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The First Amendment in Cyberspace: No Place for Analogies

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Introduction

In the wake of the Littleton, Colorado high school tragedy, the Internet is under more scrutiny than ever. In a desperate attempt to find a reason behind such a senseless act, the media and the public have been looking to the influences on teenagers' lives. This searching for an answer has drawn attention to the supposed influence of song lyrics, video games, movies, and especially the Internet.[1] A Gallup poll reported by MSNBC states that 82 percent of those surveyed thought the Internet deserved some blame for the killings, with 34% of those believing the Internet deserved "a great deal of the blame." [2] While it is arguable that the Internet may have actually helped avert the tragedy,[3] the fear surrounding the Internet has only been exacerbated.

This fear of the Internet is not new. Until the killings in Littleton, most of the concern has been about pornography and its availability to children. These fears, of sex and violence, drive lawmakers to try and regulate the medium. Even though logic tells lawmakers that "free speech doesn't cause massacres," [4] there is a desire to respond to the fear of constituents, who want a simple solution to society's ills. In the recent past, television was seen as the corrupting influence, now the Internet has taken its place. Because parents and the government generally do not understand the medium, nor can they keep up with its evolution, the goal is to regulate it and therefore make it more predictable and manageable. However, as little as is understood about the revolutionary medium of the Internet is as little as is understood about how or if to regulate it.

As judges and legislators struggle to adapt existing legal standards to the revolutionary medium of cyberspace, much of the discussion has focused on finding an appropriate analogy from the familiar to apply to the unfamiliar realm of the Internet.[5] This paper proposes that no other medium provides an appropriate analogy from which to build First Amendment law and jurisprudence of the Internet. The Supreme Court, following its context-specific approach, can develop jurisprudence fitting the medium. It is this paper's proposition that government regulation of speech on the Internet is an unwarranted infringement on the First Amendment and should not be validated by the Court.

Part I describes the Internet. Its unique attributes and culture are discussed, as well as its potential contribution to the freedom of speech embodied in the First Amendment. Part II provides background as to how the Court has dealt with regulations

placed on other new technologies. The purpose is two-fold: to illustrate how the context-specific approach evolved, and to provide information about technologies that have been referenced to establish regulations and jurisprudence for the Internet. Part III addresses the analogies that have been applied to the Internet. It proposes that none of these analogies are appropriate for the unique medium of the Internet. Part IV offers a solution which invalidates any government regulation and provides the Internet with the highest degree of First Amendment protection. This part explains how the Internet can operate effectively without government intrusion, while maintaining the government objective of protecting users from unwanted materials.

I. A Description of the Internet

The Internet is a Unique Medium

The Internet is a "unique and wholly new medium of worldwide human communication." [6] Its content is "as diverse as human thought." [7] What was once a limited form of military communication [8] has spread to connect a web of users in approximately 140 countries world-wide. [9] This decentralized "Web" connects millions across the globe and has the potential to revolutionize the way that people interact and engage in dialogue. [10] The degree of flexibility that the Internet offers to our ability to communicate cannot be exaggerated. No other medium known to humankind is comparable. Because of its wholly unique character, laws from other modes of communication don't apply to the Internet. Because existing laws cannot be applied to this new phenomenon, the Internet will remake laws in its own image. [11]

Everyone as Publisher

The Internet is the participatoriest form of mass speech yet developed. [12] Through the Internet, the barriers to becoming a publisher are lower than ever before. [13] Economic barriers limit the number of speakers on other mediums. [14] Unlike radio, television, and mass-print mediums such as newspapers and books, a person with only a few hundred dollars can publish a message to people around the globe via the Web. [15] "[T]he Internet provides an easy and inexpensive way for a speaker to reach a large audience," [16] and therefore represents "the greatest self-publishing vehicle ever." [17]

Internet communication, unlike broadcasting, which is limited to a finite number of frequencies, is not scarce. [18] Furthermore, there is a trend towards consolidation of media in which the same entities own the newspapers, radio stations and television stations. [19] This results in the power to inform the American public resting in only a few hands. [20] However, through the Internet, anyone can be Time-Warner. [21]

Critics have complained that First Amendment protection is meaningless to those who have no effective means of communicating their ideas. [22] As the famous quote by A.J. Liebling goes, "Freedom of the press belongs to the man that owns one." [23] Unlike conventional forms of expression, the Internet has the ability to realize the ideals embodied in the First Amendment. [24] The Internet makes the possibility of "owning a press" a reality for more people than any other medium in history. For as little as

\$100.00,[25] a person with access to a computer can create and post a Web page on the Internet, reaching an audience of 150 million people.[26] Truly, this is the epitome of free speech envisioned by the forefathers. As the Court has realized:

"Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." [27]

This description is the embodiment of what many may envision when reading the guarantees of the First Amendment.[28]

The Interactive Nature of the Internet

Through the Internet, a high school student's Web page has potentially the same audience, 24 hours a day, as a commercial Website of a large company. In addition to giving the average person a platform for expression, the Internet creates parity among speakers.[29]

Due to the anonymous nature of many Internet transactions, people are not judged by usual standards. Such typical classifiers as age, gender, race, and socio-economic status are not obvious to the audience. This leaves the speaker to be judged by, and interacted with, based on the content of his or her speech. Martin Luther King's prophecy that one day people would be judged, not by the color of their skin, but by the content of their character[30] applies. Because of this potential for unlimited speakers, and the parity among them, the Internet has the potential to create permanent change in American culture, developing what Mike Godwin terms "radical pluralism." [31]

Other Attributes of the Internet

In addition to the revolutionary speech attributes discussed, the Internet presents its own culture, its own forms of regulation, and unique jurisdictional issues. The Internet represents a multitude of "communities." These communities are not bound by geographical limitations, but rather by commonalities of interests. Each community on the Internet sets its own rules.[32] The expectations of the community may be explained through its culture of through formal rules. Compliance is achieved by peer pressure or actual regulation by the community.[33]

The Internet is a decentralized "web," connecting computers around the world. Via the Internet, a message sent from one physical location can find its way to any other physical location, with no established barriers.[34] Therefore, there is no way for Internet speakers to control the geographical scope of their speech.[35] This leaves open the issue of what constitutes jurisdictional boundaries and how any single jurisdiction can apply its laws to a medium that defies geographical barriers.

These and many other unique attributes of the Internet lead to the conclusion that regulation of speech in cyberspace is unnecessary and impractical.

