4-21-1997

Government Censorship of the Internet: A Denial of the Individual Right to Access

Robert Alan Weil

Government Censorship of the Internet:

A Denial of the Individual Right to Access

Robert Alan Weil

April 21, 1997

Louisiana State University

Manship School of Mass Communication

Acknowledgments

I would like to thank those individuals who aided me in completing this arduous, yet rewarding, task. My deepest gratitude to Dr. John Windhauser, whose tireless efforts helped make each page a little easier to write and whose insight proved invaluable in its completion. To Dr. James Hardy, Jr., who will always hold a very dear and special place in my heart; thank you for your kindness, your generosity, and your fatherly spirit. Without you, aimlessness would have certainly prevailed. To Dr. Matt Reavy, a friend and fellow academic spirit who guided me in my maturation process. Your continual interest in my work has spurred me to achieve my fullest potential. To Dr. Jay Perkins, whose sense of determination and unending dedication to accuracy and precision shall indelibly remain with me for the rest of my life. And, to Dr. Whitney Mundt, whose strength and determination shall forever remain a part of my character and spirit.

The greatest debt of gratitude is owed to my parents, Lt. Colonel Louis Weil and Mrs. Peggy Weil. Family is truly the source of inspiration, and this creation is the eternal tribute to their patience, love, and dedication. Their wisdom and impeccable characters shall always be part of me, as they are forever part of my work. It is with great pleasure that I dedicate this honors thesis to my parents, they who shall always be my heart and my soul.

Table of Contents

I

Oh, What A Tangled Web We Weave

The first appearance of John Peter Zenger's New York Weekly Journal occurred on November 5, 1733. The newspaper, which was designed to voice concerns of the New York government opposition, immediately became a smashing success. On December 3, 1733, Zenger's paper published an attack on the governor of New York, Sir William Cosby, "...for permitting French warships to spy on lower bay defenses" (Emery,1992). Additionally, that particular issue also contained an editorial from an irate New Jersey settler that decried the corrupt New York bureaucracy as incompetent. The readers of Zenger's newspaper enjoyed this particular issue so much that additional copies of the paper had to be specially printed. However, Cosby's reaction did not mirror the enthusiasm nor the enjoyment of the Journal's audience. After the governor could not obtain a legal indictment against Zenger for sedition, a majority of the governor's council did. On November 17, 1734, Zenger went to prison for "raising sedition" (Emery,1992).

During this period of American history, a prosecuting attorney need only prove that a newspaper editor published a seditious statement for the editor to be convicted of libel. Publication, not truth, was the decisive factor in determining whether a statement was considered libelous. Under early

American colonial law, a jury did not determine the truthfulness of a defendant's argument; only whether the libelous statement had been published by the accused. Zenger's attorney, Andrew Hamilton, successfully argued that: (1)a jury should be given the right to determine the facts of a case, and (2)that truth be a defense against libel. Although the judge forbade him from making such an argument, Hamilton physically bowed to the judge and then appealed directly to the members of the jury to use truth as the criterion in weighing Zenger's publication as libelous. Ultimately, the jury returned a verdict of not guilty, ignoring legal precedent and the judge's instruction.

Although Hamilton was victorious in Zenger's vindication, he failed to permanently alter New York's colonial libel law. In fact, it wasn't for another fifty years that truth would become the standard by which published statements could be successfully defended against the charge of libel. In 1790, Pennsylvania became the first state to recognize truth as a defense against libel and to allow the right of the jury to determine both the law and the fact of a case (Emery,1992).

The primary aim of this thesis is to prove that government censorship of the Internet in a democratic society denies the individual right to access the free flow of information. Several questions raised by this study include: How do traditional definitions of media law apply to the Internet?; Can the

Internet be regulated in a manner consistent with existing forms of media?; and Which constituted body(ies) should control regulation of the Internet?

This paper shall argue that governments use censorship, not only to protect their own privacy, but to restrict or completely deny the individual's right to access information. The paper will first provide a brief history of the Internet, including its inception, development, and mainstreaming into society-at-large. The paper will also give a detailed explanation of the theoretical right to access. This paper will explore the historical tendency of governments to use censorship as a safeguard against media intrusion. An in-depth case study of the publication ban in the Homolka trial will demonstrate how government restrictions deny the individual right to access the free flow of information. Additionally, a detailed analysis of the 1995 Communications Decency Act will provide further insight into how governments use censorship to deny the individual's right to access. Sprinkled throughout this paper, examples of press restraint in the British Commonwealth and the United States augment the premise that an unconditionally free press is crucial to maintaining a fully democratic society. Indeed, the muting of their voices consigns the people of a free society to the whims of their government.

Since the publication of Milton's Areopagitica in 1644, scholars and

journalists have often cited a free press as the hallmark of a democratic society. However, scholars and journalists have also commented that an unconditionally free press is a dream yet to be realized by humanity. Attempts to establish an unconditionally free press in democratic societies have usually been victories without peace. The use of prior restraint, licensing, and other forms of censorship have historically proven to be obstacles in achieving unconditional freedom of the press. Governments of democratic societies, especially those of Great Britain and the United States, have repeatedly demonstrated their contempt for the media. From the Star Chamber to the trial of John Peter Zenger, history is replete with government censorship of the Fourth Estate. Now that the Internet has become a corporeal division of the media, it too has fallen under the cutlass of government censorship. The modern controversy surrounding the silencing of expression on the Internet can only be seen as the latest battle in the war to guarantee the unconditional freedom of the press.

Government censorship also has the peculiar effect of removing the individual's right to access the free flow of information. Neither the First Amendment nor common law provide access to government meetings; therefore, access has traditionally been granted through statute (Middleton & Chamberlin,1994). Although legislation has been passed to secure the right to access, governments tend to legally restrict as much information as

possible. Because the Internet provides immediate access to an almost unending stream of information, governments worldwide have felt their security and privacy increasingly threatened. Therefore, in some instances government censorship terminates an individual's unqualified right to access.

When discussing universal access to the free flow of information via the Internet, it is important to note that 'universal' does not necessarily mean absolute penetration of every individual within a society. Rather, what constitutes universal access should be judged by "...the maximum penetration of the potential market" (Anderson, et al.,1995). By this standard, television and radio provide universal access, because both mediums have a "maximum penetration of the potential market." Similarly, the Internet contains components of these broadcast mediums, as well as utilizing the many tools of print journalism. Therefore, the Internet's capability to provide universal access to information should be judged by how ubiquitous the medium is within society. Additionally, "...the goal of achieving universal access has two main subgoals: (1)achieving interconnectivity among separate...systems, and (2)widespread accessibility of individuals to some...system" (Anderson, et al.,1995). Another facet to universal access includes distinguishing between the technology 'haves' and 'have-nots.' As Anderson states in his text:

> "An information elite still exists, made up of those with access to and knowledge about computers and e-mail. And as e-mail becomes more pervasive, as more commercial and government transactions in the United States takes place on-line, those information haves may leave the have-nots further behind, unless we make concerted efforts today to provide all citizens with access to the technology."

Currently, individuals can access the Internet through two channels: (1)through computers at work or school, and (2) through several commercial on-line services (Anderson, et al.,1995).

When the question of universal access arises, it is often accompanied by the issue of government regulation. However, because the Internet is an international tool of communication, who deserves (or is entitled to) the awesome responsibility of international regulation? The creators of the Internet designed the Information Superhighway to be a "wide-area hypermedia information retrieval initiative aiming to give universal access to a large universe of documents" (Zeltser,1995). Because it is an international tool of communication, its regulation should be conducted by an international body. Should the Chinese government be allowed to censure American Internet protests of human rights violations, even if it means denying access to the rest of the world? Obviously, a single regulatory body governing the Internet could not be controlled by a single national government; the consequences for free speech would be devastating and irreversible. This paper shall provide different options for the

regulation of the Internet, including the current international regulatory body, The Internet Engineering Task Force (IETF).

Government regulation denies individuals a multitude of rights, including the right to access the free flow of information that is always uncompromised by censorship. The theoretical application of the right to access originates from the beliefs of several prominent philosophers. Locke, Milton, de Beauvoir, and Bok are only a few journalists whose ideas have contributed to the foundations of a free press. Bok would agree with Lenny Zeltser's statement that, "The WWW project is based on the principle of *universal readership*: 'if information is available, then any (authorized) person should be able to access it from anywhere in the world' " (Zeltser,1995). It is this cornerstone principle of freedom of expression that makes the Internet so susceptible to government regulation. Several theories of access all point to government regulation as the greatest evil plaguing media practitioners today.

The sensational publication ban on the Canadian 'trial of the decade,' the Karla Homolka case, demonstrates how destructive government censorship can be to universal access of information. Homolka and her husband Paul Bernardo-Teale were charged, respectively, with manslaughter and first-degree murder in the deaths of two teenage girls. Homolka's trial has been conducted; she is currently serving her sentence of 12 years for

manslaughter. But, in order to ensure a fair trial to Bernardo-Teale, the judge presiding in the joint cases ordered a ban on publishing the details from Homlka's trial (Campbell,1994). Eventually, because the ban began to involve issues of press censorship (and even arouse the opposition of Teale himself), the ban began to make more headlines than the trial.

