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# THE COMMUNICATIONS DECENCY ACT OF 1996: SENSIBLE, NOT CENSORSHIP

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I would like to speak in practical terms. My great concern as an advocate for protection of children is not only the terribly vile material that children are accessing on the Internet,<sup>1</sup> but also stalking on the Internet. I am a *pro bono* consultant to a multi-jurisdictional law enforcement task force which is specifically targeting pedophiles, preferential child molesters who are, in fact, stalking children on the Internet. Some of these pedophiles have made contact and have flown across country with the intent of molesting those children and producing child pornography.<sup>2</sup>

I ask you, in my pursuit of making this discussion very practical, how many of you have ever received an obscene phone call? May I see your hands? Oh, come on. How many of you have ever made an obscene phone call, more hands? How about an indecent or harassing phone call, how many of you have ever experienced

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<sup>1</sup> See Suzanne Fields, *Protecting Kids from Filth on the Internet, Enough is Enough*, ATLANTA J. CONST., June 9, 1995, at 8A (advocating more public involvement in fight against indecent material on Internet); see also Karen Hosler, *Congress Explores Ways to Guard Children from Cyber-Pornography, Violence*, BALTIMORE SUN, June 15, 1995, at 22A (discussing congressional attempts to limit smut accessible on Internet); Cheryl Wetzstein, *Anti-Porn Group Targets On-Line Activities*, WASH. TIMES, June 8, 1995, at A2 (discussing possible legal roadblocks to vile information available to children on Internet).

<sup>2</sup> See Jo-Ann M. Adams, *Controlling Cyberspace: Applying the Computer Fraud Abuse Act to the Internet*, 12 SANTA CLARA COMPUTER & HIGH TECH L.J. 403, 414 (1996) (discussing abuse of children lured from their homes via Internet); see also *Computers & Technology Unlawful Entry of Computers*, INVESTORS BUS. DAILY, June 24, 1996, at A6 (noting role of FBI in investigating crimes involving enticement of children through Internet).

that? I ask these questions because sections of the existing law which address such acts have been amended to include telecommunications devices<sup>3</sup> and interactive computers,<sup>4</sup> in addition to the new laws in place through the Communications Decency Act.<sup>5</sup>

Our First Amendment<sup>6</sup> is not absolute.<sup>7</sup> Although I am here to defend the Communications Decency Amendment, I am staunchly opposed to any form of censorship, and if I believed that this law was censorship, I would have no part in defending it. I treasure the First Amendment. I do believe, however, that those who would seek to put the mantel of its sacred protection around toxic waste trivialize and demean the First Amendment.

Obscenity, along with many other forms of speech, as our moderator has pointed out, is not protected by the First Amendment.<sup>8</sup> As Mr. Abrams indicated, libel and slander,<sup>9</sup> perjury, fighting words,<sup>10</sup> false advertising,<sup>11</sup> and so forth—including obscenity and child pornography<sup>12</sup> have never been protected by the First Amendment. Our First Amendment is well intact even though we have those laws on the books.

For example, some weeks ago William Safire, a noted columnist of the *New York Times*, called our First Lady a congenital liar, just a few blocks from the White House.<sup>13</sup> He did so without fear of

<sup>3</sup> Communications Decency Act, 47 U.S.C. § 233 (1996).

<sup>4</sup> 47 U.S.C. § 220 (1996).

<sup>5</sup> 47 U.S.C. § 233 (1996).

<sup>6</sup> U.S. CONST. amend. I. The First Amendment provides: Congress shall make no law . . . abridging the freedom of speech. *Id.*

<sup>7</sup> See *Miller v. California*, 413 U.S. 15, 23 (1973). "The First and Fourteenth Amendments have never been treated as absolutes . . ." *Id.*; see also *Roth v. United States*, 354 U.S. 476, 485 (1957). "We hold that obscenity is not within the area of constitutionally protected speech or press." *Id.*

<sup>8</sup> See *New York v. Ferber*, 458 U.S. 747, 774 (1982) (upholding constitutionality of New York statute proscribing promotion of sexual performance by children under 16); see also *Miller*, 413 U.S. at 23 (1973) (noting that Supreme Court has categorically held obscene material unprotected by First Amendment); *Roth*, 354 U.S. at 485 (holding obscenity not constitutionally protected).

<sup>9</sup> See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (creating standard of "actual malice" as threshold for defamation actions by public figures against media defendants).

<sup>10</sup> See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (noting that fighting words are outside scope of First Amendment protection).

<sup>11</sup> See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens of Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). "Untruthful speech, commercial or otherwise, has never been protected for its own sake." *Id.*

<sup>12</sup> See, e.g., *Ferber*, 458 U.S. at 758 (1982) (holding that state laws restricting child pornography "easily pass muster under the First Amendment.").

<sup>13</sup> William Safire, *Blizzard of Lies*, N.Y. TIMES, Jan. 8, 1996, at 27 (commenting on inconsistencies among first lady's public statements).

criminal prosecution. New York's own Don Imus just a few weeks ago, much to the chagrin of many other members of the established media, in very sarcastic humor, attacked the President and First Lady in their presence.<sup>14</sup> The First Amendment, though clearly not absolute, is well intact.