II. The First Amendment Applied to New Technologies

The test developed for First Amendment rights evolved into a "speech" and "not speech" model.[36] Forms of expression that were considered "speech" for First Amendment purposes were given a high degree of protection. Regulations affecting these free speech rights would be examined under a least-restrictive-means test.[37] Courts have refused to characterize other forms of expression as "speech" for First Amendment purposes.[38] The list of what is "not speech" has evolved, but currently includes libel, fraudulent advertising, obscenity, and child pornography.[39] "Fighting words" are technically not speech after the decision in *Chaplinsky*. [40] No cases have been decided on the basis of *Chaplinsky*, therefore, many scholars debate its continuing significance.[41] Government regulation of the "not speech" category is permitted, leaving those communications virtually unprotected.[42]

Not all protected speech has been treated identically. Currently, print media enjoys the highest degree of protection.[43] As new mediums of expression have developed, the Court has adapted its First Amendment jurisprudence with each new form of communication. It is clear from case law that very few mediums actually enjoy the protection of the least-restrictive-means test. What has evolved is a contextual analysis of each new medium, with characteristics of the medium dictating the level of First Amendment protection received.[44]

First Amendment Jurisprudence in the Broadcast Media

In 1978, the Court dealt with the issue of expression through the broadcast medium of the radio. In *FCC v. Pacifica Foundation*, the Court addressed the broadcast of an "indecent" (but not obscene) comedy routine.[45] The routine, entitled "Filthy Words" was created and performed by comedian George Carlin. It was a satire about profanity and why certain words were considered "dirty" and couldn't be said on television.[46] The words in question were used throughout the monologue. Prior to the 2:00pm airing of the radio broadcast, the station provided a warning.[47] One listener, driving with his young son, did not turn off the program after he realized its content, but listened to it in its entirety and subsequently filed a complaint with the FCC.[48] The FCC put the complaint in the station's file, where it would be considered when the station applied for a license renewal.[49] Subsequently, the FCC issued an order prohibiting the broadcast due to its indecent content.[50] The station appealed the order asserting a First Amendment right to broadcast the "protected" speech.[51] In 1978, the Court dealt with the issue of expression through the broadcast medium of the radio. In *FCC v. Pacifica Foundation*, the Court addressed the broadcast of an "indecent" (but not obscene) comedy routine.[52] The routine, entitled "Filthy Words" was created and performed by comedian George Carlin. It was a satire about profanity and why certain words were considered "dirty" and couldn't be said on television.[53] The words in question were used throughout the monologue. Prior to the 2:00pm airing of the radio broadcast, the station provided a warning.[54] One listener, driving with his young son, did not turn off the program after he realized its content, but listened to it in its entirety and subsequently filed a complaint with the FCC.[55] The FCC put the complaint in the station's file,

where it would be considered when the station applied for a license renewal.[56] Subsequently, the FCC issued an order prohibiting the broadcast due to its indecent content.[57] The station appealed the order asserting a First Amendment right to broadcast the "protected" speech.[58]

The Court accepted that the broadcast was "speech" and not an obscenity.[59] However, the Court did not apply the usual least-restrictive-means test. There was no discussion of a compelling government interest in protecting people from this type of speech (a usual requirement in First Amendment cases). Instead, the Court discussed reasons why it would treat the radio and broadcast media under a different, though undefined, standard.[60] According to the Court, the two major why broadcast media stands apart from print media are that it is a "pervasive" medium, and it is uniquely accessible to children.[61]

The pervasive element refers to the fact that people may be subjected to the medium unexpectedly.[62] The idea being that a television or radio may broadcast a program that the viewer finds offensive, but she will not know it until she has already viewed or heard some of the offensive material.[63] A warning, such as the one given by the radio station in *Pacifica*, is only helpful to those listeners that were tuned in at the beginning of the broadcast. Anyone tuning in at the middle of a program would not have the benefit of a broadcast warning. This differs from other mediums, such as telephone messages, where the listener is warned before she hears the message.[64]

Furthermore, this pervasiveness makes it readily accessible to children. A television or radio is likely to be on in the home, a public place, etc., and children may be inadvertently exposed to inappropriate material.[65] The overall rationale for heightened regulation is that the information is "out there" and there are no adequate protections to those that would be offended or harmed by hearing the speech.[66]

There are several problems with this analysis. The Court does not deal with the fact that a radio or television has to be actively turned on. It is not pervasive in the sense that it walks into your home and spontaneously broadcasts. A person must first make the choice to have the medium in their home, then make an active effort to turn it on.

There is also a problem with the "in public" idea. In *Cohen v. California*, the Court found that the words "Fuck the Draft" on the back of a war protestor's jacket, worn in a public place, were constitutionally protected speech.[67] A similar argument to that made in *Pacifica* about inadequacy of warnings was argued by the State in *Cohen*. [68] However, in *Cohen*, the Court responded to this argument about unwilling viewers by making it clear that their rights did not outweigh the speakers.[69] Furthermore, the Court explained that a viewer, after becoming aware that the message was offensive, could avert their eyes and avoid further contact with the "speech." [70]

The Court in *Pacifica* did not explain why the same was not true of broadcast media. Once the listener heard the first few offensive words from George Carlin's monologue, he could have turned the radio off and averted further contact with the

offensive message. As with radio, the jacket's message in *Cohen* provided no warning. As will be discussed, these two rationales for differential treatment of broadcast media and their inherent problems are applicable to the discussion of Internet regulation.

The Court expressed another basis for government regulation of broadcast media in *Red Lion v. F.C.C.*[71] In *Red Lion*, the government was allowed to regulate and base its licensing decisions on certain standards in the broadcast context by relying on the issue of scarcity of resources.[72] Further, the government has the authority to require a radio station to provide response time to parties "attacked," so they may exercise their First Amendment right to speech on a medium otherwise inaccessible to them.[73] As in *Pacifica*, the Court's rationale in *Red Lion* finds itself amidst the Internet debate.

First Amendment Jurisprudence and the Telephone

In *Sable Communications v. FCC*, the Court confronted the issue of "dial-a-porn" accessed via telephone and a law, which completely prohibited both indecent and obscene phone messages.[74] In *Sable*, the Court reverted back to the least-restrictive-means test.[75] In its analysis, the Court stressed the narrowness of its holding in *Pacifica* and distinguished the two mediums.[76] After examining the context of the telephone in comparison to broadcast media, the Court found that the regulation of "indecent" speech accessed through the telephone was unconstitutional.[77] While the Court did find a compelling interest in protecting minors from the speech, the regulation was not narrowly tailored to achieve that purpose.[78] Less restrictive means, such as credit card access could have protected minors and the government interest.[79]

In looking at the unique attributes of the telephone medium, the Court noted that access to "dial-a-porn" requires affirmative steps on the part of the person wishing to receive the communication.[80] This is contrasted with broadcast media, which may inadvertently be encountered by an unwilling audience.[81] Further, unlike the facts in *Pacifica*, a warning would be effective as it could be received prior to listening to any potentially offensive material.[82] The Court found that technological solutions, such as credit card access and user passwords were adequate to handle the screening of minors from the "dial-a-porn" audience.[83]

