the Internet would decrease as individuals who feared criminal sanctions would be more reluctant to post materials on the Internet. A decrease in the number of people accessing the Internet would invariably cause the diversity of material to decline, thus eroding the Internet's usefulness as the most accessible and valuable source of world wide information.

152 Id.
153 Id. at 839.
In determining that the challenged provisions of the CDA are facially unconstitutional, the court has left the CDA virtually lifeless. "There's nothing really operative left of the CDA. It still has arms and legs; it just doesn't have a heart." As disruptive as the challenged provisions would have been to communications over the Internet, the *ACLU v. Reno* holding was a victory for supporters of the open, decentralized and diverse nature of the Internet and the World Wide Web. The high level of scrutiny that regulation of "indecency" on the Internet will receive leaves one with the conclusion that no such legislation will pass constitutional muster.

Rather than assisting in the development of technology that would allow families, schools and libraries to shield children from offensive material, Congress chose to place on speakers the onus of determining what material might possibly be considered indecent. In censoring the speaker, rather than seeking to help restrict the listener's access to the speaker, Congress focused on the wrong end of the communication. Those responsible for children have the primary obligation to shield them from exposure to offensive on-line material. Indecent and patently offensive books, magazines and movies abound, but society has chosen to restrict children's access to such materials by creating adult book stores or adult sections in book stores that are off limits to minors. Similarly, society requires children to reach a certain age before they can view "R" rated movies without an adult. With these media, legislators have not sought to censor the speaker. Rather, minors' access to such speakers is restricted. Speakers on the Internet should be afforded the same level of freedom. The computer industry will continue to invent new ways to empower parents to control Internet content from the user end. Rather than trying to establish uniform standards of what is "indecent," Congress should focus on assisting in the development of technology that allows parents to choose what they and their children are able to access.

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Allowing unfettered free speech on the Internet promotes discourse in the global marketplace of ideas. The freedom to think and speak as one will is indispensable to the discovery and spread of truth and knowledge. The ACLU v. Reno decision is a step in the right direction to ensure that the Internet continues to serve as the world's largest form of mass communication. "Any content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig."\textsuperscript{156}

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