A Feminist Response to the Exon Bill

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On February 8, 1996, President Clinton signed the Communications Decency Act (a.k.a. the Exon Bill) into law.1 On June 11, 1996, the United States District Court for the Eastern District of Pennsylvania held that it was unconstitutional, and enjoined the Justice Department from prosecuting any matter premised upon the Act.2 In December of 1996, the Supreme Court granted certiorari to hear the appeal.3

This Note is about the Communications Decency Act and its implications for both feminism and the future of the internet. In the reprieve before an appeal is heard, it is worth taking stock of what is at stake for feminism in the way that the internet is regulated, and to understand how the act purports to do just that. Why should feminists care about this? What could be new or different about the electronic media that implicates feminism?

Before beginning an analysis of what might be lost or gained through internet regulation, it is useful to briefly lay out what the internet is and can be for women. The internet is a forum for expression. It offers educational possibilities, tools for education, access to information, sources leading to training in preparation for new jobs, news about job opportunities and other chances for learning. It also offers a means for political organizing and an extraordinary advance for grass roots campaigning. All of these offerings are available to the public as a whole, not just to women or feminists. Significantly for women and critically for isolated minority groups, the internet provides a new leverage. By going online, traditionally disconnected groups can become connected ones. In sum, the internet "has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country ... has yet seen."4

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But that is just the beginning. There are also specific feminist needs that the internet already serves and could continue to serve. For example, the internet is a safe medium for sexual discussion. Its safety derives from its anonymity and also from the current level of openness which leads internet users to discussions about sex, sexual health, sexual oppression, sexual identity, sexual discrimination, sexual violence and sexual story-telling. The sexual nature and explicitness of the discussion have received a lot of media attention but their usefulness and importance have not had much vocal feminist support.

A central premise of this Note is that sex and sexual expression are political, and that opportunities to discuss and engage in conversations that address sexual images, sexual role-making and sexual identities are crucial to feminism’s strength. The geographic reach and potential diversity of the internet’s audience, combined with its anonymity, make the internet an excellent means to facilitate this discussion.

Because the internet holds an interesting promise of both practical and theoretical possibilities for feminist enterprises it is thus essential to understand the Act’s impact. In assessing that impact, this Note situates itself in a feminist analytical methodology. It proposes to answer questions such as what is the current scheme of regulation and its impact on the internet in the absence of Exon’s bill? What pieces of the bill (if any) might feminism wish to keep? What happens if the bill remains as enacted? Is there a different, a feminist, vision of the sexual representations on the internet that may lead to a different regulatory scheme?

In answering these questions, the position of this Note is that feminists should engage in the politics of sexual expression, rather than restrict it. For this reason, the position of this Note is one of great skepticism toward government regulatory efforts which would hide, filter or ban that dialogue. This skepticism is directed at the political assumptions made by the regulators when deciding who needs to be protected and from what. This Note’s analysis of the proposed regulations negotiates between two opposing feminist positions about sexual representation. These two opposing positions are represented by 1) the anti-pornography feminists who argue that pornography should be vigorously regulated because of the harm it causes


women; and 2) the anti-censorship feminists, who support the existing protections for pornography within First Amendment jurisprudence and would like to see even greater protection.

Section one of this Note begins with a brief overview of current law regulating obscenity and indecency, which already poses dilemmas for effective internet regulation. Section two presents an analysis of the Exon Bill itself, and examines its failings under the current laws, including some of the implications for free speech if it passes. This Note presents speculation as to what anti-pornography and anti-censorship feminist reactions to the bill might be. The philosophy underlying these analyses and speculations is that it is important to confront the advocacy of protection for speech, including protection for pornographic, obscene and indecent speech, with the problems that such advocacy may entail. This confrontation strives toward the goal of creating a better, more knowing advocacy and a more aware and nuanced understanding of speech. Last, this Note proposes a new model that would accept and make room for different meanings, that would protect equality interests on the internet without broad, across-the-board, bans on categories of speech.

A few notes of clarification and explanation before beginning. First, this Note does not directly address child pornography—meaning pornography that uses children as its subjects. First Amendment jurisprudence has traditionally drawn a distinction between child pornography on the one hand and obscenity on the other. One rationale for this distinction is the States’ interest in protecting children from the harmful experience of participating in the creation of pornography. It has been argued by some anti-pornography feminists that this same overwhelming interest in preventing harmful effects also applies to women. Yet there are critical issues of agency, understanding and consent that are different for children than for women. For this reason, the Court’s distinction between the two types of pornography stands. In keeping with the belief that they are different, this Note does not propose

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8. See generally Strossen, supra note 7, for the view that freedom of expression, hence feminism, would benefit from fewer restrictions, not more.
12. I acknowledge that the categories “agency, understanding and consent” are categories determined by more than age or maturity. Economic pressure alone throws “consent” into question, and other factors play into each of the three. I would argue that a viable distinction still remains; however, a worthwhile discussion of this difference is beyond the scope of this article.
how child pornography should or should not be regulated. That is a separate enterprise.

Second, the term “internet” used here is shorthand for the communications infrastructure that the bill seeks to regulate. However, electronic communications are vast and multi-layered. Many people use the internet and the services it provides: in fact it is the existing resources of the internet and the World Wide Web that have the most potential for users as a whole and feminism in particular. The internet can facilitate electronic visits to the Library of Congress, sending mail to people at virtually any university, and participating in countless discussion groups, to name a few of many possibilities. The internet resembles a kind of interactive cable television service with an astounding array of interactive programming. Online service providers, such as America Online, provide their own services in addition to access to the internet. Other online service providers and bulletin board services do not connect to the internet at all, but supply other services or information to subscribers. A rough analogy for the bulletin board services is a 900 number that a subscriber calls for a particular reason, but through which the subscriber can not tap into anything else. What all of these have in common is that one uses one’s computer and modem to do the communicating. However, because the internet is often portrayed as the culprit in the media and its services and potential are so vast, for the purposes of this paper, the “internet” is shorthand for the larger electronic communications structure.

I. EXISTING LAW REGULATING OBSCENE AND INDECENT SPEECH

This section provides a brief overview of how obscenity became unprotected speech. It first will lay out how speech is currently regulated and the way in which indecent (but non-obscene) speech emerged as a target for restriction, and will then conclude with a look at some of the tensions and dilemmas in applying the current law to the internet. By way of introduc-

13. For example, see Bork, supra note 5, for a long list of services that the internet provides.
14. I am grateful to Tom Dowdy of Apple Computer, Inc., for his clarification of these models.
16. A more complete map of the different services and how they interconnect can be found in the recent Georgetown Law Journal Symposium on Pornography on the Internet. See, e.g., Marty Rim, Marketing Pornography on the Information Superhighway, 83 Geo. L.J. 1849 (1995). The District Court opinions also contain descriptions and glossaries of terminology.
tion, it is important to note that "obscenity" is one of several categories of expression that are not protected under the First Amendment. Together with advocacy of illegal action,18 "fighting words,"19 and libel,20 obscenity is an area of speech where the Supreme Court has ruled that the States' need for regulation can outweigh the individual's right to speak.21

There are several reasons why certain types of sexual expression were moved from the protection of the First Amendment to the mercy of the States' legislatures. The Court and several commentators have argued that "obscenity," or "hard-core" pornography, is not speech at all, but rather a sex-aid.22 There is also a longstanding historical justification that the United States has "always" regulated obscenity: doing so is part of traditional government activity.23 For now, what is critical to remember about obscenity is that without constitutional First Amendment protections, the creator (and sometimes the purchaser) of sexually explicit material has only due process protection from legal sanctions.24 Ever since obscenity left the charmed circle of First Amendment protection, the questions in obscenity regulation interpretation turn not on the right to speak, but rather on whether due process safeguards are properly in place.25

A. ORIGINS: FROM COMSTOCK TO MILLER

The reason for starting with the a brief history of obscenity law is to illustrate how women's interests, needs, and livelihoods have been on the wrong side of "decency" or "obscenity" regulation for a long time. In the examples below, all kinds of women, from women who were abortion and contraceptive providers to women whose work and interests led them to avant garde literature, were prosecuted.26

In the late 1800's, until well into the 20th century, the regulation of sexual expression was dominated by Anthony Comstock and his successor, John Sumner.27 The Comstock Act prohibited a far broader spectrum of speech than the current obscenity standard.28 Comstock himself was a clerk

23. Paris Adult Theatre, 413 U.S. at 57.
25. Id.
28. The Act provided, inter alia, "[t]hat no obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing
in a dry goods store and a special agent of the Post Office. In this second capacity, he became “America’s greatest anti-smut crusader,” vigorously and ruthlessly enforcing his eponymous act. Walter Kendrick writes in *The Secret Museum* that Comstock boasted of fifteen suicides among those he accused, including the abortionist Madame Restell. Sumner was reported to be more laconic, but even his prosecution of the *Little Review* for its publication of a chapter from *Ulysses* was devastating to the magazine’s editors:

> It was like a burning at the stake as far as I was concerned. The care we had taken to preserve Joyce’s text intact; the worry over the bills that accumulated when we had no advance funds; the tears, prayers, hysterics and rages we used on printer, binder, paper houses; the addressing, wrapping, stamping, mailing; the excitement of anticipating the world’s response to the literary masterpiece of our generation. . . . And then a notice from the Post Office: BURNED.

Comstock’s regulation of obscenity through the mail also foreshadowed Exon’s current attempts to regulate the internet.