Although the ban itself was not out of the ordinary for such a delicate capital case, the actions taken by law enforcement officers throughout Canada were extraordinary. Magazines were yanked from shelves for violating the ban; students' Internet accounts at Canadian universities have been frozen and sifted through by police, and even articles in foreign publications, such as the Washington Post and the New York Times, prompted Canadian officials to ban the importation of foreign literature deemed to be in violation of the publication ban. Obviously these actions are extraordinary for most Americans, who are guaranteed a free press by the First Amendment to the United States Constitution. The issues raised by such blatant examples of censorship and prior restraint harken back to English licensing and prior restraint of her press during the middle of this millennium. Because the premise of all democratic societies dictates 'rule by the people,' any democratic or republican society that does not have an unconditionally free press, which is the voice of the people, is an oxymoron. Therefore, it is important to study how modern democratic societies and

republics outside the United States balance press freedoms and press restrictions. Thus, the Homolka publication ban is a natural choice to comparatively study press freedoms and press restrictions in democratic societies.

When the Communications Decency Act (CDA) passed Congress on June 14, 1995, it stimulated, if not threatened, the marketplace of ideas as it hadn't been repressed since colonial America. In fact, "Moments after the president approved the bill...twenty organizations and individuals filed a lawsuit and thousands of Internet sites were turned black in protest" (McLeod,1996). The CDA, which was part of a larger telecommunications bill, aimed at restoring the 'moral fiber' of the country. It laid a cornucopia of restrictions upon the content of all communications mediums, especially the Internet. Supporters of the bill argued that the nation's communications infrastructure must be safe for children to utilize. Critics, such as one university professor, argued, "You can't lower all conversations in society to a level that is tolerable to children" (McLeod,1996).

In June, 1996, a three-judge federal panel in Philadelphia struck down the Communications Decency Act as unconstitutional. The Supreme Court even suggested that the CDA is, at best, a blatant attempt at unconstitutionally regulating the Internet (Carelli,1996). Regardless of support or criticism, the CDA violated the First Amendment's guarantee of

free speech. Knowing that the unconstitutional act passed the legislative body of the United States, it is important to understand the events surrounding, and the rationale dictating, its creation, passage, and eventual demise.

With both American and British restrictions upon press freedoms, the individual right to access the free flow of information is clearly hindered, and in some cases it is completely denied. Understanding the rationale behind these actions, and the philosophical and constitutional reasons for opposition to those actions, are important steps in analyzing the role the media plays in a free society. Hopefully, it will be demonstrated that a free press is the hallmark and representation of democratic and republican societies.

II

Where Wizards Stay Up Late

Today, the Internet contains over sixty-five million separate web pages, which service approximately twenty-five million people globally (Morris,1996). Amazingly enough, the Internet was never intended by its creators for the general public. Popular belief ordains as God's truth that the Internet was designed by the U.S. Department of Defense to maintain simultaneous communication in the event of nuclear fallout. In reality, ARPANet and its progeny, the Internet, were designed to, "...link computers at scientific laboratories across the country so that researchers might share computer resources" (Hafner,1996).

However, there is some merit to popular belief about the origins of the Internet. The early Internet experiment, which took the title of ARPANet (Advanced Research Projects Agency Net), was spearheaded by the Defense Department's Advanced Research Projects Agency. Eventually, between the period of 1969 and 1987, the project became renamed NSFNet. Bob Taylor, director of the Information Processing Techniques Office of ARPA, conceived the Internet as a means of connecting computer operators from universities all over the world to a single network system. This early genus of the Internet consisted of a network of supercomputers connected via the

Department of Defense, which was then linked to universities throughout the country. Additionally, a multitude of regional networks were established. On September 1, 1969, the first computer system designed to log-in to the Internet was installed at UCLA. At the end of 1969, four universities and ARPA constituted the entire ARPANet. By 1989, the modern Internet, with its millions of computer users, had been born (Hafner,1996).

"The Internet has been alternately described as a 'functioning anarchy' that is virtually impossible to control from a centralized command post" (McChesney,1996). One of the reasons for that 'functioning anarchy' was the introduction of an easier graphic interface for users in 1989, called the World Wide Web (WWW). Created at a physics laboratory called CERN in Geneva, Switzerland, this new interface replaced a text-only screen with graphic interface. Time Berners-Lee, the Swiss corporation that created the WWW, made the new graphic interface into an interface that looked like any other Windows application. These advances for the Internet resulted in the rediscovery of the "new" Internet in 1994 by marketing executives and the general public. Ironically, this network system, which was developed during the Cold War and designed to keep America's computers afloat in the event of a nuclear holocaust, was thriving in a period after which the Cold War had already ended. "Regardless of how a communication technology is owned and operated, it will have consequences that are often unintended and

unanticipated, and related only in varying degrees to its structural basis" (McChesney,1996). Like the television before it, and radio before the television, the Internet is a continuously growing and continuously expanding communications tool that is becoming increasingly more difficult to define.

If that argument stands as a valid and cogent one, which it does, why have the public and marketing executives become so enthralled with the Internet? The answer comes in the form of the multitude of services the WWW has to offer its browsing audience. "It's like walking into a massive library with no librarians and no Dewey decimal system" (Pierson,1996). Additionally, there are no limits on entertainment, communications, travel, business, and the list goes on and on. More than fifty-percent of the Fortune 500 companies actively use the WWW to launch advertising campaigns (Pierson,1996). Although technologies may be improved and upgraded, the basic premise of consumer-producer relationships will never alter. Therefore, the Internet is not only valuable in terms of its vast repository of assorted pieces of information, but it is equally as profitable as a tool of capitalism.

However, that is not to say that the Internet is without a police force to govern the armies of little capitalists. CERT, or the Computer Emergency Response Team, is the brainchild of the United States Department of Defense.

Its primary duty is to ensure the integrity and security of the Internet network. One of the greater threats facing the integrity of the Internet comes from computer hackers. Complaints and calls for help to CERT have continued to increase over the past few years. Almost 2500 computer break-ins were reported in 1994, up 68% from 1993 (Wisebrod,1995).

The major problem with this police force is that it doesn't brandish a very big stick. As an agency, it has no power to arrest or prosecute individuals guilty of computer hacking. It exists to, "...advise and investigate in cases of potential or actual breaches of Internet security" (Wisebrod,1995). But, it does not scrutinize the internal operations of the Internet. Therefore, it provides a valuable service to American users of the Internet in two ways. First, it protects the Internet from foreign 'invasion,' and, second, it does not practice censorship of Internet material through its style of regulation. In many ways, this is the ideal form of government regulation--external security without internal interference.

Bob Taylor once remarked, "You know, everyone really uses this thing for electronic mail" (Hafner,1996). The numerous advantages electronic mail possesses for both consumers and capitalists makes e-mail one of the most efficient and profitable means of communicating in the world. However, e-mail was never intended as a part of the original ARPANet. Rather, the entire network of super-computers, which was connected to

universities and research laboratories, was originally intended strictly for resource sharing (Hafner,1996). The human tendency to talk and to communicate eventually overwhelmed that original purpose, and e-mail literally took flight as an easy and efficient way to communicate across endless voids of batched computer space.

As one can plainly see, the Internet, via the World Wide Web, has become a major source of activity, not just for commerce and defense, but for use by the general public. As Kapor notes,

> "Instead of a small number of groups having privileged positions as speakers--broadcast networks and powerful newspapers--we are entering an era of communication of the many to the many...the nature of technology itself has opened up a space of much greater democratic possibility."
>
> (McChesney,1996)

With over twenty-five million people accessing the World Wide Web, Kapor's argument seems to be valid. With the adolescence of the Technological Revolution underway, more people, now more than ever, have access to a vast source of varied information. Yet, governments, in general, are not tapping into the democratic power that the Internet possesses as a communications and as a policy tool. Some governments are moving toward a policy of restricting the content of Internet material, even when that principle goes against the grain of previous judicial interpretation and precedent.

When discussing government censorship of the Internet, it is important to understand the theoretical premise behind the individual right to access. In a democracy, the people theoretically rule. Government, as seen through Locke's eyes, serves as a necessary evil to safeguard individuals against loss of life, liberty, and property. Thus, the citizens of a democracy, through the government, oblige themselves to protect these natural rights. Although this doesn't always happen in reality, the aforementioned principle is evident in some democratic institutions and historic documents.

The Universal Declaration of Human Rights, adopted by the U.N. in 1948, specifically prohibits government interference with a person's correspondence and specifically provides for the right to the freedoms of thought and expression. Many declarations passed in support of the freedom of expression are: The U.N. Charter, the U.N. Declaration of Human Rights, the European Convention on Human Rights, the American Convention on Human Rights, the U.N. Covenants on Civil and Political Rights, the Helsinki Final Act, and the U.N. Covenants on Economic, Social, and Cultural Rights. The First Amendment to the United States' Constitution protects the freedom of the press and the freedom of expression for its citizens. According to a survey published by Freedom House in the late 1980s, citizens from over sixty countries enjoy free access to mass communications (Konvitz,1995).

The individual right to access information usually entails the ability of an individual to access government records without restriction. A 160-nation negotiating session of the United Nations' World Intellectual Property Organization recently created a precedent that protects access to documents on the Internet. It ruled that, "...temporary copies of copyright materials that computers automatically make when a user is browsing the World Wide Web won't be considered copyright violations" (USA Today,Dec. 23,1996). Of course, the vanguard of freedom and democracy, which also provides substantial access to the free flow of information, is the United States.

