



Case Western Reserve Law Review

Volume 48 | Issue 2

1998

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Recommended Citation

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)

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COMMENTS

THE SWORD OF DAMOCLES¹ IS NOT NARROW TAILORING: THE FIRST AMENDMENT'S VICTORY IN *RENO V. ACLU*

*[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market*²

INTRODUCTION

Bill Jones, a fictional public school teacher in New York, had seen enough. Too many young girls were becoming pregnant during their puberty years. His frustration at his inability to spread the word of safe sexual practices led him to design a small informational page on the World Wide Web. Through this medium, Jones hoped to educate more boys and girls in their early years about how to practice safe sex by using street language he knew they would understand. He also hoped that the anonymity of the Web would allow more kids to access the information without any attaching stigma.

The citizens of Small Town were not impressed by Jones' noble goals. His use of "gutter language" and promotion of under-age sex offended the townsfolk. They felt that they alone had the

¹ In Greek mythology, the god Dionysus hung a sword by a single hair over the legendary courtier Damocles' head. Not knowing when or if the sword would fall, Damocles soon learned the precarious nature of happiness. See OXFORD CLASSICAL DICTIONARY (Simon Hornblower and Antony Spawforth eds., 3d ed. 1996). In First Amendment jurisprudence, laws which produce a chilling effect upon speech have often been analogized to the sword: "[T]he value of a sword of Damocles is that it hangs—not that it drops." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

² *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

right to educate their children in their own way, and that Jones' intrusion upon that right was inappropriate. The citizens decided to press charges in federal court because Jones had not taken adequate measures to prevent minors from accessing this "indecent" and "patently offensive" material. The fact that minors are actually the intended audience only exacerbated the seriousness of the offense. Jones would be fined, imprisoned, or both under the provisions of the Communications Decency Act, passed as part of the Telecommunications Act of 1994.³ Or would, that is, had this sword of Damocles not been invalidated by the Supreme Court in the Spring of 1997.

In *Reno v. ACLU* ("*Reno II*"),⁴ the Supreme Court struck down two portions of the Communications Decency Act ("CDA") and preserved the principals of the First Amendment in the Internet. In this unique case, the Court has made a decision which will impact Internet participants—domestic and foreign—as they espouse their ideologies, decry injustices and attempt to educate the masses. Not only have the values of the First Amendment been applied full force to the most diverse medium ever created, but the extension of these principals will for the first time have a direct effect upon non-citizens as they access the Internet and are privy to the unfettered wealth of information contained within.

This Comment will examine the Court's decision in *Reno II*. It will first look at the case itself and the statute at issue, and explore the ambiguities which led to the Court's decision. The Comment will then discuss the underlying First Amendment precedent which the Court used to justify striking down the law. Finally, the Comment will discuss the ramifications of the Court's decision, conclude that the impacts of this case are not confined to this country, and argue for continued broad First Amendment protections for the Internet.

³ The Communications Decency Act was passed as Title V of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C. (1996)).

⁴ 117 S. Ct. 2329 (1997) [hereinafter *Reno II*].

I. BACKGROUND

A. *The Communications Decency Act*

Underlying this case was the Telecommunications Act of 1996 (the "Telecommunications Act"),⁵ a far-reaching and unusually important piece of legislation. The Telecommunications Act was comprised of seven titles, most of which were designed to promote competition in over-the-air broadcasting, the local telephone service market, and the multichannel video market.⁶ These titles were the product of extensive committee hearings and the subject of reports prepared by committees in both the House of Representatives and the Senate.⁷ The primary purpose of the Telecommunications Act was to encourage "the rapid deployment of the new telecommunications technologies."⁸ The Telecommunications Act advanced its goals of competition and deployment of new technologies by loosening controls on media ownership, deregulating cable rates, and allowing phone companies, long-distance carriers, and cable companies to enter each other's businesses.⁹ Upon signing the Act into law, President Clinton said, "This is truly revolutionary legislation that will bring the future to our doorsteps."¹⁰

In contrast to the rather business-oriented titles, the Telecommunications Act's Title V attempted to curb the obscene, harassing, or otherwise wrongful usage of telecommunications facilities.¹¹ Known as the Communications Decency Act of 1996 ("CDA"), Title V banned such acts as harassing phone calls,¹² and required the development of the so-called "V-chip" to protect minors from violent and sexual images.¹³ More relevant to *Reno II*, two provisions of the CDA attempted to prevent "indecent" and "patently offensive" material from reaching minors through any telecommunications devices or interactive computers—the Internet. Specifically,

⁵ Pub. L. 104-104, 110 Stat. 56 (1996).