Today’s far narrower obscenity standard followed a several-decade journey through different, less satisfactory and less workable approaches. One important early step was Judge Woolsey’s ruling in *U.S. v. One Book Called Ulysses* that the novel *Ulysses* was not obscene because it had no “arousing effect.” Although no lasting standard was achieved in this lower court case, it nevertheless signaled a move away from the highly restrictive Comstock era. There were many Comstockian after-effects, however. For example, it took until 1952 for the Supreme Court in *Butler v. Michigan* to rule that adult interests and choices should not be governed by the perceived vulnerability of children. This ruling permitted sexually explicit materials to be available to adults, rather than, as previously, being banned from the marketplace entirely in a broad and unfocused effort to protect children.

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29. Id.
30. Id. at 136.
31. Id. at 151.
32. DE GRAZIA, supra note 26, at 14.
33. United States v. One Book Called Ulysses by James Joyce, as discussed in DE GRAZIA, supra note 26, at 29-30.
34. Id. at 22.
Later, in the landmark Roth decision authored by Justice Brennan, the Court continued to loosen its grip on obscenity regulation, holding that a work must be “utterly without redeeming social importance,” before it could be termed obscene and banned. This was arguably the high water mark for free speech protection, as Roth’s was a very difficult standard to meet. Finally, in 1973, the Court tempered Roth considerably and created the current Miller standard.

Under the Miller standard, in order to be categorized as obscene, a work, which must first be “taken as a whole,” must then be shown to appeal to the “prurient interest.” While the Court did not explicitly so state in Miller, “prurient” interest has been understood to mean “that which turns you on.” The Miller test requires that the work depict or describe, in a “patently offensive way,” sexual conduct specifically defined by the applicable state law. Further, the work, again, taken as a whole, not fragmented, must be without “serious literary, artistic, political or scientific value.” The Court explained that “patently offensive sexual acts” are “patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated” or “patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals.” Lastly, “obscenity is to be determined by applying ‘contemporary community standards’ not national standards.” Importantly, the contemporary community passes judgment only on the “prurient interest” prong of the Miller test, not the question of literary, scientific, political or artistic value.

Miller is thus the primary ruling from which to judge an individual work. Many further rulings have defined and limited the rights to own, buy, make, share and broadcast works. For example, in Stanley v. Georgia, the Court ruled that people had a right to have obscene material in their own homes. Under Stanley, anyone at home could read or watch even that which the government prohibits the bookstore from selling, or the video store from sending through the mail. While later cases sharply limited the ability of private individuals to obtain or receive pornography, Stanley remains a landmark ruling both for privacy rights and for obscenity law. Notably,

the age of 16 was per se obscene, even if the depictions did not otherwise meet the Miller standard.

39. Id. at 24.
40. See Schauer, supra note 22, at 928.
41. Miller, 413 U.S. at 24.
42. Id. at 25.
43. Id. at 24.
Stanley’s privilege of privacy has reverberated in feminist theory, which has roundly criticized Stanley’s implicit privileging of the private, of the home as a castle, where otherwise illegal things may happen. 47

Succeeding courts have continued to wrestle with obscenity rights outside of the home setting. The Supreme Court focused on the prurient interest, and the question of whether the material need appeal to the prurient interest of the target audience, in Mishkin v. New York. 48 The work in Mishkin depicted, among other things, homosexual S/M scenes. Under Mishkin, the prurient interest test could be met if the jury thought this material would appeal to the prurient interests of a gay or lesbian S/M community—even if the jury had very little understanding of what these scenes were about. The Mishkin ruling is significant for many reasons, not least because it demonstrates the problem of notice within obscenity regulation. What if Mishkin’s jury was wrong? What if they could not know? What if the gay S/M community used these books for informational or safety purposes only? By allowing a mainstream jury to decide the fate of work targeting the gay and lesbian S/M community, Mishkin allows juries to speculate about types of behavior they may know nothing about. Mishkin also shows how obscenity regulation singles out the expressions of sexual minorities. 49 The Court has openly revealed this prejudice, holding in Brockett v. Spokane Arcades, Inc. that “wholesome, healthy and old-fashioned” depictions of sex were not obscene, whereas “shameful” and “morbid” representations were.50

In sum, the law governing “obscenity” first permitted free speech protection to be replaced with due process protection. Miller exemplifies this standard. However, in subsequent rulings, particularly with respect to notice, even due process protections have been significantly eroded.

B. THE EMERGENCE OF SLIGHTLY PROTECTED SPEECH

In Young v. American Mini Theatres, Inc., the Court produced a new way of dealing with sexually explicit materials.51 In Young, the material at issue was not obscenity under the Miller test, and therefore was, in principle, protected, unregulable speech. But Young created what seemed to be new category of speech. The new category was low-value speech, “not worth marching our sons and daughters off to war for,” and certainly not what the Supreme Court was willing to protect against Detroit’s zoning regulations.52 Rather, the Court in Young permitted the city to zone in such a way as to prohibit adult bookstores and movie theaters from operating

47. See generally MACKINNON, supra note 11.
49. Robin West makes this point beautifully in reference to the Meese Commission’s report on pornography. See West, supra note 7, at 707.
52. Id.
within a certain distance of one another (or other regulated use establish­ments, including theaters, bookstores, liquor stores and pawn shops).\(^{53}\) Once again, the Court willingly replaced First Amendment protection with due process protection. However, in this case the Court allowed the States’ interest to intervene in an area of speech that should have been protected. But rather than protection, \textit{Young} offers balancing of interests.

Balancing continued in \textit{Renton v. Playtime Theatres, Inc.}, where the Court applied a time, place and manner restriction to this newly demoted form of speech.\(^{54}\) Both of these rulings hold that it is permissible to zone such speech provided there are adequate alternate channels for expression.\(^{55}\) This has critical implications for the internet, and it had immediate application for the next area of Supreme Court speech regulation: broadcast regulation.

In the manner of \textit{Young} and \textit{Renton}, broadcast regulations operate with the premise that there is a middle, less protected standard for “near obscene” speech.\(^{56}\) In the context of broadcast regulation the Court maintains its two standards, obscenity and near obscenity, by permitting limitations on expression so long as there are contemporaneous outlets for near obscene speech.\(^{57}\) Whereas in \textit{Renton} the “other outlets” provision means that communities must permit adult bookstores to operate in some areas; in the context of television or radio, it means programming with adult content is permissible but must be limited to non-primetime hours.\(^{58}\)

Where \textit{Young} and \textit{Renton} were anti-skid-row ordinances that supported cities’ efforts to keep neighborhoods free from adult theatres, the broadcast regulations return to the idea that children should not be exposed to indecent expression, even if the expression is not outright obscene.\(^{59}\) There are two conflated rationales here: first, that children have unlimited access to television (or radio) which the parents cannot control and second, that the television (or radio) audience is an unwilling prisoner in front of the TV and should be protected from television’s intrusion. By way of confronting the confused rationales between the skid-row ordinances and the TV ones, at least one commentator has questioned the extent to which a television viewer is captive, and whether that viewer is less or more captive than someone in the street.\(^{60}\) Nevertheless, this is the language that the Court uses.\(^{61}\) For example, in \textit{FCC v. Pacifica Foundation}, the station was issued a reprimand

\(^{53}\) Id.
\(^{55}\) Id.; \textit{Young}, 427 U.S. at 50.
\(^{57}\) Id.
\(^{58}\) \textit{Young}, 427 U.S. at 50.
\(^{59}\) Id.
\(^{60}\) Id. (Brennan, J., dissenting quoting Judge Bazelon’s circuit court opinion).
\(^{61}\) \textit{Pacifica}, 438 U.S. 726.
by the FCC for broadcasting George Carlin’s “Seven Dirty Words” at two o’clock on a weekday afternoon. A car-radio listener and his fifteen year old son heard Carlin’s riff on the seven words; six weeks later the father complained to the station. In ruling that the broadcast was impermissible, the FCC limited the holding to the circumstances of the afternoon broadcast and the captive, young listener.\textsuperscript{64} \textit{Pacifica} seemed to leave open the possibility that a different medium which incorporated an express understanding of consent between the listener and provider might not be as strictly circumscribed.

In addition to the “alternate channels” requirement, the broadcast regulations approved by the Court and Congress’s 1984 Cable Communications Policy Act\textsuperscript{65} suggest useful models for the internet.\textsuperscript{66} The Supreme Court’s ultimate position seems to be that government may regulate in order to assist parents but governmental regulation will not step in to substitute for parental controls. Instead, a combined force of government, industry’s own efforts (via lock boxes, codes, scrambled images, credit cards for pay-per-view stations),\textsuperscript{67} and parents need to take responsibility for what their children see and hear.

\textbf{C. OBSCENITY LAW, INDECENCY LAW AND THE INTERNET}

Before turning to the Communications Decency Act itself, it is useful to note that traditional obscenity law assumes facts about viewers and purveyors of sexually explicit materials that are not necessarily true or accurate when applied to the internet. Perhaps the best example of the clash between the law and the medium is in the “community standards” element of the \textit{Miller} test. Although community standards already have their own complexity and controversy, they are even more complex and controversial in the internet context. There is no anchoring community in a new world where the geographic boundaries of communities do not exist at all, yet the Justices in \textit{Miller} seemed certain that one nationally based standard was inappropriate: the whole country should not have to live with a standard that would be acceptable “in New York or Las Vegas.”\textsuperscript{68} Hence the \textit{Miller} test of “obscene”

\textsuperscript{63}. Laurence Tribe, \textit{American Constitutional Law} 938 (2d ed. 1978).
\textsuperscript{64}. \textit{Pacifica}, 438 U.S. 726.
\textsuperscript{66}. See generally Meyerson, \textit{supra} note 62.
\textsuperscript{67}. Cable Communications Policy Act, \textit{supra} note 65.
\textsuperscript{68}. \textit{Miller}, 413 U.S. at 32.
is a local one\textsuperscript{69} which may function adequately in a proceeding to close down a bookstore or a theater, where the community is physically present.\textsuperscript{70} But “community” on the internet has nothing whatsoever to do with proximity to a site of obscene material. This presents serious problems with regard to due process protection afforded to obscene speech: if the community is culled from the place where an offended person downloaded images, there is no notice about or relevance to that community’s standards for the transmitter.

