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ARTICLE

“Marketplace of Ideas” or Anarchy: What Will Cyberspace Become?

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Morality in Media is a national organization that works to curb traffic in pornography through enforcement of obscenity and related laws and to uphold standards of decency in the media.

The author began working for Morality in Media in 1985 as a staff attorney. In 1987 he was named assistant director of the National Obscenity Law Center, a project of Morality in Media. In his capacity as an attorney, he has proposed and drafted federal, state, and local laws pertaining to obscenity, sexually oriented businesses, and media indecency. He has also authored and coauthored amicus curiae briefs in federal and state court cases. In addition, he has authored and coauthored official comments in FCC proceedings involving TV indecency and the TV rating system. He is interviewed frequently by the news media.

I. INTRODUCTION

I recall reading somewhere that Dartmouth College was a pathfinder in the use of personal computers. I also recall being required, as part of a first-year course at Dartmouth, to write a simple computer program. That was 1967-1968, and it was my first contact with the world of computers.

My second memorable contact (albeit indirect) came in 1985. That was the year I began my employment at Morality in Media ("MIM") as a staff attorney. It was also the year a bill was introduced in the United States Senate to prohibit the use of computers to transmit obscene material and child pornography.¹ MIM supported that bill, but it would be three more years before Congress amended the federal child sexual exploitation laws specifically to prohibit sexual exploitation of minors through the use of computers.² It would be eleven more years before Congress amended the federal obscenity laws specifically to prohibit importation or transportation of obscene matters through the use of computers.³

My third memorable experience relating to computers came in 1991 when I received a telephone call from a man concerned about the use of the government-funded national computer network then in existence to transmit pornography, including child pornography. What still disturbs me about that call (I can be naive, sometimes) is the "implication" that supposedly intelligent, well-educated, "responsible" human beings were using a government instrument intended for science and education for such sordid purposes.

In recent years my contact with the Internet has become a daily experience at MIM. We receive frequent complaints about (1) children accessing Internet pornography, both unintentionally and intentionally, (2) adults being exposed to Internet pornography unintentionally, (3) spouses addicted to Internet pornography, and (4) the vile nature of much Internet pornography, including child pornography.

1. See Computer Pornography and Child Exploitation Act of 1985, S. 1305, 99th Cong. (1985).

2. See Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, §§ 7511-7512, 102 Stat. 4181, 4485-87 (1990) (codified as amended at 18 U.S.C. §§ 2251-2252 (1994 & Supp. IV 1998)).

3. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 507, 110 Stat. 56, 137 (1997) (codified at 18 U.S.C. §§ 1462, 1465 (1994 & Supp. IV 1998)).

On the positive side, MIM has also had its own Internet site since 1996.⁴ This site has proved incredibly helpful and enabled us to obtain information and to get our message out quickly and inexpensively to our constituency and to the general public.

Clearly, the challenge for society is to maximize the great potential of cyberspace for mankind's benefit while minimizing its great potential for harming mankind. The latter task may not be easy, but if we fail, the benefits may be outweighed by the harms.

II. FIRST AMENDMENT PARAMETERS

The subject of this year's Lead Articles Edition is "The Marketplace of Ideas in Cyberspace." I thought at first that it would be necessary to define what is meant by "ideas." For example, if a Peeping Tom with a pair of binoculars watches a woman undress in front of an open window, are ideas transmitted that should be protected by the First Amendment?

If the Peeping Tom is paying to watch the woman undress and masturbate in front of a camera linked to the Internet, are ideas now being transmitted or induced that should be protected by the First Amendment? Can anyone say with a straight face that our nation's founding fathers, or the Supreme Court during the first 175 years of our nation's history, would have responded "yes" to either question?⁵

But perhaps it is not really necessary to define ideas because it seems clear that the First Amendment was never intended to protect every idea, no matter how it is defined. For example, if a concerned citizen, whose worthy intention is to save the public from a political candidate's rotten policies, accuses that candidate of a serious crime that he or she knows the candidate did not commit, his or her libelous speech will find no safe haven in the First Amendment.⁶ If, to protect the integrity of the military, an officer publicly denounces the President as a liar and adulterer, his speech will find no safe haven in the First Amendment.⁷ If, to ease the pain of a client who is about to lose a high profile case, the attorney calls a press conference to berate the judge, who handled the case flawlessly, that lawyer's speech will find no safe haven in the First Amendment.⁸

4. See <<http://www.moralityinmedia.org>>.

5. *But cf.* *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 587 (1991) (White, J., dissenting) ("This is no more than recognizing . . . that dancing is an ancient art form and inherently embodies the expression and communication of ideas and emotions.") (internal quotation marks omitted).