Provided that the speech does not present a 'clear and present danger' to society, individuals may openly attack and criticize the government. Additionally, open meeting laws require that government officials conduct regular sessions as public proceedings. The Sunshine Act, passed by Congress in 1976, states that the public, "...is entitled to the fullest practicable information...concerning the decision-making processes...of the federal government" (Middleton & Chamberlin,1994). The Freedom of Information Act provides for nine different categories of exemptions from open records; however, this statute delineates the boundaries between what is exempt and what is not exempt. Subsequently, the Freedom of Information Act allows any individual to request federal records (except for those in the White House). Citizens of the United States also have access to

criminal records, civil records, property records, and census information, in addition to the other government information it can access. These, and other examples, demonstrate the range of freedom American citizens and the American press have in obtaining information from and about the government.

Despite these legal reassurances of the individual right to access information freely, the First Amendment does not provide for an unconditional right to access. In fact, the Supreme Court has ruled that the First Amendment guarantees only the right of access to the courts. However, the Supreme Court has found that prior restraint, or other forms of censorship (a denial of access) are unconstitutional. In the Pentagon Papers case, where a federal official (Daniel Ellsberg) leaked a 47-volume classified report to the press, the Supreme Court ruled that the government could not justify prior restraint. Although the documents were illegally obtained, the publication of those documents did not constitute a threat to national security. Rather, prior restraint demonstrated a threat to constitutional liberties of free speech and free press, "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity...The government thus carries a heavy burden of showing justification for the imposition of such a restraint."[1]

---

[1]New York Times Co. v. United States. 403 U.S. 713, 1971.

The freedom to publish and distribute information remains unqualified and unfulfilled without the corresponding right to gather that information. Although the Supreme Court does not recognize a specific, individual right to the access of information, many federal courts (including the Supreme Court) and state courts recognize the need for limited access to government information.

The Internet was originally designed to link universities across the nation for research purposes. Additionally, it was later commissioned to be used by the federal government in the event of a nuclear war. However, there are over twenty-five million users on the Internet today, far exceeding the original use of the Internet. Advances in Internet technology, such as the World Wide Web and electronic mail, have created a 'functioning anarchy' that is incapable of centralized control. The dissemination of ideas in the marketplace has dramatically increased, as indicated by the rise in popular usage. These same advances in Internet technology have also opened up a new market to advertising and marketing executives. The possibilities for good and bad, therefore, are exponentially increased as each new Fortune 500 company adds its web-site to the Internet. Thus, the United States Department of Defense created the Computer Emergency Response Team (CERT) in an effort to patrol and maintain the integrity and security of the Internet.

Because a democracy is founded upon the "rule of the people," restriction of access to the free flow of information repudiates the founding principles of democratic freedom. Governing documents of constituted bodies, such as the United Nation's Declaration of Human Rights and the United States' First Amendment to its Constitution, guarantee freedom of thought and freedom of expression. The denial of the individual right to access by government censorship goes against the grain of democratic policy. In the United States, the Supreme Court and the Freedom of Information Act serve as valuable champions of the constitutional right to free speech and free press. Rulings handed down from the Court illustrate that any form of government censorship, except in the most dire of circumstances, is expressly prohibited by the Constitution. Hence, government censorship endangers constitutional guarantees, as it also threatens the individual right to access.

III

Thou Shalt Be My Shield and Sword

Ironically, the greatest examples of government censorship appear in the histories of the most democratic societies. Great Britain, Canada, and the United States have repeatedly tried to restrict access to information, either in the hopes of protecting privacy, or for legitimate reasons. As McChesney points out, "...newly developed computer and digital communication technologies can undermine the ability to control communication in a traditionally hierarchal manner" (McChesney,1996). That unlimited and unrestricted access to information is a particular threat to the 'traditional hierarchy,' has been governments' justification for censorship throughout history.

In the history of Great Britain, licensing and prior restraint earmark the Fourth Estate's struggle for freedom of the press. One of the distinguishing facets of American judicial history has been the uphill battle the media has fought to obtain its freedom. Particularly with the First Amendment, and with the 1931 decision of *Near v. Minnesota*, the American press has waged a war, sometimes successfully and sometimes not, for freedom. In *Near v. Minnesota*, Chief Justice Charles Evans Hughes held that a state law was unconstitutional because it permitted prior restraint on

publication. He and the Court contended that suppression was even more dangerous than an irresponsible attack on public officials due to the nature of prior restraint (Emery,1992). In Canada, the press do not enjoy freedom in the sense that Americans are accustomed to; there is no First Amendment and there is no right to access, "...the American press enjoys greater freedom and independence than the media in Canada" (Jenish,1992). Hence, when the Homolka publication ban went into effect, law enforcement officials could act heavily-handed in their enforcement of it. Because the United States Constitution possesses First Amendment rights to freedom of the press, its history of censorship differs slightly from that of Canada's or England's.

Regardless of where a democratic society is located, one of the major issues facing the media is whether or not the free flow of information can be regulated. For supporters of Internet censorship, the distinction between material presented via the Internet, and through other communications mediums is lost. As one Canadian radio host asked, "Why should the Internet be any different?" (Wisebrod,1995). There isn't a correct answer to this question, because the question itself is flawed. If the Internet is truly a unique communications medium, then its regulation must be treated in a unique way. It is much easier to determine what regulation should go into a national broadcast of the BBC than it is to determine the regulation of a

global communications tool. More importantly, it is much easier to define the regulatory bodies of a sovereign state than it is to determine the regulatory bodies of an entire planet. Because communication laws and constitutional freedoms differ greatly from nation to nation, and from continent to continent, it would be impossible to treat the Internet as the traditional media has been treated. Therefore, to ask the question, "Why should the Internet be any different than any other medium?" is to not understand the premise behind global communication and universal access.

Traditionally speaking, governments censor for the protection of: (1)the family, (2)the church, and, most importantly, (3)the state (Konvitz,1995). Censorship of the Internet is generally viewed as an attempt by the state to protect its privacy, regardless of the consequences to its individuals. As the final arbiter of constitutional law in the United States, the Supreme Court traditionally stands as the last bulwark against government censorship. A federal three-judge panel in Philadelphia struck down the Communications Decency Act, because it violated the First Amendment's guarantees of free speech and free expression. A similar panel in New York state also struck down the CDA, despite claims that children could access indecent material over the Internet (Carelli,1996). The Supreme Court has already pledged to rule whether the government can restrict indecency on the Internet; oral arguments have begun and a ruling

is expected to be handed by July 1997.

Typical of its protectionist attitude toward free speech and the media, the Supreme Court ruled against, "FCC regulations governing indecency on cable TV...their splintered decision conceded that quickly changing technology makes it difficult to set definitive free-speech rules" (Carelli,1996). Justice Souter went so far as to write:

> "In my ignorance, I have to accept the real possibility that if we had to decide today just what the First Amendment should mean in cyberspace, we would get it fundamentally wrong."
>
> (Carelli,1996)

Decisions such as these echo those decisions reached in previous cases tried before the high Court, such as the Pentagon Papers case. The Supreme Court ruled that the government must prove an overwhelming and immediate threat to national security to warrant prior restraint and censorship. And, in other historic cases, such as *Near v. Minnesota* (1931), the Supreme Court reaffirms that government censorship of any medium is strictly prohibited by the Constitution, with only rare and qualified exception to the rule.

If the Supreme Court is the defender of constitutional law, universities and colleges are constitutional law's greatest threat. Some educational institutions are not waiting for the Supreme Court's decision concerning government regulation of the Internet. Throughout the United States and Canada, there is an increasing trend to restrict Internet access for college

students. Administrators of these institutions claim that lewd and pornographic material located on the Internet detracts from the educational environment. Subsequently, accessing these web sites poses legal problems.

Carnegie-Mellon University, located in Pittsburgh, Pennsylvania, shut down and denied access to, areas of their mainframe computer that contained news-groups depicting explicit sexual acts. This action had been taken by the university's administration after a research associate brought the content of the discussion groups to its attention. The attorneys for the university successfully argued to the administration that CMU could be held liable for the explicit sexual material contained on its computers. According to state law, it is illegal in Pennsylvania to knowingly distribute that kind of material to anyone under the age of eighteen. Of course, a great majority of entering freshman, and even some sophomores, would have fallen under that category of juveniles. As a result, CMU decided to officially close down those areas containing sexually explicit material.

The ensuing uproar over the shutdown of the affected areas became a cacophony of protest against the administration. The student council, American Civil Liberties Union, staff counsel for the Electronic Frontier Foundation, and countless independent attorneys voiced concern over the course of action the university chose to accept. As one CMU student succinctly stated, "Some lawyer told them they might someday be dragged

into court, and they just decided, 'To hell with the First Amendment.' " (Elmer-Dewitt,1994).

Within one week of the policy's enactment, no remnant of the policy remained. Ironically, CMU was an original partner in establishing the ARPAnet, the immediate precursor to the modern Internet. Yet, the experience of Internet users at CMU is not an isolated event. Throughout the United States and Canada, university students' right of free access to the Internet is constantly abrogated by the government's desire to protect the ruling hierarchies of family, church, and state. Lest we forget the lesson learned in *Hazlewood School District v. Kuhlmeier* (1988), a palpable threat to free speech still thrives in institutions of higher learning.