The archetypal instance\textsuperscript{71} of the community standards problem regarding notice took place in the companion cases of United States. v. Robert Thomas and United States. v. Carleen Thomas.\textsuperscript{72} The Thomases, a California couple who ran what they called the Amateur Action bulletin board service, were convicted of interstate distribution of obscene material.\textsuperscript{73} Robert Thomas provided a wide variety of material, some of it very hardcore and potentially obscene in many jurisdictions; some of it displaying no more than Thomas’ offbeat humor.\textsuperscript{74} The drama in the Thomas cases derives from San Jose jury’s decision, applying San Jose community standards that their material was not obscene.\textsuperscript{75} In Tennessee, however, where the Thomas offerings were downloaded by a Post Office agent – a modern day Anthony Comstock, perhaps – the jury found differently, and thus Robert Thomas sits in prison.\textsuperscript{76}

Other legacies from Miller pose interpretive problems when applied to the internet. For example, the Court in Stanley v. Georgia held that one could possess obscene materials in the privacy of one’s home.\textsuperscript{77} However, obtaining obscenity from a bookstore, a movie theater or selling obscenity is

\textsuperscript{69}. \textit{Ibid.}

\textsuperscript{70}. \textit{Miller} more or less turns community standards into a jury issue. Interestingly and perhaps importantly there was no jury in the Ulysses trial which may have saved the book. \textit{De Grazia}, supra note 26, at 31.

\textsuperscript{71}. Anne Wells Branscomb points out that this case is more complicated than commentators are admitting. As an example, there was contact between Thomas and the Postmaster via the ordinary mail system, in addition to the internet contact. Anne Wells Branscomb, \textit{Internet Babylon? Does the Carnegie Mellon Study of Pornography on the Information Superhighway Reveal a Threat to the Stability of Society?}. 83 GEO. L.J. 1935, 1948 n.71 (1995).

\textsuperscript{72}. For an exploration of these cases, see Huelster, \textit{supra} note 17 (citing United States v. Robert A. Thomas, No. 94-20019-01-G (W.D. Tenn. 1994) (on file with the Boston University Law Review); United States v. Carleen Thomas, No. 94-20019-G (W.D. Tenn 1994) (on file with the Boston University Law Review).

\textsuperscript{73}. \textit{Ibid.} at 866.

\textsuperscript{74}. \textit{Time} reports that Thomas sells one picture with the line “Wait till you see this cutie sitting on the toilet!”—once downloaded this reveals itself to be a picture of a 15-lb. lobster. Wendy Cole, \textit{The Marquis de Cyberporn}, \textit{Time}, June 3, 1995, at 43.

\textsuperscript{75}. Huelster, \textit{supra} note 17, at 866.

\textsuperscript{76}. \textit{Id.}

\textsuperscript{77}. Stanley v. Georgia, 394 U.S. at 567.
not protected.\textsuperscript{78} Thus defining where “obtaining” or “sending” begin and end and where “possessing in privacy” take over, are prerequisites, following \textit{Stanley}, for regulating electronic communications. The “obtaining” prohibited in \textit{Reidel} and other cases limiting the \textit{Stanley} holding, was an “obtaining” which reflected the models of the customer and the book shop, or the person awaiting a delivery from across state lines. But these models do not mesh with internet communications in which items are instantaneously “sent” and “received.” Further, state lines have no application in an environment without a physical geography.

All of these problems zero in on a core issue in the regulation of obscenity: notice. Because violation of an obscenity law entails a criminal sanction, notice plays a key role in ensuring some sort of due process protection is in place. A prosecution under obscenity law exposes the purchaser, creator or owner’s private interest to the gaze of prosecutors and the public. Personal expectations of privacy for purchasers and creators are inverted with potentially extreme consequences,\textsuperscript{79} whether or not the prosecution is successful. Whatever one’s perspective on the merits of regulating this kind of expression, understanding the boundaries of what is and is not legal, of what will subject one to sanctions versus what is protected is critical for establishing simple due process protection. A creator, seller or receiver and viewer needs to know where the definitions of the legally permissible lie. As unpredictable a task as this was previously, it is far more so now on the internet. In a medium where interactions with other people are often fragmentary back and forth conversations, defining “taken as a whole” is problematic. In a medium in which geographical boundaries cease to have any kind of meaning, it is similarly difficult and perilous to second-guess the community standard to be applied to what a person writes or draws or lets someone else know. In a medium which people have made such a part of their lives that communications are often spontaneous, off the cuff and unthinking, prior notice of the potential illegality of one’s acts is essential.

In sum, traditional obscenity law was not ready for the challenges and nuances of the internet environment.\textsuperscript{80} The question today is whether the newly signed law will be any better suited to the new technology and culture.

\section*{II. THE EXON BILL, THE FIRST AMENDMENT, AND THE INTERNET}

This section first presents the relevant portions of the text of the new law, and then offers an analysis of it in the context of current First Amend-

\textsuperscript{78} Paris Adult Theatre, 413 U.S. at 69; United States. v. Reidel, 402 U.S. 351 (1971).
\textsuperscript{79} See supra text accompanying note 30.
\textsuperscript{80} None of these arguments challenging application of existing obscenity law in the internet environment were brought up in the ACLU cases. Both cases focused uniquely on the use of “indecency” in the statute.
ment obscenity and indecency regulation. Following that will be an evaluation of the law's potential impacts in the context of the internet. It is worth noting that the Exon Bill is not an atypical obscenity statute. The reasons that it deserves this special attention is because of the way it will operate in the dramatically different internet medium.

A. THE LAW ITSELF

The Act's drafters consider it vital to make the internet safe for families and children. Senators Jim Exon and Dan Coats both introduced the bill spurred on by the danger, as they saw it, that obscenity, sex and pornography were taking over the internet. Their dual goals were protecting children from the sight of pornography and violent sexual images while protecting women from the potential pain and harassment of pornography on the information superhighway. Senator Exon had successfully attempted to view various types of pornography using different on-line services only to be "startled" by what he was able to see. The Exon Bill was born from the Senator's experience.

The original introduction of the Exon Bill was contemporaneous with publicity about the availability of a wide variety of pornography, including violent pornography, depictions of bestiality and child pornography, and incidents of solicitation and harassment between minors and adults. Against this background, Senators Exon and Coats introduced a bill to stop what they saw as an erosion of our society. The Exon Bill is part of a larger Telecommunications Act. Its initial innovation is to update current telephone regulations to the computer age, often by changing the word "telephone" to "telecommunications device" which also includes computer networks, modems and the internet. The text of the 47 U.S.C. § 501(1), as modified, prohibits

[W]hoever (in the district of Columbia or in interstate or foreign communication) (A) by means of a telecommunications device knowingly" (i) makes, creates or solicits, and (ii) initiates the

81. Robert and Carleen Thomas were punished under a statute with nearly identical language. 18 U.S.C. § 1465 (1988). Huelster, supra note 17, at 866. The Exon Bill itself is an update to the telephone law which also had the same language. 47 U.S.C. § 223 (1994). The Comstock Act used a similar phraseology. See Kendrick, supra note 27.
83. Id.
84. Id.
85. See Cole, supra note 74.
86. Bork, supra note 5.
transmission of, any comment, request, suggestion, proposal, image or other communication which is obscene, lewd, lascivious filthy or indecent, with intent to annoy, abuse, threaten, or harass another person; (B) by means of a telecommunications device (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 communication is under 18 years of age, regardless of whether the maker or such communication placed the call or initiated the communication . . . shall be fined no more than $100,000 or imprisoned not more than 2 years or both . . . . 90

The new regulation continues in a subsequent section:

[And] . . . [Whoever] 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 . . . shall be fined no more than $100,000 or imprisoned not more than 2 years or both . . . . 91

Because the law deals with obscenity, it must comply with Miller to meet a threshold constitutionality standard. It does not. The new law's initial constitutional conflict appears to be its broader standard prohibiting the "lewd lascivious, filthy obscene and indecent." The constitutional definition of "obscene" refers to "patently offensive depictions of ultimate sexual acts."92 Certainly under the Miller test, section 501(1) does not supply a sufficiently narrow scope of expression for most communication. The newly enacted law, unlike the previous bill, is more specific in section 501(2) borrowing language from Miller to define what it prohibits. The failure to specify in subsection (1) and the disparity between subsections (1) and (2) raise a question of constitutional vagueness, which in turn suggests that the Exon Bill does not provide the necessary notice to a potential defendant.93

However the Court has provided some relief for legislators who draft in

91. The Communications Decency Act, 47 U.S.C. § 223(d)
92. Miller, 413 U.S. at 24.
93. Hamling v. United States holds that defendants must be aware of the character of the material in order to be held criminally liable. Hamling v. U.S, 418 U.S. 87, 123 (1974).
such a "synonym mongering" fashion.\textsuperscript{94} under \textit{Ward v. Illinois} courts could provide a narrowing construction of existing statutes to reconcile them with \textit{Miller}.\textsuperscript{95} While this appears to spare the Exon Bill its constitutional conflict, it presents even more of a due process problem for the internet using public. This holding gives wide latitude for interpretation of the material after the fact and little advance warning to the purveyor. There is perhaps even more latitude embodied in a ruling in another case, \textit{Brockett v. Spokane Arcades}, in which the word "lust" was held to be unconstitutional "only insofar as the word ‘lust’ is understood as reaching protected materials."\textsuperscript{96} Further, the Ninth Circuit Court of Appeals, following \textit{Miller}, has explicitly held that "lascivious," like "lewd," was a "commonsensical term whose constitutionality was specifically upheld in \textit{Miller}."\textsuperscript{97} Therefore, although the Exon Bill seems far too broad, the language is subject to a narrowing interpretation by judicial review. While this makes the law look at least superficially less constitutionally suspect, if anything, it makes the notice problem much worse.