The Court, despite its continual recognition of a government interest in protecting minors from "harmful" material, accepted the fact that there was no "fail-safe" method.[84] Making several references to the 1957 case of *Butler v. Michigan*,[85] the Court stressed that the government may not reduce the information available to the adult population to only that which is suitable for children.[86] Further, regulating all information in order to protect minors would be analogous to "burning the house to roast the pig." [87]

The final issue that the Court addressed in dealing with the telephone medium was the problem of defining the "community standards." [88] One of the guidelines for the trier of fact put forth in *Miller* requires that the material be judged by an "average person, applying contemporary community standards." [89] This guideline is imperative

when distinguishing between merely indecent, therefore protected speech, and obscenity, classified as "not speech" for First Amendment purposes.[90] However, the service provider bears the burden of identifying each individual "community standard," or of tailoring the message received to that individualized standard.[91] Again, this is in contrast to broadcast media where the broadcaster knows what geographical area his message is reaching. As will be seen, much of the holding in *Sable* is pertinent in the analysis of the Internet as well.

First Amendment Jurisprudence and Cable Television

The Court again faced a new type of medium in cable television. The Court looked to cable television and whether it should be treated as another broadcast media such as the radio in *Pacifica*.^[92] Cable television, unlike conventional broadcast media, does not depend on airwaves for transferring its programming to the audience. A cable operator owns an physical network of cables that is uses to convey its programming to subscribers of the service.^[93] Federal law requires that cable operators provide a "leased channel" which unaffiliated third parties can lease. Local governments have required cable operators to provide "public access channels" in exchange for the city allowing cable to be installed under public streets.^[94] Because of the theoretical endless supply of cable and cable channels, the problems of scarcity inherent to broadcast are not applicable to the cable medium.^[95]

Despite the lack of scarcity, cable does present some similarities to broadcast media. Cable television is viewed on a television, which is in the home and accessible to children. However, cable also has attributes similar to the telephone and "dial-a-porn" in *Sable* as the person wishing to receive the message must take affirmative steps to receive the broadcasts. A cable viewer must subscribe to the service, and can decide what specific channels to receive. These differences between broadcast and cable, while not specifically analogized,^[96] led the Court to give increased protection to cable over regular television in *Denver Area Educ. Telecomm. Consortium v. FCC*.^[97]

Justice Breyer, who wrote the opinion for the Court, has received much criticism for his approach to cable.^[98] As opposed to using an analogy to another medium and the law developed for it, Justice Breyer noted that the medium was new and still evolving and therefore could not be properly categorized.^[99] He stated that "no definite choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a single rigid standard..."^[100] His refusal to put a new form of communication into a pre-established category is precisely the approach being advocated in this paper for the Court to take when dealing with the Internet.

First Amendment Jurisprudence related to Movie Theatres and Zoning

The Court faced zoning issues in *Young v. American Mini Theatres*.^[101] Upholding a Detroit zoning regulation which restricted where "adult" movies could be exhibited, the Court explained that the ordinance would not have a significant deterrent effect on protected First Amendment speech.^[102] The Court went on to explain that a

municipality may control the location of general movie theatres and other establishments as well; therefore the zoning of adult theatres does not create an impermissible restraint.[103] The Court held this to be the case despite the fact that the different zoning requirements were based on the contents of the movies.[104] The concept of "zoning" may not be unique to this medium as expressed in Justice O'Connor's concurrence in *ACLU v. Reno*, where she proposes possible "adult zones" within cyberspace.[105] The idea of having certain "adult zones" on the Internet, while appealing, is not currently feasible, as will be discussed.

III. Review of Analogies Applied to Internet and Why They Fail

Broadcast Applied to the Internet

The government, in its attempt to protect the Communications Decency Act.[106] (CDA) from unconstitutionality,[107] relied on *Pacifica* as the source authorizing government regulation of indecent speech on the Internet.[108] As Judge Dalzell explained, that argument mistakenly assumed that regulations appropriate to broadcast would be the same for the Internet.[109]

The Internet actually shares few commonalities with broadcast media. As has been discussed, the Internet offers an interactive media where individuals are both listener/viewer and speaker at the same time.[110] First Amendment jurisprudence for broadcast is based on a model of a passive "listener" being fed information from an outside source. As discussed, it was this invasive nature that the Court found would justify broadcast media's lower level of First Amendment protection.[111] This conclusion was based on the pervasiveness of the broadcast media and unique accessibility to children. As discussed, even these rationales were not sound.

While the Internet and home computers are "pervasive" in the sense that a growing number of households have access, the Court used "pervasiveness" to describe the fact that a listener could encounter content anywhere by accident, which also made it readily accessible to children.[112] In contrast, the Internet is not an "invasive" media.[113] Not only does a user have to bring a computer into the home and turn it on (as is true with radio and television), but "[i]t takes several steps to enter cyberspace," therefore information doesn't come into your home unbidden.[114] "Users seldom encounter content 'by accident'." [115] A person using the Internet usually gets information about a site's content while searching.[116] Overall, the Internet is a "choice-driven medium." [117] There is a unique level of control over the information received on the Internet that is unlike broadcast or other mediums.

Telephone Applied to the Internet

The case of *Sable Communications of Cal., Inc. v. FCC* provides some useful elements to the Internet analysis, as well as some important differences. As the Court explained in *Sable*, society doesn't want to keep adults who want information from being able to access it.[118] The Court was implicitly satisfied with the screening devices available such as credit cards and user passwords.[119] Additionally, the Court was

willing to accept that there was no fail-safe method to protect minors and that some "enterprising and disobedient young people" might access the information.[120]

Judge Sloviter, in *ACLU v. Reno*, used these attributes to argue that the best analogy for the Internet would be the telephone.[121] The ability to provide up-front warnings, as well as the availability of technological screening devices served as a basis for the analogy.[122] Similar to the judicial rationale in *Sable*, Judge Sloviter allowed for the possible, though unlikely fact that some minors might access "indecent" material on the Internet.[123] Due to this high degree of First Amendment protection, the use of the telephone analogy may seem appealing. However, while there may arguably be similarities, again the analogy should not be taken too far.

Telephone conversations do not resemble the asynchronous timing of e-mail communications. Information both received and sent via e-mail can be screened or filtered based on content, which is not possible with phone conversations. Additionally, the location of any speaker in a telephone conversation is ascertainable, while the location of a Webmaster and all of the users on the Internet is not. Furthermore, the telephone does not present multi-media capabilities.