6. See, e.g., *Herbert v. Lando*, 441 U.S. 153, 169-75 (1979).

7. See, e.g., *United States v. Howe*, 37 C.M.R. 555, 561 (U.S. Army Bd. of Review 1966).

8. See, e.g., *Idaho State Bar v. Topp*, 925 P.2d 1113, 1115 (Idaho 1996).

If, to ensure that his readers get the whole story, an author with a contract to write an article borrows heavily from another publication without permission, that author's violation of the copyright laws will find no safe haven in the First Amendment.⁹ If a government employee who believes in racial segregation makes frequent use of racial slurs in an integrated workplace, that speech will find no safe haven in the First Amendment.¹⁰ If male employees who have a deep appreciation for the curvature of the female body hang *Playboy* foldouts all over the walls of a workplace shared with female coworkers and daily make lewd, explicit comments to their female coworkers that speech may find no safe haven in the First Amendment.¹¹ If a citizen who has a sincere belief that society's outmoded beliefs about adult-child sex are hurtful to both adults and children disseminates child pornography to his neighbors, that "speech" will find no safe haven in the First Amendment.¹²

I could go on to treason, inciting a riot, threats, nonsexual harassment, fraud, misleading advertisements, perjury, bribes, soliciting prostitution, and more. But to avoid trying the reader's patience, I will address just one more exception to First Amendment protection—obscenity. In holding that obscenity is not protected by the First Amendment, the Supreme Court stated in *Miller v. California*:¹³

The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a "misuse of the great guarantees of free speech and free press . . ." *Breard v. Alexandria*, 341 U.S., at 645. The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. "The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people," *Roth v. United States*, [354 U.S. 476,] 484 (emphasis added). See *Kois v. Wisconsin*, 408 U.S., at 230-232; *Thornhill v. Alabama*, 310 U.S., at 101-102. But the public portrayal of hard-core sexual conduct for its

9. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548-49, 555-60 (1985).

10. See, e.g., *Wright v. Glynn County Bd. of Comm'rs*, 932 F. Supp. 1476, 1480-82 (S.D. Ga. 1996).

11. See, e.g., *Faragher v. Boca Raton*, 524 U.S. 775, 786-88 (1998).

12. See, e.g., *New York v. Ferber*, 458 U.S. 747, 756-64 (1982).

13. 413 U.S. 15 (1973).

own sake, and for the ensuing commercial gain, is a different matter.¹⁴

To my knowledge, no one is arguing that cyberspace should enjoy less First Amendment protection than other areas,¹⁵ but I can see no reason why the Supreme Court should now conclude that cyberspace should enjoy greater First Amendment protection.

One of the arguments that opponents of the Internet indecency provisions of the Communications Decency Act of 1996 ("CDA")¹⁶ made was that the law would set a bad example for other nations. In other words, if the United States restricted children's ability to access patently offensive depictions or descriptions of sexual or excretory activities or organs on the Internet, the governments of other nations would feel free to restrict even political speech. In my view, the best example that the United States can set for the world is to make the vital distinction between political speech and other speech on matters of public concern¹⁷ on the one hand and hardcore pornography and the exposure of unwilling adults and children to indecency and lewdness on the other hand.

One argument often made in opposing any government restrictions on speech is that the best response to bad speech is good speech. There is, of course, some truth in this saying. But like most "sayings," there are also limitations. For example, without adequate access to society's means of communication, counteracting falsehoods and distortions can be very difficult. Addiction to drugs, gambling, or pornography also do not yield easily to "good speech." And at times even a majority of a society may be totally deceived by falsehoods and distortions or may simply not want to listen to the truth—because the truth is not pleasant or because of prejudice.

Another argument often made in opposing government restrictions on speech is that it is difficult to draw lines between the injurious speech and speech which either does not cause the harm or which should nevertheless be protected for some reason. Undoubtedly, the task of

14. *Id.* at 34-35.