Although Canada's political and judicial systems are considerably different than those in the United States, its educational system is extraordinarily similar, especially concerning patterns of censorship. In 1988, a battle over USENET groups on the Internet broke out at the University of Waterloo (Donham,1994). Again, the university eventually recanted its position, and it restored access to the affected USENET groups. However, like the United States, this incident was not isolated in Canada at the University of Waterloo. This remarkable tendency, which remains a strong similarity between the U.S. and Canada, has gained considerable strength in recent years. In Canada, the family, church, and state are

institutions that must be protected at all costs. By summarizing the words of United States President James Madison, one Canadian student observed the tangible connection between the two countries:

> "Those who would lock up the press because it produces monsters, ought to consider that so do the sun and the Nile. As long as there are such things as printing and writing, there will be libels. It is an evil arising out of a much greater good."
>
> (Donham,1994)

Of course, the obvious question to ask is, "Can we justify any form of government censorship to students when these same students are taught the crucial importance of free speech?". Indeed, do we destroy the good to repudiate the bad? The answer to both questions is a resounding, "NO!". Obviously, for any democratic society to be truly democratic, the people must invariably rule. Without access to the flow of free information, and without the possibility of an unhindered exchange of information, democracy idles. People cannot rule under these conditions, because they cannot make informed decisions. For college students, whose primary job is to assimilate information and draw conclusions based on that information, government censorship significantly hinders the exchange of information.

Without regard to specific moral or ethical objections that could be levied against material found on the Internet, an excellent question to ask is, "Why should it and its information be regulated any different than television or radio?" Indeed, why should indecent material on the Internet remain

unfettered, especially when hateful speech or indecent material on television is illegal? The response is simple: can the Internet be regulated like a person on a street corner or like a television show? Obviously, it cannot. For this reason, the Internet poses a substantial threat to government regulation. It would be virtually impossible for the federal government of either the United States or Canada to justify regulating a global means of communication.

Aside from debating justification for or against regulation, it is the structure of the Internet itself that prevents centralized control by government. Remember, ARPAnet was primarily designed for communication amongst universities and research facilities, and it was designed to withstand nuclear attack (Wisebrod,1995). Therefore, a single nuclear bomb would have been incapable of destroying the entire network. Likewise, because the Internet network is so thinly spread throughout the world, a single government would be incapable of successfully regulating the network. Additionally, its usage of TCP/IP, or Transmission Control Protocol and Internet Protocol, "ensures the decentralized nature of the network" (Wisebrod,1995).

Even though the Internet could be considered an 'anarchy in progress,' it is a 'functional anarchy.' On the Internet itself, and through Internet service providers, individuals wishing to use bulletin boards or chat rooms

must follow certain rules affectionately termed Netiquette. The etiquette of the Internet has traditionally been self-imposed. Therefore, if regulation occurs, what role would Netiquette play in the future of the Internet? Would the government be willing to accept Netiquette as sufficient and necessary regulation of the Internet? In certainty, the government would not accept the traditional 'rules of the road' as the fulfillment of regulation. Because Netiquette is already used on the Internet, and because the government continues to argue that regulation is necessary, the government has already decided that Netiquette is not a powerful enough force for regulating the free exchange of ideas occurring over the Internet.

Is that statement actually true? One example augments the premise that the Internet is fully capable of regulating itself. Lawrence Canter and Martha Siegel posted advertisements for their law firm in a USENET newsgroup. This action boldly violated Netiquette in several places. Unsolicited advertisements are expressly prohibited in newsgroups. The advertisement was placed in a newsgroup that had nothing to do with the topic being discussed. Users of the newsgroup were so incensed at this breach of Netiquette that they 'flamed,' or sent enormous amounts of disrespectful e-mail to, the two lawyers. The lawyers received so much mail that the mainframe computer of their service provider crashed more than fifteen times. The lawyers' account was terminated; subsequently, Canter

and Siegel threatened to sue the Internet provider for a quarter-million dollars. But the lawsuit never went to court (Wisebrod,1995).

Canter and Siegel were reassigned their logon-ID by their service provider; this was done only after they signed an agreement that bound them to following Netiquette. When they posted an advertisement in another USENET newsgroup, they were again terminated. Canter and Siegel attempted to argue in their book, "How to Make a Fortune on the Information Superhighway," that the only rules one had to follow when on the Internet were, "...those passed by the country, state, and city in which you live" (Wisebrod,1995). In other words, they blatantly advised users to ignore Netiquette. The problem with their advice, and the problem that they faced after their second breach of protocol, was that an individual needs access to the Internet, which means access to an Internet provider. It is a certainty that no service will provide Internet access for those persons whose activities puts its system in jeopardy of crashing.

Historically speaking, governments of democratic societies tend to use censorship as a tool to protect their own privacy, even when it means compromising the individual right to access. The regulation of the flow of information in a free society hinders its capacity to provide democratic freedoms for its citizens. Although censorship has been used to protect the church and the family, it is most often used to protect the privacy of the

state. In the United States, the Supreme Court acts as the final arbiter of constitutional law; and, in several cases, it has reaffirmed the First Amendment guarantees of a free press and of free speech. Although the Supreme Court advocates protectionism toward the media, colleges and universities are becoming increasingly hostile to uninhibited dissemination of ideas via the Internet. Governments and educational institutions claim that the Internet must be regulated like other forms of mass communication. However, the Internet is a 'functioning anarchy' that escapes solid definition. Therefore, it is incapable of being regulated like other forms of mass communication. Self-imposed regulation, such as Netiquette, and the very structure of the Internet itself, provides some semblance of hierarchy that directs the flow of traffic on the Information Superhighway.

IV

Homolka

The primary aim of this thesis is to prove that government censorship of the Internet in a democratic society denies the individual right to access the free flow of information. Although the Supreme Court of the United States has constantly reaffirmed its defense of First Amendment freedoms for the press, mediums in other democratic societies do not have the same luxuries as does the American press. For that particular reason, it is important to contrast press freedoms in the United States with press freedoms in other democratic societies. In Canada, which is part of the British Commonwealth, press freedoms and the individual right to access the free flow of information are severely curtailed. However, that is not to say that Canada does not provide some semblance of protection for its media. Its Charter of Rights and Freedoms proclaims, " '...freedom of the press and other media of communication' and a defendant's right to a trial 'in a fair and public hearing by an independent and impartial tribunal' " (New York Times,1993). Because government censorship in Canada is virtually unrestrained, the individual right to access in that 'democratic' society is constantly threatened. There can be no greater example of this argument than the strange cases of Karla Homolka and her estranged husband, Paul

Bernado-Teale.

Homolka and Bernardo-Teale were jointly involved in the deaths of two teenage girls: "Homolka was charged with two counts of manslaughter and Bernardo-Teale was charged with two counts of first-degree murder and several other offences" (Wisebrod,1995). However, beginning in 1993, they were tried separately. Homolka's case was scheduled to go to trial first; once it did, the presiding officer, Justice Francis Kovacs, ordered a publication ban (July 5, 1993) on the details of her trial in order to ensure fairness in the husband's trial, "A limited ban on publication must rest on the balancing of the constitutional rights of freedom of the press and the right of a fair trial by an impartial tribunal for Paul Bernardo-Teale" (Shallit). Eventually, media attention shifted focus from the trial itself to the publication ban. The gag order on the media, by Canadian standards was expansive and broad:

> "Journalists could report that at a two-hour trial Ms. Homolka was convicted on manslaughter and given a 12-year prison sentence, but not much of the evidence or even whether she pleaded guilty or not guilty. This gag order, which Mr. [sic] Teale himself opposed, will expire after his trial next year or the year after. Canadian news organizations are appealing it."
>
> (New York Times,1993)

The Canadian media abided by the ban, even though they appealed it, but, foreign media organizations did not.

Law enforcement officials, charged with enforcement of the ban, did not have much difficulty in intercepting hard-copy foreign media before it entered Canada. "Hard Copy," the American tabloid news journal, was blocked from Canadian cable. Issues of the Washington Post and the New York Times were banned from entering Canada unless it struck news articles detailing the proceedings of the Homolka trial. In fact, at the trial itself: "Foreign journalists were excluded from the courtroom; Canadian reporters were allowed to hear the evidence but were prohibited from publishing most of it until after Teale's trial" (Watson & Kay,1993). Of course, this form of government censorship was ill-received by the Canadian media and also by the Canadian people.

There was one area in which Canadian police had substantially less good fortune in intercepting violations of the publication ban--the Internet: "By routing messages through the United States and elsewhere, and by storing information outside Canada, Internet users have rendered the Canadian press ban powerless" (Gimon). Canada's government, like that of the United States, has been unable to precisely define the Internet. As such, regulation of the Internet consistently eludes the Canadian government. Therefore, when details of the Homolka trial were published on the Internet, Canadian police interpreted the publication of those details to be in violation of the ban. A week after the ban went into effect, a USENET newsgroup

called alt.fan.karla-homolka went up on the Internet. Five months after its creation, it was yanked from most computer network systems because a warning from the Canadian police stated that the forum was in violation of the publication ban (Wisebrod,1995).