In comparing \textit{Exon} to \textit{Miller}, another conflict arises in the law’s lack of exceptions for works with artistic, literary, political or scientific value. Under \textit{Miller}, "serious artistic, literary, political or scientific value redeemed a work."\textsuperscript{98}

Yet another problem is presented by the Exon Bill’s inclusive terms prohibiting the transmission of as little as "a suggestion, a comment," that contains indecency or obscenity,\textsuperscript{99} unlike \textit{Miller}, which required that the work must be "taken as a whole."\textsuperscript{100} Because the Exon Bill does not include this language, it thus opens up the possibility of a prosecution based on use of fragmented depictions, representations or "suggestions." In this respect, Exon is a more blatant violation of \textit{Miller}. This conflict again presents the possibility that the Exon regulation is simply unconstitutional.\textsuperscript{101}

Exon’s biggest departure from \textit{Miller} is that its categories of obscenity, filth, lewdness and indecency have no defining community reference point. The bill does not indicate who decides what is obscene and for whom. While subsection (2) of the bill refers to a community standard, the law does not

\textsuperscript{94} For synonym mongering obscenity definitions see \textit{Kendrick}, \textit{supra} note 27. "Much anti-obscenity legislation reflects the same busy concern with plugging up all possible loopholes, although as several critics have pointed out, such words as “indecent,” “lewd” and “obscene” can be defined only in terms of one another, producing a closed system that thwarts even the most assiduous inquiry into what any part of it might mean." \textit{Id.} at 160.


\textsuperscript{96} \textit{Brockett v. Spokane Arcades, Inc.}, 472 U.S. 491 (1985).

\textsuperscript{97} \textit{United States v. X-Citement Video}, 982 F.2d 1285, 1288 (1992).

\textsuperscript{98} \textit{Miller}, 413 U.S. at 24.


\textsuperscript{100} \textit{Miller}, 413 U.S. at 24.

\textsuperscript{101} \textit{Hamling}, 418 U.S. at 123.
say how community is to be determined. Subsection (1), with a broad potential impact on internet users, does not provide a source for the standard at all. The bill appears to conflict with other aspects of obscenity law because the standard proposed by Senators Exon and Coats was designed to protect children. This desire to protect children reopens the questions that were settled in Butler v. Michigan, and again in Pinkus. In both those cases the Supreme Court ruled that the world could not be regulated for the needs of children, which the Exon Bill purports to do. Thus, Exon’s bill appears to be squarely in conflict with obscenity law.

Before the Supreme Court articulated the Miller standard, it decided another obscenity case which was an interesting throwback in many ways to the earlier prosecution of Ulysses. In Kingsley Int’l Pictures Co. v. Board of Regents, the Court explicitly repudiated legislation that acted as one track moral advocacy. The Court was considering the film Lady Chatterly’s Lover. The advocacy at issue was the “promotion of adultery.” Kingsley exemplifies both the dilemmas within First Amendment jurisprudence and the tension between regulating decency and regulating thought. The Exon standard, with its own one-track mindedness, does not concern itself in these distinctions, and thus may flunk the Kingsley test. What happens to the site that provides the film version of Lady Chatterly’s Lover on-line? And if children see it? The service provider might spend one hundred thousand dollars and two years in jail, now that the Exon Bill has taken hold.

Arguments in support of the Exon Bill are similar, however, to the arguments made in support of broadcast regulations of near obscene speech. This analogy is strongest when the laws sponsors make the argument that on the internet, children have access which their parents cannot control. These were some of the arguments made in Pacifica, which established constitutional rules for regulating the decency of broadcast media. The captive audience argument made in Pacifica is less apt than the parental control argument because the computer has so many different functions. But once on the internet, one can certainly be harassed or receive unwelcome

103. Id.
105. DE GRAZIA, supra note 26, at 25-32.
107. Id. This is a particularly problematic work for a feminist and a free speech analysis. Lawrence was opposed to permitting obscenity and indecency to be published, and felt strongly that his work was not that. See DE GRAZIA, supra note 26, at 30-40. In this respect, Lawrence articulates a nice, irony-laden example of the subjectivity of the standard.
108. See Elmer-Dewitt, supra note 5.
mail.\textsuperscript{110} This seems to be another suitable justification for a regulation under \textit{Pacifica}.

However, if the Exon Bill is to follow the model of broadcast regulation, upheld in \textit{Pacifica}, it needs to provide alternative channels for the expression of indecent speech.\textsuperscript{111} The bill fails to do this. All of the categories of speech are criminalized by the Exon Bill; the level of penalty varies when the work falls into the hands of a younger internet user. There is no legitimate outlet.

C. THE BILL AND THE MEDIUM

While public attention has centered on the bulletin board pornography services, the first victims of the Exon Bill are likely to be the original, ongoing and potential services that the internet provides to students, teachers, academics, libraries, hospitals and universities.\textsuperscript{112} These services will be vulnerable in a number of ways. First, the Exon Bill has none of the value exceptions (artistic, political, literary, scientific) which were crafted in response to criticism of earlier obscenity law.\textsuperscript{113} These values serve to protect expression despite obscene-seeming elements. But Exon's bill is not drafted for protection. On its face the law would seem to immediately threaten several existing internet AIDS newsgroups which provide explicit sexual information.\textsuperscript{114} It would make most library retrieval services subject to censorship.

Another vulnerability is the Exon Bill's prohibition on obscenity in even small, fragmentary, "suggestion" form. This could subject many people to prosecution. It is difficult to employ "the work taken as a whole" methodology satisfactorily in an electronic medium in which people work and communicate radically differently, relying on editing, re-editing, alteration and maintenance of several versions of one text. Exon's bill, which addresses obscenity and indecency at such a minute, fragmentary level is more modern

\textsuperscript{110} The story of Mr. Bungle is one example. \textit{See} Branscomb, \textit{infra} note 187 and accompanying text.

\textsuperscript{111} \textit{Pacifica}, 438 U.S. 726.

\textsuperscript{112} Section 223 (f) specifically mentions non-profit libraries and universities. The gist of this section would appear to be that states may not impose different, more onerous sanctions for violations of the Communications Decency Act, although they may encourage regulation procedures, so long as they affect only intrastate activities. Under § 223(g) the Act reminds us that the Federal government is not limited by anything in this bill. The Communications Decency Act, § 47 U.S.C. § 223.

\textsuperscript{113} \textit{See}, e.g., David A. J. Richards, \textit{Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment}, 123 U. PA. L. REV. 45 (1974); DE GRAZIA, \textit{supra} note 26. \textit{See also} KENDRICK, \textit{supra} note 27, at 150; STROSEN, \textit{supra} note 7, at 31, 225-29 (discussing obscenity regulation and the Comstock Act and the following time period with limitations on contraceptive and other gynecological health related issues).

\textsuperscript{114} \textit{X-Citement Video} held that the purveyors only had to know the character of the material, but not whether or not it was legally obscene in order to be held criminally responsible. \textit{X-Citement Video}, 982 F.2d at 1290 (citing \textit{Hamling}, 418 U.S. at 119-120).
than Miller in this respect, as Miller dates from an understanding of representations and communications as whole and final in form.

The absence of reference points for a community or national standard reintroduces a third issue, one concerning tastes and tolerances which Miller helped to minimize. As illustrated in the Thomas cases, on the internet, the expectation and understanding of what “community” is not so much regional, but rather cultural.115

Beyond these institutional threats, the Exon Bill poses several immediate threats to individual users. For one, the bill’s failure to recognize that internet correspondents may never physically meet each other is particularly problematic and poses the notice problem most directly. Under the Exon Bill, transmission of material to someone under eighteen, whether knowing or not, is subject to criminal sanction. The actual knowledge of one another on the internet is very slight. Exon portrays this anonymity as dangerous. However, it is surely also one of the medium’s strengths. Anonymity and confidentiality offer protections that enable users to discover more about the world and themselves. Making internet users criminally responsible for communications to an unseen person in an unknown place would eliminate that freedom, for all but the most technically astute users.

Another threat to individual users is illustrated by potential application of the Mishkin rule. The Court in Mishkin provided a rule that targeted material produced by and for sexual minorities.116 Taken together, Mishkin and the possibility for large-scale internet monitoring turn the Exon Bill into an especially powerful censorship tool. Discussion among sexual minorities has flourished on the internet, thanks to anonymity and the absence of social censure. There are strong feminist and free speech arguments in support of this discussion, but it certainly looks endangered under the Exon Bill, prompting some critics to suggest that the sexual discussion, not the pornography is the real target of the bill.117

Many of these threats could have been alleviated but Exon deliberately avoided basing his bill on the broadcast and cable models.118 We are in an unprecedented situation, he says, for which those models are insufficient.119 He has expressed a fear that children understand computer technology better than parents.120 Further, Exon’s opinion of the material he downloaded led him to believe that the internet content was much worse than cable television content.121 The Exon Bill seeks to impose a more direct control.

