broad authority to enforce a huge range of law, the nation no longer can afford

Mr. Burnham, an award-winning investigative reporter, formerly with the New York Times is the author of the recently published "Above the Law" (Scribner), on which this article is based.

nal administrative records of the department suggests that it was not an exception, and that the Justice Department frequently makes its discretionary decisions on the basis of the class and position of the individual target, as well as the category of the crime.

In fiscal year 1994, for example, the

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CIVIL LIBERTIES *By Harvey A. Silverglate*

Cyber Speech at Risk

RECENT WEEKS have not been kind to the First Amendment's free speech and free press guarantees in the spheres of computerized electronic communications (the Internet) and broadcast radio and television.

The most recent blow was the overwhelming passage by Congress of the 1996 Telecommunications Reform Act, which President Clinton signed with some reservations as to the constitutionality of the speech restrictions. The president wasn't alone in his reservations. Civil libertarians, computer communications experts and enthusiasts and people in a wide variety of fields have been taken aback by the scope of the Communications Decency Act provisions of the final omnibus legislation. Overnight, the federal government transformed the newest and freest medium of communication into the most heavily censored.

In concept, the legislative tool for accomplishing this revolution was simple.

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In addition to maintaining for the Internet the same ban on transmission of "obscene" material that already applies to all media, the act criminalizes the transmission of "indecent" speech or images to persons younger than 18 years of age. Indecency is defined as any communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.

The problem with this definition is that it makes no exception for materials that have serious artistic, literary, scientific and other redeeming social value. Under traditional obscenity doctrine, as spelled out by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), any written or graphic materials that have such value are accorded constitutional protection (and hence are not obscene), even if they are offensive under community standards. In an effort to insulate the indecency ban from constitutional attack, however, the Telecommunications Act has limited it to the communication of offensive materials to minors.

The history of the television and radio indecency ban shows how destructive it would be applied to the Internet.

The problem is that, because of the structural and

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Let Parents Control Use of Internet

['SPEECH' FROM PAGE A19]
technical nature of the Internet, it is virtually impossible for a common carrier or content provider to keep minors from gaining access to materials available to adults. This being so, the legislation is likely to have a "dumbing down" effect; it will restrict all communications on the Internet to a level suitable for children.

Lessons of History

The history of the indecency ban that applies to broadcast radio and television demonstrates how and why the ban on Internet indecency will be so destructive to free speech. Pursuant to the Communications Act of 1934, the Federal Communications Commission banned "indecent" speech on broadcast radio and television during the day, when children were awake. Federal jurisdiction over the broadcast medium was predicated not only upon its interstate commerce aspect, but also on the theory that, in the early days, the number of broadcast channels was limited and hence the medium had to (or at least could) be heavily regulated in the public interest.

If the government asserts control over Internet indecency, there will be a giant hole in the First Amendment.

A 1978 challenge to the constitutionality of the indecency ban failed in *FCC v. Pacifica Foundation*, 98 S. Ct. 3026; the Supreme Court upheld the FCC's penalty for the broadcast of a satiric monologue by George Carlin that featured "seven dirty words." Radio and television obviously were not safe for daytime adult satire.

In 1989, encouraged by *Pacifica*, Congress enacted the "Helms Amendment," which sought to expand the ban on broadcast indecency to 24 hours per day. That total ban was held unconstitutional by the U.S. Circuit Court of Appeals for the District of Columbia in 1991 in *Action for Children's Television v. FCC*, 932 F.2d 1504, on the ground that since children are asleep late at night, the FCC must reestablish the "safe harbor" abolished by the amendment—a period from midnight until 6 a.m. during which indecent material could be broadcast. The plaintiffs thought it was insufficient, but the Supreme Court Jan. 8 denied review.