⁶ See *Reno II*, 117 S. Ct. at 2337-38.

⁷ See *id.* at 2338.

⁸ Telecommunications Act preamble, 110 Stat. at 56.

⁹ See Mimi Whitefield, *A New Era in Telecommunications*, MIAMI HERALD, Feb. 9, 1996, at C1.

¹⁰ *Id.*

¹¹ See Communications Decency Act § 502 (amending 47 U.S.C. 223 (1996)).

¹² See *id.* § 502(a)(1)(C) (amending 47 U.S.C. § 223 (1996)).

¹³ See *id.* § 551(c) (amending 47 U.S.C. § 303 (1996)). The "V-chip" is a device installed in a television which allows parents to restrict the amount of violence, sex, and profanity their children are exposed to by screening out offensive programs. See *id.*

47 U.S.C. § 223(a) was amended to provide, in relevant part:

(a) Whoever—

(1) in interstate or foreign communications—

. . .

(B) by means of a telecommunications device knowingly—

(i) makes, creates, or solicits, and

(ii) 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, regardless of whether the maker of such communication placed the call or initiated the communication;

(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined under Title 18, or imprisoned not more than two years, or both.¹⁴

Similarly, 47 U.S.C. § 223(d) provides, in pertinent part:

(d) Whoever—

(1) in interstate or foreign communications knowingly—

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, 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; or

(2) knowingly permits any telecommunications facility under such person's control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity,

¹⁴ Communications Decency Act § 502 (amending 47 U.S.C. § 223(a) (1996)).

shall be fined under Title 18, or imprisoned not more than two years, or both.¹⁵

The sweep of these sections was far reaching. First, not only would the creators of Web pages, such as Bill Jones, be potentially liable criminally, but Internet access providers, such as Prodigy and America Online, which did not aggressively monitor the content of Jones' Web site, could be prosecuted as well. The costs which these companies would incur by developing such a monitoring system was never explored by Congress or the courts. Secondly, those such as Jones who created Web pages and those who provided the access to them would not even have to know what audience was accessing the messages or images. So long as it was reasonable to assume that minors could get their hands on any indecent postings (and the fact that Jones' Web page was aimed at minors would make this assumption reasonable), the creator and access provider would be liable, even if minors were not the intended audience. Finally, the "community standards" provided a heckler's veto¹⁶ to the most easily offended community in America. The standards for indecency in New York probably do not match those of small town America, but adults in New York posting arguably indecent materials primarily for the use of New Yorkers would have to worry about prosecution in Small Town, even though Small Towners were not the intended audience.

¹⁵ *Id.* (amending 47 U.S.C. § 223(d) (1996)). Congress did provide some affirmative defenses to prosecution under these two divisions of the section. Section 223(e)(5) provided:

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 and activity under subsection (a)(1)(B) of this section 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.

47 U.S.C. § 223(e)(5) (1996).

¹⁶ The "heckler's veto" is one of the pariahs in First Amendment jurisprudence. Courts are loathe to allow one person (the "heckler") in the audience who objects to the speaker's words to silence a speaker. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296 (1940) (reversing the conviction of a Jehovah's Witness sharply attacking Roman Catholics on the street).

B. *Reno I: The District Court*

On the day the CDA was signed, a diverse array of plaintiffs led by the American Civil Liberties Union filed suit to enjoin the government from enforcing the two provisions which would regulate content on the Internet.¹⁷ In *ACLU v. Reno* ("*Reno I*"), the plaintiffs were comprised of businesses, libraries, non-commercial and non-profit organizations, and educational societies and consortia.¹⁸ While none of the plaintiffs would be commonly considered commercial purveyors of pornography,¹⁹ some have posted online information regarding protection from AIDS, birth control, or prison rape—sexually explicit material that could be considered "indecent" or "patently offensive" in some communities.²⁰ Other plaintiffs, such as Prodigy, are companies through whom information is posted to the Internet.