15. I do not mean to imply that every form of communication on the Internet (e.g., broadcasting, chatrooms, e-mail, newsgroups, and telephone) should be treated, for first Amendment purposes, like a daily newspaper purchased at a newsstand or ordered for home delivery.

16. Pub. L. No. 104-104, 110 Stat. 56, 133-43 (1997).

17. The following are examples of matters of public concern: abortion, affirmative action, breakdown of the family, crime, economic freedom, environmentalism, euthanasia, evolution, feminism, gambling, gun control, health insurance, homosexual rights, illegal drugs, immigration, morality, national defense, nuclear power, public education, public health, religion, smoking, social security, unemployment, and the United Nations.

drawing boundary lines is seldom easy, but if government fails to provide redress for grievous wrongs, the result could (will) ultimately be "a return to the law of the jungle."¹⁸ Vigilantism is already present on the Internet.

III. POTENTIAL FOR BENEFITTING OR HARMING MANKIND

Cyberspace has the potential directly and indirectly to benefit large numbers of ordinary citizens with a link to the Internet in many different ways, including the following:

1. It will make vast amounts of beneficial information available quickly and inexpensively.
2. It will provide new, inexpensive means of interpersonal communication through e-mail and chatrooms.
3. It will make a broad range of lawful commercial activities more accessible, convenient, and faster.
4. It will provide new, inexpensive leisure time activities.

However, the various different ways that cyberspace can enhance human life can also be utilized to debase and injure human life. Examples include the following:

1. Harmful content is also readily available, including: child pornography and instructions on how to build bombs, make illegal drugs, drug and rape women, and commit murder.
2. Chatrooms and e-mail are used by pedophiles to exploit children sexually.
3. Cyberspace "commerce" includes trafficking in illegal pornography, prostitution, and drugs; false advertising; insider trading; fraud; theft; bribes; and privacy invasions.
4. Cyberspace "leisure time" activities include viewing pornography, gambling, vandalism, harassment, and misusing employer computers for personal purposes.

Not too many decades ago, television was thought to have great potential either to enhance or debase human life. Without question, Television has in fact benefited individuals and society in many different ways. But, in my opinion, Television has caused more harm than good to the human race. And I believe cyberspace will cause more harm than good unless society is not only committed to maximizing the Internet's potential for good, but also to minimizing its potential for harm. It should also be obvious that the multifaceted cyberspace has greater potential for either good or harm than Television ever had.

18. *Rosenfeld v. New Jersey*, 408 U.S. 901, 902 (1972) (Burger, C.J., dissenting).

IV. COMPARING TWO "REAL SPACE MARKETPLACES OF IDEAS" WITH "CYBERSPACE AS A MARKETPLACE OF IDEAS"

To evaluate the advantages and disadvantages of cyberspace as a marketplace of ideas, it may also help to compare cyberspace with two present day, "real space" marketplaces of ideas—public libraries and mainstream commercial bookstores.

One advantage of libraries and bookstores is that if they do their job well, they make the citizen's task much easier by selecting the best materials on a particular subject matter or issue. They also place these materials in a single, accessible place, and public libraries preserve them for future generations.

A related advantage of public libraries and bookstores is that they often weed out materials whose potential for harm exceeds their potential, if any, for benefiting individuals or society. Examples are pornography, books providing detailed descriptions on how to build terrorist bombs or commit murder, and materials advocating violence against minorities. A book such as *Mein Kampf* might be included in a library or bookstore's offerings for its historical value, but not for its advocacy of Hitler's vile ideology. Another potential advantage of libraries and bookstores is that they are often in a position to restrict minors' access to at least some material that may be harmful to them.

Motives for weeding out some materials that could harm the community or for restricting children's access to some materials include the positive role of community pressure.

However, libraries and bookstores also have disadvantages. No matter how wise and disinterested libraries and bookstores may be, they cannot possibly include in their stacks every valuable resource. Physical space limits their potential value. Furthermore, libraries and bookstores are not always wise and disinterested. Ignorance, bias, and financial motives can and do distort the selection process, as can the negative effects of community pressure. In addition, many public libraries, in particular, operate under the misguided notion that whatever is suitable for adults is also suitable for children, or, in the alternative, that if some materials can harm children, it is up to parents—not public libraries—to supervise children.

