Chapter 2

FREEDOM OF SPEECH IN CYBERSPACE

Governments of the Industrial World, you weary giants of flesh and steel, We come from cyberspace ……..We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity.

John Perry Barlow[101]

2.1 Introduction

Freedom of Expression is one of the most universally recognized and prominent rights in all democratic legal systems. The right to impart and receive information has long been a cornerstone of human rights law, and of democratic theory[102]. On 26th August 1789, , the architects of the French Revolution issued the Declaration of the Rights of Man, which secured the right of citizens to communicate ideas and opinions freely, and which right has been retained virtually unchanged throughout the history of democracy. Almost exactly a month later, the United States, declared free speech to be fundamental to its nascent political structure by amending its recently adopted Constitution to protect that right explicitly[103]. Over a century and a half later, the United Nations' Universal Declaration of Human Rights (UDHR) recognized the right to free speech[104]. Similarly International Covenant on Civil and Political Rights (ICCPR) and European Convention on Human Rights have upheld the significance and importance of freedom of expression. Although the protection of freedom of expression was not given prominence in most western democracies fifty or even thirty years ago, recent developments indicate that most democracies

[101] John Perry Barlow is a retired Wyoming cattle rancher, a former lyricist for the Grateful Dead, and co-founder of the Electronic Frontier Foundation. Since May of 1998, he has been a Fellow at Harvard Law School's Berkman Center for Internet and Society.
[102] Brian W Esler, Human Rights in the Digital age, (ed.,Mathias Klang & Andrew Murray), Cavendish Publishing Ltd., US, 2005
[103] ibid
[104] Art.19, UDHR

have started developing protective freedom of expression jurisprudence in the past ten to twenty-five years[105].

2.2 Freedom of Speech and Expression – Justifications

Right to free speech as invaluable fundamental right of human beings can be justified on several grounds. The liberty to express one's self freely is important for a number of reasons[106], which help to shape development and application of law on freedom of expression[107]. The main free speech justifications are widely referred as the classical model. This model offers explanations regarding the core of free speech, the speech truly valued by society[108]. In this research work we have considered five justifications for the protection of free speech viz., freedom of conscience, personal identity and self-fulfillment, market place of ideas, democracy and self-governance, and right to self-expression which includes artistic and scholarly endeavor.

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[105] See Fredick Schauer, Freedom of Expression of Adjudication in Europe and the United Sates: A case study in Comparative constitutional Architecture, in Europe and US constitutionalism, 53-56 Edited by George Nolte, Council of Europe Publishing 2005

[106] Supreme Court of India has provided certain insights as to the significance of Freedom of expression and the purpose it serves in society in Indian Express Newspapers (Bombay) Pvt. Ltd. and Ors. v. Union of India and Ors. MANU/SC/0340/1984. The Court observed that The freedom of expression has four broad social purposes to serve; (i) it helps an individual to attain self fulfillment, (ii) it assists in the discovery of truth, (iii) it strengthens the capacity of an individual in participating in decision-making and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of the society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know. Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration.

[107] Barendt .E, Freedom of Speech, Oxford-Clarendon Press, London,1987

[108] Carmi E Guy, Dignity-The Enemy from within: A theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification, University of Pennsylvania Journal of Constitutional Law, Vol. 9, No. 4, 2007 , available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896162 , visited on 14 May 2006

2.2.1 Freedom of conscience, Personal identity and Self-fulfillment

First, self-expression is a significant instrument of freedom of conscience, personal identity, and self-fulfillment. From the point of view of civil liberties, this is probably the most important justification which can be offered for free speech. The commitment to liberty lies mainly in the idea of individual autonomy, an ability to live a life according to choices consciously made between a reasonable range of options. The freedom to choose between values, to have fun through communication, to identify and be identified with particular values or ideas, and to live one's life according to one's choice, is the essence of liberty. Freedom of expression has an important role to play here. If one takes seriously one's choice of values, it will be important to be able to express them through words and actions alike. Such expression does not only serve the instrumental goal of persuading others or advancing understanding. It is also the means by which people acknowledge and start to put into effect their commitments to selected values and choices, thereby defining an important aspect of their personal identities. In all such cases expression has to be protected. Some expressions, verbal or written textual outpourings do not merit protection because they do not express any choice between values. For this reason, Edwin Baker has argued that, while the First amendment to the US Constitution 'bars certain governing nonverbal conduct, it does not bar controls on commercial speech including advertising[109]. The commercial speech is not substantially valuable as they are not expressions of life choices but are, at best, instrumentally useful ways of exercising commercial freedom, or informing potential purchasers about products. This would be a more powerful argument if the liberty model were the only theoretical framework for justifying protection for freedom of expression, but it is not[110]. There are others, which overlap with it in

[109] Baker C E, Human Liberty and Freedom of Speech, Oxford University Press, London, 1989 at p 73

[110] Feldman, David, Civil Liberties and Human Rights in England and Wales, 2nd Edition, Oxford University Press, UK, 2002, at 763

core areas, but also extend it to justify free speech on other grounds at the peripheries[111].

2.2.2 Discovery and Truth- Market place of ideas

The second justification can be drawn from the "discovery and truth" model suggested by John Stuart Mill[112] in his work "On Liberty". This model, also known as "market place of ideas" since it suggests that in a free market the exchange of ideas will enable the truth to be established[113]. Oliver Wendell Holmes and Louis Brandeis of US Supreme Court have justified free speech on this idea[114]. Freedom of expression enables people to contribute to debates about social and moral values. It is arguable that the best way to find the best or truest theory or model of anything is to permit the widest possible range of ideas to circulate[115]. The interplay of these ideas, challenging each other and allowing the strengths and weaknesses of each to be exposed , is more likely than any alternative strategy to lead to the best possible

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[111] ibid at p763

[112] Mill, John Stuart. *On Liberty*. Vol. XXV, Part 2. The Harvard Classics. New York: P.F. Collier & Son, 1909–14; Bartleby.com, 2001, available at www.bartleby.com/25/2/. Visited 3 Nov 2003

[113] Adams V United Sates, 250 US 616, 630(1919) (Holmes J, dissenting) , available at http://www.realcampaignreform.org/decision/thomas.pdf, visited 4 Dec 2004 . In this case Holmes J, proposed the now-famous theory of market place of ideas : But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. . . . While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. He held that defendant could not constitutionally be convicted because – " nobody can suppose that the surreptitious publishing of silly leaflet by an unknown man, without more, would present any immediate danger that its opinion would hinder the success of the government arm….."

[114] Voon, Tania, Online Pornography in Australia: Lessons from the First Amendment – [2001] UNSWLJ 15

[115] Feldman, David, Civil Liberties and Human Rights in England and Wales, 2nd Edition, Oxford University Press, UK, 2002, at 764

conclusion[116]. This treats freedom of expression as an instrumental value, advancing other goods, that is, development of the true or good ideas, with a consequential benefit for the individual and society[117].

Stuart Mill argued on utilitarian grounds that there was a distinction in principle between facts and opinion. When dealing with opinions, all should be freely expressed, subject to any restrictions necessary to protect against identifiable harm. This wide freedom would benefit individuals by allowing them to choose between the widest possible range of opinions, where none could be definitively shown to be right or wrong, maximizing personal autonomy. It would also extend freedom of political choice, and bolster democratic process by encouraging rational debate which, it was confidently expected, would render it more likely that the best solution would be found for any problem[118]. Assertions of fact, on the other hand, could by definition be either true or false[119]. There would be good reason to allow free expression of truth, as this would lead to advances in knowledge and material improvements in society, but this does not justify permitting free expression of falsehoods. However, it is not always possible to say whether an assertion is true or false, and many benefits may flow from allowing statements of facts to be asserted so that they may be tested, even if they are ultimately found to be false[120]. This cannot in itself justify the publication of factual claims which are known to be false, but on a utilitarian rule analysis the benefits of general principle permitting freedom of expression are held to outweigh the disbenefits resulting from express opinions and facts, even if future, rather than to adopt a general rule which permits censorship and coercion in relation to expression.

This approach is sometimes linked with the notion of market place of ideas, in which the best win through the operation of market forces. The market place theory was influential in the USA, where it was developed by the Supreme Court to justify First amendment protection for unpopular speech, such as advocacy of racist

[116] ibid at p 764
[117] ibid at p 764
[118] ibid at p 765
[119] ibid at p 765
[120] This is particularly important in the physical sciences if one accepts Karl Popper's portrayal of scientific advance as occurring through the testing of factual hypotheses. See K.Popper, The Logic of Scientific Discovery , Hutchinson, London, 1959

theories by the Ku Klux Klan[121], but also to deny protection to those forms of expression- such as obscenity- which were regarded as offering nothing worthwhile to the market place of ides, and so having no redeeming social merit[122]. Obscenity was considered to be useful, it at all, only as a sex aid.[123] However, the fact that it adds nothing valuable to the market place of ideas does not necessarily mean that obscenity or any other form of expression ought not to be protected[124]. A privacy issue then arises , even if the material is of purely prurient interest and is resorted to as an aid to, let us say, masturbation, it is hard to see how the state can have a sufficient interest in its effects to justify making it unavailable for use by consenting adults[125].

The market-place-of-ideas model has implications for commercial speech. In a market economy, commercial speech, including advertising, may be useful in order to permit information about products and the relative merits of commercial competitors to be promulgated, facilitating informed choices by customers. This in a liberal society with a market economy, freedom of expression could be thought to support an important aspect of collective economic life[126]. This depends on the assumption the information will be presented to the markets, through advertising, in a way which enables potential customers to choose between products. That is, of course, highly questionable. We have seen very successful advertisements giving very little information about the products. Magazine and poster advertisements for cigarettes (TV advertisements banned in India) rely almost wholly on image, and purposely give no information (save the health warning required by law) about the qualities of the product. The same applies to most liquor advertisements. The

[121]Bradenburg v Ohio 395 US 444 (1969), available at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=395&invol=444, visited on 23 Sep 2004
[122] Roth V United Staes 354 US 476 (1957), available at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=354&invol=476 , visited 26 Nov 2004
[123] Supra Note 107
[124] Supra Note 109 at p 622

[125] ibid at p 766
[126] ibid at p 767

argument does not justify protection for all commercial speech, unless one takes the view that, on a utilitarian analysis, the social costs involved in vetting commercial speech would outweigh the benefits[127].

In reality this approach is not without its limitations. The free speech does not always produce truth, and protecting Nazi messages or pornography demands some justification other than truth discovery. Similarly, by itself, this justification does not explain clearly why statements of mere opinion that are neither true nor false should be protected[128].

2.2.3 Democracy and Self-governance

The third justification for free expression is that it allows the political discourse which is necessary in any country which aspires to be a democracy. This justification based on democracy[129] and self-governance is most closely identified with the work of Alexander Meiklejohn[130]. This approach reinforces the personal autonomy justification by mandating protection for the political expression of those who regard participating in politics as an aspect of their self-fulfillment as people and citizens. The power of this justification depends on the view which one adopts about the structural arrangements which democracy entails. A democratic rationale for freedom of expression makes perfect sense if applied to a society in which the operative model of democracy is one in which the people have the right to participate directly in day-to-day governmental decision making, or to have their

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[127] ibid at p 767

[128] Wojceiech Sadurski, Freedom of Speech and its Limits, (1999) quoted by Tania Voon , Online Pornography in Australia:Lessons from the First Amendment – [2001] UNSWLJ 15

[129] Justifying the importance of Freedom of expression, Supreme Court of India in S. Rangarajan V. P. Jagjivan Ram and Ors. MANU/SC/0475/1989, observed that the democracy is a government by the people via open discussion. The democratic form of government itself demands its citizens an active and intelligent participation in the affairs of the community. The public discussion with people's participation is a basic feature and a rational process of democracy which distinguishes it from all other forms of government.

[130] See generally, Alexander Meiklejohn, Free Speech and its Relation to Self-Government, Harper& Brothers, US, 1948.

views considered in the choice of policies by government[131]. It works less well if the prevailing model for the way in which it has used power. The representative system, such as we have in India, would offer less support to free expression rights than a participatory system.

For any democratic process a measure of free speech coupled with right to information is sine qua non for its success. As the Privy Council observed in Hector V Attorney-General of Antigua and Barbuda[132]:

"In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kid…./ It is no less obvious that the very purpose of criticism leveled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make viewing a statutory provision which criminalizes statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion."[133]

Democratic theory, however, has been subject to its own ambiguities. The constitutional meaning of self-government has proved intensely controversial. It is of course generally agreed that democracy subsists in the people governing themselves, but historically there have been two competing accounts of the practice of self-determination, each with different implications for Freedom of speech and expression.