115. Huelster, supra note 17, at 866.
117. 141 CONG. REC. S8987-04, supra note 82 (remarks of Senator Exon when he reels off a long list of newsgroup titles).
118. Id.
119. Id.
120. Id.
121. Id.
There are also several important distinctions between the internet and cable television regulation. For example, jurisdictional issues are completely different for cable operators sending material via satellite and the massive, multi-directional communications on the internet. The internet is also a means for people to directly communicate with one another via e-mail and chat rooms. This has produced a certain amount of harassment and unwanted sexual solicitation. The internet as a whole has no recognized, licensed gatekeepers, whereas cable television does. Thus, there are unquestionably far fewer controls on what gets posted to the internet.

But if the goal of the Exon Bill is to protect children from access and satisfy First Amendment requirements, the cable television model remains a far better one than the Senator’s own proposal. Under the broadcast and cable television models, it is not only government’s responsibility but a shared responsibility between industry, parents and government support for a ratings enforcement system. Under the cable model, opportunities for different kinds of viewing must be made available.

III. TWO FEMINIST REACTIONS

This section presents two feminist reactions to the Exon Bill including their understandings of the use and value of the internet. The first reaction is purely speculative. It is constructed from current feminist anti-pornography writings. The second reaction is drawn from the writings of feminists who believe that feminism’s best ally is the broadest possible protection of speech.

A. MACKINNON AND THE EXON BILL

Women Against Pornography (WAP) is a twenty year old movement led by Catharine MacKinnon and Andrea Dworkin. Since MacKinnon’s work articulates the most forceful and encompassing feminist anti-pornography, speculation on a WAP response to the Exon Bill uses her writing as its primary reference.

To MacKinnon, pornography is pervasive, has always been so, is even


more so now and a significant effort is needed to regulate it. 124 MacKinnon is a dissenter from and powerful critic of existing obscenity law, not because of its fuzzy, inarticulate morality, but because of what she regards as the law’s bald sexism. 125 To MacKinnon, hegemonic culture is a regime where pornography is encouraged to flourish, not only at the expense of women, but in order to subordinate women. 126 Obscenity law is a male sleight of hand, perfectly displayed in rulings such as Stanley, whereby men’s oppression of women via pornography is masked as a constitutional right to privacy. 127

It is important to note that MacKinnon has effectively changed the terms of the legal debate. Instead of discussing obscenity, with its carefully crafted “test” and legal barricade, MacKinnon uses the word pornography, which, legally speaking, has no definition at all. This change in terminology is indicative not only of MacKinnon’s deep disdain for obscenity law, but also of her own formidable influence on framing the debate about how women may be depicted. Whatever pornography’s original meaning, 128 it now signifies a political discussion about representations of women and whether and how to regulate them. Because that is a meaningful category for the purposes of analyzing the goals and impact of the Exon Bill, this paper will use “pornography” as well. As MacKinnon uses the word, pornography unquestionably has a broader, more overt and explicit political meaning, calling the bluff of the Court’s implicit claim to neutrality and “point of viewlessness.” 129 The term “pornography” in MacKinnon’s work refers to “a form of discrimination on the basis of sex,” 130 and can signify any visual depiction of sex or of women in degrading poses. This is WAP’s own sleight of hand: pornography has no fixed meaning, it is everywhere and it can be anything.

MacKinnon attributes three types of harm to pornography: harms against women who are coerced or are forced for economic reasons to pose or act out pornography, harm to women who have pornography used against them as a kind of screenplay for rape and domestic violence, and harm to all women as a class for whom pornography is sexual discrimination. 131 A simultaneous strength and weakness of MacKinnon’s writing is how these three groups of victim-women merge and separate from one another

124. See MacKinnon, supra note 11.
125. Id.
126. Id.
128. See Richards, supra note 109; Kendrick, supra note 26. Both identify “pornography” as stemming from the word for writing about prostitution.
130. See The Model Ordinance in A New Day for Women’s Equality, supra note 122.
131. See MacKinnon, supra note 11.
throughout her descriptions of different kinds of harm. The result for the reader is that one is hoodwinked into feeling that each experience is equally bad, or even, MacKinnon seems to suggest, that they are all the same thing.

In Pornography and Civil Rights: A New Day for Women’s Equality, MacKinnon and Andrea Dworkin map out a means for addressing these harms and redressing pornography’s imposition of inequality. To achieve this, the authors propose a Model Ordinance or the “Indianapolis Ordinance” which is the law at issue in American Booksellers’ Ass’n v. Hudnut. Understanding how the Model Ordinance was intended to work and its reasons for existing offers insight into MacKinnon’s perspectives on the Exon Bill and regulation of obscenity on the internet. First, the Ordinance defines the regulable category of pornography:

Pornography is a form of discrimination on the basis of sex.

1. Pornography is the sexually explicit subordination of women, graphically depicted, whether in pictures or words, that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things or commodities; or

(ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures of sexual submission; or (vi) women’s body parts — including but not limited to vaginas, breasts and buttocks — are exhibited such that women are reduced to these parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.

The language used to define pornography has been culled from the test-

132. See, e.g., the opening pages of ONLY WORDS in which MacKinnon addresses the reader as “you” and you are the subject of multiple scenes, some of pornography, with the pornography of MacKinnon’s pages, and others are “real” but nonetheless are pornographic for the ONLY WORDS reader. You become the woman who is harmed, the spectator who can’t distinguish between pornography and the real world and the culture confused by the lack of difference. MACKINNON, supra note 11, at 3-7.

133. American Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985). This ordinance, in slightly modified form became law in Canada. See Gates, supra note 123, at 23; STROSSEN, supra note 7, at 19.

134. DWORIN & MACKINNON, A NEW DAY FOR WOMEN’S EQUALITY, supra note 122, at 101. The use of men, children or transsexuals in the place of women is also pornography. Id.
timony of women who experienced pornography as harm in these specific ways. The offenses using this kind of pornography include “discrimination by trafficking in pornography,” “coercion into pornographic performance,” “forcing pornography on a person” (this includes in a place of employment, education and the home) and “assault or physical attack due to pornography.”

The ordinance attacks the underlying theory hidden in today’s obscenity law. The ordinance drafters challenge existing law to acknowledge its own values and propose to expose its “First Amendment pieties” for what they are. By creating a specific category of pictures to prohibit and by articulating the political reasons that the images require regulation, the drafters challenge the stated political neutrality of existing obscenity law. This is a complete departure from current First Amendment structure and values. The challenge here is not to make obscenity law less political, but rather a charge that the politics which is already inscribed in current obscenity law is a sexist one that is harmful to women. Because the First Amendment protects pornography, erotica, and other allegedly degrading and humiliating depictions of women, and because this is deeply harmful specifically to women, there is nothing neutral or virtuous about this right, assert MacKinnon and Dworkin. In their analysis, Stanley’s privacy right is a shield behind which oppression of women can continue. What is “free,” they ask, about a “free speech” protection that enslaves women? This is a Constitution that masks a social atrocity, says MacKinnon.

Revealing obscenity law as ideologically based allows the Model Ordinance to respond with a different ideology, one which is upheld by prohibitions on speech, on expression and on depictions of women that MacKinnon finds harmful to women. MacKinnon’s description of what is “harmful to women” is very broad, leaving the ordinance as wide open to abusive interpretation as the Exon Bill. MacKinnon’s ordinance doesn’t require that a work “taken as a whole” be pornographic—one of the reasons the Indianapolis incarnation of the ordinance failed its constitutional test in court. In response to this ruling MacKinnon retorted, “if a woman is subjected, why should if matter that the work has other value?” The ordinance and

135. See West, supra note 7, at 686-90, for a brief introduction to some of these specific experiences.
137. Stanley Fish, There’s No Such Things as Free Speech . . . And It’s a Good Thing, Too 110 (1989).
138. MacKinnon, supra note 127.
139. MacKinnon, supra note 122.
141. American Booksellers’ Ass’n v. Hudnut, 771 F.2d at 325. There is every reason to criticize her glibness as an affront to artistic freedom and a baldly pro-censorship statement. There is also something admirably daring and populist about this moment of MacKinnon’s rhetoric. However, the artistic protection rationale of broader First Amend-
the Exon Bill thus overlap in this respect. Exon’s position that a suggestion or a fragment of a total work is subject to regulation is in line with MacKinnon’s strict analysis of what would make any work subject to censorship. The Exon Bill’s “lewd, lascivious and filthy” might mesh with the specific politics of the model ordinance in some discrete instances. Both the Exon Bill and the model ordinance would seem to have a lower threshold than standard obscenity law for finding certain representations illegal. Significantly, neither proposal carves out a special space for pornography where only consenting adults can find it. The problem for Exon is that if pornography is available, children will get to it and be hurt. MacKinnon, who forcefully rejects the privacy doctrine, sees the problem differently: if pornography exists, it creates a culture which oppresses women.

The cornerstone of MacKinnon’s and Dworkin’s legislation, as they see it, is the effect of pornography. How women are depicted must be regulated because of what that depiction does. Exon’s bill makes no such refinement. Still more dangerously, the Exon Bill’s broad language may sweep up a good deal of the potential for grass roots organizing that the internet could provide. Exon has not carved out a talk space for feminist issues; this too would fall victim to the bill’s “lewd, lascivious or indecent standard.” This is the Act’s biggest problem for WAP. It does not challenge the politics of what “decency” means in the way that MacKinnon and Dworkin have done. Instead it is an old-fashioned effort to extend First Amendment obscenity jurisprudence to a new medium.

B. FEMINISTS AGAINST CENSORSHIP

While some First Amendment commentators refer to the MacKinnon-Dworkin alliance as “the feminist position” on pornography, there are actually many feminist positions on pornography, several of which see nothing feminist at all in MacKinnon’s position on the First Amendment. This section will look at the conflict between feminist anti-pornography and feminist anti-censorship positions before exploring possible anti-censorship responses to the Exon Bill.