More important to the legal analysis, credit-card verification is feasible in telephone communications, but not on the Internet. Credit-card verification is only available in connection to a specific commercial transaction or by paying a fee for the service.[124] Any company that would be selling telephone communications such as "dial-a-porn" would necessarily be able to pass on the cost of credit card verification to its customers.[125] However, not all parties on the Internet are of such a commercial nature. Internet non-commercial publishers include government agencies, educational institutions, advocacy groups, and individuals.[126] As the Supreme Court noted in upholding the lower court's finding of facts, the cost of credit card verification would be prohibitive to many who wish to communicate on the Internet, requiring them to shut down.[127].

Railroad/Superhighway Analogy and the Internet

After observing that the courts have struggled to find the appropriate legal analogy for the Internet, Judge Preska, in *American Libraries Ass'n v. Pataki*, compared the Internet to a highway or railroad, taking the "information superhighway" phrase rather literally.[128] This analogy was based on the observation that the Internet, like highways and railroads, are "instruments of commerce"[129] While this may have been a convenient analogy for Judge Preska to use in order to invalidate a New York Internet regulation on Commerce Clause grounds, it cannot even begin to accurately describe the complex and unique nature of the medium. This analogy deals with a single aspect of Internet communication information flow. It does not begin to adequately address the information itself, the individuals using the medium, or the interactive and other unique qualities.

Printing Press

At first glance, the printing press may seem like an acceptable analogy for First Amendment Internet jurisprudence.[130] However, this is due more to the fact that the printing press receives the highest degree of First Amendment protection of any medium, and not to any inherent similarities between the two contexts. The analogy is less than compelling for two reasons, the obvious dissimilarities between the two mediums, and the fact that print media is still subject to regulation.

While newspapers and other print media currently receive a high degree of protection, it is far from being complete. Examples of restrictions include time, place, and manner regulations which may be applied to the distribution of printed material.[131] School newspapers created by students may be edited by faculty.[132] As discussed, "non speech" categories such as obscenity can be completely banned from print.

Further, much of the analysis that the Court has used in differentiating between print (and its higher degree of protection) and broadcast media fall apart upon scrutiny. As discussed in *Red Lion*, part of the rationale for treating broadcast media different from print is due to scarcity.[133] Although technically true that airwaves are physically limited while print medium may be limitless, the difference holds up in theory only. Even the Court in *Miami Herald*, realized the fallacy in its own distinctions,[134] by recognizing that newspapers are monopolized by those very few that can afford to own one.[135] This creates a situation where the average person is unable to effectively contribute to the public dialog.[136] The result is a "marketplace of ideas ... controlled by the owners of the market." [137]

In reality then, much of the concern about the scarcity in broadcasting and the accompanying rationale for regulation can logically be applied to newspapers. While this is not the current trend of the Court, it is a possible development, and one that should be kept a far distance from the interpretation of the First Amendment in cyberspace.

Why No Analogy is Appropriate

As Justice Breyer explained in *Denver Area*, there is an inherent problem in trying to import law developed in different contexts into a new and changing environment.[138] In reference to cable television, Justice Breyer commented, "we believe it is unwise and unnecessary definitively to pick one analogy or one specific set of words now." [139] Those comments ring even truer in cyberspace. As the Court noted in *Reno v. ACLU*, previous cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet.[140]

Professor Sunstein explains that "for analogical reasoning to operate properly, we have to know that A and B are 'relevantly' similar, and that there are not 'relevant' differences between them.[141] The challenge is to determine whether differences are relevant.[142] As has been shown by the discussion of the various mediums that have been compared to the Internet, there is no "B" that is relevantly similar enough to the Internet ("A"). Because of these significant differences, reasoning by analogy is unworkable.

IV. Proposed First Amendment Jurisprudence for the Internet

Background: *Reno v. ACLU*

Some may argue that the decision in *Reno v. ACLU* should end the debate.[143] However, that decision was limited to the issue of the CDA. While some have concluded that the Court intends on assuring that the Internet remains unfettered by government regulation,[144] the holding in the case creates no such mandate. The Court struck down the CDA based on the fact that it was facially overbroad.[145] The terms used in the Act, "patently offensive" and "indecent," were considered vague,[146] and the statute not narrowly tailored to the government's proffered interest of protecting children.[147] That was as far as the holding went.

As seen by the recent decision in *Apollomedia Corporation v. Reno*, the Court makes no such mandate that the Internet will be regulation free.[148] In that case, the Court upheld the part of the CDA that prohibited "obscene" communications via e-mail.[149] It is imperative that the Court re-examine its First Amendment jurisprudence surrounding the Internet before it continues down this slippery slope it started in April.

The appropriate jurisprudence for the Internet is found not in the Supreme Court's decisions, but alluded to by the district court in *ACLU v. Reno*. As that court recognized, the "Internet deserves the broadest possible protection...."[150] Recognizing the potential of the Internet in comparison to print media, Judge Dalzell commented that "If 'the First Amendment erects a virtually insurmountable barrier between government and the print media' (quoting Justice White in *Miami Herald*), even though the print media fails to achieve the hoped-for diversity in the marketplace of ideas, then that "insurmountable barrier" must also exist for a medium that succeeds in achieving that diversity." [151] Judge Dalzell goes on to allude to an even higher standard of protection for the Internet, commenting that in comparison to newspapers, the Internet "should receive at least the same protection." [152]

Context Approach

Mandating a regulation-free Internet is completely consistent with the First Amendment jurisprudence of the Court to date, and requires no false analogies to other mediums. Using the Court's own context-specific approach, the analysis leads to the conclusion that the medium requires no regulation, and therefore, any attempt to do so should be invalidated. The Internet and its users, unfettered by government interference, are able to fulfill the promise of the First Amendment while at the same time protecting the interests that are considered important by the government and the Court.

There is no need to revamp all of First Amendment jurisprudence, as suggested by Stephen Jaques, in order to provide the Internet with the highest protection possible.[153] A medium-specific approach takes into account the individual technology and finds the proper "fit" with First Amendment values.[154] It is specifically the differences between the Internet and other mediums such as broadcast, that would allow a revolutionary

jurisprudence to be applied. By asking the Court to overturn decades of medium-specific analysis, Jaques provides little realistic guidance for the development of the law.

Under the current least-restrictive means analysis, the least restrictive means that the government can employ in order to achieve any child protection goals is to leave the Internet unencumbered by regulation, and this is all the Court should permit. There currently exist, and continue to develop, new technologies which allow individuals to control what's accessible to their children, which solves the issues concerning legislators in a less intrusive way than regulation.[155] Following this context-specific approach, it will be shown that Internet regulation 1) should not be allowed, and 2) is unworkable.