One account, associated with the work of Alexander Meiklejohn, views democracy as a process of "the voting of wise decisions."[134] The First Amendment is

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[131] Supra Note 109 ; The problem lies with the definition of the term democracy. Even China calls itself as Republic of China but imposes huge burden on free speech. Recently Chinese Government ordered web search giant Google to censor certain category of information. In response to Chinese order Google's launched a new, self-censored search engine in China. This has been regarded as a "black day" for freedom of expression in China by leading international media watchdogs. See "Google move 'Black day for China'" available at BBC NEWS: available at http://news.bbc.co.uk/go/pr/fr/-2/hi/technology/4647398.stm ,visited on 25 July 2006

[132] [1990] 2 ALL ER 103

[133] [1990] 2 ALL ER at 106

[134] Post, Robert, Reconciling Theory and Doctrine in First Amendment Jurisprudence, California Law Review, Vol.89, January, 2001

understood to protect the communicative processes necessary to disseminate the information and ideas required for citizens to vote in a fully informed and intelligent way. Meiklejohn analogizes democracy to a town meeting; the state is imagined as a moderator, regulating and abridging speech "as the doing of the business under actual conditions may require."[135] For this reason "abusive" speech, or speech otherwise inconsistent with "responsible and regulated discussion," can and should be suppressed[136]. From the Meiklejohnian perspective, "the point of ultimate interest is not the words of the speakers, but the minds of the hearers," so that the First Amendment is seen as safeguarding collective processes of decision making rather than individual rights. Meiklejohn summarizes this assumption in a much quoted and influential aphorism: "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[137]

The alternative account of democracy, which we can call the "participatory" theory, does not locate self-governance in mechanisms of decision making, but rather in the processes through which citizens come to identify a government as their own[138]. According to this theory, democracy requires that citizens experience their state as an example of authentic self-determination. How such an experience can be sustained presents something of a puzzle, because citizens can expect to disagree with many of the specific actions of their government[139]. The solution to this puzzle must be that citizens in a democracy experience their authorship of the state in ways that are anterior to the making of particular decisions. The participatory account postulates that it is a necessary precondition for this experience that a state be structured so as to subordinate its actions to public opinion, and that a state be constitutionally prohibited from preventing its citizens from participating in the communicative processes relevant to the formation of democratic public opinion.

If, following the usage of the Court, we term these communicative processes "public discourse," then the participatory approach views the function of the First

[135] ibid at p 22
[136] ibid at p 22
[137] ibid at p 23
[138] Post, Robert, Equality and Autonomy in First Amendment Jurisprudence, 95 Mich.L.Rev.1517,1523(1997)
[139] ibid p 1518

Amendment to be the safeguarding of public discourse from regulations that are inconsistent with democratic legitimacy. State restrictions on public discourse can be inconsistent with democratic legitimacy in two distinct ways. First, to the extent that the state cuts off particular citizens from participation in public discourse, it *pro tanto* negates its claim to democratic legitimacy with respect to such citizens[140]. Second, to the extent that the state regulates public discourse so as to reflect the values and priorities of some vision of collective identity, it preempts the very democratic process by which collective identity is to be determined.

Although both the Meiklejohnian and participatory perspectives share the common problem of specifying which communication is necessary for self-government and hence worthy of constitutional protection, they differ in at least two fundamental respects[141]. First, the Meiklejohnian approach interprets the First Amendment primarily as a shield against the "mutilation of the thinking process of the community," whereas the participatory approach understands the First Amendment instead as safeguarding the ability of individual citizens to participate in the formation of public opinion[142]. The Meiklejohnian theory thus stresses the quality of public debate, whereas the participatory perspective emphasizes the autonomy of individual citizens[143].

Second, the Meiklejohnian perspective imagines the state within the arena of public discourse as occupying the position of a neutral moderator, capable of saving public discourse from "mutilation" by distinguishing between relevant and irrelevant speech, abusive and non-abusive speech, high and low value speech, and so forth. It specifically repudiates the notion that public discourse is filled with "unregulated talkativeness." The participatory approach, in contrast, denies that there can be any possible neutral position within public discourse, because public discourse is precisely the site of political contention about the nature of collective identity, and it is only by reference to some vision of collective identity that speech can be categorized as relevant or irrelevant, abusive or not abusive, high or low value. The

[140] ibid
[141] ibid
[142] Supra Note 130
[143] ibid at p 26

participatory theory understands national identity to be endlessly controversial, so that national identity cannot without contradiction provide grounds for the censorship of public discourse itself[144].

In both of these respects the Meiklejohnian perspective is structurally quite analogous to the theory of the marketplace of ideas. Both theories focus primarily on maintaining the integrity of processes of collective thinking. The Meiklejohnian approach seeks to safeguard the dialogue necessary for voting wise decisions; the theory of the marketplace of ideas seeks to protect the dialogue necessary for advancing truth. Just as Holmes J, in his *Abrams* dissent stressed that in proposing the theory of the market-place of ideas he was "speaking only of expressions of opinion and exhortations,"[145] so contemporary

Meiklejohnians seek to distinguish "between cognitive and non-cognitive aspects of speech" and to award "less constitutional protection" to the latter. Both theories are keenly aware of the prerequisites for constructive thinking. Just as Dewey viewed "ridicule, abuse, and intimidation" as incompatible with rational discussion so also Meiklejohn viewed "abusive" speech as incompatible with a well ordered town meeting[146].

2.2.4 Right to self-expression

Fourthly, it has been suggested that it is good for people to be forced to respect each other's right to self-expression, especially if they disapprove of the way it is being exercised, because it helps to develop a capacity for tolerance[147]. This, it is said can be done most easily in the relatively harmless sphere of speech acts, making it more likely that people will extend the same attitude to other fields which are not as obviously harmless[148]. This controversially assumes both that speech is relatively harmless often, but not always, the case and that tolerance is one filed can and should be translated into tolerance of other activities. Alternatively, accepting that

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[144] ibid
[145] ibid
[146] ibid
[147] Feldman, David, Civil Liberties and Human Rights in England and Wales, 2nd Edition, Oxford University Press, UK, 2002, at 766
[148] ibid

speech is sometimes dangerously harmful, it can be argued that allowing harmful speech stimulates opponents of racist or sexist speech to campaign in ways which ultimately overcome the harm and revolutionize the law and society[149].

Finally, freedom of expression facilitates artistic and scholarly endeavor of all sorts. This is not, perhaps, a separate head of justification. It is a specialized form of the first and second heads, and depends on accepting that art and scholarship are valuable in their own right[150].

These justifications draw mainly on three values: personal autonomy, which is served by maximizing the range of information and choice of opinions to which people have access; truth, which may be advanced by full information and open debate (this would be meaningful if conducted under conditions of fairness in which no one ideology is permitted to dominate or dictate the terms of the discussion) and democracy , which depends on some choice at least being available in the market-place of ideas, as well as drawing strength from the combination of personal autonomy of electors legislators in the political sphere and the hope that it will lead to the selection of the 'best' or 'most true' policies. For example, where a government proposes to introduce a law regulating commercial advertising, the autonomy of consumer choice favours free advertising, subject to any controls needed to ensure that people are not misled by false claims which advertisers might make for products[151]. Were there no constraints on freedom of expression, the difficulty would arise that one of the objects of upholding free expression- truth could be defeated if it were in a person's commercial interest to do so. There is an element, as the Committee on Obscenity and Film Censorship[152] noted, of bad expressive coinage driving out of the good, and it is important to regulate expression to limit the extent to which this can happen.

While theorists disagree regarding which identifiable values ought to be given precedence over other, the 'truth' and 'democratic' arguments are generally

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[149] ibid
[150] ibid at 767
[151] ibid
[152] Report of the Committee on Obscenity and Film Censorship (Chairman: Prof Bernard Williams), Cmnd.7772 (London :HMSO, 1979)

perceived as the most powerful free speech justifications, especially in the United States[153].

2.3 The Nature of Free Speech in International and National Law

The right to freedom of expression is protected by all the major international human rights instruments. In Art.19 of the UN Universal Declaration of Human Rights (UDHR) and Art.10[154] of the European Convention on Human Rights (ECHR), it is sated to include rights to hold opinions and to receive and impart information and ideas. The International Covenant on Civil and Political rights (ICCPR) , Art.19[155],

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[153] Lee Bollinger, The Tolerant Society, Oxford University Press, USA, 1988 at 41-42; Bollinger provides a critique of the major theories of freedom of expression, finding these theories persuasive but inadequate. Supporting his argument with references to the case laws and many other examples, as well as a careful analysis of the primary literature on free speech, he contends that the real value of toleration of extremist speech lies in the extraordinary self-control toward antisocial behavior that it elicits: society is strengthened by the exercise of tolerance.

[154] Art.10 of ECHR provides as follows;

(1).Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2).The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[155] Art.19 of ICCPR provides as follows;

(1). Everyone shall have the right to hold opinions without interference.

(2). Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

(3). The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

separates the right to hold opinions in Art.19(1) from freedom of expression in Art.19(2), but includes in the latter the right to seek, as well as receive and impart, information and ideas. The ICCPR and the ECHR recognize that the exercise of these freedoms carries with it special responsibilities, and so may be subjected to restriction for specified purpose. The ECHR contains the most extensive grounds for restricting the freedom, which apply to the right to hold opinions as well as to the other elements in freedom of expression. The blanket authority to license to broadcasting, television, and cinema enterprises under ECHR Art.10 (1) does not depend on there being a justification for restricting the freedom under Art.10 (2). By contrast, ICCPR Art.19 requires any licensing regime has to be justified by reference to the permitted grounds of restrictions set out in Art.19(3). Neither the ICCPR nor the ECHR permits licensing regimes to be imposed on the dissemination of printed material, which may be restricted only in accordance with ECHR Art.10(2). Art.19 of the ICCPR does not permit any restrictions of the freedom to hold opinions without interference, guaranteed by Art.19 (1).

In India Freedom of speech and expression is guaranteed under Art.19(1)(a) of the Constitution of India. ICCPR binds India in international law and right to free speech is recognized through Protection of Human Rights Act, 1993 apart from Constitutional guarantee. The Act defines human rights under Sec.2 (d) - "human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India. India being a signatory to ICCPR, abridgment of free speech can be easily enforced in India.

The protection of free speech in India is somewhat similar to the protection offered to it in US. But if we look into the various Indian court decisions another different

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(b) For the protection of national security or of public order (ordre public), or of public health or morals.

view seems to be plausible. In Express Newspapers Pvt.Ltd., V Union of India[156], Bhgwati J, observed that – " .. the fundamental right to the freedom of speech and expression enshrined in our Constitution is based on the First amendment of the Constitution of the United States and it would be therefore legitimate and proper to refer to those decisions of the US Supreme Court to appreciate the true nature, scope and extent of this right in spite of the warning administered by this Court against use of American and other cases".[157]

But as to this opinion of Bhagwathi J, H.M. Seervai[158] begs to differ. He submits that the provisions of the two Constitutions as to freedom of speech are essentially different, the difference being accentuated by provisions in our Constitution for preventive detention which have no counterpart in the US Constitution. The First amendment enacts an absolute prohibition, so that a heavy burden lies on anyone transgressing it to justify such transgression[159]. Again, since the first amendment contains no exception, it is not surprising that exceptions have had to be evolved by judicial decisions which have limited the scope of such exceptions with increasing stringency. The position in India is different[160]. The right to freedom of speech and expression and the limitation on that right, are contained in Art.19 (1) (a) read with sub-Art. (2). Laws which fall under sub-Art(2) are expressly permitted by our Constitution and the problem in India is to determine whether an impugned law falls within the Art.19(2), and that is essentially problem of construction. No doubt Art.19 (2) of the Constitution authorizes the imposition of 'reasonable restrictions' and in the end, the question of reasonableness is a question for Court to decide. However, a law made in respect of the matters referred to in Art.19(2) must prima facie be presumed to be constitutionally valid and due weight must be given to the legislative judgement on the question of reasonableness , though that judgment is subject to judicial review. It is difficult, if not impossible, to read into the words 'reasonable restrictions' the test of 'clear and present danger' evolved by the US

[156] (1959) SCR 12
[157] As per H.M.Seervai, such warning (not to follow US Precednts) was given by the Supreme Court in trav-Cochin V Bombay Co, Ltd., and Bombay v R M D Chamarbaguwalla
[158] Seervai H.M, Constitutional Law of India, 4th Edition, N.M.Tripathi Pvt Ltd., 1991
[159] ibid
[160] ibid

Supreme Court in dealing with the freedom of speech and the press. He also draws our attention to difference between First amendment and Art.19 (1)(a) noted by Douglas J in Kingsley Corp V Regents of the University of New York[161]. In holding that all pre-censorship of cinema films was constitutionally void, Douglas J, said – " if we had a provision in our Constitution for reasonable regulation of the press such as India has included in hers there would be room for argument that censorship in the interest of morality would be permissible."[162]

In US, the right to free speech is guaranteed in absolute terms. But Courts have invented a doctrine called 'Police Power of the State' to prevent the abuse of First amendment right. In various cases US courts have held that State can exercise Police Power, only when State can show the compelling state interest factor. This is quite similar to the ground specified in Art.19 (2) of the Indian Constitution.

It is very difficult to accept the views of H.M.Seervai, in the light of new technological developments. Indian Judiciary has very limited knowledge and experience in applying traditional principles and doctrines of law to new technological environment. Indian courts have been relying excessively on American courts decisions for settling legal matters including free speech issues, which not only poses challenges as rights issue but also has created jurisdictional issues. Internet was introduced by Americans and hence they had the first opportunity of determining legal issues. It is good for the Indian courts to a take a leaf out of the American experience when dealing with the problems created by new media communication technologies. Canada and Australia have largely followed the precedents set by American courts.