The feminist arguments with MacKinnon’s analyses and activism take different forms. To many feminists, MacKinnon’s full-force attack bears a strong resemblance to older censorship efforts and old-fashioned anti-sex
moralism. While equating MacKinnon’s arguments with right-wing family values deserves the political arguments MacKinnon brings to this debate, it is true that, where implemented, the Model Ordinance has produced Comstockian effects. In Defending Pornography, Nadine Strossen recounts the story of the application of Dworkin-MacKinnon’s bill in Canada. The enforcers used the language of the bill to stop material of any sexual description, first stopping pamphlets on gay health information at the US-Canadian border, and then prosecuting a gay book store. It has not mattered that the seized material, as MacKinnon points out, does not resemble what the Canadian bill was designed to limit. The officials enforced the text of the law, not its spirit. They interpreted the ordinance in such a way to reinscribe a familiar system of anti-dissent, anti-gay values.

This incident is more than cautionary: MacKinnon, and in this context, law professor and critic Stanley Fish, have done a great deal to debunk the neutrality myth and unmask the politics within current legal tools. MacKinnon advocates an openly context-based, value-driven legal system. Unfortunately, her suggested remedies of overtly value-invested rules fail to take into account our culture’s unwillingness to enforce a new value system. MacKinnon’s so-called alliance with the Meese commission is a stark example of how feminist ordinances can, have been, and will be re-interpreted for anti-feminist ends. While speech – here pornography – may signify a power relationship, it does not preexist it. Getting at the speech by itself, even altering the speech, does not get at power.

Accepting and endorsing Fish and MacKinnon’s lead in recognizing and repudiating the First Amendment’s hidden politics does not necessarily lead to imposing another more limiting politics of one’s own. If one agrees with Fish that the political is always present, it is nevertheless also true that there are different kinds of political structures, some less limiting than others. Feminists have advocated fewer limitations on speech and argued that the space inadvertently left open within First Amendment jurisprudence can be reclaimed as a feminist space. In this argument, both private unregulated speech and pornographic speech (which is speech protected in some ways by the First Amendment but would be pornographic under the Model Ordi-

144. See generally, Steven G. Gey, The Apologetics of Suppression: The Regulation of Pornography as Act and Idea, 86 Mich. L. Rev. 1564 (1988); Hunter & Law, supra note 6; West, supra note 7; STROSSEN supra note 7; KENDRICK, supra note 27.
145. West, supra note 7.
146. STROSSEN, supra note 7, at 19, 229-44.
147. Gates notes that “homosexual literature is a frequent target of Canada’s restrictions on freedom of expression.” Gates, supra note 123, at 43.
148. MACKINNON, supra note 11; Fish, infra note 181.
149. STROSSEN, supra note 7, at 161-78.
150. ld.
nance) is speech with which women can articulate a sexuality that does not re-inscribe women’s subordination to men. Without First Amendment protections of, at the very least, speech with political, artistic, scientific and literary value, this articulation would be censored. With them, women possess the right to author their own stories and representations, recognize dominant sexual models as political models and address them politically.

Feminists, people of color and gay activists have all insisted on the importance of authoring their own sexual stories. They view suppression of sexual expression as a suppression of their struggles for equality. Dissenting sexual expression is fundamentally upstart and destabilizing in existing power structures. MacKinnon rejects the idea that there can be a female sexuality in a male-defined world. However, Angela Carter envisions a feminist pornography which is radically disruptive. It would replace critical male fictions about women and sex, and present a different model of women, and of what sex might mean, to the world. Still more destabilizing is this imagined Wildean vision:

Oscar Wilde today . . . would not be a playwright, [he] would be a pornographer. Or blasphemer. Sometimes it is important not to be able to tell whether one is reading a poem or a polemic, whether one is watching a movie or a religious rite, whether one is inhabiting a nation or a laboratory, whether one is looking at a masterpiece or observing a pornographic spectacle. These are uncertainties – of genre, of propriety – in whose grip I am convinced Wilde would have wanted us to remain.

The opportunity for presenting a different set of fictions, that is, addressing, publishing and reaching an audience is vastly different online than off. Public discussion has misleadingly focused on certain bulletin board services and newsgroups that feature almost exclusively sexual storytelling for the male audience and male pleasure. Other newsgroups have a strong feminist voice which could grow in both value and sophistication. The

151. See, e.g., ANGELA CARTER, THE SADEAN WOMAN; DOROTHY ALLISON, SKIN: TALKING ABOUT SEX, CLASS AND LITERATURE.
152. Hunter & Law, supra note 6.
153. See generally, CARTER, supra note 143; ALLISON, supra note 143.
154. See MACKINNON, supra note 11.
155. See generally, CARTER, supra note 143; ALLISON, supra note 143.
158. See e.g., “Soc. Feminism” on the Internet. See also the discussion of the internet as
Exon Bill would profoundly interfere with such expressive feminist uses of the internet. Its application would mean censorship, monitoring, and suppression for all of the initiatives that pro-free speech feminists might support. Just as the movie "Lady Chatterly's Lover" would run afoul of the Exon Bill, so would many milestone feminist writings. In her 1992 keynote speech to the gay and lesbian writers' conference, "Outwrite," Dorothy Allison writes about her own development as a writer, the power of rare meetings with other writers and the immeasurable importance of defining who she is to her own survival:

I am part of a nation that is not secret but is rarely recognized. Born poor, queer and despised, I have always known myself one of many — strong not because I was different, but because I was part of a nation just like me, human and fragile and stubborn and hungry for justice in an unjust world. . . . I have lived my life in pursuit of the remade world. 159

Allison's story is subversive in its unflinching truthfulness. It is also without question, too blunt and direct to survive the Exon regime.

Feminists have also sharply criticized MacKinnon's argument that pornography is the stimulus that can and inevitably will create a violent response in men. 160 MacKinnon says pornography creates men's violence and women's passivity. 161 Thus men harass and rape women at pornography's instigation. According to MacKinnon, representations have one specific set of effects; they are simple, uninterpreted, and unnegotiated by other ideological factors. 162 She does not recognize the possibility that different reasons cause different people to do different things; her view does not recognize or value exploration, experimentation, or for that matter, pornography for women. Profoundly, this view negates any possibility for autonomy. For MacKinnon, we are programmed by pornography and autonomy is the delusion. 163

MacKinnon's detractors object to privileging representation over the real, thereby erasing issues of agency and choice. They object to the analysis that representations act as cattle-prods and create uniform reactions, instead of requiring complex interpretation and negotiation within other frameworks. Most astonishing is MacKinnon's seeming belief that once these representations go away, the world will be transformed. It is an ahis-
torical view that posits pornography as the source of sexual oppression, rather than a current, historical manifestation of living in a world defined, in part, by sexual oppression.\footnote{See KENDRICK, supra note 27, at 229, in particular on the ahistoricism of this view.}

MacKinnon's stimulus/response view is shared by other advocates of internet regulation. Judge Bork's \textit{American Spectator} article\footnote{Bork, supra note 5.} provides an instructive example of where this argument leads. In his article, Bork first professes he is an internet fan, and then proceeds to recount his horror at discovering the content of the alt.sex.stories newsgroup. While claiming to be relating what is wrong with the internet, he in fact relates only the particular reaction of Robert Bork, using himself as the measure of what everyone should be. He visits the newsgroup for the first time "enthralled," but soon is shocked, as was Exon, to read a ghastly story of the sexual abuse and mutilation of children.\footnote{There are many political problems with Bork's reaction, besides the one explored in the text above and below. Bork does not take this opportunity to wonder why the entrapment and punishment of children seems to be a national obsession (witness the popular \textit{Home Alone} films, the thriller \textit{Nick of Time}, the openly vindictive \textit{Eye for an Eye}, or the adventure movie \textit{Die Hard With a Vengeance}). Nor does he distinguish the fact that a good deal of powerful literature describes abuse of children (the works of Alice Walker, Dorothy Allison, Kaye Gibbons and Toni Morrison are a few of many examples) some arguably as extreme as the story he encountered (See, e.g., Shusaku Endo's \textit{Scandal}). Bork might argue that we can tell the difference between literature and a story in alt.sex.stories. Maybe he could, maybe we could. But could a censor? We could also pause for a moment to reflect on why someone such as Judge Bork gets his education in shock literature uniquely from the internet, or why if he got it elsewhere (such as a local bookstore selling Brett Easton Ellis, or Eric McCormick's \textit{Paradise Hotel}, or Catherine Texier's anthology of New York Fiction) it is only the internet that commands his attention for regulatory purposes.} While Bork may be right that it is problematic if children read such a story, it is not clear that the story should not be there at all, nor is it clear that this kind of writing will lead to similar action.\footnote{This is a belief that Bork shares with MacKinnon, and is the impetus for the restriction on the use of pornography as an assault in the Model Ordinance. \textit{Supra} note 122.} What Bork would like to do is cast the stories out, deny them a place in anyone's imagination, together with other sexual fantasies and practices which he discovered on the internet. When Bork writes about what is bad, horrifying, and should be regulated, his implicit message is that "this is not me." A feminist analysis would question to what extent "like me" should become a legal standard when it simply enshrines the likes and dislikes of the hegemony.