A. Government Should Not Be Allowed to Regulate the Internet *Government Regulation Hurts the Medium*

Government regulation of the Internet is more likely to interfere than encourage the free exchange of ideas.[156] This is primarily due to the fact that lawmakers don't understand the Internet.[157] In the words of John Barlow, a member of the "Cyber Elite," "What we have here is attempted governance by the completely clueless, in a place they've never been, using tools they don't possess." [158] It is this lack of understanding that led Congress to pass the semi unconstitutional Communications Decency Act. It is this same lack of understanding that causes the courts to struggle with finding an appropriate frame of reference from which to view the medium

Against the urge to regulate, is the need to protect the autonomy that the Internet confers to the average citizen.[159] This autonomy outweighs any government interest in controlling the medium. As even the Court affirms, "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefits of censorship." [160]

No Legitimate Interest in Regulation

Much of the impetus for government regulation of the Internet stems from the "Great Cyberporn Panic." [161] As Mike Godwin asserts, the American public is nervous about sex, nervous about children, and nervous about computers. [162] The combination of these elements creates often unjustified anxiety about the Internet and its potential to do harm. [163] This public fear was exacerbated by a Time magazine cover story in 1995.

On Monday, July 3, 1995, the cover of Time magazine portrayed a young boy staring in horror at his computer screen, [164] in conjunction with the cover story entitled, "Marketing Pornography on the Information Superhighway." This article created such serious concern about the Internet that it was actually read into the Congressional record during the CDA hearings by Senator Charles Grassley (R-Iowa). [165] The story was based on a law review article of the same name which had been published in the Georgetown Law Journal. The law review article, written by undergraduate student Marty Rimm, was later found to contain extreme inaccuracies. [166] Only three weeks

later, in its July 24th issue, Time had to disclaim much of its cover story, admitting that there were serious concerns about the study and that it "grossly exaggerated the extent of pornography on the Internet." [167] This was a perfect example of the media and the public reinforcing common fears and misperceptions.

As John Barlow, co-founder of the Electronic Frontier Foundation, explains, each government is using its own "cultural bogeymen" as a rationale for regulating cyberspace. [168] In Germany the focus is on skinheads, in Iran it is on infidel conversations and inappropriate contact between the sexes, and in the United States the bogeyman is pornography. [169] In the aftermath of the shooting at Columbine High School in Littleton, Colorado, it is likely that youth violence will take its place next to pornography as the target of fear.

While much of the concern is unwarranted, what valid concerns do exist regarding the content of communication taking place on the Internet can be remedied within the medium itself. Individuals are capable of protecting themselves from any unwanted material available on the Internet. Following the model of the "marketplace of ideas," individual users and service providers can effectively control the information they encounter in cyberspace. Therefore, the government should not be permitted to do for people what they are able to do for themselves. Government regulation is harmful, as discussed, and unnecessary, as will be seen.

Internet "Communities" and Community Standards

Voluntary controls act as the first level of defense on the Internet. Internet communities develop their own standards for what is appropriate within a specific group. [170] The idea is that norms develop and people learn to communicate within the accepted parameters or they leave in search of communities more compatible with their communicative objectives. [171] This is similar to groups in the physical world, where usually no speech regulation takes place unless laws are broken.

A new buzzword on the Internet - "netiquette" shows the organization and influence that communities on the Internet have with their members. Netiquette is a set of rules for properly interacting online. [172] The rules, while informal, are now widely distributed both online and in the "real-world" through books. These rules are comparable to ones in society that keep most individuals behaving in a socially acceptable manner without any government regulation forcing one to do so. Beyond this voluntary compliance, Internet Service Providers act as a second layer of defense.

Internet Service Providers

Most issues that arise within the Net can easily be handled at the ISP [Internet Service Providers] level. [173] ISP's must respond to the demands of their users in order to attract and retain customers. [174] It is precisely this marketplace approach that will ultimately determine what is and is not available on the Internet. While there is a market for objectionable information, different Internet Service Providers will be able to cater to

the tastes of their clientele, much like subscribers to magazines. If the free market is allowed to work, there will be providers that exert no editorial control and others that cater to specific audiences.[175] Those individuals that break the rules of a specific ISP will be banned from that service.[176] Therefore, individuals will be able to protect themselves from information they do not wish to receive without the government stepping in to regulate.[177] In addition to exerting control over information via the marketplace approach, individuals can exert control during their personal use of the Internet

User Controls/Filtering

There is currently filtering software available that allows the user to filter any material they do not wish to receive. These programs, such as Cyber Patrol and Net Nanny, provide two ways for the user to control what she downloads off the Internet. One is through the use of software and updates that provide the user with pre-set lists of objectionable sites by category that can be filtered-out, subject to the modification of the user. A second type of filtering allows the user to input a list of words or phrases, and sites in which they appear will not be transmitted to the filtering computer.[178] Filtering services may use either or both of these methods.

Cyber Patrol provides an example of the first type of program. Weekly "CyberNO" lists can be downloaded off the Web and contains categories of sites including nudity, profanity, drugs, violence, and others.[179] The user decides which categories will be restricted, and can override the program by adding or deleting certain sites. The program is capable of creating different user profiles for different people in a household and can also control how long a specific individual may stay online.

Net Nanny uses lists of "bad" words or phrases, which can be completely customized by the user.[180] When a Website or news-group contains one of the restricted terms, that site cannot be downloaded to the computer using the program. In addition to filtering incoming information, Net Nanny is able to block outgoing information such as names, addresses, and credit card information.[181]

While none of these services are currently foolproof, they do provide an effective means of controlling information coming in to and going out of a family's home computer.

Other Services

While not currently as prevalent as filtering software, there are other user controls that exist or are being developed. Many Websites are part of a volunteer rating system, developed by the Recreational Software Advisory Council in 1996.[182] By answering a questionnaire, sites receive ratings from 0 to 4 in the categories of sex, nudity, language, and violence.[183] The service has rated at least 35,000 Websites, and the ratings are posted directly on the sites themselves.[184] In the future, these ratings may become part

of filtering or other user services.[185] However the best level of protection against children encountering unwanted material on the Internet is parental supervision.[186]

Other Laws Available

Individuals are capable of protecting themselves from unwanted speech on the Internet. Without government regulation, individuals still have civil remedies available for problems such as copyright infringement or violation of trade secrets. If an Internet encounter progresses from online speech to the physical world, there are criminal laws available for protection of the citizenry.[187] While the Internet may be used as a means of communication by pedophiles or stalkers, the Internet neither created the problem nor forced the individuals to act on their criminal tendencies. There are no statistics showing that the Internet has in any way increased the overall numbers of child molestations or stalkings. If the Internet were not available, these criminals would contact their victims in conventional ways. If anything, it can be argued that the Internet acts as a line of first defense before any physical contact is made. Assuring that the speech on the Internet remains regulation-free in no way diminishes the criminal punishment to those who violate societal norms.

B. Regulation of the Internet is Unworkable

"Cyberspace is naturally anti-sovereign." [188] Its decentralized nature, coupled with its global interconnectedness, place it beyond the scope of traditional laws.[189] It is a unique medium with a spirit that defies terrestrial governance.[190] Therefore, any attempt to apply traditional government regulation to the medium will necessarily be unsuccessful and should not be validated.