2.4 Restrictions on Freedom of Speech

The freedoms enumerated in Art.19 (1) of the Indian Constitution are those great and basic rights which are recognized as the natural rights inherent in the status of a

[161] 360 US 684 (1959), available at http://supreme.justia.com/us/360/684/case.html , visited on 12 Jan 2004
[162] Supra Note 158

citizen[163]. But none of these freedoms including freedom of speech and expression is an absolute or uncontrolled, for each is liable to be curtailed by laws made or to be made by the State to the extent mentioned in clauses (2) to (6) of Art.19. Clauses (2) to (6) of the Art.19 recognize the right of the State to make laws putting reasonable restrictions in the interest of general public, the sovereignty and integrity of India, security of the state, public order, decency or morality or in relation to contempt of court , defamation or incitement to an offence. The principles on which the power of the State to impose restriction is based is that all individual rights of a person are held subject to such reasonable limitations and regulations as may be necessary or expedient for the protection of the general welfare[164]. In the words of Das, J., "social interest in individual liberty may be well have to be subordinated to other greater social interest[165]. Indeed there has to be a balance between individual rights guaranteed under Art.19(1) and the exigencies of the state which is the custodian of the interests of the general public, public order, decency or morality and of the other public interests which may compendiously be described as social welfare"[166]. The restrictions that may be imposed on the exercise of free speech right must be reasonable. It may be emphasized that the requirement that a restriction should be reasonable is of great constitutional significance, for it acts as a limitation on the power of the legislature, and consequently, widens the scope of judicial review of laws restraining the exercise of freedoms guaranteed by Art.19[167]. The determination by the legislature of what constitutes a reasonable restriction is not final or conclusive; it is subject to supervision of courts[168].

Sovereignty and integrity of India is one of the grounds on which free speech can be restricted. The object is to enable the Government to combat cries for secession and the like. Security of State means 'the absence of serious and aggravated forms of

[163] Sate of WB V Subodh Gopal Bose AIR 1954 SC 92
[164] Shukla V N, Constitution of India (edited by Mahendra P.Singh), Eastern Book Company, Lucknow, 1994 , at p 101
[165] A.K.Goplan V State of Madras AIR 1950 SC 27
[166] Hari KHemu Gawali V Dy.Commissioner of Police, AIR 1956 SC 559
[167] Shukla V N, Constitution of India (edited by Mahendra P.Singh), Eastern Book Company, Lucknow, 1994 , at p 102

[168] Chintaman Rao V State of M.P AIR 1951 SC 118

public disorder, as distinguished from ordinary breaches of public safety or public order which may not involve any danger to the State itself. Thus, security of the State is endangered by crimes of violence intended to overthrow the government, levying of war and rebellion against government, external aggression or war but not by minor breaches of public order or tranquility, such as unlawful assembly, riot, promoting enmity between classes etc[169]. But incitement of violent crimes like murder which is an offence against public order may also undermines the security of the State[170]. But the advocacy of revolutionary socialism as a panacea for present day evils cannot be restricted under the ground of 'security of state' unless the use of violence is suggested. The object of restricting freedom of speech and expression on the ground of 'friendly relations with foreign States' is to prevent libels against foreign State in the interests of maintaining friendly relations with them.

Another ground on which State can restrict free speech is Public Order. The concept of public order is different from the concept of 'law and order' and of security of the State'. They refer to three concentric circles. Law and order represents the largest circle, within which is the next circle representing public order and the smallest circle represents security of the State[171]. Hence an activity which affects law and order may necessarily affect public order and an activity which may be prejudicial to public order may not necessarily affect security of the State[172]. In the interest of public order, the State may impose restrictions on the incitement

(i) to withhold services by public employees or persons engaged in any employment which is essential for securing the public safety or for maintaining services essential for the life of the community[173]

(ii) for committing breach of discipline amongst employees[174]

(iii) of feelings of enmity or hatred between different sections of the community[175]

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[169] Romesh Thappar V State of Madras AIR 1950 SC 124
[170] State of Bihar V Shailabala Devi AIR 1952 SC 329
[171] Ram Manhoar Lohia V state of Bihar AIR 1966 SC 740
[172] Ibid
[173] Dalbir Singh V State of Punjab AIR 1962 SC 1106
[174] ibid
[175] Virendra V State of Punjab AIR 1957 SC 896

(iv) of the use of loudspeakers likely to cause a public nuisance or to affect the health of the inmates of residential premises, hospitals and the like[176]

(v) for insulting the religious feelings of any class of citizens with deliberate and malicious intention under Sec.295A of Indian Penal Code (IPC) and Sec.99 of Criminal Procedure Code (Cr.PC)[177]

On the other hand criticism of government policies[178], criticism of or defamatory slogan against a Minister[179], scurrilous attacks upon a judge[180], exhibition of which , though it depicted scenes of violence, was capable of creating a message of peace and co-existence[181] have been held by the courts cannot be restricted or penalized in the interests of public order.

The ground of decency or morality has been engrafted for the purpose of restricting speeches and publications which tend to undermine public morals[182]. Decency or morality is not confined to sexual morality alone. Decency indicates that the action must be in conformity with the current standards of behaviour or propriety[183]. The question whether an utterance is likely to undermine decency or morality is to be determined with reference to the probable effects it may have upon the audience to which it is addressed[184]. The age, culture[185] and the like of the audience thus becomes a material question. But the use of mere abusive language, which has no suggestion of obscenity to the persons in whose presence they are uttered, would not come under this ground[186] and so would the use of expletives in a nude scene of rape to advance the message intended by the film by arousing a sense of revulsion against the perpetrators and pity for the victim[187].

[176] Rajani Kant verma V State of Bihar AIR 1958 All 360
[177] State of Rajasthan V Chawla G AIR 1959 SC 544
[178] Jawali V K V State of Mysore AIR 1966 SC 1387
[179] Ram Nandan V State of UP AIR 1956 All 101
[180] Sodhi Shamsher Singh V State of Pepsu AIR 1954 SC 276
[181] Ramesh Chotalal Dalal V Union of India AIR 1988 SC 775
[182] Ranjit D Udeshi V State of Maharashtra AIR 1965 SC 881
[183] Ramesh Yeshwant Prabhoo V Prabhakar Kashinath Kunte AIR 1996 SC 1113
[184] Ranjit D Udeshi V State of Maharashtra AIR 1965 SC 881
[185] Rajani Kant verma V State of Bihar AIR 1958 All 360
[186] Kartar Singh V State of Punjab AIR 1956 SC 541
[187] Bobby Art International V Om Pal Singh AIR 1996 SC 1846

2.4.1 Blocking Internet Blogs – Public Interest as a ground for restriction

One of the recent controversy as to the control and regulation of free speech is related to the use of blogs by Indian netizens. Block out of blogs and websites were ordered by Central Government in public interest in the month of July, 2006. Millions of domestic internet users could not access some of the world's most popular blogs like geocities.com, blogspot.com and typepad.com, as the government ordered a blackout of around 18 sites for publishing content that was 'anti-national' and 'against public interest'[188]. Blogging[189], particularly on fanatic and religious websites, had surged soon after the Mumbai bomb blasts on July 11. Over 25% of India's 38 million internet users are active bloggers. Currently, there are over 120 million bloggers worldwide and multiplying at the rate of about 10 million per month. The number is expected to cross 160 million in 2006[190].ISPs are believed to have been asked to block sites like bloodspot.com, hinduhumanrights.org, hinduunity.org and clickatell.com, besides frontline blogs like the Google owned blogspot.com[191]. However, Government soon withdrawn its order owing public outcry. There is no provision in the IT Act as it stands now for the government to impose such a ban on the publication of websites or blogs. But government can always use provisions of Art.19(2) to restrict speech on Internet or any other media. The problem of exercising control over cyberspace is that it is multi-jurisdictional and not easily amenable to jurisdiction of Indian courts.

In the exercise of one's right of freedom of speech and expression, nobody can be allowed to interfere with the due course of justice or to lower the prestige or

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[188] Financial Express, Blogs, websites go blank, Tuesday , July 18, 2006 available at http://www.financialexpress.com/fe_full_story.php?content_id=134366 , visited on 4 Nov 2005

[189] A weblog (usually shortened to blog, but occasionally spelled web log) is a web-based publication consisting primarily of periodic articles (normally in reverse chronological order). Although most early weblogs were manually updated, tools to automate the maintenance of such sites made them accessible to a much larger population, and the use of some sort of browser-based software is now a typical aspect of "blogging".;available at www.en.wikipedia.orgwiki/Blogging , visited on 23 Nov 2003

See generally, Sullenger Wes , Silencing the Blogoshpere : A First Amendment Caution to Legislators considering Using Blogs to Communicate directly with constitutents , 13 RICH.J.L & TECH. 15 (2007), available at http://law.richmond.edu/jolt/v13i4/article15.pdf , visited on 25 Jan 25, 2007.

[190] ibid

[191] ibid

authority of the Court[192]. But the contempt jurisdiction should not be used by judges to uphold their own dignity. In the free market place of ideas, criticism about the judicial system or the Judges should be welcomed, so long as criticisms do not impair or hamper the administration of justice[193]. Restriction on the ground of defamation protects the right of a person to his reputation. Just as every person possesses the freedom of speech and expression, every person also possesses a right to his reputation which is regarded as property. Hence, nobody can so use his freedom of speech or expression as to injure another's reputation. Laws penalizing defamation do not, therefore, constitute infringement of the freedom of speech[194]. The last ground on which free speech can be restricted under Art.19 (2) is incitement to an offence. This ground will permit legislation not only to punish or prevent incitement to commit serious offences like murder which led to breach of public border, but also to commit any offence[195]. Hence, it is not permissible to instigate another to do any act which is prohibited and penalized by any law. But mere instigation not to pay a tax may not necessarily constitute incitement to an offence[196]. US courts follow time, place and manner principle to restrict free speech. In India, the laws and judicial decisions governing freedom of press[197] are equally applicable to publications or writings in cyberspace. Hence, any restriction that is directly imposed upon the right to publish[198], to disseminate information or to circulate[199] constitutes a restriction upon the freedom of press in the real world as well as virtual world. The right to publish includes the right to publish not only its own views but also those of its correspondents.[200] This right protects the right of

[192] Namboodripad E.M.Sankaran V Narayan Nambiar AIR 1970 SC 2015
[193] Duda P N V Shivashankar P AIR 1988 SC 1208
[194] Dupthary C K V Gupta O P AIR 1971 SC 1132
[195] Sankoth Singh V Delhi Administration AIR 1973 SC 1901
[196] Kedar Nath Singh V State of Bihar AIR 1962 SC 995
[197] Under Indian Constitution there is no separate guarantee of freedom of the press. It is implicit in the freedom of expression which is conferred on all citizens. However, this freedom cannot be claimed by person who is not a citizen of India. On the other hand, First Amendment of US Constitution expressly guarantees freedom of press. It reads as follows – "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the **freedom of speech, or of the press**; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
[198] Express Newspaper Ltd., V Union of India AIR 1958 SC 578
[199] ibid
[200] Sakal Papers (p) Ltd., V Union of India AIR 1962 SC 305

ISP's to publish the views of their subscribers. To require a newspaper to reduce its space for advertisements would directly affect its circulation since it would be bound to raise its price[201]. In cyberspace price of hosting may not raise by reducing website size but it definitely affects the revenue earned by the website through websites. Also traditional law recognizes right to reply[202] as a part of freedom of speech. As a result of these entities which are providing blogging or website hosting facilities must also allow the aggrieved person to post his reply on appropriate forum.

2.4.2 Free Speech – American Jurisprudence

In US, Content based governmental restrictions on speech are unconstitutional unless they advance a "compelling state interest." To this principle, there are six exceptions:

1. Speech that is likely to lead to imminent lawless action may be prohibited[203].
2. Fighting words -- i.e., words so insulting that people are likely to fight back mabe prohibited[204].
3. Obscenity -- i.e., erotic expression, grossly or patently offensive to an average person that lacks serious artistic or social value may be prohibited[205].
4. Child pornography may be banned whether or not it is legally obscene and whether or not it has serious artistic or social value, because it induces people to engage in lewd displays, and the creation of it threatens the welfare of children[206].
5. Defamatory statements may be prohibited. (In other words, the making of such statements may constitutionally give rise to civil liability.) However, if the target of the defamation is a "public figure," she must prove that the defendant acted with

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[201] ibid
[202] Manubahi Shah V L.I.C AIR 1981 Guj 15
[203] Fed.Election Commission V Colo.Republican Fed. Campaign Comm, 533 U.S.431, 465 (20010; available on www.findlaw.com website, visited on 10 Dec 2005
[204] Chaplinsky V New York, 340 U.S.315 568, 571-74 (1942) available on www.findlaw.com website, visited on 20 Dec 2005
[205] Miller V California, 413 U.S. 15, 36-37 (1973), available on www.findlaw.com , visited on 20 Dec 2005
[206] Ginsberg v New York, 390 U.S. 629, 635-43(1968), also in New York V Feber, 458 U.S. 747, 754-58 (1968) , available on www.findlaw.com website, visited on 20 Dec 2005

"malice." If the target is not a "public figure" but the statement involved a matter of "public concern," the plaintiff must prove that the defendant acted with negligence concerning its falsity[207].

6. Commercial Speech may be banned only if it is misleading, pertains to illegal products, or directly advances a substantial state interest with a degree of suppression no greater than is reasonably necessary[208].

2.5 Free Speech Protection in cyberspace

Institutions[209] that are required to uphold Freedom of Speech and Expression generally must uphold these rights in cyberspace as well. For higher education, this means, for example, the public colleges and Universities have limited ability to filter incoming or outgoing web pages or Usenet newsgroups based on content. The question, whether cyberspace a public forum was raised in Loving V Boren[210]. The United States District Court for the Western District of Oklahoma addressed this issue. After an elected representative complained that material available in news groups stored on the public university's server violated state law, the university blocked access to some groups. A professor said this violated his free speech rights and filed suit. The court held that the computer systems of public institutions are not inherently public forums and that such institutions could limit servers to officially approved material[211]. This decision would not prevent a public or a private institution from creating a public forum, either intentionally or unintentionally.