Regardless of law enforcement officials' attempts at intercepting details over the Internet, the information is widely available by World Wide Web, Gopher, and FTP outlets. Any attempt at stopping publication of the details of the trial over the Internet is futile, because it would be completely ineffective. Because the Internet is a global medium, the Canadian government would have to censor web pages scattered throughout the world. Somehow, it is doubtful that they would either have the resources or the cooperation of other sovereign nations to accomplish that global task. However, that is not to say that the Canadian police didn't attempt to enforce the publication ban on the Internet.

There are three particular instances in which Canadian law enforcement officials blatantly threatened the individual right to access the free flow of information via the Internet. The first deals with censorship at the University of Waterloo. Enforcement of the publication ban in the city of Sarnia, and public reaction to that investigation, constitutes the second example. Last, a detailed account of a student's struggle to preserve his individual rights to access and privacy make up the final example of

Canada's denial of the individual right to access information via the Internet.

In the last few months of 1993, when the publication ban had become a heated topic of debate, the Provost of the University of Waterloo, Jim Kalbfleisch, instructed that all material relating to the publication ban or the trial be removed from the university's computer network. Additionally, the librarian, Murray Shepherd removed the pages of foreign newspapers that contained articles detailing the Homolka trial:

> "In each case, the page on which the article appeared was removed, photocopied, and then locked in a sealed archives box...According to a senior librarian, this represents the first time in University history that materials have been removed from public access because of a court order."
>
> (Shallit I)

Of course, the obvious question prompted by the publication ban, and by the actions of the chief librarian, is, "Does a library publish material when it allows access to it?" The university lawyers answered 'yes,' while other lawyers responded with a resounding 'no.' McGill Legal Advisor Raynald Mercille stated, "The Ontario Court ban prohibits publication...There is no prohibition on the possession of banned material 'per se'" (Shallit I). Because libraries are often the only repositories of government information, the removal of publications from those libraries denies individuals the right to access that information. Additionally, the senior librarian also revoked access to several USENET newsgroups on the university network, which dealt with the Homolka trial. When questioned about the decision to remove the

publications and revoke access to the USENET newsgroups, one senior librarian stated, "The law is not subject to interpretation. This is Canada" (Shallit I).

However, the university's actions contradict their official position on the publication ban. Because there was no judicial ruling condemning the library publications as illegal, the university passed preliminary judgement when revoking access to both sources of information (Shallit II). Hence, the university did, in fact, believe that the publication ban was subject to interpretation. Instead of erring on the side of press freedom the university decided to err on the side of government censorship. University censorship of the campus library denied the individual right to access information. Commenting on the actions taken by the administration of the university, the American Library Association published a paper that stated: "Challenged materials which meet the criteria for selection in the materials selection policy of the library should not be removed under legal...pressure..." (Shallit II).

Not only did the university censor library material, but it also revoked student and faculty access to several USENET newsgroups that had details of the Homolka trial. By late November 1993, details of the trial had leaked into a university newsgroup entitled "alt.fan.karla-homolka." Immediately, Provost Kalbfleisch ordered that the newsgroup be removed from the

university network. The newsgroup was removed, and further censorship continued throughout 1994. However, that particular newsgroup, as well as other newsgroups censored, contained a minority of articles that were in violation of the publication ban. Rather, the majority of the newsgroups contained discussions about the publication ban. In essence, censorship of these newsgroups denied free speech. These actions, although supported by university policy, were in direct conflict with the Canadian Charter of Rights and Freedoms, which prohibits direct censorship of free speech. Succinctly, the University of Waterloo acted as, "...an agent of the state, in deciding what can and cannot be read at Waterloo" (Shallit III).

In the Canadian town of Sarnia, police responded to a complaint concerning a possible breach of the Homolka publication ban. A computer store owner lodged the complaint with the police, which accused a twenty-two year old college student of uploading Homolka files to the store owner's bulletin board system. The police called the parents of the student in question into the station for an interview. During the interview, the police informed the student's parents that they would like to interview their son about his possible violation of the publication ban. The parents readily gave their consent to the interview.

The student, Jamie Baillie, was described in police reports as, "...a very slow learner or as border-line mentally challenged" (Riley,1994). Before

Jamie's interview took place, his parents informed him that if he did not attend the police interview, and if he did not tell the truth about his violation of the publication ban, the police chief would go to his home and take away his computer and modem. After discovering this conversation from Jamie himself, the police chief allowed Jamie to continue believing what his parents had told him. The chief warned Jamie that if he should violate the publication ban again, he would go to Jamie's house and take away his computer and modem.

The police chief and the Crown Attorney for Canada, Paul M. Taylor, refused to prosecute Jamie because both felt it was not in the 'public interest' to do so. Several memos between them and the complainant indicate that Jamie's mental instability, and his desire to be ingratiated with his peers, contributed to the violation of the publication ban. In Taylor's eyes, "The activity does not appear to be a deliberate attempt to be disrespectful towards the Order of Justice Kovacs or motivated out of commercial gain" (Riley,1994).

All of these events, and their supporting documents, became public when Mr. Robert Riley requested the records in accordance with the Canadian Municipal Freedom of Information and Protection of Privacy Act. As is the case in the United States, names of the complainants and defendants are blacked out to protect individual privacy, while allowing

public access to government documents. After receiving the requested documents, Mr. Riley was shocked to find that the ink used to blot out the names of individuals was inadequate to complete its task. Therefore, the privacy of the individuals involved with the case was breached (Riley,1994).

These memos point to several disturbing issues arising out of this case. First, if the investigating officers knew of Mr. Baillie's mental deficiencies, surely the tactics and techniques used were questionable. Allowing a twenty-two year old, mentally deficient student to believe that the police would seize his computer and modem is an unethical and cruel technique to be used on such a handicapped individual. Second, does uploading a file onto a bulletin board constitute publishing? By traditional definitions of media publication, uploading the files does constitute publication. However, as previously stated, the Internet defies traditional definition. Third, the breach of privacy for the individuals involved in this case constitutes serious infringement upon implicitly guaranteed Canadian freedoms. Therefore, in this particular case, the publication ban not only denied the individual right to access, but it also led to a repudiation of the individual demand for privacy.

The final instance in which the Homolka trial's publication ban attempted to infringe upon the individual right to access involves a student at the University of Western Ontario in London, Canada. The student, known

as "Abdul," discovered a revised copy of a Homolka FAQ (Frequently Asked Questions) in his electronic mailbox. Tired and overworked, Abdul e-mailed copies of the revised FAQ to his friend, "Lt. Starbuck," and to Toronto's major news outlets. Perhaps too tired, he inadvertently sent copies to the Canadian Premier, Bob Rae, and to Ontario's Attorney-General, Marion Boyd. Perhaps chronically fatigued, Abdul left the real names of himself and Lt. Starbuck on the FAQ (Campbell,1994).

The next morning, the university's Computer and Network Security Officer, Reg Quinton, notified Lt. Starbuck that his Internet account had been frozen and that he was to meet with London police the next day. Starbuck immediately deleted and "shredded" any and all information relating to the FAQ on his computer. No warrant and no subpoena had been issued for the police interview (Campbell,1994). Quinton complied with the London police voluntarily. When the police arrived to interview him the next morning, they showed Lt. Starbuck a copy of the FAQ sent to the Premier and to the Attorney-General. Lt. Starbuck recalled, "I stared at it in disbelief, whispering to myself, 'Oh shit.'" (Campbell,1994). Because there was no evidence that Lt. Starbuck's computer possessed any part of the Homolka FAQ, the police did not press charges. But, the police informed Lt. Starbuck that criminal charges could still be pressed against him for violating the publication ban.

Again, serious issues arise out of the actions taken by Canadian law enforcement officers. As Reg Quinton, Computer and Network Security Officer for the University of Western Ontario, stated:

> "If you or your users are in possession of material covered by the publication ban, especially if they are involved with the mailing list run by 'Abdul, the ELECTRONIC Gordon Domm' <abdul@io.com>, then you run a risk that the police may get a search warrant and seize your machine. The risk is modest, but are you prepared to take that risk?"
>
> (Smith,1994)

Does possession of the Homolka FAQ constitute a violation of the publication ban? Remember, it was Abdul, not Lt. Starbuck, who e-mailed the FAQ and posted it to the Internet. Why should charges for violating the publication ban even be considered against Lt. Starbuck for simply possessing the FAQ? The Attorney-General and other law enforcement officials refuse to officially differentiate between publication and possession of Homolka Internet files. Because the publication ban prohibits only publication, simple possession of the files in an e-mail account, or even on a university computer network, does not constitute a violation of the ban. Canadian criminal attorney, Eddie Greenspan, states, "Simply cruising out on the Internet and grabbing a copy of the Homolka FAQ is not a breach of the ban; nor is holding it in a university computer account" (Campbell,1994). With such a diverse body of opinion on the subject, who do we believe as the final authority in the matter? As Abdul states, "If it comes between Greenspan and Boyd, Ontario's

first non-lawyer attorney-general, I'll take Eddie's opinion every time..." (Campbell,1994). This incident is the penultimate demonstration of Canada's incapability to determine what one "does" and to determine where one "is" when in cyberspace.