Law Unable to Keep Up

In addition to the reason that government regulations are unwise and unwarranted, the legislature faces practical problems related to creating a standard for an ever-changing medium. The technology of the Internet is moving at an amazing speed, while legislatures and courts take time to develop the law.[191] When making fact-based legal decisions regarding the Internet, the courts are faced with facts that may have changed between briefing and trial, or may change following the decision. For example, in 1997, the Court in *Reno v. ACLU* noted that 40 million people were on line; [192] current estimates have the number of Internet users approximating 150 million.[193] In addition, the filtering technology has steadily evolved, as have many other user controls. As Nesson and Marglin, in their article' insightfully ask "What is the relevant moment in time at which facts about the Internet are determined?" [194] Even with acceptable laws of general applicability, such as copyright, the unique attributes of the Internet have created new complications such as determining jurisdiction and identity of parties.

"Zoning" Not Feasible

Contrary to Justice O'Connor's assertion in *Reno v. ACLU*, the Internet is not readily zoned like a municipality in *American Mini Theatres*. As Justice O'Connor remarked, the Court has only upheld zoning provisions in the physical world, and the "electronic world is fundamentally different." [195] Zoning would theoretically entail having "adult" or other classifications of "zones" on the Internet. Individuals would have to meet the requirements of a zone in order to be able to access a Website, newsgroup, or others within that specific zone. However, this zoning would not alter the age verification problems already discussed. Without this cost-prohibitive step, users may remain anonymous, therefore making it impossible for such "zoning" to take place. [196]

Community Standards

As expressed in *Sable*, it is practically impossible to have a consistent community standard when your audience cuts across a variety of communities with vastly different ideas regarding what is acceptable. [197] Because the Internet is international, it is virtually impossible to create community standards in the traditional sense. The traditional community standards tend to reflect the norms and values of those living in a specific geographical region. There are different moral standards in different communities, and the Internet reaches them all. [198]

Obsenity

In *Reno v. ACLU*, the Plaintiff's conceded, [199] as have many First Amendment scholars, that the government can regulate obscenity on the Internet. This concession comes from the fact that obscenity has been unquestionably outside the category of "speech" since *Roth v. United States*. [200] This means that any regulation of obscenity requires no justification. [201] A court's finding of obscenity does, however, require that it be defined as such under a "community standard." [202] As has been discussed, the Internet defies traditional geographical community boundaries. This makes it virtually impossible for Web pages to reach the "community standard" prong of the Miller test and therefore be labeled "obscene." [203] Obscenity is not definable, and therefore not subject to regulation, in cyberspace. [204]

The doctrine of overbreadth further complicates the application of obscenity laws to the Internet. An overbroad statute is one that punishes protected speech in addition to the unprotected speech it targets. [205] Due to the infinite number of communities represented on the Internet, statutes aimed at obscenity will necessarily reach communication that, while obscene in the community that passes the statute, will not be defined as obscene in another community. In order to avoid the problem of overbreadth and unconstitutionally punishing protected speech, a statute would have to be as permissive as the most permissive community in existence. Because it is neither feasible, nor necessary, the Internet should be free from obscenity laws.

Conclusion

The unique attributes and culture of the Internet do not allow for any relevant analogies to other technologies the Court has faced. Following the Court's own context-specific approach, the Internet's potential contribution to the freedom of speech embodied in the First Amendment should be encouraged. The Court should invalidate any attempts at government regulation of speech on the Internet as it is both unnecessary and impractical.

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[FN1] *See generally* Alan Boyle, MSNBC: *On the Watch for Web Warning Signs*, (visited April 26, 1999) <<http://www.msnbc.com/news/262940.asp>> visited May 15, 2000.

[FN2] *See id.*

[FN3] Part of the concern surrounding the teenagers that did the shooting in Littleton was the fact that they maintained at least one Website that contained threats against other students and bomb-making information. *See id.* It is arguable that the existence of this site, which was reported to police, could have helped officials confront the individuals and prevent the massacre.

[FN4] Boyle, *supra* note 1 (quoting Charles Platt of *Wired Magazine*).

[FN5] *See American Libraries Ass'n. v. Pataki*, 969 F.Supp. 160, 161 (S.D.N.Y. 1997).

[FN6] *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (Stevens, J., concurring) (quoting *ACLU v. Reno*, 929 F.Supp. 824, 844 (E.D. Pa. 1996)).

[FN7] *ACLU*, 929 F.Supp. 824, 842 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

[FN8] The Internet began in 1969 as the military program "ARPANET," designed to allow defense entities to communicate during times of war. *See Reno v. ACLU*, 521 U.S. at 849-50.

[FN9] *See* Leander Kahney, *Net Users to Top 200 Million*, *Wired News* (April 8, 1999) <<http://www.wired.com/news/technology/,0,1282,19020,00.htm>>

[FN10] *See* JOHN BROCKMAN, *DIGERATI: ENCOUNTERS WITH THE CYBER ELITE* 140 (1996) (interview with David R. Johnson)

[FN11] *See id.*

[FN12] *See ACLU v. Reno*, 929 F.Supp. at 881. (Dalzell, J., supporting).

[FN13] BILL GATES, *THE ROAD AHEAD* 123 (1995).

[FN14] See *ACLU v. Reno*, 929 F.Supp. at 880 (Dalzell, J., supporting).

[FN15] BILL GATES, *supra* note 13, at 94-95. The Web is the nickname for the World Wide Web, where individuals can "publish" Websites by signing up with a host service and creating their own individual site that will be available to all other users of the Web.

[FN16] *ACLU v. Reno*, 929 F.Supp. at 843.

[FN17] BILL GATES, *supra* note 13, at 123.

[FN18] See MIKE GODWIN, *CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE* 71 (1998).

[FN19] See *ACLU v. Reno*, 929 F.Supp. at 880 (Dalzell, J., supporting).

[FN20] See *id.*

[FN21] See Brockman, *supra* note 10, at 271 (interview with Bob Stein).

[FN22] See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* ¶16.18 at 1038 (5th Ed. 1995).

[FN23] GODWIN, *supra* note 18, at 11 (quoting A.J. Liebling).

[FN24] See BROCKMAN, *supra* note 10, at 116-120 (interview with Mike Godwin).

[FN25] There are some Website hosting services, such as geocities.com that offer free Website hosting (and support this service by selling advertising space on individuals' Websites). Currently, it costs at a minimum \$70.00 to register a domain name with InterNic. Network Solutions: Web Address Registration <http://www.networksolutions.com/catalog/domainname/> (visited 3/21/00).

[FN26] See Leander Kahney, *Net Users to Top 200 Million*, *Wired News* (April 8, 1999) <<http://www.wired.com/news/technology/0,1282,17020,00.htm>> (quoting Vint Cerf, chairman of the board of trustees for the Internet Society).