Let me ask a question here. Suppose we have a pervert, a potential child molester, who knowingly exposes himself along side the playground of a public school; what does the law do to that individual? We have laws in place that criminalize indecent exposure.<sup>15</sup> My follow-up question is this: What if that same individual takes a picture of his exposed genitalia and posts it in a chat-room for children? Such as the Alt.Barney Newsgroup? That is essentially one of the things the Communications Decency Act forbids.<sup>16</sup> It prohibits the knowing transmission or display of indecent material either to a known child or in a place where children are likely to see it.<sup>17</sup> For example, in a chat room or news group where the title clearly indicates that it is for children. If an adult is in an adult-designated chat room or news group and has no reason to know that a child has entered, the adult would not be liable for transmitting indecency; however, if a child entered and identified himself by saying, "I'm Billy, age 12," the adult would be liable for transmitting indecency to the child.

I have been called by numerous members of the media, both print and electronic, to comment on the Act, and the opening question is generally: "I want to talk to you about this ban on indecency on the Internet." To which I reply, "Well let us start off with the fact that there is no ban on indecency on the Internet." What this Act bans is the knowing transmission of indecency to minors.<sup>18</sup> That is perfectly consistent with existing law.<sup>19</sup> In fact,

<sup>14</sup> See, e.g., Kim Masters, *Punch Lines & Apologies; Just About Everyone's Sorry, Except Don Imus*, WASH. POST, March 23, 1996, at H01 (noting controversial remarks by radio personality at Washington dinner).

<sup>15</sup> See, e.g., N. Y. PENAL LAW §§ 245.00, 245.01 (McKinney 1989) (defining "Public Lewdness" and "Exposure of a Person").

<sup>16</sup> 47 U.S.C.A. § 233 (1996); see also Laura J. McKay, Note, *The Communication Decency Act: Protecting Children from On-Line Indecency*, 20 SETON HALL LEGIS. J. 463, 490 (1996) (discussing protection of children).

<sup>17</sup> See McKay, *supra*, note 16 at 501 (discussing children's access to pornographic and obscene material); see also Hosler, *supra* note 1, at 22A (discussing legislation and regulation to prevent children's access to obscene material on Internet).

<sup>18</sup> 47 U.S.C. § 233 (1996); see also Allen S. Hammond, *Indecent Proposals: Reasons, Restraint and Responsibility in the Regulation of Indecency*, 3 VILL. SPORTS & ENT. L.J. 259, 260-62 (1996) (discussing statutes, protection of children, and punishment for transmission of indecent material to children); Stacey J. Rappaport, Note, *Rules of the Road: The Consti-*

Professor Baker alluded to it. In *F.C.C. v. Pacifica*,<sup>20</sup> the George Carlin, famous seven dirty words case, the court, at least impliedly, upheld the definition of indecency.<sup>21</sup>

In addition, let me clarify that the judge in the federal district court in Philadelphia only restrained one section of the CDA—the section which amends title 47, section 223, containing the word “telephone” and its use in making an obscene, indecent, or harassing “telephone” call.<sup>22</sup> The word “telephone” was changed to “telecommunications device,” so that the law would now include harassment, indecency, or obscenity by facsimile, conference call, or cellular telephones.<sup>23</sup>

That section was enjoined because the word “indecency” was not defined in that section. If you go to the next section, however, where the law prohibits the transmission of indecency to a known minor through an interactive computer device, “indecency” is defined.<sup>24</sup> The definition is taken from the *F.C.C. v. Pacifica* case.<sup>25</sup> So, we are applying the same old law to the Internet and to computers.

*tutional Limits of Restricting Indecent Speech on the Information Superhighway*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 301, 303 (1995) (discussing congressional limitation on transmission of indecent material to minors).

<sup>19</sup> See Bruce A. Taylor, *NLC's Summary of the "CDA", The Communications Decency Act of 1996* (on file with National Law Center for Children and Families (NLC) 4103 Chain Bridge Rd., #410, Fairfax, VA 22030, (703) 691-4626 & (714) 435-9090); see also *NLC's Memorandum of Opinion in Support of the Communications Decency Amendment, as adopted by the United States Senate on June 14, 1995*, reprinted in CONG. REC. S9770 (daily ed. July 12, 1995); Bruce Taylor, Symposium Q: *Will New Decency Standards on the Internet Protect America's Kids?*, INSIGHT ON THE NEWS, Mar. 4, 1996 at 22; OCAF White Paper on Internet Pornography, *The Agincourt Project* (1996) (on file with Oklahomans for Children and Families) [posted Feb. 2, 1996, on the World Wide Web at “noporn@mailback.com”].

<sup>20</sup> 438 U.S. 726 (1978).

<sup>21</sup> *Id.* at 740. “[T]he normal definition of ‘indecent’ merely refers to nonconformance with accepted standards of morality.” *Id.* See generally *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 481-87 (1962) (considering various definitions of “obscenity.”); Robert F. Goldman, *Put Another Log on the Fire, There's a Chill on the Internet: The Effect of Applying Current Anti-obscenity Laws to On-Line Communications*, 29 GA. L. REV. 1075, 1095-97 (1995) (discussing effects of *Pacific* case on defining obscene and indecency).