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[207] Dun & Bradstreet V Greenmoss Builders, 472 U.S. 749 , 763 (1985), available on www.findlaw.com website, visited on 22 Dec 2005

[208] Fla.Bar V Went for IT, Inc 515 U.S. 618, 623-24, 635 (1995) available on www.findlaw.com website, visited on 25 Dec 2005

[209] All those institutions, instrumentalities, authorities etc who would be regarded as 'State' within the meaning of Art.12 of Indian Constitution.

[210] Loving v. Boren_, 956 F. Supp. 953 (W.D. Okla. 1997) available at http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=10th&navby=case&no=976086 , visited on 25 Dec 2005

[211] ibid

2.5.1 Channels of Free Speech in Cyberspace and Media Freedom

In order to exercise the free speech right one has to find a medium. Undoubtedly, the first was communication through gestures before the human race invented speech. For many centuries, speech became the second mode of communication. The third mode of communication was writing. Writing brought in a series of written laws. The invention of telephone revolutionized the communication media. Then the revolutionary media, the broadcasting media appeared in the form of Radio. After radio the dream of seeing pictures and hearing sound from distance places was realized through Television. Radio and Television are regarded as push technologies as they provide one way communication. Aspiration and desire of common man to own his own printing press and publish his views and opinions became a reality when internet was opened to the public in 1993[212].

The medium of mass communication is vital to promote freedom to receive and impart information and ideas. Mass media includes Press, Radio, Television, Internet, Satellite, Cable broadcasting etc. There is an obvious relationship between free media and freedom of speech. It is therefore important on a number of grounds. Some of them are;

(a) As a tool of self-expression it is a significant instrument of personal autonomy[213];

(b) As a channel of communication it helps to allow the political discourse which is necessary in any country which aspires to democracy[214];

(c) It helps to provide one of the essential conditions of scholarship , making possible the exchange and evaluation of theories, explanations and discoveries[215];

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[212] See generally Castells , Manuel, The Rise of the Network Society, 2nd edition, Blackwell Publishers, USA, 2000

[213] Feldman, David, Civil Liberties and Human Rights in England and Wales, 2nd Edition, Oxford University Press, UK, 2002, at p 802

[214] ibid at p 802

[215] ibid at p 803

(d) It helps to promulgate a society's cultural values and where they are in flux, facilitates the debate about them, advancing development and survival of civilization[216];

(e) Free media can contribute to the implementation of both consumer choice and public policy by providing channels for communicating commercial information and governmental advice or information[217].

It is pertinent note here that while highlighting the difficulty of regulating the media and controlling the transmission of information across the border, the committee on Telecommunication of UK observed that -

"Many people brought up in a world in which there were only a few broadcasting channels feel bewildered by the explosion of choice. The boundaries of industries are blurring: telecommunication companies want to become broadcasters, while broadcasters are increasingly moving into e-commerce, and Internet Service Providers are offering television channels."[218]

This makes it impossible for any country to control the media of communication. The growth of communication across frontiers by satellite, telephone lines, and the Internet has necessitated an international approach to regulation and a framework for these increasingly convergent industries that combines different ingredients[219].

The earliest dated printed book known as the "Diamond Sutra", printed in China in 868 CE. However, it is suspected that book printing may have occurred long before this date. In 1041, movable clay type was first invented in China. Johannes Gutenberg invented the printing press with replaceable wooden or metal letters in 1436[220]. The Gutenberg press with its wooden and later metal movable type printing brought down the price of printed materials and made such materials available for the masses. It remained the standard until the 20th century. During the centuries,

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[216] ibid
[217] ibid
[218] Department of Trade and Industry and Department of Culture, Media and Sport, A New Future for Telecommunications, available at http://www.culture.gov.uk/PDF/CM5010.PDF , visited 2 Jan 2006
[219] ibid
[220] Bellis, Mary, Johannes Gutenberg and the Printing Press, available at http://inventors.about.com/library/inventors/blJohannesGutenberg.htm , visited on 23 Sep 2006

many newer printing technologies were developed based on Gutenberg's printing machine e.g. offset printing[221]. The press has developed a special meaning and a particular significance over and above that attaching to freedom of speech. The invention of printing press vastly increased the capacity of books and pamphlets- especially political ones- to reach people of all sorts. This made it a powerful medium of instruction, but also opposition to the established order[222].

Reactions to government's overuse of powers to control the press varied. In India judiciary has clearly recognized through various judicial decisions the freedom of press to be implicit in freedom of speech and expression guaranteed under Art.19 (1)(a)[223]. There was civil disobedience against the government's arbitrary control over the press in England. The courts and Parliament have slowly come to recognize that there is a special public interest in press freedom and legislative steps have been taken to protect it.

Even though printing press provided an opportunity to express and communicate freely, owning a printing press remained a distant reality owing to cost factor and the lack of printing skills.

On March 10, 1876, in Boston, Massachusetts, Alexander Graham Bell invented the telephone. Thomas Watson fashioned the device itself; a crude thing made of a wooden stand, a funnel, a cup of acid, and some copper wire. But these simple parts and the equally simple first telephone call -"Mr. Watson, come here, I want you!"- belie a complicated past. From that day onwards the man has been empowered with new medium of communication which has come to a stage of mobile phones and fancy wireless handsets[224].

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[221] ibid

[222] Feldman, David, Civil Liberties and Human Rights in England and Wales, 2nd Edition, Oxford University Press, UK, 2002, at p 807

[223] Romesh Thappar V State of Madras AIR 1950 SC 124

[224] Tom Farley's Telephone History Series, available at http://www.privateline.com/TelephoneHistory/History1.htm, visited on 25 Sep 2006

The invention of radio by Guglielmo Marconi in 1896 heralded the new era for music, drama and talk. But the broadcasting media remained largely as a push technology and listeners are held as captive audience by this media[225].

Work on Electronic television, based on the cathode ray tube done independently in 1907 by English inventor A.A. Campbell-Swinton and Russian scientist Boris Rosing. During the same period, American Charles Jenkins and Scotsman John Baird followed the mechanical model while Philo Farnsworth, working independently in San Francisco, and Russian émigré Vladimir Zworkin, working for Westinghouse and later RCA, advanced the electronic model[226]. Television also remained in the category of broadcasting and was not of much use to common man for expressing his views.

The world of cyberspace is a true democracy[227]. The influence of the netizens is not measured by wealth or position, but how well he writes and reason. Internet supports different kinds of communication- text, audio, video and so on. The perfect market place of idea is one where all ideas, not just the popular or well funded ones, are accessible to all. ICT have dramatically reduced the cost of distributing speech and therefore, the new media order these technologies bring will be much more

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[225] History of American Broadcasting, available at http://members.aol.com/jeff560/jeff.html , visited on 29 Sep 2005

[226] Federal Communication Commission, Vision Period, 1880's through 1920's, available at, http://www.fcc.gov/omd/history/tv/1880-1929.html , visited on 20 Mar 2006

[227] Balkin , Jack, Digital Speech and Democratic Culture: A theory of Freedom of Expression for the Information Society, 79 N.Y.L. Rev 1 (2004) available at www.papers.ssrn.com . In this essay, Professor Balkin argues that digital technologies alter the social conditions of speech and therefore should change the focus of free speech theory, from a Meiklejohnian or republican concern with protecting democratic process and democratic deliberation, to a larger concern with protecting and promoting a democratic culture. A democratic culture is a culture in which individuals have a fair opportunity to participate in the forms of meaning-making that constitute them as individuals. Democratic culture is about individual liberty as well as collective self-governance; it concerns each individual's ability to participate in the production and distribution of culture. Balkin argues that Meiklejohn and his followers were influenced by the social conditions of speech produced by the rise of mass media in the twentieth century, in which only a relative few could broadcast to large numbers of people. Republican or progressivist theories of free speech also tend to downplay the importance of nonpolitical expression, popular culture, and individual liberty. The limitations of this approach have become increasingly apparent in the age of the Internet

democratic and diverse than the environment we saw earlier to this[228]. Cheap speech will mean that far more speakers, rich and poor, popular and not, banal and avant-garde will be able to make their work available to all[229]. The internet communication, however, has turned out to be the great equalizer. Suddenly anyone can become a publisher, reporter, or editorialist. What is more, each of us has as good a chance of being heard as anyone else in the electronic community. The new internet based forums for debate and information exchange are witnessing perhaps the greatest exercise of freedom of expression that the world has ever seen[230].

The special feature of the internet speech is that the community content creation. The community content creation is just opposite to the traditional model of collaborative content creation[231]. Instead of a team, it relies on the individual, it depends on propagation and instead of an assured cycle time, its key differentiator is the spontaneous nature of propagation over the internet[232]. While collaborative content creation is limited by the size of available team, and its skill sets, community content creation relies on the availability of thousands, spread across time zones and over inaccessible geographies, with arrange of talent and capabilities that an organized team can never match. Because of its very nature, community content displays all characteristics of mob at work. More often than not, it is disruptive of the established order[233]. Lacking in an established leadership and hierarchy, its effectiveness on a given issue is difficult to predict, once community, depending on the way speaker wants to see it, gets galvanized, seemingly no force

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[228] Godwin, Mike, Cyber Rights- Defending Free Speech in the Digital age, 1st Edition, Times Books, New York, 1998 at p 21
[229] ibid at p 22
[230] ibid at p 23
[231] Collaborative content creation depends on team work. Take the example of publishing articles in a weekly magazine. One of the writer in the team writes an article that is checked by a senior in the team. The article then moves to the copy desk where it is checked for language and reliability, before it moves to the design department. From there, it traverses back for proof reading and checking before finally going to the printing department from where it is sent to the press. This is a chain of collaborative activities that takes up some cycle time from the creation of content to the time it reaches readers.
[232] Binesh Kutty, Krishna Kumar, Rinku Tyagi, Sujay V Sharma and Varun Dubey, Will Technology Kill the News Paper?, PC Quest, Cybermedia Publications, November, 2005
[233] ibid

on earth can match or stop its impact[234]. So, of millions of community content initiatives, only few reach mass proportions and ones that do reach mass movement proportions do so rather quickly[235].

2.5.2 Community Content Creation Tools in Cyberspace

Some of the content creation tools that may be used in cyberspace are;

(a) Bulletin Board Systems (BBS) – it is one of the oldest community content creation tool, whose origin can be traced back to pre-internet days. This is one of the most moderated community content initiatives. It lets people post their opinions about a topic and string together opinions posted under the same thread. Since these forums are created by some other entity, there is some amount of moderation of the content posted.

(b) Wiki – Wiki[236] is where individuals from across the globe collaborate to create, edit and update content on a page. The traditional method of creating the page, laying it out and subsequently updating it on the server is given the go by. It allows us to edit or add content posted by someone else on the same page as it was originally posted. Wiki's are traditionally used to collate knowledge as in www.wikipedia.org. The practice of using a wiki site as a personal website is known as wikisquatting.

(c) Weblogs- These are popularly known as blogs. Originally these were online diaries maintained by individuals. Soon they evolved into online commentary, and what has made them a raging success is ease with which one can create a blog on a site such as blogspot.com and the ability to hyperlink to other blogs and sites easily. Blogs have give rise to Moblogs (blogs updated over the mobile phone), Plogs (Picture blogs) Vlogs(Video blogs) and Splogs[237] (spam blogs).

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[234] ibid
[235] ibid
[236] The word wiki is derived from the Hawaian word 'wki wki' which means 'rapid'.
[237] Also known as SPLOGGING. It is an art of creating fake blogs in an effort to drive up search engine ranking on websites and get more hits.

(d) Social Networks- These networks are more like online clubs. They allow people to come together and find each other and form groups based on commonality of interests. There are social networking sites that cater to almost every need, from business networking to friendship to dating and marriage[238].

(e) Podcasts – These are audio and video files of contemporary thought made available online. The word has its origin in iPod + broadcast, with practice originally being to create and download these files to an iPod. They are not as amenable to hyper linking as with text[239].

2.6 Content Regulation- Hicklin Speech – Sexually Explicit Material

Pornography is a curious example of an issue which has grown very quickly from a state of insignificance to become a major social issue at least in some parts of the world. From the very beginning in the early 1960s of what has been termed the 'modern pornography wave', there has been controversy over nearly all aspects of the topic: definition, amounts and contents of material, uses and users, economy and, most importantly, effects[240].

Erotic art is probably as old as art itself. Sexual themes appear in the artistic creations of all times and cultures. The first erotic paintings, sculptures and writings were probably

produced by the first painters, sculptors and writers in the early youth of humanity, and

every milestone in the arts usually saw new developments in the field of erotica[241].

The real development and distribution of pornographic pictures started with the invention of printing press[242]. The next giant step towards mass media production,

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[238] Wikipedia, Online Free Encyclopedia, available at http://en.wikipedia.org/wiki/Social_networks , vsisited 2 Mar 2006

[239] Definition as given in Wikipedia, Online Free encyclopedia, available at http://en.wikipedia.org/wiki/Podcast , visited 2 Mar 2006

[240] Berl Kutchinsky, Pornography, Sex Crime,And Public Policy, available at http://www.aic.gov.au/publications/proceedings/14/kutchinsky.pdf visited on 13 June 2005.

[241] ibid

the invention of the photographic process in 1832, had very similar consequences. Forty years later, in 1874, 130,000 'obscene' photographs and 5,000 slides were seized by police in a raid on two houses in London owned by photographer Henry Hayler. By this time, pornography was beginning to broaden its appeal beyond the narrow literate class that had been its primary audience[243].