The Canadian press does not enjoy the same amount of freedom, nor the same quality of freedom, as does the American press. Although Canada's Charter of Rights and Freedoms explicitly guarantees "freedom of the press," the actions and rulings of law enforcement officials and courts have not interpreted that freedom liberally. The publication ban issued by Justice Kovacs in the Homolka trial demonstrates that when democratic governments censor the Internet, or other outlets of information, they are denying the individual right to access. Three particular instances of government censorship demonstrate this principle: (1)actions taken by the administration at the University of Waterloo; (2)actions taken by the Sarnia police in investigating possible breaches of the publication ban; and (3)actions taken by system administrators at the University of Western Ontario. These actions supplement the premise that universities are quickly becoming agents of government censorship. Furthermore, these actions substantially validate the premise of this thesis: government censorship of the Internet denies the individual right to access the free flow of information.

V

"...With Liberty and Justice For All !"

In 1995, the United States Congress created legislation that seriously endangered, not only the individual right to access, but, also the First Amendment's guarantee of free speech. Senator Jim Exon, a Democrat from Nebraska, authored, and successfully lobbied for, the Communications Decency Act (CDA) of 1995. It amended Title IV, Section S.652, of the Communications Act of 1934, the section concerning obscenity. Passed by the Senate on June 14, 1995, the CDA attempted to censor sexually explicit material from the Internet and other forms of the media. In the words of Senator Exon, "I cannot imagine that the framers of the Constitution intended that pornography, in and of itself, would be protected under the First Amendment. Certainly not for kids" (Nielsen,1995). Although the content of non-obscene sexual expression in the media has generally been protected by the Supreme Court, as in *FCC v. Pacifica Foundation*,[2] the legislative branch has never been content to settle for the Supreme Court's interpretation of the Constitution.

There are problems with attempting to censor non-obscene sexual material via the Internet or via other forms of the media. The Supreme

---

[2]*FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Court has consistently ruled that content-based restrictions upon transmitted material are unconstitutional. The CDA mandates that the only material fit for consenting adults is that which is acceptable for minors. As an inherent flaw in the CDA, critics quickly assert that a society based upon an adolescent mentality cannot reconcile itself with democratic freedom: "The Exon proposal would severely restrict the flow of online information by requiring service providers to act as private censors..." (ACLU,1995).

The Communications Decency Act provides for the following:

- "Whoever, in the District of Columbia or in interstate or foreign communications...by means of telecommunications device knowingly makes, creates, or solicits, and initiates the 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...shall be fined not more than $100,000 or imprisoned not more than two years, or both..."

(S.314,1995)

Defenses to the subsections of the CDA follow:

- "No person shall be held to have violated...solely for providing access or connection to or from a facility, system, or network over which that person has no control..."

- "No employer shall be held liable...for the actions of an employee or agent unless...the employer has knowledge of, authorizes, or ratifies the employee's or agent's conduct..."

- "It is a defense that a person has taken reasonable, effective, and appropriate actions in good faith to restrict or prevent the transmission of or access to a communication specified in such subsections..."

(S.314,1995)

Additionally, the provisions of the Communications Decency Act call for the creation of an oversight committee, charged with ensuring the continual effectiveness of the act: "Within two years from the date of enactment and every two years thereafter, the Commission shall report on the effectiveness of this section" (S.314,1995).

Before analyzing the rationale for and the rationale against the CDA, there is one other interesting aspect to this bill that should be mentioned. Like the popular sovereignty issue of slavery during the nineteenth century, the Congress would leave local and regional enforcement for the act up to the states themselves:

> "...nothing herein shall preclude any State or local government from enacting and enforcing complementary oversight, liability, and regulatory systems, procedures, and requirements so long as such systems, procedures, and requirements govern only intrastate services and do not result in the imposition of inconsistent rights, duties, or obligations on the provision of interstate services. Nothing in this subsection shall preclude any State or local government from governing conduct not covered by this section..."
>
> (S.314,1995)

The problem with allowing states to define the enforcement for local and regional violations of the CDA is that Internet transmissions are not local and they are not regional. Likewise, there are some traditional forms of media

that are not local and that are not regional. For example, issues of the Washington Post were intercepted as it entered Canada during the Homolka publication ban. How can local legal agencies justify having the responsibility of enforcement for a global phenomenon such as the Internet?

Shortly after the popular sovereignty compromise between the Free Soilers and the Southern congressmen was forged, it failed to achieve a lasting peace over sectional conflict. Territorial selection of slavery proved inadequate in solving what was, in essence, a *national* crisis. Likewise, because the Internet is global, national or state regulation of the medium is doomed to failure. Regional enforcement cannot legislate morality or social regulation for an entire planet: "One obvious enforcement problem, for example, is that the global nature of the Internet makes it easy for people to evade the reach of U.S. law" (Andrews,1995). Plus, both the Communications Decency Act and the popular sovereignty compromise suffered from a lack of clear and concise language. They were both beautifully vague.

The rationale behind the Communications Decency Act is to protect the innocence of American children. White House spokeswoman Ginny Terzano stated, "The administration abhors obscenity, in whatever form it is transmitted..." (Washington Post,1995) There is no other rationale behind the Communications Decency Act. Therefore, it is very easy to conclude that

the United States Congress has attempted to balance censorship against the innocence of children. Congress, as well as the Clinton administration, has irresponsibly assumed the tremendous task of interpreting the United States Constitution. In attempting to balance freedoms, the Supreme Court has traditionally ruled that constitutional freedoms take precedence over all forms of censorship.

However, there should be no doubt that questionable material appears on the Internet. At one particular site, For Your Eyes Only, scenes depicting bestiality and masochism can be found lingering in data archives (Andrews,1995). Playboy magazine features completely nude pictures of women on the Internet at no cost to users. Chat rooms, belonging to both service providers and to the Internet, provide opportunities for individuals to participate in "cyber-sex." The issue is not the objectionable material; rather, it is the constitutionality of prohibiting those types of free and voluntary exchanges over the medium. The author of the CDA has consistently stated that his intention is not to censor but to protect, "I'm not trying to be a super-censor...The first thing I was concerned with was kids being able to pull up pornography on their machines" (Andrews,1995). A cacophony of voices protest that the federal government does not possess the right, nor the obligation, to censor material in such a fashion. One of the voices leading the charge is, in fact, the federal government itself.

On June 12, 1996, a three-judge federal panel in Philadelphia unanimously struck down the Communications Decency Act as unconstitutional. Later that same year, a New York federal court struck down the Communications Decency Act as unconstitutional. This summer, the United States Supreme Court is expected to rule against the Communications Decency Act as a blatant attempt to unconstitutionally censor material. Patricia Nell Warren, an author who was a plaintiff in *ACLU v. Reno*, stated, "...the federal government and religious special-interest groups [use the]...excuse that 'youth must be protected.' What they really have in mind is control" (Warren,1996). Ms. Warren makes a valid point. Under the conditions of the CDA, transmitting a picture of Michelangelo's *David* would be illegal and a violation of federal law. The three-judge federal panel apparently agreed with Ms. Warren, "...the law wrongly would chill adults' right of access to sexual material that may be inappropriate for children" (Carelli,1996).

A second group of similar responses against the passage of the CDA is based in libertarian groups: "Civil libertarians say the new law will make it a federal crime to transmit a wide range of material...that could be interpreted as unsuitable for viewing by children" (McLeod,1996). As the American Civil Liberties Union points out:

> "The Exon proposal would prohibit communications with sexual content through private e-mail between consenting adults...the Exon proposal would expand current restrictions on...access...in effect, online providers would be forced to offer to adults only that content that is 'suitable for minors..."
>
> (ACLU,1995)

A letter issued to the Senate Commerce Committee by the Center for Democracy and Technology carried the names of almost thirty Internet providers, media moguls, and civil libertarian groups. It urged the committee to reject the Exon amendment because, "This bill poses a significant threat to freedom of speech and the free flow of information in cyberspace" (CDT,1995). A letter from a subscriber to America Online details his frustration at its inadequacy to effectively protest removal of the CDA from Congressional statutory law: "Large Online providers...did not lobby Congress to kill this bill which still leaves their CUSTOMERS liable if there were to post something that someone might consider offensive" (Moore,1995).

Newspaper editorials are another large repository for anguish over the censorship that the CDA imposes:

> "The bill can be characterized as a federal agent muscling a private citizen. Agent Big Brother in your study or in your workplace, breathing on your neck, reading over your shoulder. Leaning on you. Leaning over the person with whom you are communicating."
>
> (Levendosky,1995)

Certainly, the media is biased when commenting on infringements of their own First Amendment press freedoms. However, in combination with the

immense amount of protests from so many diverse groups, media criticism only serves to complete the grim and gloomy picture of the Communications Decency Act.

In analyzing the rationale for and against the Communications Decency Act, one must perform his own kind of balancing act. Which is more important: the protection of innocent children or the protection of free speech? To put it succinctly, it is the difference between asking which is more important: federal law or the United States Constitution? The answer for both questions is the protection of the Constitution and its guarantees of free speech and the individual right of access to the free flow of information. The Communications Decency Act violates those inherent, constitutional guarantees, and as such, it will probably be ruled unconstitutional by the Supreme Court.