While a limited safe harbor is, of course, better than a 24-hour ban, the broadcast indecency rule still remains an obstacle to adult-level broadcasting. Among the plaintiffs was the poet Allen Ginsberg (for whom, I should disclose, I acted as co-counsel), whose masterpiece, "Howl," could no longer be read on daytime radio on the Pacifica radio stations, which annually had conducted such readings on the poem's publication anniversary. Indeed, it was Mr. Ginsberg's receipt of a letter from Pacifica on Oct. 1, 1987, that caused him to join the lawsuit.

Although the Supreme Court denied review of the *Action for Children's Television* case, earlier it had given broadcast free-speech advocates some encouragement in *Sable Communications v. FCC*, 492 U.S. 115, a 1989 "dial-a-porn" case involving telephonic communications. Any ban on adult speech under the guise of protecting children, ruled the court, had to be accomplished by the least restrictive means. This doctrine was the legal basis for requiring a safe harbor for broadcast indecency. However, the court may yet offer some guidance in a case argued on Feb. 21, concerning indecency legislation aimed at cable television. *Denver Area Educational Telecommunications Consortium v. F.C.C.*, 95-124.

Precedent Ignored

The new legislation has ignored this precedent: Congress' Internet indecency ban does not adopt a least-restrictive-means mechanism. Presumably this is because it is not clear that anything made available on the Internet could be withheld from a computer-literate minor. Unlike television broadcasting programs and specialized telephone services, the Internet is everywhere, at all hours of the day and night. Software is available to facilitate parental control in the home, but Congress seems not to trust parents to supervise their children's activities.

The American Civil Liberties Union has filed suit on behalf of 20 plaintiffs, seeking to get the indecency provisions of the Telecommunications Act declared unconstitutional. The ultimate decision surely will be made by the Supreme Court. The court will be asked to decide whether the indecency standard is too vague or too broad to withstand constitutional scrutiny. The more fundamental question to the court, however, will concern where the burden must rest for keeping adult materials away from minors. If the government is to do the job and, hence, have the power, it is hard to see how a narrowly tailored regulatory scheme can be found to keep such material from children but allow it for adults.

This would mean that for the first time in First Amendment history, adults would be deprived of non-obscene material simply because it is considered unsuited to minors and there is no practical way of keeping it out of young hands.

On the other hand, the court could decide, at long last, that the job of determining children's viewing, reading and communicating habits is best left to parents, and that the First Amendment rights of the nation's entire adult population need not be sacrificed wholesale in the government's quest to create an intellectual environment considered "safe" for children. Let us hope the courts at long last will see that unless this task is returned to parents, the government will exercise the power to act as parent to all of us, and a giant hole will have been carved in the First Amendment. NLJ

9th Circuit Split Would Be Premature

['CIRCUIT' FROM PAGE A19]
implemented controls.

Supporters of S. 956 claim that, as a result of California's size, population density and economy, a California philosophy permeates the court, and the number of California cases and judges generally dominates the judicial system of the Pacific Northwest.

These complaints apparently reflect proponents' discontent with the 9th Circuit's decisions in fields such as natural resources law. Perhaps the most prominent example of this is precedent in which the court prevented logging in old-growth forests to protect the spotted owl. Proponents suggest that a decision such shrunken 9th Circuit. For example, the new 9th Circuit would have an unfavorable ratio of judicial panels to cases. Each year, panels of the new 9th Circuit would have to resolve several hundred more cases than those of the new 12th Circuit. Thanks to the overwhelming population size and density of California, the new 9th Circuit would essentially be a one-state circuit.

Bill supporters claim a California philosophy permeates the court because of the state's size and population.

As an immediate practical matter, the critics also claim that dividing the 9th a reputation as a court that has experimented with promising ways to improve the system. For instance, the court has been an acknowledged leader in the use of technology. Bifurcation might change all this.

Dividing the 9th Circuit would send a national message that this is a good way to institute reform, before it has been proven essential and before all alternative methods have been fully examined. This precedent could encourage further appeals court splits