[FN27] *Reno v. ACLU*, 521 U.S. at 870

[FN28] See generally U.S. CONST. amend. I. ("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." U.S. CONST. amend. I)

[FN29] See *ACLU v. Reno*, 929 F.Supp. at 881 (Dalzell, J., supporting)

[FN30] Martin Luther King, Jr., Pilgrimage to Nonviolence, in *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* 35, 36 (James M. Washington ed., 1986)

[FN31] GODWIN, *supra* note 18, at 14.

[FN32] *See generally* ESTER DYSON, Release 2.0 31-53 (1997).

[FN33] *See generally id.*.

[FN34] *See ACLU v. Reno*, 929 F.Supp. at 831.

[FN35] *See id.* at 878 (Dalzell, J. supporting).

[FN36] *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1022 (13th Ed. 1997).

[FN37] *See* NOWAK & ROTUNDA, *supra* note 22, ¶16.10 at 1002 ("Even if the legislative purpose is legitimate, and one of substantial government interest, the government cannot pursue it by means that broadly stifle personal liberties if the end can be more narrowly achieved.").

[FN38] *See* GUNTHER & SULLIVAN, *supra* note 36, at 1022.

[FN39] *See id.*

[FN40] 315 U.S. 568 (1942)

[FN41] *See* NOWAK & ROTUNDA, *supra* note 22, ¶16.39 at 1112.

[FN42] NOWAK & ROTUNDA, *supra* note 22, ¶16.57 at 1196, discussing *Roth v. U.S.*, 354 U.S. 476 (1956).

[FN43] *See generally*, *Miami Herald Publ'g. Co. v. Tornillo*, 418 U.S. 241 (1974).

[FN44] *See ACLU v. Reno*, 929 F.Supp. at 873 (Dalzell, J., supporting).

[FN45] *See FCC v. Pacifica Foundation*, 438 U.S. 728 (1978). *See id.*

[FN46] *See id.* at 729-730.

[FN47] *See id.* at 729.

[FN48] *See id.* at 730.

[FN49] *See id.*

[FN50] *See id.* at 732.

[FN51] *See id.* at 733.

[FN52] *See id.* at 744.

[FN53] *See id.* at 748-50.

[FN54] *See id.* at 748-49.

[FN55] *See id.* at 728.

[FN56] *See id.* at 748

[FN57] *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 127-28 (1989).

[FN58] *See id.* at 127.

[FN59] *See id.* at 127-128.

[FN60] *Cohen v. California*, 403 U.S. 15, 25-26 (1971).

[FN61] *See* NOWAK & ROTUNDA, *supra* note 22, ¶16.39 at 1114.

[FN62] *Id.*

[FN63] *See id.*

[FN64] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 376 (1969)..

[FN65] *Id.* at 390.

[FN66] *Id.* at 389

[FN67] *Sable*, 492 U.S. at 117 (dealing specifically with Section 223(b) of the Communications Act of 1934, as amended in 1988, 47 U.S.C.A. ¶223(b))

[FN68] *See id.* at 126. (requiring a compelling interest and narrow tailoring).

[FN69] *See id.* at 127-28.

[FN70] *See id.* at 131.

[FN71] *See id.*

[FN72] *See id.* at 128.

[FN73] *See id.* at 127-28

[FN74] *See id.* at 128.

[FN75] *See id.*

[FN76] *See id.*

[FN77] *See id.* at 129-130.

[FN78] 352 U.S. 380 (1957)

[FN79] *See id.* at 128.

[FN80] *See id.* at 127 (quoting *Butler v. Michigan*, 352 U.S. at 383).

[FN81] *See id.* at 125.

[FN82] *Miller v. California*, 413 U.S. 15, 24 (1973).

[FN83] *See id.* at 25.

[FN84] *See Sable*, 492 U.S. at 125-26.

[FN85] *See, e.g., Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, (1996).

[FN86] *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 733 (1996)

[FN87] *See id.* at 734.

[FN88] *Turner Broad. Sys., Inc. v. FCC*, 522 U.S. 622, 638-39 (1994).

[FN89] *Denver Area*, 518 U.S. at 741-42..

[FN90] *See generally Denver Area*, 518 U.S. at 760. (holding that while a cable operator could prohibit "patently offensive or indecent" materials from leased access channels, the same block on public access channels violated the First Amendment. Furthermore, the "segregate and block" provisions constituted a constitutional violation as well. *See id.*

[FN91] Jonathan Wallace & Michael Green, *Bridging the Analogy Gap: The Internet, the Printing Press and Freedom of Speech*, 20 SEATTLE U. L. REV. 711, 731 n.99 (1997)

(citing Justice Kennedy's dissenting opinion in *Denver Area*) - (analogy is a "responsibility" explain this last parenthetical more).

[FN92] *See Denver Area*, 518 U.S. at 742.

[FN93] *Id.* at 741-42.

[FN94] *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

[FN95] *See id.* at 60.

[FN96] *See id.* at 62..

[FN97] *See id.* at 70 (distinguishing zoning ordinances from impermissible content-based regulation by saying the regulation was not based at the social, political, or philosophical message).

[FN98] *Reno v. ACLU*, 521 U.S. at 889((O'Connor, J., concurring).

[FN99] 47 USCA ¶223(b).

[FN100] *Id.* at 889.. (discussing provisions of the Communications Decency Act that were in question prohibited "indecent" and "patently offensive" communications on the Internet.)

[FN101] *ACLU v. Reno*, 929 F.Supp. at 874 .

[FN102] *See id.*

[FN103] *See id.* at 843-44.

[FN104] *See Pacifica*, 438 U.S. at 748-49.

[FN105] *See Pacifica*, 438 U.S. at 748.

[FN106] *See Reno v. ACLU*, 521 U.S. at 869.

[FN107] *ACLU v. Reno*, 929 F.Supp. at 844.

[FN108] *Id.*

[FN109] *See id.* (results or "hits" are listed along with a brief description of the site).

[FN110] *See GODWIN*, *supra* note 18, at 71.

[FN111] *See Sable*, 492 U.S. at 128

[FN112] *See id.*

[FN113] *See id.* at 130.

[FN114] *See ACLU v. Reno*, 929 F.Supp. at 851-52.

[FN115] *See id.*

[FN116] *See id.* at 852.

[FN117] *Reno v. ACLU*, 521 U.S. at 856.

[FN118] *See id.*

[FN119] *See id.* at 853.

[FN120] *See id.* at 856 (citing *ACLU v. Reno*, 929 F.Supp. at 846).

[FN121] *See American Libraries Ass'n v. Pataki*, 969 F.Supp. 160, 161 (S.D.N.Y.).