While MacKinnon positions herself as a dissenter, her regulatory scheme would normalize and exclude like any other. Both she and Bork clash head on with the structuralist interpretation that regulating pornography is a means of regulating sex.\footnote{KENDRICK, supra note 27, at 28 (drawing from the model of normalizing in MICHEL FOUGAULT, \textit{THE HISTORY OF SEXUALITY} (1978)).} When interpreting a regulation such as
this one, a judge, lawyer, government enforcer engages in a normalizing process while deciding questions about what is harmful and what should be regulated. This power analysis is all the more important in the internet context, where all forms of communications could easily be monitored and over-seen, creating an immediate and present gaze of the censor. Even the sympathetic censor who names, approves and blesses the most outrageous communications engages in normalizing. A feminism which is skeptical of the censor’s norm/other dichotomy would reject MacKinnon’s reinscription. MacKinnon seeks to eliminate pornography in order to protect women. This is a questionable means to an end which is arguably not advantageous to women. The Exon Bill would like to regulate to protect children. This is also suspect under a feminist analysis. When the protection of children is the rationale, many communications become suspect.

The news story of Daniel Montgomery and Damien Starr is an example of the deeper issues that are at stake, beyond control of a medium, when the internet is ostensibly controlled for the sake of protecting our children. Daniel, a Washington fifteen–year–old, met Damien Starr online and went to meet him in San Francisco. When the press found out, it reported the story as an adult kidnapping of a minor, something which Exon says happens hundreds of times all over the internet. In fact, the police have reported an approximate figure of ten to twelve instances of solicitation of minors. But in this case, Damien turned out to be a teenager too, who was thrown out of his own home because he is gay. Daniel characterizes his trip to San Francisco not as a kidnapping, but as a running away with encouragement. “I want everyone to understand there was nothing but friendly contact,” Daniel says, referring to Damien and the adults with whom Damien now lives. Daniel is back at home.

Perhaps it is risky for children to talk on the internet. Perhaps, accepting police statistics, the other nine episodes were far less friendly. Perhaps these were not the full facts of Daniel Montgomery and Damien Starr’s story. But the underlying issue in this story is not internet. It sounds instead very much like a story about a teenager who began discovering his own sexuality in a home that was not receptive. He then found and visited someone who alleviated his isolation. A case like this really deals with controlling sexual identity. Perhaps the internet is being used to exert an influence on people like Daniel that is worrisome. But the discussion is not being carried out around the issues of people evolving new identities or discovering their different sexualities. Instead we are legislating against cybersmut, cy-

170. OMAHA WORLD-HERALD, supra note 87.
171. Id.
172. At least one ended in the conviction of a 28 year old man.
berporn and cyberfilth. Children and adults may be using the internet to voice sexuality, but what bothers the Exon Bills' backers, really, is the sexuality itself, not the medium. "Someone should stop this," says Judge Bork,173 believing as MacKinnon does, that this will make what he finds so disturbing go away. The internet is eroding our society, says Senator Exon,174 by which he means that his vision of society is submerged by chaotic, competing visions that he finds on the internet.

Faced with those visions, the Exon Bill proposes to take freedom of speech a long leap backwards in time, taking fundamental feminist advances with it. This is all much more like Comstock than Miller, or for that matter, FCC v. Pacifica. The bill proposes to replace the sexual dialogue that the internet has brought to light with silence. Exon justifies this silence with providing the greatest good for children. MacKinnon would argue that it is for the good of women.175 But an anti-censorship feminism must reject this silence and show that silence, not privacy, is the repressive, sexually-subordinating regime, and that within silence, old power hierarchies re-assert themselves.

IV. STUCK BETWEEN TWO WORLD VIEWS

The question this discussion poses is whether progressive feminism should repudiate internet legislation at all costs. However, to stumble towards that inevitable would be to move from one set of problems into another, and would ignore an imperative posed by Robin West: not just to acknowledge but to "insist on the contradictions in women's experiences of pornography."176 While it is not the purpose of this paper to reconcile these contradictions directly, the competing visions create a deadlock over regulation such as the Exon Bill. It is the project of the last two parts of this paper to analyze briefly the intransigence of these two positions and then to provide a proposed model in which the two responses could, to some extent, co-exist.

Anti-censorship feminist arguments are less convincing when confronted with pornography's more limited role as an implement of sexual harassment. The presence of a vast archive of pornography on the internet is not somehow in and of itself harassment. But continual ongoing reduction of one's self and one's possibilities to one's sex or the possibility of sex is harassment. It is exactly the kind of harassment which suits the internet, a largely male enclave with anonymous communication. The anti-censorship group has not presented an answer for how to address this.177

173. Bork, supra note 5.
175. MacKinnon, supra note 122.
176. West, supra note 7, at 710-11.
177. One answer is to flood the internet with feminist net surfers. This solution brings to
The intractability and self-investment of the free speech and anti-pornography positions are presented in the following analyses of two opposing dilemmas in obscenity law. What is revealing about both of these analyses is the extent to which both MacKinnon’s views and anti-censorship views share a totalizing vision.

A. THE CLASH OF VISIONS

In the first example, from The Secret Museum, Walter Kendrick quotes Richard Nixon disavowing the findings of the 1970 Report of the Attorney General’s Commission on Pornography and Obscenity. That report made the determination that most obscenity laws should be repealed, that neither pornography nor obscenity was bad for the public, and a host of other findings which shocked the President. Kendrick cites Nixon’s speech to a group of would-be Nixon supporters. Nixon promised a new Commission that would produce a different set of not-so-appalling findings. For “if this current report is true,” said Nixon, “it would mean a complete change in all our values.” But “ten minutes of common sense” show that pornography is not able to do this. What Nixon is saying by this, writes Kendrick, is that:

If an attitude of permissiveness were to be adopted regarding pornography, this would contribute to an atmosphere condoning anarchy in every other field—and would increase the threat to our social order as well as to our moral principles. It is supremely ironic that ‘worthless trash’ like pornography should drive even a president to the brink of that abyss. [But then] the unthinkable last step was never taken.

In the second example, which echoes the first, Stanley Fish walks through Judge Frank Easterbrook’s evaluation of MacKinnon’s Model Ordinance and its ramifications for Indianapolis. Here, Easterbrook contemplates MacKinnon’s ordinance, a document that would impose strict controls on speech and also presents a confrontation with a different world. Easterbrook accepts the law’s premise that pornography [speech] is harmful to women, but recoils from it immediately. To Easterbrook, “If the fact
that speech plays a greater role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech. According to Fish, Easterbrook almost completely changes his view of the "rights" world, but then suddenly does not.

Both of these visions rely on the transformative power of government action, even though the desired action is different for each critic. For one, accepting the model ordinance brings the recognition of politics in law. For the other, the repeal of obscenity laws, would lead to a transformative anarchy. Both visions rely on an unacknowledged posture of advocating a completely new world, a radical vision of that which is possible but which is not here now. Both also are based on a notion of a pent-up otherness, kept at bay by cultural and legal mechanisms which are operating just beyond reach.

But sexual discourse — here pornography and obscenity — resists these postures because pornography is both what its detractors say it is, and what its proponents want it to be. Because pornography depicts sexuality, it is political: it is what feminists want to protect and it is bland, insensitive, and injurious, so much so that we as feminists want it to go away. The problem with explicit sexual representation, particularly in the form of explicit sexual harassment on the internet, is that it has real, negative effects and it needs to be protected.

How then, can both needs be met? Once the single view of pornography has revealed its false dream of transformation, the understanding that there are real interests to be protected emerges. Then the answer, rather than being rooted in radical transformations, is a pragmatically worked out understanding of limits around the protection of self and recourse for when self, community, work or privacy is invaded. What also becomes apparent is that the blanket issue of speech regulation recedes, and the more particularized self emerges. This is not to suggest that "self" exists prior to or without protected speech, but rather that a level of particularity is required to understand why speech matters, and why regulating the category of "speech" is not the answer.

Finding the real problems that affect real people is difficult in this area because these persons are the best and only ones to know when it has happened. The questions which need to be answered are ones from practical experience, all of them highly relevant to the internet environment: what does a harassing invasion of privacy do to expression, interaction, work, or

184. Fish, supra note 181, at 1066. Here is an instance writes Fish: "[o]ne of the most interesting (and least commented upon) moments in intellectual discourse, the moment . . . when the path of inquiry a practitioner is following points in a direction that fills him (or her) with horror, and as a result, the inquiry is abandoned, short of its distressing conclusion." Id.
185. This, again, is one of Robin West's central insights. West, supra note 7, at 710-11.
study?

There are several archetypal cases of harassment and invasion on the internet which exemplify the relevancy of these questions. One is "Pamela’s Ordeal." In this case, a Michigan student named Jake Baker wrote a very violent pornographic story about a young woman. He used the real name of a classmate for his title character who he then fictionally imprisoned, tortured, raped and finally burned. Because the language and events of the story almost certainly come under the prohibitions of the Exon Bill, Baker would surely have been prosecuted had the bill been in force. But Baker’s prosecution, by the government, does not advance a feminist interest, nor does it advance the rights of Pamela. It does not address her injury, as phrased in any of the questions above. It turns Baker into a free speech martyr and Exon into a vindicated legislator. Exon does not address the particularity of Pamela’s injury. His bill transforms people into issues, which takes away speech (from Baker) and self (from Pamela).

In Internet Babylon, Anne Wells Branscomb provides another archetypal internet harassment case with the episode of Mr. Bungle and the Lambda MOO. In her account, a group of people anonymously gathered to experiment with an electronic group workspace. The purpose and expectation of the gathering was to learn about and evaluate an online collaborative environment. The common understanding of the group members was that people were there to work. One anonymous participant, Mr. Bungle, started harassing a female participant (also anonymous) with graphic and violent sexual threats.

Both of these cases demonstrate the strong potential for alienation in the internet environment. At the same time, the kind of activity that is identified as an injury is very narrowly defined. There is strong evidence that the harasser knew what he was doing by reaching into someone else’s privacy or private expectations, either thoughtlessly as in Jake Baker’s case, or deliberately as in Mr. Bungle’s. These activities do not fail for a lack of statutory notice. They also illustrate the inappropriateness of a sweeping speech regulation, since they are unrelated to the solicitation of minors or to the bulletin board services that provide pornographic images to willing investors in their products. Instead, their importance turns on specific and local reactions. What they also reveal is the lack of a framework to work through those local reactions.