What then are the advantages and disadvantages of cyberspace as a marketplace of ideas? The obvious advantage is that a potentially vast supply of helpful material is available and accessible in cyberspace. Physical space is not a limitation. Responsible but unpopular or offensive viewpoints on matters of public concern will also be difficult to exclude completely, as they often are in public libraries and mainstream bookstores. But gone will be selectivity on the basis of importance and

quality and the essential help that provides to those with insufficient time or research skills. Gone too will be selectivity on the basis of harm to society and restrictions on children's access to materials harmful to them.

Of course, it remains to be seen if, in the long run, cyberspace becomes the great marketplace of ideas envisioned by its eloquent and often financially motivated proponents.

If Internet power consolidates into fewer and fewer hands (e.g., AOL-Time Warner, AT&T), the same ignorance, bias, and financial motives that limit the usefulness of existing bookstores may also limit the usefulness of on-line marketplaces—particularly if most citizens choose an on-line service based upon effective marketing or a fear of an unregulated Internet.

V. CONCLUSION

During the heated debate surrounding the CDA's Internet indecency provisions, opponents argued that the provisions would be impossible to enforce effectively because of the international dimension of the Internet and because of the difficulty of identifying offenders who want to remain anonymous. I was not then, and I am still not convinced that either impediment to effective enforcement is insurmountable. But what struck me as disingenuous about the argument was that it could also be made concerning a variety of other harmful activities on the Internet, including terrorism, vandalism, theft, fraud, copyright violations, libel, harassment, privacy invasions, child pornography, and drugs. Yet few, if any, were arguing that society should do away with laws addressing these problems simply because it may not be easy to enforce existing or new laws.

If society fails to enact and enforce effectively the necessary laws for cyberspace, then cyberspace will remain a dangerous place. And, in the long run, most citizens will not needlessly expose themselves to danger. Rather, they will choose safe havens, much as humans did during medieval times or in the "Wild West." Therefore, instead of having this romanticized wide-open marketplace of ideas, what cyberspace may become is a series of commercial, political, religious, and lifestyle fiefdoms or forts with relatively little communication between them. This is not a happy thought.

But if society is to fulfill its responsibility to bring necessary order to cyberspace without sacrificing cherished First Amendment freedoms, then it must seek a middle ground between the censorship of dictators on the one hand and the free speech absolutism of civil libertarians on the other hand. As former Justice William Brennan correctly pointed

out in *Roth v. United States*,¹⁹ “[I]t is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance.”²⁰ Government does have a constitutional role to play in bringing about order in cyberspace.

But nongovernmental entities must also play an important role other than telling parents to use imperfect screening technology. A responsible company has no excuse for knowingly providing access to some Internet sites or tolerating the same content on a system under its control. Nor does a responsible company have an excuse for knowingly providing children with access to some Internet sites or tolerating their access to the same content on a system under its control.

Drawing lines is often not easy, but drawing lines is part of what communal life is all about, regardless of whether it is government or private citizens that must draw the lines. As another old saying goes, “Your rights end where mine begin.” I would suggest four “lines” that may prove helpful in finding a needed balance between legitimate societal interests and personal freedoms.

The first is the line between an audience consisting of consenting adults and an audience which includes unconsenting adults and children. What is acceptable for the first audience will frequently not be acceptable for the latter.²¹

The second is the line between a discussion or debate about sexuality and the “public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain.”²² The principle would also have application to “hardcore violence.”

The third is the line between government preventing publication of speech it doesn’t like and government providing redress for citizens injured by the abuse of freedom of speech.²³

The fourth is the line between speech that offends and speech which is intended to encourage, provoke, incite, facilitate or aid and abet criminal violence, destruction of property or harassment.²⁴

While a free society may wisely tolerate a much broader scope of harmful or potentially harmful speech than it does of harmful or potentially harmful conduct, the end product of no restraints on speech is not a healthy civilization, but rather ruinous anarchy.

19. 354 U.S. 476 (1957).

20. *Id.* at 483.

21. *See, e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 748-51 (1978).

22. *Miller*, 413 U.S. at 35.

23. *See, e.g.*, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-17 (1931).

24. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969); *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243-50 (4th Cir. 1997).

* * *