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THE COMMUNICATIONS DECENCY ACT: MORALLY NECESSARY OR POLITICS AS USUAL?

BARRY STEINHARDT*

I suspect that on this panel, I am the person who has spent the most time on-line. I will candidly admit that I have spent thousands of hours on-line. In those thousands of hours, information has never come to me unintentionally. For many reasons, it is often very difficult to find the material for which you are searching. Those of you who are on-line know that the Internet does not need traffic cops, it needs road maps.

I had hoped that I was going to have a little time to enjoy myself and “wax philosophic” because this is a law school audience. I see, however, that I am going to have to spend most of my time talking in more practical terms, as a working civil libertarian and as a parent.

As a working civil libertarian, I represent an organization with real clients and real cases—for example, the combined case of *ACLU v. Reno* and *American Library Association v. Reno*, the case before the three court panel in Philadelphia.¹ In this case, we challenge three sections of the Telecommunications Act:² the pure indecency section,³ the patently offensive section which I like to

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Mr. Steinhardt has published articles in a variety of publications, including: *Business and Society Review*; *U.S.A. Today*; *Net Guide*; *The Philadelphia Inquirer*; and the *Pittsburgh Post Gazette*. Recently, Mr. Steinhardt served on the United States Delegation to the 1995 OSCE Conference on Non-Governmental Organizations in Warsaw, Poland.

¹ *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).

² Telecommunications Act, Pub. L. No. 104, 110 Stat. 56 (1996).

³ *Id.* § 502, 110 Stat. at 133 (describing transmissions which are “obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person”).

refer to as the "naked indecency" section,⁴ and the amendment to the old Comstock law.⁵

The Comstock law was a turn of the century piece of federal legislation that prohibited the distribution of information about contraception or abortion.⁶ Literally at the last moment, Representative Henry Hyde slipped into the conference committee report, in a way that various members of the conference committee say they had not even realized, an amendment to the Comstock law to cover the distribution of that information by telecommunications devices [*i.e.*, the Internet].⁷

In court, we find ourselves actually in a rather curious position in that the Justice Department has agreed not to enforce any of the three sections we are challenging during the pendency of this suit. On the Comstock Act provision, the Justice Department has orally conceded its unconstitutionality.⁸

On the ACLU's Web site is information on how to obtain an abortion. The names of our reproductive rights cases alone provide such information. One of our clients, Planned Parenthood of America, obviously has such information on its Web site and in its non-digital communications. The Comstock law covers not only on-line communications, but all communications.⁹

We have been trying to remind the Justice Department that we are going to have an election this November, and that Janet Reno may not be Attorney General in January and Bill Clinton may not be President. It is not inconceivable that Henry Hyde himself could be Attorney General. He is, afterall, Chairman of the House Judiciary Committee.

I raise the Comstock law issue here, which some of the proponents of the Communications Decency Act have said is a red her-

⁴ *Id.* § 502, 110 Stat. at 133-34 (describing transmission to persons under 18 that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs . . .").

⁵ *Id.* § 502, 110 Stat. at 137 (amending Comstock law's prohibition on distribution of information about abortion services to include transmission on interactive computer services).

⁶ Comstock Act, ch. 258, 17 Stat. 598, 598-99 (1873) (current version at 18 U.S.C. §§ 1461, 1465 (1994)).

⁷ See, e.g., Eric Zorn, *Hyde's Tinkering With an Old Law Raises New Fears*, CHI. TRIB., Mar. 20, 1996, at 1 (noting controversy over amendment by Rep. Henry Hyde regarding restraint on flow of abortion information through telecommunication devices).

⁸ See, e.g., Statement by President of the United States, Feb. 12, 1996, available in 1996 WL 189556, at *6 (Leg. Hist.) (stating that Justice Department advised President Clinton that amendment to Comstock Law violates First Amendment).

⁹ 18 U.S.C. § 1461 (1996).

ring, not because it is a red herring, because it is a red flag. It is a red flag symbolizing the irresponsibility of this statute.¹⁰

The proponents of this statute, and I have debated most of them by now, refuse in many respects to own up to what it actually says. I said to one of them the other day, "why don't you just confess to what you actually did and stop pretending that the law covers only 'hard core pornography.'" This is a bill that does, in fact, ban indecency on on-line communications and restricts adults to only that speech which would be acceptable for children. At least that is its intention.

The notion that those who speak on-line know who their audience is and, therefore, can protect themselves against a communication that may be accessed by a minor, is pure nonsense. No one knows who the readers of Use Net news groups are. That is a plain and simple fact that you know if you are on-line. No one knows who is participating in a chat room. One of the things people do on-line is assume different identities, even if users identify themselves as an adult or a man or a woman, you cannot know that for certain that it is true.¹¹

We have real clients who are in real jeopardy by this statute. For example, we represent an organization called The Critical Path AIDS Project. The Critical Path AIDS Project is an organization in Philadelphia, that has a Web site on which they publish information about safe sex practices. They publish that information for free, they are a non-profit organization trying to educate young people. Their goal is to prevent the transmission of HIV and other sexually transmitted diseases. They publish information which uses street terms and is graphic. It has to be, they say, in order to be effective. I believe they are right.