There are several analyses that will qualify this assertion. At its outset, the Communications Decency Act treats the Internet as a broadcast medium, attempting to regulate all obscene and indecent material as being immoral and destructive to society. However, it has hopefully been proven that the Internet is not similar to broadcast journalism; rather, it is an amalgamation of different mediums; it is hypermedia. Currently, the government has the authority to content-regulate only two forms of media systems: broadcast and telephone-based services that utilize common carriers (Godwin,1995).

Indecent material, no matter how morally repugnant it is to an individual or society, is constitutionally protected speech: "In *Sable Communications v. FCC*, the Supreme Court found that any regulation of indecent material must use the 'least intrusive means' for accomplishing the goal of protecting children" (Godwin,1995). Concerning pornography, it is also considered to be constitutionally protected, unless it is found to be obscene. The government's justification that the CDA regulates obscene material on the Internet remains invalid. Obscene material in any medium has already been ruled illegal, regardless of what future technology should enter into society. Therefore, this justification proves that sections of the CDA are at least redundant in nature. Furthermore, because the Internet is a global medium, no law can prevent foreign individuals from sending lewd or lascivious material to Internet users who are residents of the United States.

The language of the amendment also poses problems for regulation. According to the CDA, you only have to "make available" indecent or obscene material to have violated the federal statute. Thus, even if you are unaware of downloading a pornographic image to a minor, you can still be held accountable for violating the CDA. Additionally, although the CDA grants a degree of immunity for carriers and service providers, it does not grant a degree of immunity to the services' customers. It is also

unreasonable and impractical to assume that a network or service provider could sort through every e-mail and USENET newsgroup processed through its system daily.

There is also the question of self-regulation. Because the Internet is a "functioning anarchy," it has had to develop rules and regulations to provide the most efficient service possible to its users. Concerning obscene and indecent material: "Nowadays, computer bulletin boards require filed proof of age before accessing adult areas...The image of innocent victims being assaulted by unwarranted information is...not the reality..." (Fagin,1995). If the Internet is capable of regulating itself, why should the government intervene in its daily operations?

Freedom comes at a price. It is an opportunity cost associated with democracy. The First Amendment guarantees of free speech and of a free press are the very essence of the American democratic spirit. When those freedoms are encroached upon, the very character of the nation is endangered and jeopardized. The purpose of the Communications Decency Act, which was to protect the innocence of children, could never successfully be balanced against the First Amendment guarantees of free speech and press. In arguing for such a justification, the government advocates the reduction of society to that of an adolescent mentality. Certainly not qualifying as progressive, this regressive statute provides for imprisonment

and fines for reproducing or distributing indecent and obscene material to minors. Although service providers are granted some immunity, individuals who utilize those resources are not; imprisonment and financial strife await those who would grapple with the provisions of the CDA.

The issue of regulating the Internet should not be viewed as a national issue. Because the Internet is a global communication medium, no national government can justify its regulation of cyberspace. As hypermedia, the Internet combines elements of many different forms of more traditional mediums. Applying American standards of telecommunications regulation to the Internet is not only ethnocentric, but it is also anachronistic. It is impossible to regulate the Internet as broadcast or newsprint; the amalgamation of mediums into the hypermedia covers too broad of an informational spectrum to be categorized for national regulation. Federal courts throughout the United States agree with this premise, as several have already struck down the CDA as unconstitutional. Succinctly, the Communications Decency Act violates First Amendment freedoms and denies the individual the right to access a free flow of information.

The belief that the CDA poses a threat to American civil liberties resonates throughout the many organizations that have protested it. Ranging from the ACLU to the Center for Democracy and Technology, dissimilar organizations have formed a coalition to protect the most

fundamental rights granted in our American democracy. Each of these groups argues that government censorship of the Internet denies the individual right to access information via the Information Superhighway. Aside from the aforementioned reasons to repeal the CDA, these groups also believe that this piece of legislation threatens constitutionally protected information.

The Supreme Court has consistently ruled that indecent material is constitutionally protected, as was the case in *Sable Communications v. FCC.* Furthermore, the Court has argued that state and national legislatures may only regulate the time, place, and manner of speech, not its content. In *FCC v. Pacifica Foundation,* the Supreme Court found that when weighing the right to access a free flow of information against the protection of innocent children, the former always prevails over the latter. Although indecent material is constitutionally protected, obscene material is not. Industry self-regulation has already begun to effect barriers to accessing obscene material by minors. Government regulation cannot effect any greater change.

VI

Under Construction: The Information Superhighway

From John Peter Zenger to the Communications Decency Act of 1995, the issues of government censorship and repression of the media have remained constant throughout American history. Additionally, the histories of other democratic societies, such as Canada and the United Kingdom, reflect similar trends in government regulation of the media. A free press is the true hallmark of a democratic society, and most democratic societies possess a relatively free press. However, it is the goal of achieving an unconditionally free press that best meets the needs of a democracy. If the people truly rule, invariably their voices must not be hindered in any form or fashion. Attempts to establish an unconditionally free press have always fallen short of success; yet, the battles fought for constitutional guarantees of free expression have traditionally borne the fruit of victory. It is only the muting of their voices that consigns the people of a free society to the whims of their government.

Hopefully, it has been proven that government censorship of the Internet removes the individual right to access the free flow of information. Additionally, government censorship effects a denial of freedoms inherently found in a democracy, such as privacy. Although universal access to a free

flow of information is remotely possible, society need only find "the maximum penetration of the potential market" to qualify the individual right to access. Every precaution must, therefore, be taken to prevent a social division between technological 'haves' and 'have-nots.' Concisely stated, government regulation of the Internet is impossible. Issues of national sovereignty and international authority prevent a single, regulatory body from being created to patrol cyberspace. As a 'functioning anarchy,' the Internet has learned to adapt to itself, constantly changing to meet the needs of its patrons. Self-regulation and the disparate condition of the network systems themselves also prevent government regulation from ever being successful. Comparative studies of democratic societies, such as the one conducted between the United States and Canada in this work, provide valuable insight into the patterns of government censorship.

With over twenty-five million people worldwide communicating via the Internet, the new hypermedia qualifies as one of the more, if not the most, important tools of the twentieth century. Created to link universities and research stations, and later adapting to serve the Defense Department in the event of nuclear holocaust, the Internet has readily adapted to whatever changes in technology or society may occur. The Internet never really fulfilled its original purpose; true, it still connects universities and research institutions, but present technology has exponentially increased global

awareness and use of the Information Superhighway. Marketing executives and students, housewives and industrial moguls, the handicapped and the healthy all use the Internet as a tool for global communication. Aside from demonstrating versatility of purpose, the Internet's sordid history of mutation illustrates how difficult it is to precisely define its boundaries. This serves as another justification for rejecting government censorship of the Internet; it is incapable of adequately completing its task of global regulation.

There are no policemen, there are no armed agents. The Internet has a small police force known as the Certified Emergency Response Team, but they are powerless before the onslaught of computer hackers. As the number of hackers increases, the ability of CERT officers to enforce the borders of cyberspace proportionately decreases. Without adequate power to enforce punishment or to levy financial impositions upon those who would ignore Netiquette, CERT falls immensely short of achieving its goal of internal network security.

The theoretical right to access guides citizens of a democracy to a repository of vast information. Without that individual right to access the free flow of information, the voice of the people is muted and the people themselves are left ignorant of their society. Historical documents, such as the United Nations Declaration of Human Rights, the First Amendment to the

U.S. Constitution, and the Helsinki Final Act affirm the validity of the right to access information unfettered by government regualation. In the United States, for example, speech remains virtually unrestricted. Except for occasions warranting an imminent threat to national security, freedom of speech stands as an unequivocal right in American society. The Sunshine Act of 1976 further illustrates the critical need for governments to provide access to information. Although the United States Supreme Court has never qualified an unconditional right to access, the individual right to access has been guaranteed on a limited basis. As demonstrated in the Pentagon Papers case, a compromise between security and freedom can be reached.

Ironically, the greatest examples of censorship often occur in the most democratic of societies. The Fourth Estate's struggle for freedom of expression and freedom of speech has been well documented in the histories of three democracies: the United States, Canada, and England. The Communications Decency Act, the Homolka publication ban, and the Star Chamber all represent the conflict existing between the media and the government. How does a democratic government reconcile censorship with an informed populace?

Governments censor for protection of the family, the church, and the state, but primarily, governments censor for the protection of the state. In the United States, the Supreme Court and the judicial branch remain as the

last bulwarks against government censorship. In landmark cases, such as *Near v. Minnesota* and *ACLU v. Reno*, the media and civil liberties groups have successfully convinced the Court that constitutional guarantees of freedom must take precedence over any other concern. Repeatedly, American courts have found the needs of access to be much more important than needs for government privacy.

However, not all government institutions agree. Universities and college campuses have become increasingly hostile to the freedoms of expression and speech. At the University of Waterloo and at Carnegie-Mellon University, indecent material was removed from network systems either to protect the institutions against legal repercussions or to protect the innocence of younger students. Yet, universities, such as these, will continue to teach their journalism students that the freedom of the press is a hallmark of American democracy. The hypocrisy between computer operations and educational philosophies at institutions of higher learning is only another sign that government censorship of the Internet denies the individual right to access the free flow of information.

As a 'functioning anarchy,' the Internet regulates itself. Policies that have developed over its history, from Netiquette to rules of an America Online chat room, demonstrate a concerted effort by computer users to police themselves. Government regulation only serves to harm the sense of

community created by the structure of the Internet itself. At its very least, government regulation is redundant.