When Edison invented the moving pictures, the pornographic potential of this new media was, of course, too obvious to be overlooked, and very soon a prosperous, underground production of 'blue movies' began, particularly in South America. In fact, Edison himself produced an erotic motion picture as early as in 1886; called *The Kiss*. It created a public scandal, and was a tremendous success. The film was not pornographic, of course, but heralded a new era in the erotic industry which has now, in very recent years, reached another stage with the video tape, cable and satellite television productions of pornography[244].

So, erotic art has a long history, and even if we restrict ourselves to speaking about commercial pornography, that is, a commodity depicting explicit nudity and sexual behaviour, produced and sold with the sole purpose of creating sexual arousal, this product has an age of more than 300 years. The starting point seems to be the appearance in about 1650 of *La Puttana Errante The Wandering Whore*. Although this was not the first book to describe the life of a prostitute in intimate detail hence the word *pornographos* (there is a classic Greek and renaissance Italian tradition of 'writing about prostitutes'). This book was the first which skipped the social, philosophical, satirical, and artistic aspects in order to concentrate on the only thing that mattered: the titillation of the reader[245].

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[242] This is apart from stone carvings on Temples which may be regarded as indecent rather than obscene. For example, Johann Gutenberg developed the art of printing around 1448, and one of the very first books to appear in print was *Il Decamerone*, Boccacio's erotic masterpiece. Suppression of freedom of the press — a phenomenon which is a significant part of the history of eroticism – followed immediately after. In 1497, sections of the *Decameron* were thrown into Savonarola's 'bonfire of the vanities' in Florence.

[243] Berl , Kutchinsky, Pornography, Sex Crime, And Public Policy, available at http://www.aic.gov.au/publications/proceedings/14/kutchinsky.pdf , , Visited on 13 Jan 2003

[244] ibid

[245] ibid

In the eighteenth and nineteenth centuries, Europe experienced a 'porno wave' which as far as the number of different publications were concerned, can match the present times. Alfred Rose (alias Rolf S. Reade) listed more than 5,000 English, French, German, Italian and Spanish titles in his *Register Librorum Eroticorum* in London in 1936[246].

Nevertheless, there are certain unique features about the pornography situation which has developed during the last twenty-five years and is now prevailing in most countries of the Western world, Japan and some other developed countries in Asia, and is now quickly developing in the former communist countries of Central and Eastern Europe. One important feature is that pornography has become easily available to people in general, while earlier it was mostly restricted to the economic and intellectual upper class. Another feature is that, to a large extent, pornography at least in some forms, has become morally and socially acceptable and in a few countries even legal, which has not been the case for about 200 years[247].

An important factor in this development is that new technologies have made possible the mass production of colour magazines, films and videos of high technical quality at a very low cost. Another, and perhaps the most important factor, has been the emergence of a more liberalised view of sexual behaviour, which has exonerated the naked body and the sexual act from earlier indictments of sinfulness. This new sexual liberalism, the so-called 'sexual revolution', has been influential in several different ways. It has awakened and strengthened a latent need for erotica among many people. It has also made possible the economic exploitation of this new attitude. And it has paved the way for a more lenient enforcement and eventual abolition of existing bans[248].

In most countries, the emergence of pornography as an everyday commodity has stirred relatively little controversy although at times great public interest. This is true of Denmark, which was the first country to legalise pornography, and most other continental European countries. In other countries, such as Norway, Great Britain, the United States, Canada and Australia, pornography has continued to be

[246] ibid
[247] ibid
[248] ibid

an issue of sometimes considerable controversy, giving rise to heated debate, mass demonstrations, violent actions, citizens' associations and rallies, criminal prosecutions as well as civil law suits, legislative initiatives, and numerous conferences and commission reports[249].

Expression of a sort which might contravene accepted standards of social morality is potentially subject to restrictions of three types in law. First, there are various statutory and common law offences for which people may be prosecuted. Secondly, there are provisions restricting access to material, and requiring outlets selling the material to be licensed and regulated. Thirdly, there are provisions allowing seizure and forefeiture of immoral goods in certain circumstances, without the need for anyone to be shown to have committed any offence.

There are various statutory provisions in India which regulate pornography. Secs 292[250], 292-A[251] and 293[252] of Indian Penal Code, 1860 and Sec.67[253] of

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[249]ibid

[250] **Sale ,etc., or obscene books, etc.**- [(1)] For the purpose of sub-section (2), a book, pamphlet, paper, writing drawing, panting , representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is , if taken as a whole , such as to ten to deprave and corrupt person , who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it].

[(2)] Whoever-

(a) sells, less to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purpose of sale, hire, distribution, public exhibition or circulation, makes , produces or has in his possession any obscene book, pamphlet, paper , drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purpose aforesaid, or knowing or having reason to believe that such as to tend to deprave and corrupt person, who are likely , having regard to all relevant circumstance, to read, see or hear the matter contained or emboldened in it].

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made , produced, purched , kept, imported, exported, conveyed, , publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any which is an offence under this section, or that any such obscene object can be procured from or through any person, oroffers or attempts to do any act which is an offence under this section, shall be punished [on first conviction with imprisonment or either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and ,in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees].

[1][Exception . – This section does not extend to-

(a) any book, pamphlet, paper, writing , drawing, painting, representation or figure-

the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing , drawing, painting,

representation or figure is in the interest of science, literature, act of learning or other objects of general concern, or

(ii) which is kept or used bona fide for religious purposes;

(b) any representation sculptured, engraved, painted or otherwise represented on or in-

any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or

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(ii) any temple , or an any car used for the conveyance of idols, or kept or used for any religious purpose.]]

[251] **Printing, etc., of grossly indecent or scurrilous matter or matter intended for blackmail**.- Whoever.-

(a) print or causes to be printed in any newspaper, periodical or circular, or exhibits or causes to be exhibited , to public view or distributes or cause to be distributed or in any manner puts into circulation any picture or any printed or written document which is grossly indecent, or in scurrilous or intended for blackmail; or

(b) sells or lets for hire, or for purpose of sale or hire makes , produces or has in his possession any picture or any printed or written document which is grossly indecent or is scurrilous or intended for blackmail; or

(c) conveys any picture or any printed or written document which is grossly indecent or is scurrilous or intended for blackmail knowing or having reason to believe that such picture or document will be printed, sold, let for hire distributed or publicly exhibited or in any manner put into circulation; or

(d) takes part in, or receives profits from, any business in the course of which he knows or has reason to believe that any such newspaper , periodical, circular, picture or other printed or written document is printed, exhibited, distributed, circulated, sold, let for hire, made, produced, kept, conveyed or purchased; or

(e) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any Act which is an offence under this section, or that any such newspaper , periodical , circular , picture or other printed or written document which is grossly indecent or is scurrilous or intended for blackmail , can be procured from or through any person; or

(f) offers or attempts to do any act which is an offence under this section *[shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with fine, or with both] :

Provided that for a second or any subsequent offence under this section , he shall be punished with imprisonment of either description for a term which shall not be less than six months *[and not more than two years].

Explanation I .- For the purposes of this section , the word scurrilous shall be deemed to include any matter which is likely to be injurious to morality or is calculated to injure any person:

Provided that it is not scurrilous to express in good faith anything whatever respecting the conduct of-

(i) a public servant in the discharge of his public functions or respecting or respecting his character so far as his character appears in that conduct and no further; or

(ii) any person touching any public question, and respecting his character, so far as his character appears in that conduct and no further.

Explanation II.- In deciding whether any person has committed an offence under this section, the court shall have regard inter alia, to the following considerations-

(a) The general character of the person charged, and where relevant the nature of his business;

(b) the general character and dominant effect of the matter alleged to be grossly indecent or scurrilous or intended for blackmail;

Information Technology Act, 2000 (IT Act). The essence of all these provisions is that they prohibit and penalize dealing with pornographic material. Indian courts have been following the test laid down by Privy Council in R V Hicklin to determine whether the material under consideration is obscene or not?. In that case Cockburn J, laid down the test of obscenity which has been widely accepted as the correct exposition of the law. According to him the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influence and into whose hands a publication of this sort may fall? It is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced year, thoughts of most impure and lubricious character[254].

The Supreme Court has accepted this test in Ranjit D.Udeshi V State[255]. The appellant who was one of the four partners of a firm owning a book stall was convicted along with other partners under Sec.292 of IPC by the magistrate for keeping a banned book named 'Lady Chatterly's Lover' in his stall for sale. The High Court and the Supreme Court maintained his conviction. The Supreme Court observed that treatment of sex in such a way as to appeal to the carnal side or as to have a tendency towards that is obscene, and it must be seen as to whether such a matter is likely to deprave and corrupt those whose minds are open to such influences and into whose hands such material is likely to fall. Obscenity which is

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(c) any evidence offered or called by or on behalf of the accused person as to his intention in committing any of the acts specified in this section

[252] **Sale, etc., of obscene objects to young person.-** Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such do , shall be punished [2][on first conviction with imprisonment or either description for a term which may extend to there years and with fine which may extend to two thousand rupees ,and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to seven years, and also with fine which may extend to five thousand rupees].]

[253] **Publishing of information which is obscene in electronic form:** Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees.

[254] Bhattacharya T, Indian Penal Code, Central Law Agency,3d Edition, Allahabad, 2001

[255] AIR 1965 SC 881

offensive to modesty or decency cannot be protected on the ground of the constitutional protection of freedom of speech and expression guaranteed under Art.19 (1)(a) as this freedom is subject to reasonable restrictions in the interest of public order, decency or morality[256].

Commenting on the continued application and its relevancy in the contemporary era on Hicklin test of obscenity Stable J, observed that – "because that is a test laid down in 1868, that does not mean that what you have to consider is, supposing this book had been published in 1868 and the publishers had been prosecuted in 1868, whether the Court or a jury, nearly a century ago, would have reached the conclusion that the book was an obscene book. Your tasks are open to such immoral influences and into whose hands the book may fall in this year, or last year when it was published in this country, or next year or the year after that".[257]

The test of obscenity in England is laid down in Sec.1 of the Obscene Publications Act, 1959. This section states that, for the purpose of this Act an article shall be deemed to obscene if its effect is, if taken as a whole , such as to tend to deprave and corrupt persons who are likely , having regard to all relevant circumstances, to read it. This Act has been supplemented by the Obscene Publications Act, 1964 and amended by the Criminal Law Act, 1977. Discussing the scope and ambit of the obscene Publication Act Cross and Jones states that an article is deemed to be obscene if its effect or the effect of any one of its items, is, taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all the circumstances to read, see or hear the matter contained in it. Though a novel may be considered as a whole, a magazine must be considered item by item and, if any one of the items is obscene, the accused is guilty. A novelist who writes a complete novel and who cannot cut out particular passages without destroying the theme of the novel is entitled to have his work judged as a whole, but a magazine publisher who has a far wider discretion as to what he will and will not insert by way of items is to be judged under Act on what we call the item to item basis.

[256] AIR 1970 SC 1390
[257] R V Reiter (1954), 1 All ER 741

In US, the test of obscenity is laid down in Miller V California[258]. The basic guidelines for the jury under the Miller test are:

(a) Whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest[259];

(b) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law[260]; and

(c) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value[261].

Rejecting as unworkable the "utterly without redeeming social value" prong, the Court restricted the permissible scope of regulations to works that depict or describe sexual conduct and such works include "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" and patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." The first two prongs of the Miller test use contemporary community standards to determine subjectively whether or not a work as a whole appeals to a prurient interest in sex and describes sexual conduct in a patently offensive way. The third prong examines serious literary, artistic, political, or scientific value according to the reasonable person standard. Because the definitions of patent offensiveness and prurient appeal are dependent upon a jury's determination, outcomes may vary. Nevertheless, in Miller case the Court rejected the requirement of a national community standard, and subsequently determined that the Constitution did not mandate a statewide standard either[262]. For the internet world where pornographic material seems to be the darling of majority net users, Miller test appears to be appropriate to determine whether a particular

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[258] Miller V. California, 413 U.S. 15 (1973) available at http://laws.findlaw.com/us/413/15.html, visited 20 Jan 2003

[259] ibid

[260] ibid

[261] ibid

[262] Burke D Debra, Thinking Outside the Box: Child Pornography, Obscenity and the Constitutionl, Virginia Journal of Law & Technology, Vol.8, No.11, Fall 2003

article is obscene or not as the standards for judging obscenity vary from country to country.

2.6.1 Why Pornography is bad?

Sexual expression which might contravene accepted standards of social morality is potentially subject to restrictions of three types in India and England. First, there are various statutory and common law offences for which people may be prosecuted. Secondly, there are provisions restricting access to material, and requiring outlets selling the material to be licensed and regulated. Thirdly, there are provisions allowing seizure and forfeiture of immoral goods in certain circumstances, without the need for anyone to be shown to have committed any offence. The law is in a confused state. It has developed over the centuries since the invention of printing press. The confused state of law have different purposes. In particular, there is difference between the law on obscene publications and the law on indecency[263].

The term pornography includes obscenity and indecency. Law prohibits obscenity and some sort of protection is given to indecent speech. The definition of 'obscenity' has been controversial and varies from country to country. In England and India, obscenity is criminalized to protect those who come to it willingly against moral harm- depravity and corruption- which the obscene article is held to threaten. In US courts follow guidelines given in Miller V California[264] to determine obscenity of object.