They come to the court in Philadelphia saying, "we do not know if we are covered by this statute. We are publishing on-line to an

¹⁰ See Daniel G. Berystein & Michelle W. Cohen, *Federal Legislation Confronts Cyber-smut*, N.Y.L.J., Apr. 22, 1996, at S8 (concluding that Communications Decency Act provides vague defenses as well as advocating "delicate balance" between policing of Internet and beneficial use of Information Superhighway); see also Richard Raysman & Peter Brown, *Liability of Internet Access Provider Under Decency Act*, N.Y. L.J., Mar. 12, 1996, at 3 (noting that since *ACLU v. Reno* court did not grant temporary restraining order regarding amendment to Comstock law, Internet access providers must safeguard actions to avoid liability).

¹¹ See, e.g., Anne W. Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace*, 104 YALE L.J. 1639, 1664-65 (1995) (observing that anonymous messages are facet of communication in cyberspace that cannot be completely eliminated).

audience that we know includes children, in fact, we intend to reach minors with this communication. We do not know if this material, which is clearly sexual in nature, will be patently offensive to whatever community standards are found to apply.”

In the real world, in which these statutes operate, such groups are just the sort of groups who will be targeted for prosecution. Targeted groups of individuals and organizations are unpopular and are relatively powerless in many communities. The Critical Path Aids Project happens to be a group primarily comprised of gay men with HIV.

They know from their own experience of being harassed by police officials in the city of Philadelphia, in the shadow of the Liberty Bell, that there are going to be communities out there where the kind of information they publish will subject them to prosecution for engaging in “indecent” speech in a manner that is accessible to children.

This is the real world. I believe those of you who are on the Net also know that the notion that the Internet is awash in pornography and that pornography and sexual materials dominate the Internet is pure hogwash.

It has been the subject of much media hype. Some of you remember the lurid cover story in *Time* magazine¹² that touted the Rimm study¹³ published in the *Georgetown Law Review*,¹⁴ which was later debunked.¹⁵ Even the government which first appended that study to its answer in our case later backed off, having read the criticisms, and when we put an expert witness on the stand, who was one of the debunkers.

In many respects, we are dealing with smoke screens here. We often hear about pedophiles on the Internet. Well let me tell you, in addition to someone who will proudly confess to having been on the Internet, I will proudly tell you that I have a seven-year-old

¹² See, e.g., Philip Elmer-DeWitt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 38 (citing Rimm article and Carnegie Melon study of pornography on-line).

¹³ *Id.* at 38 (describing how 18-month study produced close to one million sexually explicit pictures, descriptions, short stories, and film clips).

¹⁴ Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in over 2000 cities in Forty Countries, Provinces and territories*, 83 GEO. L.J. 1849 (1995).

¹⁵ See, e.g., Peter H. Lewis, *Critics Troubled by Computer Study on Pornography*, N.Y. TIMES, July 3, 1996, at A5 (noting that critics contend evidence revealing prevalence of pornography on-line is “unscientific and sensationalistic”).

daughter. My seven-year-old daughter is on-line. I must tell you that I am a lot less concerned when she is on-line than I am when she is in a public park. The notion that a pedophile is somehow going to reach through the screen and grab my daughter is absurd. In-line skating is a lot more dangerous than on-line communications to my seven-year-old daughter. Let us have a reality check here. The Communications Indecency Act is an attempt to stifle a new medium at its inception and an attempt to impose a particular set of moral values on the Internet.¹⁶

Let me conclude with one other thought. If Mike Godwin from the Electronic Frontier Foundation was here, he would have noted this, but I will say it in his absence. John Gilmore, one of the founders of the Electronic Frontier Foundation, said that in cyberspace the United States Constitution is just a local ordinance. The reality is that we are talking about a global medium.¹⁷ That has profound implications that I do not believe any of us truly understand.

One of the clear implications of this new reality, however, is that this is not speech that the United States government is going to be able to control. It is in fact as easy to access a computer that sits in Finland, where they have much more liberal laws with respect to free speech than we do, as it is to access one in Flatbush. The United States government is not going to be able to reach the speech from Finland. This is a reality.

This is a war on indecency which, in the end, cannot be won by the government. Like any war, however, there will be innocent casualties. One casualty may be that local ordinance, the First Amendment,¹⁸ while other casualties may be the very real clients that we represent who are put at risk by this statute.

¹⁶ Cf., e.g., Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1801 (1995) (arguing that when government bans indecent or filthy material on-line, whether least restrictive means of preventing harm has been chosen, is paramount question to be asked).

¹⁷ See Mike Godwin, *The First Amendment in Cyberspace*, 4 TEMP. POL. & CIV. RTS. L. REV. 1, 14 (1994) (asserting that Internet and Usenet are uncensorable due to global environment); see also Henry J. Reske, *Computer Porn: A Prosecutorial Challenge*, 80 A.B.A. J. 40, 40 (1994) (noting that material on-line can originate anywhere and be transmitted around globe).

¹⁸ U.S. CONST. amend. I. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . ." *Id.*