<sup>22</sup> *A.C.L.U. v. Reno*, 929 F. Supp. 824, 849 (E.D. Pa. 1996) (holding indecency provision of Communications Decency Act unconstitutionally overbroad); see also *Denver Area Telecomm. Consortium, Inc. v. F.C.C.*, 116 S. Ct. 2374, 2378 (1996) (discussing restrictions on obscenity on cable television); *Shea v. Reno*, 930 F. Supp. 916, 940 (S.D.N.Y. 1996) (applying strict scrutiny to constitutionality of Communications Decency Act).

<sup>23</sup> 47 U.S.C. § 223 (1996).

<sup>24</sup> 47 U.S.C. § 224 (1996).

<sup>25</sup> *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 740 (1978) (defining indecent as nonconformance with accepted standard of morality).

One of the questions that has been raised is: In cyberspace, whose community standard will apply? We have this idea that "cyberspace is no place." I beg to differ; it is a place. The Sixth Circuit has answered this question for us in an obscenity case.<sup>26</sup> The case involved Amateur Action Bulletin Board Service out of Milpitas, California, where the operator of the bulletin board, Mr. Thomas, disseminated obscenity to a United States postal inspector in Tennessee. I was somewhat offended, as a Californian, by the defendant's briefs and those of the *amici* in support of the defendant, saying that the reason the plaintiff in this obscenity case<sup>27</sup> chose Tennessee, the Bible Belt, was because the material would not be found to be obscene in California.<sup>28</sup>

If you read the description of the particular video that was the subject of this case, and you believe that the people of California, as bad as our reputation seems to be, would not find that obscene, I beg to differ from you. If you look at the last sentence of the description of that video, you have a woman whose genitalia is nailed to a board. I do not want to wrap the First Amendment around that. That picture was posted freely on the Internet, it was not confined to an adult chat-room or to an adult Use-Net site. That picture was out there, free for any child to access.

This is just one example of the kind of material that children are accessing. There is also bestiality, bestiality with children, urination, defecation, the kind of torture described in the Thomas' video, and the most degrading and humiliating kinds of descriptions of women, children, and, yes, even men.<sup>29</sup> If you think I am exaggerating, I have color photographs that law enforcement officers I work with have taken of computer screens. These are not even downloads.

The argument that, "the 1's and 0's" transmitted by computers through the Internet can't be "obscene" because they are "intangible and indecipherable," was raised by Thomas and his *amici* and

<sup>26</sup> *United States v. Thomas*, 74 F.3d 701, 709 (6th Cir. 1996) (upholding conviction of husband and wife for violating 18 U.S.C. § 1465, which regulates distribution of obscene material).

<sup>27</sup> *Thomas*, 74 F.3d at 705.

<sup>28</sup> *Id.* at 709 (rejecting defendants' venue challenge).

<sup>29</sup> See 141 CONG. REC. S8089 (daily ed. June 9, 1995) (statement of Senator Exon listing various indecent topics that could be easily accessed on bulletin boards); see also Wetzstein, *supra* note 1, at A2 (discussing vile and perverse materials that children can download from Internet).

rejected by the court. Those "1's and 0's were the same tangible smut that Thomas up-loaded in California and the Postal Inspector down-loaded in Tennessee. It is in this same way that the postal inspector's tangible credit card number would be transmitted from Tennessee through cyberspace, as "intangible 1's and 0's," and result in tangible cash being deposited in Thomas' bank account in California.

The argument is also made that "you have to go out there looking for pornography, it will not come to you." Not true. I receive call after call after call about children who have accessed pornography without searching for it. The other night, a police officer went into a chat room which was not restricted in any way, typed in his name and, within seconds, his E-mail was bombarded with obscene pictures, which included urination, fisting, and extreme torture. He did not ask for them, they just came to him. This is happening time after time.

Another woman told me that she was seated next to a young boy in a public library at a computer on the Internet. She looked at his screen, and he was looking at hard core pornography. She went to the librarian on duty, and told her, "You ought to do something about that child." The librarian replied, "Why, there is nothing I can do, and by the way, our Internet users are upset that they don't have more privacy, so we are going to build them little cubicles so that they can look at what they want." This is much akin to a peep-show booth in an adult book store. I am wondering if they will also cut out little glory holes for them so that they will not have to do it themselves.

This is the kind of material available to children, and this is what the Communications Decency Act is designed to prosecute.<sup>30</sup> There is no such thing as banning indecency to adults. Adults are free to engage in any kind of talk they wish, but not in front of children. Of course, obscenity is illegal to distribute anywhere. It is only legal to have in the privacy of your own home.

<sup>30</sup> See *New York v. Ferber*, 458 U.S. 747, 757 (1982). "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.*; see also 141 CONG. REC. S9770 (daily ed. July 12, 1995) (memorandum stating that Communications Decency Act is to stop transmission of obscene or indecent material to children); McKay, *supra* note 16, at 464 (discussing reasons for enactment of Communications Decency Act).