It is not clear whether the objective of the law is, or should be, to put a stop to pornography and, if so why; to prevent pornography from falling into the wrong hands; to maintain standards of morality, and if, so whose; to stop people from being upset by public displays; or to achieve some combination of those objects[265]. Were it acceptable to criminalize or contain all conduct or expression which the

[263] See generally, Mullin I Dorothy, The First Amendment and the Web: The internet Porn Panic and Restricting Indecency in Cyberspace, available at http://www.library.uscb.edu/untangle/mullin.html, visited on 25 May 2006

[264] Supra Note 258, 413 US 15 (1973)

[265] Feldman, David, Civil Liberties and Human Rights in England and Wales, 2nd Edition, Oxford University Press, UK, 2002, at p 807

dominant members of society found offensive or immoral, it would seriously restrict the range of discussion of ethical and political issues, since many expressions of opinion will be found offensive by those who disagree with the opinion or with the way in which it is expressed[266].

The view of the liberal theory is that tolerating offensive conduct and speech is one of the prices to be paid for a reasonably free and open society. Alternatively, free speech can be regarded as a forum for debate, in which societies develop their intellectual attitudes. A bias in favour of toleration can be best be developed and systematized in cases concerning relatively innocuous forms of offensiveness and, once established , can then be applied and extended in relation to other, potentially more upsetting, offences. In a pluralist society there is unlikely to be agreement about moral standards and in a liberal society it is a commonplace assumption that choice between moral values is primarily a matter of individuals.

One of the widely discussed thought about why pornography is bad is based on the articulation made by John Stuart Mill's in his work On Liberty about the harm principle[267]. There is considerable variation between people's views of what constitutes harm for the purpose of prohibiting pornography. For some people, impressed by the wide range of interferences with rights which would become permissible if harm is given an extended meaning, desirable to restrict it to harm which is objectively verifiable according to established scientific criteria. They therefore look for physical or psychological harm which constitutes a condition or syndrome recognized by competent medical or social opinion[268]. On this basis, the Williams committee[269] took the view in 1979 that burden of establishing harm lay on those who seek to justify interference with liberty of expression, and those people had failed to discharge the burden of showing a causative link between reading or watching pornography and committing criminal or anti-social acts. However, there is growing evidence that people who commit crimes of violence ,

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[266] ibid

[267] Mill, John Stuart, On liberty, vol.XXV, Part2, The Harvard Classics, P.F. Collier & Sons, 1909, New York; Bartleby.com, 2001, at p 25, available at www.bartleby.com/25/2/ , visited on 3 Nov 2003

[268] ibid

[269] Coldham, Simon, Report of the Committee on Obscenity and Film Censorship , Chaired by Bernard Williams, The Modern Law Review, *Vol. 43, No. 3 (May, 1980)*, pp. 306-318

especially sexual violence, are likely to have been influenced by pornographic or violent books, magazines, pictures and films, even if there is as yet limited evidence as to the likelihood of exposure to that material causing people to go on to commit such offences[270].

On the other hand, some contend that rather than material harm one should take account of moral social or ideological harm for preventing pornography. This is less easy to establish on objective criteria than the former kind of harm. It is more impressionistic and allows people to propose interferences with liberty on the strength of assertions of social or moral harm which can not be scientifically tested.

2.6.2 Feminist Theory of Obscenity – Women & Pornography

Generally, the notion of restricting sexually offensive material is problematic, for two reasons. First, the standard of offensiveness can be criticized as being unacceptably indeterminate standard for the law governing the availability of public expression. The implications of this is liberal in a traditional sense: any interference with freedom must be aimed at meeting a pressing social need and should be circumscribed in sufficiently clear terms to enable people to know what the law is, and plan their activities accordingly. Secondly, restricting, but not banning, offensive matter can be seen as based on a misconception about the type and significance of the harm which pornography works. Feminist theorists have argued that pornography causes a kind of social harm distinct both from any damage it does to the shared values of the community. Instead, they suggest that all pornographic representations harm all women. The harm is done by degrading women, presenting them as dominated by men in context in which such domination is thought to be regarded as natural and even enjoyable. Women may be entirely dehumanized in pornography, becoming merely recipients of treatment by men. MacKinnon and Andrea Dworkin argue that sexual explicitness in the representation of this sort of relationship, combined with sexual arousal in the viewer or reader, cause or

[270] Feldman, David, Civil Liberties and Human Rights in England and Wales, 2nd Edition, Oxford University Press, UK, 2002, at p 924

reinforce attitudes of men towards women, and of women towards themselves which tend to encourage male domination in all areas of life[271]. Pornography is seen as form of discrimination against women disempowering them and tending to silence them politically and it merits banning as such. But in reality, there are many varieties, reflecting many different types of sexual activity[272]. It is only possible to argue convincingly that all pornography is violence against women if one imposes a definition which artificially limits pornography to material which represents sadistic heterosexual or lesbian activity. Other types of pornography may represent violence against entities other than women such as dogs, pigs, children, men etc , but it is it objectionable because it reflects violent and dominating attitudes in the relationships between the parties, or because it may be in some way harmful, or because it is revolting? . To insist upon the equation P=V (where P is pornography and V is violence against women) wrongly treats pornography as one indivisible phenomenon[273].

Contrary to the above feminist argument the importance of sexual expression is stressed by Justice Brennan in Roth V US in the following words – "The protection of sex e.g., in art, literature and scientific works is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."[274]

Finally, Leonore Tiefer[275], Psychologist and Sex Therapist , argues that "Women are more in danger from the repression of sexually explicit materials than from their free expression."

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[271] ibid at p 927

[272] ibid at p 928

[273] See Freedman On Lloyd's, Introduction to Jurisprudence, 6th Edition, Sweet & Maxwell International Students Edition, London, 1996 at p 255-565

[274] Roth V. United States, 354 U.S. 476 (1957), available at http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=354&invol=476 , visited on 24 Nov 2003

[275] The X-Rated Hoax: A tale of harridans, charlatans & poppycock, available at http://libertus.net/censor/xrhoax6.html , visited on 10 Dec 2003

The moral basis of society is important, but it is probably impossible to establish which moral standards are basic to the survival of any society and which are merely peripheral. It would be unsafe to allow indiscriminate criminalization of all immoral conduct or expression, both because of the uncertain scope of the morality in a pluralist society and because the resulting interference with freedom would be likely to cause social and economic stagnation. At the same time, people sometimes suffer offence which is of such a type, and so intense, as to be experienced subjectively as a form of harm which may be as wounding as physical harm. When this happens, it is understandable that there are demands for the cause to be repressed by law. These demands are ultimately political demands, rather than moral or legal ones, and have to be addressed by members of society in the context of a debate about the type of society in which they wish to live[276].

2.6.3 Child Pornography

Child Pornography is a major abuse of Child's legal right[277]. The damage which sex abuse can do to a child is extremely grave. If, in addition, the abuse has been captured via a pornographic image, the original abuse is both compounded and magnified. Historically child pornography tended to be found mainly in paper based photographic forms, magazines, on videos and in drawings. In many countries these forms still predominate. However, the arrival of the Internet, linked with other technological advances, has introduced an enormous step change both in the volume and the nature of available child pornography. The Internet not only acts as a mechanism for making, displaying, trading and distributing child pornography, it

[276] Feldman, David, Civil Liberties and Human Rights in England and Wales, 2nd Edition, Oxford University Press, UK, 2002, at p 925

[277] Article 34 of the UN Convention on the Rights of the Child (CRC) provides that:
States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: The inducement or coercion of a child to engage in any unlawful sexual activity; The exploitative use of children in prostitution or other unlawful sexual practises; The exploitative use of children in pornographic performances and materials;

also acts as a vehicle for child pornographers to make contact with and ensnare new victims[278].

The idea of protecting children from sexual exploitation is relatively modern. As late as the 1880s in the United States, the age of consent for girls was just 10 years. In 1977, only two states had legislation specifically outlawing the use of children in obscene material[279].

The first US federal law concerning child pornography, Sexual Exploitation of Children Act was passed in 1978. This Act prohibited the manufacture and commercial distribution of obscene material involving minors under the age of 16. In 1982, the US Supreme Court held that child pornography is not protected by Firs amendment. Further, child pornography has to be separated from obscenity laws and has to be judged on a different standard[280].

Child Protection Act, 1984 raised the age of minor covered by child pornography legislation to 18 and distinction between child pornography and obscenity codified.

In United States V Dost[281], the court expanded the definition of child pornography to include sexually suggestive depictions of a lascivious nature.

The first law that specifically referred to computers and child pornography were passed in 1988 as Child Protection and Obscenity Enforcement Act. Under the provisions of the Act it is illegal to use a computer to depict or advertise child pornography. In applying the provisions of this enactment the court ruled that private possession of child pornography illegal.

Definition of child pornography expanded to include virtual images of children and images that appear to be of a minor under Child Pornography Protection Act[282].

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[278] Child Pornography, Theme Paper,2nd World Congress against Commercial Sexual Exploitation of Children, Yokohoma, Japan, 2001 , available at http://www.csecworldcongress.org/en/yokohama/Background/Theme_papers.htm , visited 4 Jul 2004

[279] Child Pornography on the Internet, Community Oriented Policing Services, US Department of Justices, available at http://www.cops.usdoj.gov/mime/open.pdf?Item=1729 , visited on 3 Nov 2004

[280] New York v. Ferber, 458 U.S. 747 (1982) , available at http://laws.findlaw.com/us/458/747.html , visited on 3 Jan 2005

[281] United States V Dost, 636 F. Supp. 828 (S.D. Cal. 1986), available at www.findlaw.com , visited on 4 Feb 2005

[282] Child Pornography on the Internet, Community Oriented Policing Services, US Department of Justices, available at http://www.cops.usdoj.gov/mime/open.pdf?Item=1729, visited on 3 Oct 2005

Child Protector and sexual Predator Punishment Act imposes an obligation on ISP to report known incidents of child pornography to authorities[283].

2.7 Online 'Porn Panic'- Hailing Adults Right to Porn

Pornography, particularly child pornography[284] poses a direct threat to the online users per se. The utilization of cyberspace for the distribution of child pornography is an area of great concern. The practice arguably less prevalent now than it was before international law enforcement officials began to focus on it, but digital images of persons under the age of eighteen engaging in sexually explicit conduct continue to be exchanged via e-mail, Usenet, IRC and file-sharing software[285]. Posting is often to tantamount to distributing, because internet technology typically enables users to copy these pictures easily by clicking on the images and saving it to their hard drives. Usenet has been particularly troubling in this regard. Usenet groups are often filled with nude and suggestive images of young people who are clearly under eighteen. It is generally believed that the mergence of cyberspace has resulted in the widespread and, indeed unprecedented availability of child pornography worldwide[286].

The highly publicized case of US V Thomas[287] is seen by many as a watershed event in the development of cyberlaw. Working out of their Northern California home, the Thomases (husband & wife) operated a highly profitable Bulletin Board System (BBS). Through this system, online customers who registered and paid a

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[283] ibid

[284] The term 'child pornography' implies conventional pornography with child subjects and includes nay representation whatever means, of any child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes as well as the sue of child to create such representation; as defined by International Centre for Missing & Exploited Children in Child Pornography: Model legislation & Global Review, 2006,available at www.icmec.org , visited on 12 June 2006

[285] Biegel, Stuart, "Beyond our Control – Confronting the limits of our Legal System in the Age of Cyberspace", IT Press, London, 2003

[286] ibid

[287] US V Thomas 74 F.3d 701 (6th Cir. 1996) (upholding conviction of California system administrators for distribution of obscene materials in Tennessee), *cert. den.,* 519 U.S. 820 (1996) available at http://caselaw.lp.findlaw.com/cgibin/getcase.pl?court=US&navby=case&vol=000&invol=03-218 , visited on 3 Oct 2004

membership fee were able to access sexually explicit pictures via computer. Responding to a complaint from a person in Tennessee, an undercover postal inspector signed on to the system and downloaded sexually explicit Graphic Interchange Format (GIF) files and based primarily on that evidence , the Thomases were indicted in the US District court for the Western District of Tennessee and convicted under a variety of federal obscenity statutes which prohibited " knowingly using and causing to be used a facility and means of interstate commerce - a combined computer/telephone system- for the purpose of transporting obscene computer generated materials in interstate commerce". The US Court of Appeals for the Sixth Circuit upheld the conviction and the US Supreme Court declined to hear the case. The most central and the most controversial aspect of the Thomas decision was its treatment of the Jurisdiction and community standards. Thomas case fired the debate of distribution of pornography over the cyberspace.

The credit of making first legislation to regulate online pornography went to US, when it enacted Communication Decency Act in 1996 (CDA). The enactment of CDA has renewed and extended the debate on pornography in the wake of rapidly changing technology. The perceived proliferation of sexually explicit messages across computer networks has reignited discussion of adults right of access to sexual messages versus the possible contribution of such exposure to antisocial attitudes or behaviour (e.g., discrimination against women, sexual assault). Moreover, the easy point and click nature of many online media, including the WWW, has given rise to the additional concern about the availability of sexually rented materials to an audience of children and adolescents. Media attention to a study conducted by Marty Rimm in 1995 proclaiming widespread and especially deviant pornography on the information superhighway has particularly fuelled these concerns[288]. The report of Marty Rimm is now seriously discredited[289].

