

COMMENTARY

The Communications Decency Act⁽¹⁾

Senator Jim Exon⁽²⁾

The Exon-Coats Communications Decency Act stands for the simple premise that it is wrong to provide pornography to children on computers just as it is wrong to do it on a street corner or anywhere else. The three-judge panel that ruled against our law ignored previous court rulings that have upheld that simple notion, as well as other well-established laws that protect children from indecent material over a telephone, on radio and television, or cable. The ruling clears the way for a final decision by the U.S. Supreme Court.

It is important to understand what the Decency Act is and what it is not. The Decency Act makes it a crime to knowingly use a telecommunications device or interactive computer to send an indecent material in a manner accessible to a child. The new law does not ban any constitutionally protected material from adults.

If someone let a child browse freely through an adult bookstore or an x-rated video arcade, I suspect and hope that most people would call the police to arrest that person. Yet, these very offenses occur every day in America's electronic neighborhoods. A child can get on the information superhighway and freely ride to on-line "red light" districts that contain some of the most perverse and depraved pornographic material available.

The Philadelphia court found that there were no effective measures to determine the age of computer users. This technological argument is faulty because as a relatively new medium, the Internet and other interactive computer services are infinitely changeable and their architecture does and can accommodate child screening. The court overlooks that a number of Internet sites already block child access by requiring credit card or adult PIN numbers like those used for automatic teller machines to access certain sites. Even if such technology were not available, the statute does not require those who traffic in electronic pornography to do the impossible -- only what is "reasonable, effective and appropriate."

The second line of criticism was with the law's "indecent" standard. The Philadelphia court found the term "indecent" and its rendition in the statute to be vague. The court brushed aside years of U.S. Supreme Court rulings which not only found the indecent standard sufficiently clear, but which applied that very standard to radio, television, telephone and cable use. Here, the court's disagreement does not seem to be with the Congress but with the U.S. Supreme Court which has repeatedly upheld the indecent standard.

The definition of indecent contained in the new law applies to material that is "in context, patently offensive, and depicts or describes sexual or excretory activities or organs." In other words, what goes behind the counter in the convenience store should be restricted to *adults only* on the Internet as well. The Philadelphia court overlooks that no court has applied the indecent standard to prohibit serious works of art, literature or medical information. In this regard, the court feasted on a plate of red herrings.

Congress took great care to craft the law so that it zeroed in on protecting children from indecent, as the U.S. Supreme Court has repeatedly acknowledged as a compelling state interest. Congress modeled the statute after the existing dial-a-porn law which allows telephone sex services to ply their wares to adults but prohibits access by minors. The U.S. Supreme Court has already found that the dial-a-porn law does not violate the First Amendment. Adult material which is otherwise legal would still be available to adults. The Decency Act is clear and cannot be violated by accident. There must be a knowing violation and the material must be patently (that is obviously) offensive by contemporary community standards.

It is true that since our law was proposed, various software programs have been developed to block some pornographic material and I am pleased the computer industry finally agreed there is a problem. But it is also true that this software can't block everything. And shouldn't the person who knowingly gives pornography to a child be held responsible under the law? I say the answer is yes.

The Philadelphia court ignores that it is fundamentally wrong to knowingly give pornography to children or to display pornography in a public place. Some opponents of the Decency Act seem to rationalize that the framers of the Constitution plotted at great length to make certain that the profiteering pornographer, the pervert and the pedophile would be free to practice their pursuits in the presence of children on a taxpayer-created and subsidized computer network.

If there is anything positive that came from this ruling in Philadelphia, it is that it was so radical and so sweeping in ignoring existing laws and previous court ruling that it will crumble under Supreme Court scrutiny. I am hopeful that the high court, relying on its own precedents, will find the Decency Act to be constitutional. As one editorial writer recently put it, it is a weak society indeed that cannot find some constitutional way to protect its kids.

1. *Editor's Note*. The Board of Editors invited Senator Exon to respond to Robert Cannon's article regarding the legislative history of the Communications Decency Act. Senator Exon provided this unedited commentary in response.

2. * Senator Jim Exon is the senior Senator from Nebraska and a cosponsor of the Communications Decency Act.