[FN122] *See American Libraries*, at 173.

[FN123] *See, e.g., Wallace & Green, supra* note 91, at 712 (stating that the Internet is most similar to the printing press for free speech purposes).

[FN124] *See NOWAK & ROTUNDA, supra* note 22, ¶16.47 at 1142-43.

[FN125] *Id.* at 1154 (explaining *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) which permitted faculty editing of a student newspaper based on "pedagogical concerns").

[FN126] *See Red Lion Broadcasting v. FCC*, 395 U.S. 367, 376 (1969).

[FN127] *See generally Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 250 (1974).

[FN128] *See Miami Herald*, 418 U.S. at 250.

[FN129] *Id.*

[FN130] *Id.* at 251.

[FN131] *Denver Area Educ. Telecom. Consortium, Inc. v. FCC*, 518 U.S. 727, 740 (1996).

[FN132] *Id.* at 742.

[FN133] *Reno v. ACLU*, 521 U.S. at 870.

[FN134] Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 745 (1993).

[FN135] *See id.* at 745.

[FN136] *See, e.g.*, John J. McGuire, *The Sword of Damocles is not Narrow Tailoring: The First Amendment's Victory in Reno v. ACLU*, 48 CASE W. RES. L. REV. 413 (1998).

[FN137] *See id.*

[FN138] *See Reno v. ACLU*, 521 U.S. at 878.

[FN139] *See id.* at 877.

[FN140] *See id.* at 879

[FN141] *See generally Apollomedia Corporation v. Reno*, 19 F.Supp.2d 1081 (N.D.Cal 1998), *aff'd* by 1998 WL 853216 (April 19, 1999).

[FN142] *See id.* at 1092.

[FN143] *ACLU v. Reno*, 929 F.Supp. at 881 (Dalzell, J.).

[FN144] *Id.*

[FN145] *Id.* (emphasis added).

[FN146] Stephen C. Jaques, *Reno v. ACLU: Insulating the Internet, the First Amendment, and the Marketplace of Ideas*, 46 AM. U. L. REV. 1945 (1997) (suggesting that the Court do away with its current medium-specific approach).

[FN147] *See ACLU v. Reno*, 929 F.Supp. at 873 (Dalzell, J.).

[FN148] *See BROCKMAN, supra* note 10, at 137 (interview with David R. Johnson).

[FN149] *See Reno v. ACLU*, 521 U.S. at 885.

[FN150] *See BROCKMAN, supra* note 10, at 137 (interview with David R. Johnson).

[FN151] *See BROCKMAN, supra* note 10, at 14 (interview with John Perry Barlow).

[FN152] *See ACLU v. Reno*, 929 F.Supp. at 882 (Dalzell, J.).

[FN153] *Reno v. ACLU*, 521 U.S. at 885.

[FN154] GODWIN, *supra* note 18, at 206.

[FN155] *See id.* at 72.

[FN156] *See id.*

[FN157] *See* TIME, *supra*, July 3, 1995 (cover story)

[FN158] *See id.* at 207.

[FN159] *See id.* at 206.

[FN160] Philip Elmer-De Witt, *Fire Storm on the Computer Nets: A New Study of Cyberporn, Reported in a Time Cover Story, Sparks Controversy*, TIME, 57(July 24, 1995).

[FN161] *See* BROCKMAN, *supra* note 10, at 13-14 (interview with John Perry Barlow).

[FN162] *Id.* at 14.

[FN163] *See* DYSON, *supra* note 32, at 50.

[FN164] *See id.*

[FN165] Virginia Shea, *Netiquette*, (visited February 10, 1999)
<<http://www.albion.com/netiquette/introduction.html>>.

[FN166] DYSON, *supra* note 32, at 111.

[FN167] *See id.*

[FN168] *See* BROCKMAN, *supra* note 10, at 120 (interview with Mike Godwin)

[FN169] DYSON, *supra* note 32, at 111.

[FN170] *See* BROCKMAN, *supra* note 10, at 120 (interview with Mike Godwin)

[FN171] *See* Michael E. Ryan & Jennifer Triverio, *Internet Filtering: Net Guards*, PC MAGAZINE, May 4, 1999, at 273-78.

[FN172] *See id.* at 273.

[FN173] *See id.* at 276.

[FN174] *See id.*

[FN175] *See* DYSON, *supra* note 32, at 188.

[FN176] *See id.*

[FN177] *See id.*

[FN178] *See id.* at 189.

[FN179] *See* Ryan & Triverio, *supra* note 171, at 273.

[FN180] *See* *ACLU v. Reno*, 929 F.Supp. at 856-57.

[FN181] BROCKMAN, *supra*, at 13 (interview with John Perry Barlow).

[FN182] *See generally id.* at 13-14.

[FN183] *See generally id.* at 13.

[FN184] Charles Nesson & David Marglin, *The Day the Internet Met the First Amendment: Time and the Communications Decency Act*, 10 HARV. J. L. & TECH. 113, 131 (1996).

[FN185] *See* *Reno v. ACLU*, 117 S.Ct. at 2334.

[FN186] *See* Leander Kahney, *Wired News, Net Users to Top 200 Million*, (April 8, 1999) <<http://www.wired.com/news/technology/story/19020.htm>> (quoting Vint Cerf, chairman of the board of trustees for the Internet Society).

[FN187] Nesson & Marglin, *supra* note 184, at 114.

[FN188] *Reno v. ACLU*, 117 S.Ct. at 2353 (O'Connor, J., concurring).

[FN189] *See id.*

[FN190] *See generally* *Sable*, 492 U.S. at 125-26.

[FN191] *See* *New York v. Barrows*, No. 15872196 1998 N.Y. Misc. LEXIS 332, 346 (N.Y. App. Div. June 9, 1998).

[FN192] Bruce J. Ennis, oral arguments in *Reno v. ACLU*, 1997 WL 136253 (March 19, 1997).

[FN193] *See* *Roth v. U.S.*, 354 U.S. 476, 481 (1957)(cited in NOWAK & ROTUNDA, *supra* note 22, ¶16.57 at 1196.

[FN194] *See generally* NOWAK & ROTUNDA, *supra* note 22 ¶16.57 at 1196.

[FN195] NOWAK & ROTUNDA, *supra* note 22, ¶16.60 at 1202.(Support for this assertion is not found at this citation)

[FN196] *Id* (quoting *Miller v. Cal.*, 413 U.S. 15,24 (1973)).

[FN197] This is distinguishable from the decision in *Apollomedia* (upholding regulation of obscene e-mail messages sent "with the intent to annoy"). Even though the regulation pertains solely to e-mail, and not to the Web, it is unclear how it can be enforced due to the ability of users to send e-mail anonymously.

[FN198] *See* NOWAK & ROTUNDA, *supra* note 22, ¶16.8 at 996.