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[288] Mullin Imrich, Doothy, The First Amendment and the Web: The internet Porn Panic and Restricting Indecency in Cyberspace in cyberspace, available at http://www.library.uscb.edu/untangle/mullin.html , visited on 23 Jun 2004

[289] In a report published in the Georgetown Law Journal (a non-peer-reviewed legal journal), Marty Rimm (1995) examined the download patterns of images from a number of private, self- proclaimed "adult"
BBSs (i.e., BBSs that require payment and proof of age before subscribing). He also examined the number of image postings to a small subset of Usenet newsgroups. Despite his examination of only a

The relationship between technology and distribution of pornographic material can be traced back to 1995 California legislation which made selling/distribution of porn material through machine as an offence. More precisely, the statute made it a crime to sell 'harmful matter.'[290] Free speech activists challenged this statute under the First and Fourteenth Amendments. They claimed that statute is too broad and blocks the distribution of porn through vending machines. The essence of the statute was that it requires porn can be sold only by humans. Lawrence Lessig argues that by requiring that porn can be sold by people, the statute had created two sorts of

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limited portion of computer network activity, Rimm made a number of alarming assertions about online pornography in general that researchers (especially Hoffman, Novak and Godwin, 1995) have since challenged as unsupported, misleading, or outright misrepresentations of his data.
One now famous statement about the prevalence of computer pornography is Rimm's conclusion that "83.5% of all images posted on the Usenet are pornographic". This proportion of Internet pornography could not appear credible to anyone familiar with the Internet. The percentage actually refers to numbers of images posted to a narrow subset of 32 Usenet newsgroups called "alt.binaries." Specifically, Rimm found that 83.5% of the images posted to 32 "alt.binaries" newsgroups were posted to the 17 of those newsgroups that Rimm labeled "pornographic" . However, even this is likely an inflation, given that Rimm does not disclose how he counted "images" (many image files consist of multiple posts), he does not discuss how he determined which newsgroups were in fact "pornographic" (in a separate table of the forty most accessed newsgroups, he labelled "alt.binaries.pictures.supermodels" as pornographic), and he does not examine whether all the images posted to those groups were actually even sexually explicit. Both Hoffman and Novak and Post maintain that the 83.5% figure is grossly misleading. Using Rimm's own figures, they point out that the part of the Internet that involves Usenet newsgroups represents only 11.5% of total Internet traffic, and of that, only about 3% (by message count) is associated with newsgroups containing pornographic imagery. Thus, they conclude that less than onehalf of 1% (3% of 11.5%) of messages on the Internet is associated with newsgroups that contain pornography (and many of the messages in these "pornographic" newsgroups are text files that may not even be sexually explicit). Although we do not have such data about sexual explicitness in the remaining 88.5% of the non-Usenet Internet traffic (e.g., world wide web use), it is fair to say that only a small percentage of pornographic imagery, relative to non-pornographic content, occurs in the Usenet newsgroups. Nevertheless, the misrepresented 83.5% is what Rimm listed in his summary of findings (and what *Time* publicized).
Interestingly, the 83.5% figure itself comes from the small part of Rimm's study that deals with readership statistics of selected Usenet newsgroups. Most of Rimm's data concerns download patterns on selected private "adult" BBSs. Nevertheless, even with this data, Rimm obscures important methodological procedures: he does not make explicit how his sample of adult BBSs was chosen to be "representative", he confuses the actual numbers of image descriptors that were examined (917, 410 versus 292,114, among others), and he professes both "reliability" and "validity" for his categorizing procedure without providing any data for support . See Ethics of Maty Rimm, available at http://w2.eff.org/Misc/Publications/Declan_McCullagh/www/rimm/rimm.html , visited on 26 Nov 2004

[290] California Penal Code S313.1(c)(2) and (h), it was aimed at protecting the children from harmful material.

constraints, both of which apply to adults as well as kids[291]. One, he says, the constraints of Norms. The norms frown or better, sneer on porn consumers and hence consumers prefer to purchase porn anonymously as machines cannot sneer[292]. Therefore California Statute abridges the constitutionally protected speech, right to read. Second constraint identified by Lessig is cash. Porn distributed in machines costs less money. Perhaps not much less, but for the poor, marginal differences are more than marginally significant. By eliminating this form of distribution, California was effectively eliminating a particular kind of porn — namely, poor-persons'-porn. And so again, with respect to these people, the law effectively "abridges" access to constitutionally protected speech[293]. But the Supreme Court of US refused to accept these arguments and upheld the validity of the statute by denying certiorari[294].

There is a special irony in the Court's denial of certiorari that very week. The week of March 17th, 1997 was an important week for technologies that distribute speech anonymously. On Wednesday of that week, the Court heard arguments on the Communications Decency Act[295] of 1996 (CDA) — Congress's own attempt (failed) to limit the anonymous distribution of porn. Of course there are big differences between the two laws. But there are similarities as well: both deals with technologies that (in their present state) can't easily discriminate in the distribution of porn to kids. And both create incentives to modify these technologies to enable them to discriminate on the basis of age.

And both create incentives to modify these technologies to enable them to discriminate on the basis of age[296]. Yet while the Court let stand the decision in California case (Crawford), it struck down the CDA in *Reno v. ACLU*[297].

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[291] Lessig, Lawrence, What Things Regulate Speech:CDA2.0 Vs Filtering, Berkman Center for Internet & Society, available at http://cyber.law.harvard.edu/publications, visited on Apr 2004

[292] ibid

[293] ibid

[294] Crawford v Lungren 96 F.3d 280 (1996), available at www.findlaw.com , visited on 4 Nov 2004

[295] Telecommunications Act of 1996, Pub. L 104-104, Title V, 110 Stat. 56, 133-43 (Communications Decency Act).

[296] Lessig, Lawrence, What Things Regulate Speech:CDA2.0 Vs Filtering, Berkman Center for Internet & Society, available at http://cyber.law.harvard.edu/publications

[297] 521 US 844

In Reno, provisions of the CDA were challenged by various free speech organizations led by ACLU. Plaintiffs focused their challenge on two provisions of section 502 of the CDA which amend 47 U.S.C. Secs.223 (a) and 223(d).

Section 223(a)(1)(B) provides in part that any person in interstate or foreign communications who, "by means of a telecommunications device," "knowingly . . . makes, creates, or solicits" and "initiates the transmission" of "any comment, request, suggestion, proposal, image or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age," "shall be criminally fined or imprisoned."[298]

Section 223(d)(1) ("the patently offensive provision"), makes it a crime to use an "interactive computer service to "send" or "display in a manner available" to a person under age 18, "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication."[299]

Plaintiffs also challenge on the same grounds the provisions in Sec. 223(a)(2) and Sec. 223(d)(2), which make it a crime for anyone to "knowingly permit any telecommunications facility under [his or her] control to be used for any activity prohibited" in Secs. 223(a)(1)(B) and 223(d)(1). The challenged provisions impose a punishment of a fine, up to two years imprisonment, or both for each offense. Plaintiffs make clear that they do not quarrel with the statute to the extent that it covers obscenity or child pornography, which were already proscribed before the CDA's adoption[300].

In defense Government argued that CDA was not constitutionally overbroad and cited “safe harbor" defenses in new Sec. 223 (e) which provides as follows;

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[298] As discussed in the judgment by Sloviter, Chief Judge, United States Court of Appeals for the Third Circuit; Buckwalter and Dalzell, Judges, United States District Court for the Eastern District of Pennsylvania in ACLU v Reno, available at http://supreme.usatoday.findlaw.com/supreme_court/decisions/lower_court/98-5591.html , visited on 3 Nov 2003

[299] ibid

[300] See 18 U.S.C. Secs. 1464-65 (criminalizing obscene material)

In addition to any other defenses available by law[301]

(1) No person shall be held to have violated subsection (a) or (d) of this section solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or

connection that does not include the creation of the content of the communication.

(2) The defenses provided by paragraph (1) of this subsection shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate this section, or who knowingly advertises the availability of such communications.

(3) The defenses provided in paragraph (1) of this subsection shall not be applicable to a person who provides access or connection to a facility, system, or network engaged in the violation of this section that is owned or controlled by such person.

(4) No employer shall be held liable under this section for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such conduct, authorizes or ratifies such conduct, or (B) recklessly disregards such conduct.

(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d) of this section, or under subsection (a)(2) of this section with respect to the use of a facility for an activity under subsection (a)(1)(B) that a person --

(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

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[301] 47 U.S.C Sec.223(e)

(6) the Federal Communications Commission may describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications under subsection (d) of this section. Nothing in this section authorizes the Commission to enforce, or is intended to provide the Commission with the authority to approve, sanction, or permit, the use of such measures. The Commission shall have no enforcement authority over the failure to utilize such measures.

The District court found that the CDA places an unacceptably heavy burden on protected speech, and held that the defenses do not constitute the sort of 'narrow tailoring' that will save an otherwise patently invalid unconstitutional provision. In Sable Communication, the court remarked that the speech restriction at issue in that case amounted to 'burning the house to roast the pig'[302]. The CDA casting a far darker shadow over free speech threatens to torch a large segment of the internet community[303].

2.7.1 The Child Online Protection Act of 1998

Following the CDA defeat, the members of the Congress went back to the drawing board, attempting to craft a second statue that would serve to protect children from obscene and pornographic material in cyberspace. Labeled as "Son of CDA" or "CDA II" by many commentators, this Statute – the Child Online Protection Act (COPA)- was passed and signed into law by President Clinton in 1998.

The congressional team that worked on the COPA knew that the court in Reno V ACLU had identified three basic structural flaws in the provisions of the Communication Decency Act that were ultimately struck down. They are

(a) the prohibitions were too broad

(b) key terms were vague and undefined

(c) the steps potential defendants might take to avoid prosecution and conviction may not have been technologically feasible at the time

[302] Sable Communications of Cal.Inc V FCC, 492 US 115 (1989), available at http://laws.findlaw.com/us/492/115.html, visited 3 Nov 2004

[303] ibid

Congress sought to respond to the ruling by crafting much narrower statute aimed at commercial activity directed toward young people. It only addressed the World Wide Web (WWW) and only prohibited material harmful to minors. Under the terms of the Act, both civil and criminal penalties were mandated for persons who "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of WWW, make any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors[304].

By using the term 'harmful to minors' and defining it precisely, Congress hoped to avoid the problems that had arisen in Reno I (Reno V ACLU) because of such vague and indeterminate terms as indecent. Under the COPA, a minor was defined as a person under the age of seventeen and material that is harmful to minors was defined as:

Any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that

(a) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(b)depicts, describes, or represents in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post pubescent female breast ; and

(c) taken as a whole , lacks serious literary , artisitic, political or scientific value for minors

It is important to note that other statutes prohibiting material that is harmful to minors are on the books at the state level, and a similar prohibition focusing entirely

[304] Burke D Debra, Thinking outside the Box: Child Pornography, obscenity and the Constitution, Virginia Journal of Law and Technology, Vol.8, N0.11, Fall 2003, available at www.vjolt.net , visited on 12 Apr 2005

on the offline world had already been deemed constitutional in a 1968 US Supreme Court decision[305].

Given the apparent precision of the COPA and the fact that it appeared to target commercial pornographers, there was much less concern in the online community that these prohibitions might actually have negative impact on day-to-day activities of the average online user. Indeed, compared to the outcry that greeted the passage of the CDA, the reaction to the COPA was relatively muted. And the coalition of plaintiffs assembled by the ACLU to challenge the Act was significantly smaller than the coalition that had challenged the CDA.

In ACLU V Reno II, plaintiff challenged the provisions of COPA and asserted that the legislation " threatens to turn….the internet… into a child proof medium whose level of discourse would be reduced to that suitable for a sandbox". Further, they asserted that the implementation of the Act would unconstitutionally burden the speech of adults. Analyzing the Act under traditional First amendment principles, the trial court determined that any assessment of burden placed on protected speech by COPA must " take into consideration the unique factors that affect communication in the new and technology laden medium of the Web." In particular, the court found that "the nature of the Web and the Internet is such that Web site operators and content providers cannot know who is accessing their sites, or from where, or how old the users are, unless they take affirmative steps to gather information from the user and the user is willing to give them truthful responses." Thus, Web site owners and content providers who think they may be displaying material harmful to minors must construct barriers to the material that adults must cross as well[306].

The trial court agreed with the plaintiffs that "the implementation of credit card or adult verification screens in front of material that is harmful to minors may deter users accessing such materials and that the loss of users of such material may affect the website owner's ability to provide such communications". The US Government

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[305] See Ginsberg v New York 390 US 629, available at, http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=390&invol=629, visited on 4 Feb 2003

[306] ACLU V Reno II 31 E.Supp.2d 473, available at , http://epic.org/free_speech/copa/ , visited on 1 Jan 2003 (Ashcroft V ACLU)

had argued that the statute targeted only commercial pornographers, but the court agreed with the plaintiffs that many respectable sites be implicated as well.[307] Indeed, the trial court questioned whether the statute could "efficaciously meet its goal" at all, given that minors could still gain access to material harmful to minors via overseas sites, noncommercial sites and online protocols other than HTTP (Hyper Text Transport Protocol). Moreover, minors could legitimately possess a credit or debit card and access material harmful to minors despite the existence of screening mechanisms. Echoing the US Supreme Court's conclusion in Reno I, the court declared that a more effective and less restrictive means to shield minors from harmful materials is to rely upon filtering and blocking technology. Judge Reed succinctly explained the limitations of COPA. He wrote "There is nothing in the text of COPA that limits its applicability to so-called commercial pornographers only". The court reasoned that because COPA (i) imposed liability on someone whose communication includes any material that is harmful to minors (ii) defined a communication for commercial purposes very broadly and (iii) expressly indicated that it is neither necessary that the person make a profit from the communication nor that such communications be the person's sole or principal business or source of income, the prohibitions could apply to a very wide range of Web sites that contain some potentially harmful to minors.