Canada significantly lacks the press freedoms enjoyed by the American media, although its Charter of Rights and Freedoms proclaims a freedom of the press and a freedom to a speedy and public trial. The publication ban issued by Justice Kovacs in the Homolka case seriously affected the fairness of a public trial for Bernardo-Teale. Toward the end of his trial, even he advocated a lifting of the publication ban. Canadian enforcement of the publication ban was inefficient and counter-productive. Foreign routing systems could redirect the details of the Homolka trial into Canada, and there was nothing that the Canadian police could do to stop the redistribution of information.

Three specific instances illustrate police harassment of Canadian citizens. At the University of Waterloo, the publication ban cost students the unlimited use of their library. The removal of articles and other materials relating to the Homolka trial created a chasm that prevented student access to the free flow of information. In the town of Sarnia, police harassment of a mentally disturbed youth was questionable and probably unethical. Yet, no legal action was ever taken against the youth for violating the publication ban. At the University of Western Ontario, possession of the Homolka FAQ equaled publication of the FAQ. Mere possession of Homolka details resulted

in at least one student being subjected to the evils of a police state. Canada's recent actions regarding the Homolka publication ban conclusively prove that government censorship of the Internet denies the individual right to access the free flow of information.

If the Homolka publication ban reflected the Canadian tendency toward censorship, the Communications Decency Act of 1995 represented the American political passion for censorship of the media. By using the innocence of children as its justification, the United States' government attempted to illegally remove indecent material from the Internet. In *Sable Communications v. FCC*, indecent material was ruled to be constitutionally protected speech. Apparently, the Congress decided upon a different interpretation of the Constitution. Additionally, the enforcement of many of its provisions was left up to the individual states. It is impossible for localities and regions, or even a federal government for that matter, to regulate an international tool of global communication.

The Communications Decency Act was struck down in 1996 by several federal courts, but the Supreme Court has yet to decide if the government can remove indecent material from the Internet. Their decision shall revolve around a balancing act of choosing which is more important: the protection of innocent children or the protection of free speech. Traditionally, the Supreme Court has ruled for the latter; yet, the Supreme Court does has a

reputation for being non-traditional at inconvenient times.

Government censorship of the Internet conclusively denies the individual right to access the free flow of information. Freedom comes at an eternal price, that of vigilance. Throughout the histories of every democratic society, governments have exhibited tendencies to censor the media for a multitude of various reasons. Regardless of the reason, free speech and a free press are the hallmarks of democracy. Without those guarantees of freedom, the people are consigned to the silence imposed by ignorance. Without those guarantees of freedom, the people are consigned to a cursory role in society. Without those guarantees of freedom, the people are consigned to the whims of an oppressive government. The Information Superhighway remains under construction, while the search for an unconditionally free press continues.

VII

Works Cited

American Civil Liberties Union. "Fight Online Censorship! Axe the Exon Bill!" Available at gopher://gopher.panix.com:70/00/vtw/exon/analyses/aclu. April 7, 1997.

Anderson, et al. Universal Access to E-Mail: Feasibility and Societal Implications. Santa Monica, California: Rand Organization, 1995. xiv-xv, 59-60, 85, 119.

Andrews, Edmund L. "Senate Panel Backs Smut Ban on Internet." Available at gopher://panix.com:70/00/vtw/exon/media/nyt. April 7, 1997.

Associated Press. "Copyright deal offers protection, boost for Net." USA Today 23 December 1996: 4B.

Campbell, K.K. "Policing the New Media--Internet Users Have Their Liberty Threatened as Law Enforcement Agencies Blunder About Trying (And Failing) to Enforce the Homolka Press Ban." Available at http://ftp.io.org. July 17, 1996.

Carelli, Richard. "Court to hear Internet issue." State-Times/ Morning Advocate [Baton Rouge] 7 September 1996, Sat. ed.: A1, A8.

Center for Democracy and Technology. "CDT Led Coalition Sends Letter To Senators Exon and Pressler--Message: Remove S. 314 From Fast Track." Available at gopher://gopher.panix.com:70/00/vtw/exon/analyses/cdt.3. April 7, 1997.

"Communications Decency Amendment--Full Text of Final Language Passed By the U.S. Senate on June 14, 1995." Available at gopher://gopher.panix.com:70/00/vtw/exon/legislation/s314.final. April 7, 1997.

Donham, Parker Barss. "Parker's Talk to the U. of Waterloo Symposium on Internet Censorship." Available at http://cfn.cs.dal.ca/Media/TodaysNews/listserv/parker-l/335.html.

Elmer-Dewitt, Philip. "Censoring Cyberspace: Carnegie Mellon's attempt to ban sex from its campus computer network sends a chill along the info highway." Available at http://www-swiss.ai.mit.edu/6095/assorted-short-pieces/time-cmu-article-nov21.html. February 5, 1997.

Emery, Michael, and Edwin Emery. The Press and America: An Interpretive History of the Mass Media. Seventh ed. New Jersey: Prentice Hall, 1992. 310.

Fagin, Barry S. "Don't Curb Cyber-porn at the Expense of Freedom On-line." Available at gopher://gopher.panix.com: 70/00/vtw/exon/media/colorado-springs. April 7, 1997.

Gimon, Charles A. "Internet Censorship Around the World." Available at http://www.skypoint.net/members/gimonca/ foreign.html. September 20, 1996.

Godwin, Mike. "Frequently Asked Questions About the 1995 Communications Decency Act." Available at http://www. panix.com/vtw/exon/index.html. March 27, 1997.

Hafner, Katie, and Matthew Lyon. Where Wizards Stay Up Late. New York: Simon & Schuster, 1996. 10-13, 149-159, 186.

Jenish, D'Arcy. "In pursuit of evidence: Police actions may restrict media freedom." Maclean's. June 8, 1992, 15.

Konvitz, Milton. "Censorship." Encarta. CD-ROM Redmond: Microsoft, 1995.

Levondosky, Charles. "'Decency Act' A Flasher in Hiding." Available at gopher://gopher.panix.com:70/00/vtw/exon/ media/wyoming. April 7, 1997.

McChesney, Robert W. "The Internet and U.S. Communication: Policy Making in Historical and Critical Perspective." Journal of Communication 46.1, 1996. 98-119.

McLeod, Ramon G. "Clinton Oks Telecom Overhaul; Rights groups file suit--censorship concerns." The San Francisco Chronicle 9 February 1996, fin. ed.: A1.

Middleton, Kent R., and Bill F. Chamberlin. The Law of Public Communication. Third ed. New York: Longman, 1994. 487.

Moore, Thomas. "Re: EDF ALERT-communications..." Available at gopher://gopher.panix.com:70/00/vtw/exon/media/aol. April 7, 1997.

Morris, Merrill and Christine Ogan. "The Internet as Mass Medium." Journal of Communication 46.1, 1996. 39.

New York Times. "A Bad Gag Order in Canada." Available at http://www.cs.indiana.edu/canada/n.y.times-editorial. November 26, 1996.

New York Times Co. v. United States. 403 U.S. 713, 1971.

Nielsen, John. "Senator Wants to Police Internet Porno." Available at gopher://gopher.panix.com:70/00/vtw/exon/media/exon-npr. April 7, 1997.

Pierson, Kathy. "Internet 101." Texas Banking May 1996. 8.

Riley, Robert. "Sarnia Police Service Violates Privacy in Homolka Publication Ban Violation Investigation." Available at http://www.cs.indiana.edu/canada/police.2. January 4, 1997.

Shallit, Jeffrey. "Censorship: The Libraries, the Internet and the University: Part I." Available at http://www.math.uwaterloo.ca/~shallit/forum.html. October 28, 1996.

Shallit, Jeffrey. "Censorship: The Libraries, the Internet and the University: Part II." Available at http://www.math.uwaterloo.ca/~shallit/forum.html. October 28, 1996.

Shallit, Jeffrey. "Censorship: The Libraries, the Internet and the University: Part III." Available at http://www.math.uwaterloo.ca/~shallit/forum.html. October 28, 1996.

Smith, Wayne. "The Police and the Publication Ban: A real event happened here." Available at http://gopher.eff.org/pub/Censorship/Foreign_and_Local/Canada/Homolka-Teale_cas. December 2, 1996.

Warren, Patricia Nell. "One Victory in an Ongoing War!" Available at http://www.gaywired.com/wildcat/wildcat.htm. July 17, 1996.

Washington Post. "From the Washington Post, Friday March 24, 1995, Page A1 & A24." Available at gopher://gopher.panix.com:70/00/vtw/exon/media/WhiteHouse.quote. April 7, 1997.

Watson, Russell, and Linda Kay. "The Barbie-Ken Murders: Canada: Blacking out a horror story." Available at http://www.cs.indiana.edu/canada/Newsweek. January 4, 1997.

Wisebrod, Dov. "The Free Flow of Information: Can it be Regulated?" Available at http://ftp.sunset.se/pub/radio/Mirrors/CBC/radio/programs/current/ideas/speech.txt. November 20, 1996.

Zeltser, Lenny. "The World-Wide-Web: Origins and Beyond." Available at http://www.seas.upenn.edu/~lzeltser/WWW. January 11, 1997.