V. CONCLUSION: A KIND OF REGULATION

The first section of this paper briefly outlined a small piece of First

Amendment history and the rulings that brought about the current *Miller* standard. It also presented the problems of applying *Miller* to the new internet technologies. Section II presented The Communications Decency Act itself and laid out some of the Act's conflicts with current First Amendment holdings. Section III speculated about reactions of anti-pornography feminists to the bill and offered a feminist, anti-censorship response which would protect the internet against the bill's restrictions. In Section IV, the conflict between these two positions was analyzed further to reveal certain inconsistencies internal to each position. Section IV also introduced the specific issue of on-line harassment as a potential area of feminist agreement. Finally, in this section, an alternate, privately organized regulatory scheme is outlined. This section concludes with some thoughts on activism for feminists in this area.

A. FOUNDATIONAL RULES

Prior to the enactment of the bill, the internet was regulated in part by various commercial and market interests. Feminists need to become involved in this, to protect their own interests, because neither the Exon Bill nor the consortium of private regulators are poised to do it. Although there are free speech advocates trying to protect different internet interests, it does not follow that all feminist interests will be represented. What is critical is a pro-free speech position that recognizes certain types of harassment but distances itself from government regulation that limits the potential of the internet as a feminist resource.

First any scheme that can negotiate these positions would need to be privately, as opposed to governmentally, enforced. This avoids the specter of government censorship and monitoring discussed earlier. This system could take advantage of the different communications models that already make up the internet. In the earlier analysis of obscenity law and later feminist critiques of that body of law, governmental definitions of permissible sexual expression conflicted in practical ways with privacy, self-determination, notice about what is forbidden, and what constitutes the impermissible. A scheme that would facilitate the definition of boundaries between people and different spaces on the internet would be a start. The dangers of such a scheme are potentially enormous — particularly in light of the radical democracy that many people believe the internet provides. For now, it is important to keep in mind that any discussion of boundaries must also reject a re-stratification of information and access to information. It must strive to provide borders without necessarily being exclusionary.

Currently there are many self-imposed boundaries on the internet: private news groups, private areas, owners that gate access to certain discussions. There is a powerful position that the internet should remain self-regulating in this regard. This proposal suggests that an independent
group of internet users, service providers, university faculties, staff and students, other academics, libraries and community groups that use the internet be involved in defining boundaries around areas. This discussion is already happening, but largely either within or dominated by the software industry.\textsuperscript{188} Feminists need to participate in order to preserve the richness of this resource and to open up its largely male participation to women.

B. PUBLIC AND PRIVATE SPACES

The discussion of boundary needs to address the difference between public and private space on the internet because they pose distinct problems. The recourse for, or response to, a boundary infringement in each case would be very different. A private space, for example, is one in which an individual has a certain expectation of the kinds of interaction that will take place and the kinds of things that a person might receive. We do not have to reinscribe Stanley’s suspect category of privacy in doing this. When we define privacy and draw a line around a private space based on a subjective expectation, we avoid creating an internet “home” in which old power hierarchies reassert themselves.\textsuperscript{189}

The Lambda MOO example from Anne Wells Branscomb’s article is a good example of an expectation within a certain defined workspace. There, an infringement occurred when a woman was unexpectedly and violently harassed by an anonymous person who used the space for a purpose she neither expected nor wished. This violent invasion of space is akin to a notion of trespass. Because “trespass” assumes boundaries, such boundaries would need to be established and understood. Defining boundaries and making them known is the function of the group of internet users introduced above.

The woman’s actual response was to eliminate Mr. Bungle from the workgroup.\textsuperscript{190} Electronically eliminating the harasser is a fairly standard recommended procedure in many bulletin board services. It is one of the few solutions when the aggressor is anonymous. It is also an effective, albeit temporary, solution. Branscomb reports that Mr. Bungle resurfaced elsewhere. If there had been real definitions of boundaries, this episode might have ended differently. Some spaces, such as this one, could be workspaces, and the people in them would be at work. In this scenario, a person who wishes to work cannot be absolutely anonymous: there would need to be a gatekeeper with names of the workspace users. Anonymity would be maintained however, unless there were an infringement that met the current, legal

\textsuperscript{188} See Elmer-Dewitt, \textit{supra} note 5.


\textsuperscript{190} Branscomb, \textit{supra} note 71.
harassment standard. A suit could be brought under Title VII, because the harassment had taken place in a workspace. Because the kinds of work and collective workspaces on the internet do not correspond to a typical office and may involve people collaborating or sharing a server for a number of different reasons, the kinds of areas designated as actual workspaces must be carefully defined.

Another application of the borders or space idea applies to more public spaces. Here, knowing use of a person's name or image, published on the internet, could constitute defamation, or intentional infliction of emotional distress. Defamation could be punished by revocation of internet privileges, or actual suits could be brought. What is important here is the actor's level of awareness. Using someone's name or morphing someone's image to create, for example, pornographic images or a story such as Baker's suggests the actor had a fairly high level of understanding of what is going on. Boundaries help define the actor's level of knowledge. Winning such a suit for an infringement would not be easy, assuming that one has the funds to do so. But it is an important form of recourse for a private individual such as "Pamela." Moving towards a model which defines permissible actions, communications and places is an advancement for internet freedoms and protections.

C. THE CABLE AND BROADCAST MODELS POINT THE WAY

A more formalized conception of internet zones, or communities would help to address the community decency standard issue posed by current obscenity law. Rather than being defined by geographic zones, the communities could be defined as content or rated zones explicitly understood as different from a larger common zone. Movement across a boundary into a zone would be conscious and voluntary on the part of the viewer, much like across a marked, "physical" border. "Boundaries" could be maintained within levels of passwords, or a warning screen. In this case, the screen might warn about how a zone is "rated." A viewer/traveler would have the

191. The aggressed person would need to establish that (1) she or he was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Jordan v. Clark, 847 F.2d 1368 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989).
193. The Model Ordinance was modified to include a defamation statute. See DEBATING SEXUAL CORRECTNESS, supra note 122, at 277.
195. The difficulty in a public defamation/intentional infliction of emotional distress case such as this one has typically been that they are brought by public persons against the press and the Court has pointed to fame as an occupational hazard and to the need not to "chill" the press. Id.
responsibility of accepting the values of the community he or she entered.\textsuperscript{196} The nature of the protection around the zone also answers the child access problem. In the cable television model, the cable companies aided in the channeling efforts by providing lock boxes and scrambling devices.\textsuperscript{197} The software industry is rising to the occasion with numerous internet locks and keys.\textsuperscript{198}

While problematic, "zones" of this nature have been formulated and theorized in other contexts, adapted for movies and for limitations on broadcast viewing. Internet regulation could allow for different levels of speech, however, from the most open in certain zones, to more restrictive, and based on certain understandings, in others. This model could draw on codes some universities have devised which regulate certain forms of speech on campus.\textsuperscript{199} The most restrictive zones are analogous to the most intimate privacy in someone's home; slightly less restrictive zones would be more similar to the classroom and the most open would be the areas which are, as some theorists claim, unregulable.\textsuperscript{200} The campus model for parts of the internet is appropriate, given the educative and resource functions internet serves.

The problem with zoning proposals is they risk recreating a milieu the internet opposes: stratification. Should the internet's defiant anarchy be altered at all? This proposal leaves far more of that anarchy intact than does the Exon Bill. This model deliberately retains a great deal of the anarchy, if we are prepared to entertain or at least humor the idea that anarchy can be zoned. Further, it strives to avoid imposing specific, particularized, obstacles to other communities joining the internet. The internet would become more radical, not less, when everyone has access to it. The pornography debate is one obstacle to free access. The next step is providing physical access to technology for people, especially schools, all of whom can benefit from it, and risk being severely disenfranchised without it. Working toward equal access is the best feminist enterprise today.

\textit{Epilogue}

As mentioned at the start of this note, since its passage the Communicatio-

\begin{itemize}
\item \textsuperscript{196} Senator Patrick Leahy, in his counter proposal to the Exon bill is working on a model very much like this one. Nat Hentoff, \textit{The Senate's Cybercensors}, \textit{WASH. POST}, July 1, 1995, at C1.
\item \textsuperscript{197} \textit{Pacifica}, 438 U.S. 726.
\item \textsuperscript{198} See, e.g., Elmer-Dewitt, \textit{supra note 5}, listing the Net Nanny and Surfwatch, and announcing that Netscape is coming out with another product soon.
\item \textsuperscript{199} See, e.g., Stanford's ordinance in Charles R. Lawrence III, \textit{If He Hollers Let Him Go: Regulating Racist Hate Speech on Campus}, in \textit{Words That Wound} 53, 53-88 (1993); see also Gates, \textit{supra note 123}.
\item \textsuperscript{200} See generally Strossen, in \textit{Speaking of Race, Speaking of Sex, supra note 123} (responding to Charles Lawrence's proposal).
\end{itemize}
tions Decency Act has twice been challenged in court. Both courts found that the Act is unconstitutional, based upon the Act's overbroad and vague reliance on the word "indecent." Both courts also issued an injunction against prosecutions under the Act. While neither opinion addressed the particularized conflicts of contemporary First Amendment law and internet technology that this note has explored, both opinions salute the advent of the internet as a major advance for freedom of expression, and seek to protect its growth.

As expected, the government has appealed these rulings. On December 5, 1996, the Supreme Court granted certiorari.

202. Id.
203. Id.
204. Id.