Not only the trial court rule for the plaintiffs, but the decision was upheld by the third Circuit courts of Appeals in the summer of 2000. Central to the appellate court's reasoning was the determination that key differences exist between the WWW and other forms of communication. In a language reflecting the view that cyberspace is at times unique enough to merit significantly different legal approaches and conclusions the court of appeals declared:

"Each medium of expression must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems. In considering the unique factors that affect communication in the new and technology laden medium of the Web, we are convinced that there are crucial differences between a 'brick and

[307] ibid

mortar' outlet and the online Web that dramatically affect a First Amendment analysis."

But US Supreme Court has refused to accept the ruling of Reno II by Third Circuit Court, holding that COPA's reliance on community standards to identify material that is harmful to minors does not , in itself , render the statute substantially overbroad[308]. The Court however, expressed no view about other issues raised in the Third Circuit, including (i) whether COPA suffers from substantial over breadth for reasons other than its use of community standards[309]; (ii) whether COPA is unconstitutionally vague or (3) whether COPA survives strict scrutiny.

From the above discussion it is clear that censorship and filtering of internet is prevailing and the government's efforts to regulate the fundamental human right like freedom of speech is being adversely affected.

2.8 Regulation of Sexually Explicit Material in Cyberspace- Analysis

Sexually explicit material on the internet includes text, pictures, and chat and extends from the modesty titillating to the hardest core. These files are created, named, and posted in the same manner as material that is not sexually explicit, and may be accessed either deliberately or unintentionally during the course of imprecise search. Once a provider posts its content on the internet, it cannot prevent that content from entering any community. Some of the communications over the internet that originates in foreign countries is also sexually explicit[310]. Though such material is widely available, users seldom encounter such content accidentally. A document's title or a description of the document will usually appear before the document itself and in many cases the user will receive detailed information about a site's content before by warning he or she need take the step to access the document.

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[308] Ashcroft V ACLU, 122S.Ct.1700, 1713 (2002), available at www.laws.findlaw.com , visited on 14 Sep 2004

[309] Harper John A, Traditional Free Speech Law: Does it Apply on the Internet", Computer Law Review and Technology Journal, Vol.VI, 2002

[310] Justice Stevens in Reno v ACLU 521 US 844 , available at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0521_0844_ZS.html, visited on 1 Jan 2003

Almost all sexually explicit images are preceded by warnings as to the content[311]. For that reason, the 'odds are slim' that a user would enter a sexually explicit site by accident. Unlike communications received by radio or television, the receipt of information on the internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the internet unattended[312].

Systems like, filtering software, have been developed to help parents control the harmful material that may be available on a home computer with internet access. A system may either limit a computer's access to an approved list of sources that have been identified as containing no adult material, it may block designated inappropriate sites, or it may attempt to block messages containing identifiable objectionable features. Although parental control software currently can screen for certain suggestive words or for known sexually explicit sites, it cannot screen for sexually explicit images[313].

Justice Stevens seems to be transferring the burden of protecting the children from harmful material to their parents. To explain the extent of regulation of speech in cyberspace Lawrence Lessig divides free speech law into three classes[314]. One class is speech that everyone has the right to. Over this class, the state's power is quite slight or minimal: The state may effect reasonable time, place, and manner restrictions, but no more. The paradigm is political speech, but in effect it includes any speech not described in the next two classes. A second class is speech that no one has the right to. The model here is obscene speech, or more strongly, child pornography. Here the state's power is practically unlimited[315]. With child porn at least, the state can ban the production, distribution, and consumption of such speech; and with obscene speech, the state can for example ban production and distribution. The third class is speeches that people over the age of seventeen have a

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[311] ibid
[312] ibid
[313] ibid
[314] Lessig, Lawrence, Code and Other Laws of Cyberspace, Basic Books, New York,1999 at p 92-94
[315] Lessig cites the decision of the court in Roth V United States, 354 U.S. 476 (1957), available at http://laws.findlaw.com/us/354/476.html , visited on 4 Dec 2005

right to, while people under seventeen do not. This is sometimes, and unhelpfully called, "indecent" speech, but that moniker is plainly too broad. A more precise description would be speech that is "obscene as to children" even though not obscene as to adults. The category is obscenity, with the status of the relevant community determined by age rather than geography[316].

According to Lessig it is the class II regulations that increase the regulability of cyberspace. By reducing the burden of regulations generally, class II regulations make other regulations easier and hence more regulation possible. At this stage he seeks to answer two questions[317]. The first one is, is such regulations permissible? And the second, if it is permissible, how should it be evaluated? For the first question his answer is yes. There is no constitutional right to an unregulable space or in cyberspace designed to facilitate otherwise legitimate regulations are plainly permissible. In constitutional terms, class II regulations are regulations of the necessary and proper clause regulations that make it easier to carry other regulations into effect, implied in a grant of legislative power even if not expressly granted[318]. This view of Lessig is very difficult to accept. Cyberpsace being a borderless medium, it is almost impossible for any country to regulate all alone including US and regulating the cyberspace or real space without legislative power is even worse. Lessig's answer to the second question is even more evasive as he suggests cyberspace could be extraordinarily regulable space with proper architecture and behaviour.

If we take necessary clues regarding regulation of pornography over the cyberspace from US courts, three times in the past several years, critics of pornography on the Internet have sought through federal legislations, to prevent children from gaining access to it. The first of these described above, was the Communication Decency Act of 1996 (CDA) which criminalized the 'knowing' transmission over the Internet of 'obscene or indecent messages to any recipient under18 years of age. The CDA was widely criticized by civil libertarians and soon succumbed to a constitutional

[316] Lessig, Lawrence, What Things Regulate Speech:CDA2.0 Vs Filtering, Berkman Center for Internet & Society, available at http://cyber.law.harvard.edu/publications, visited on 2 Feb 2005
[317] ibid
[318] ibid

challenge. US Supreme Court holding that it violated First Amendment provided the following reasons;

(i) because it restricted speech on the basis of its content, it could not be justified as a "time, place, and manner" regulation;

(ii) its references to "indecent" and "patently offensive" messages were unconstitutionally vague;

(iii) its supposed objectives could all be achieved through regulations less restrictive of speech;

(iv) it failed to exempt from its prohibitions sexually explicit material with scientific, educational, or other redeeming social value.

Two aspects of the Court's ruling are likely to have considerable impact on future constitutional decisions in this area. First, the Court rejected the Government's effort to analogize the Internet to traditional broadcast media (especially television), which the Court had previously held could be regulated more strictly than other media. Unlike TV, the Court reasoned, the Internet has not historically been subject to extensive regulation, is not characterized by a limited spectrum of available frequencies, and is not "invasive." Consequently, the Internet enjoys full First Amendment protection. Second, the Court encouraged the development of technologies that would enable parents to block their children's access to Internet sites offering kinds of material that the parents deemed offensive[319].

To overcome the deficiencies pointed out by the Supreme Court in Reno V ACLU, Congress enacted another legislation aimed protecting children, Children Online Protection Act, 1998 (COPA) which provided obliged commercial Web operators to restrict access to material considered "harmful to minors" which was, in turn, defined as any communication, picture, image, graphic image file, article, recording, writing or other matter of any kind that is obscene or that meets three requirements:

(1) "The average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest."

[319] Fisher William , Benkler Yochai , Brackley Rebecca and Ma Sarah , Freedom of Expression on the Internet, Internet Law Program, Berkman Center for Internet and Society, available at http://cyber.law.harvard.edu/ilaw/mexico_2006_module_4_freedom , visited on 2 Jan 2006

(2) The material "depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual conduct, an actual or simulated normal or perverted sexual act or a lewd exhibition of the genitals or post-pubescent female breast."

(3) The material, "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors."

Once again, civil libertarians and online publishers challenged the statute on the grounds that it was unduly burdensome and would excessively chill online speech. The case was decided by the Supreme Court in May 2002[320]. Both of the lower courts found that Congress had exceeded its constitutional authority. In the judgment of the Third Circuit Court of Appeals, the critical defect of COPA was its reliance upon the criterion of "contemporary community standards" to determine what kinds of speech are permitted on the Internet[321].

Because material posted on the Web is accessible by all Internet users worldwide, and because current technology does not permit a Web publisher to restrict access to its site based on the geographic locale of a each particular Internet user, COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standard in order to avoid criminal liability[322].

The net result was to impose burdens on permissible expression more severe than can be tolerated by the Constitution. The court acknowledged that its ruling did not leave much room for constitutionally valid restrictions on Internet pornography:

"We are forced to recognize that, at present, due to technological limitations, there may be no other means by which harmful material on the Web may be constitutionally restricted, although, in light of rapidly developing technological

[320] Ashcroft V ACLU 542 U.S. 656 (2004) available at http://www.law.cornell.edu/supct/html/03-218.ZS.html , visited on 2 Jan, 2006
[321] ibid
[322] Supra Note 219

advances, what may now be impossible to regulate constitutionally may, in the not-too-distant future, become feasible."[323]

One of the arguments made by those who had opposed the CDA was that there was no need for such expansive regulation, because technology provided filters that would allow parents to control what their children would see. The children would thus be protected, but adults could access whatever they wanted to see. Very few voices were raised at the time concerned that the censorial effects of filters were as bad in many cases as some form of direct regulation.

The congress again mad e an attempt to curb child pornography by enacting children Internet Protection Act (CIPA) in 2000, which required schools and libraries that receive federal funding (either grants or "e-rate" subsidies) to install Internet filtering equipment on library computers that can be used by children.

Again CIPA was opposed by many libertarians. Opponents claimed that it suffers from all the constitutional infirmities of the CDA and COPA. In addition, it reinforces one form of the "digital divide" - by subjecting poor children, who lack home computers and must rely upon public libraries for access to the Internet, to restrictions that more wealthy children can avoid. However, the Supreme Court disagreed in a complex ruling, and upheld CIPA in United States v. American Library Association[324].

The CDA, COPA, and CIPA have one thing in common: they all involve overt governmental action and thus are subject to challenge under the First Amendment. Some observers of the Internet argue that more dangerous than these obvious legislative initiatives are the efforts by private Internet Service Providers to install filters on their systems that screen out kinds of content that the ISPs believe their subscribers would find offensive. Because policies of this sort are neither mandated nor encouraged by the government, they would not, under conventional constitutional principles, constitute "state action" -- and thus would not be

[323] Supra Note 219
[324] United States v. American Library Association. 123 S.Ct. 2297 (2003)., available at www.findlaw.com , visited on 23 Sep 2005

vulnerable to constitutional scrutiny. Such a result, argues Larry Lessig, would be pernicious; to avoid it, we need to revise our understanding of the "state action" doctrine[325].

2.9 Conclusion

Internet offers a great platform for self-expression. It promotes democratic values and gives us an opportunity to express and share our views and opinions with others. As John Stuart Mill calls 'Market place of idea for discovering truth' is greatly fulfilled by this new revolutionary media.

Pornography has been the central issue that is making legislators to impose restrictions on free speech in cyberspace. Several attempts made by the US government to bring in some control over the netizens free speech so far have not been successful. Free speech being a basic human right the policy of the government has to be promoting and protecting it rather than restricting it. Protection offered to free speech by American courts is the highest in the world.

Panics about the corruptive influences of new media technology are not new. Every major technological innovation, from the telephone to the radio to motion pictures to television, has seen an outpouring of public and political concern about its potential for facilitating societal decay, particularly regarding influences on children. Furthermore, fears about changing sexual morals or deviant sexual behavior have accompanied most of these technological outcries. Therefore, recent uproar about sexually explicit images, stories, and discussion available via computer networks, what Mike Godwin of the Electronic Frontier Foundation has called "the great Internet sex panic of 1995" is not surprising. Nevertheless, this panic is important because its influence on government attempts at regulation and public use

[325] Fisher William, Benkler Yochai, Brackley Rebecca & Sarah Ma, Freedom of Expression on the Internet, Internet Law Program, Berkman Center for Internet & Society, available at http://cyber.law.harvard.edu/ilaw/mexico_2006_module_4_freedom , visited on 6 Dec 2006.

of computer networks pose potentially dangerous restrictions on online communication behavior[326].

Policy makers and researchers that attempt to treat the sexual content of all of these media as mere "cybersex" or "cyberporn" may ultimately encourage regulatory efforts based on inaccurate assumptions about the pervasiveness, intrusiveness, or social effects of very different content. For example, most political and public concern about sex-related materials has centered on pornographic visual imagery, despite evidence that it is only a small part of online sexual content. Unfortunately, where social science might have served to illuminate the public about online imagery, conflating findings and misrepresented data in Marty Rimm's study of download patterns of images from private "adult" BBSs and readership data for a small subset of Usenet newsgroups unfortunately has only served to cloud the debate.

Everyone agrees that children interests have to be protected but at the same we should not make an attempt to harm the free speech interest of adults. Drawing a line between 'harmful material to children' and adults right to such kind of material is a very difficult one and appropriate policies have to be evolved through consensus among net users to achieve this otherwise total governmental regulations becomes inevitable.

[326] Mullin Imrich Dorothy, The First Amendment and the Web: The Internet Porn Panic and Restricting Indecency in Cyberspace, available at http://www.library.ucsb.edu/untangle/mullin4.html , visited on 25 May 2006