The District Court for the Eastern District of Pennsylvania granted the plaintiffs' request to enjoin the Government from enforcing the Internet-related provisions of the CDA.²¹ In doing so, the court made numerous evidentiary findings which are extremely important both as the first comprehensive legal analysis of the nature of the Internet, and as the basis for the subsequent United States Supreme Court decision. Many of the findings were stipulated by the parties and dealt with the nature and operation of the Internet itself.²² The court found that the Internet today comprises

¹⁷ *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) [hereinafter *Reno I*]. Plaintiffs sought a preliminary injunction. To obtain such relief, Plaintiffs had to show "a reasonable probability of eventual success in the litigation [and] irreparable injury pendente lite." *Aciermo v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994) (quoting *Delaware River Port Auth. v. Transamerican Trailer Transp., Inc.*, 501 F.2d 917, 919-20 (3d Cir. 1974)). The court would also consider "the possibility of harm to other interested persons from the grant or denial of the injunction and the public interest." *Id.*

¹⁸ *See Reno I*, 929 F. Supp. at 849 (Finding 123).

¹⁹ *See id.*

²⁰ *See id.*

²¹ The case was heard by a specially-convened, three-judge court pursuant to § 561(a) of the CDA and 28 U.S.C. § 2284. Therefore, the case was heard by Chief Judge Dolores K. Sloviter (Chief Judge of the Court of Appeals for the Third Circuit), Judge Buckwalter (District Court Judge for the Eastern District of Pennsylvania), and Judge Stewart Dalzell (District Court Judge for the Eastern District of Pennsylvania). *See id.* at 827. All three filed separate opinions enjoining the government from enforcing the CDA, as discussed *infra*.

²² *See Reno I*, 929 F. Supp. at 830, 838 n.12. The first forty-eight paragraphs of the Findings of Fact are the product of a stipulation the parties filed with the court while paragraphs numbered 49-69 are the product of a "sufficiently wide zone of agreement." *Id.*

over 9 million linked computers worldwide, approximately 60 percent of which are located in the United States.²³ The court also noted that no single entity—academic, corporate, governmental, or non-profit—administers or regulates the Internet.²⁴ The court determined that the Internet “is therefore a unique and wholly new medium of worldwide human communication.”²⁵

Many of the findings the district court made related to the feasibility of preventing minors from accessing offensive material—both through the affirmative defenses afforded in the CDA,²⁶ and via commercial software available in most computer stores.²⁷ One of the mechanisms the Government argued could block minors from offensive material was “tagging.”²⁸ The Government suggested that indecent or patently offensive material could be “tagged” with imbedded codes or with certain suffixes attached to the site names—alarms to which a minor’s computer could be configured to screen out the files.²⁹ While the district court found that the technology to embed tags in files currently exists,³⁰ the technology for computers to screen the tagged files does not.³¹ Chief Circuit Judge Sloviter commented on this argument by stating, “I can imagine few arguments less likely to persuade a court to uphold a criminal statute than one that depends on future technology to cabin the reach of the statute within constitutional grounds.”³² The court also questioned the costs institutions would incur to review and tag all of the files they have online. The court found that large

²³ See *id.* at 831 (Finding 3).

²⁴ See *id.* at 832 (Finding 11).

²⁵ *Id.* at 844 (Finding 81). The Findings of Fact with regard to the software were stipulated by the parties. See *id.* at 838 n.12. The Findings with regard to “tagging” and validation services were not. See *id.* at 842 n.15.

²⁶ See *supra* note 15 (quoting 47 U.S.C. § 223(e)(5) defenses).

²⁷ See *infra* notes 41-42 and accompanying text (describing the district court’s analysis of the cost and effectiveness of Cyber Patrol and Surfwatch). The court also noted, but did not discuss, such parental control software as CYBERSitter, The Internet Filter, Net Nanny, Parental Guidance, Netscape Proxy Server, and WebTrack. See *Reno I*, 939 F. Supp. at 839 (Finding 54). This software should not be confused with the screening programs the Government suggests to identify “tags.” See *infra* text accompanying note 29. Current commercially available software can only access site addresses entered into an “approved list,” while the Government’s screening software would presumably search all incoming files for identifying tags.

²⁸ See *Reno I*, 929 F. Supp. at 847-48 (Findings 108-116).

²⁹ See *id.* at 847 (Finding 108).

³⁰ See *id.* at 847 (Finding 109) (imbedding tags termed “trivial” in the opinion of plaintiff’s expert).

³¹ See *id.* at 848 (Finding 114).

³² *Id.* at 857.

organizations such as the Carnegie Library would have to hire additional employees for the task, while low-budget operations would find the requirement cost-prohibitive.³³

The Government also suggested that operators of Web pages with indecent or patently offensive material could utilize credit card validation services or adult access code services.³⁴ The cost and impracticality of this technique was noted and sharply criticized. First, the court questioned whether the credit card companies would validate card numbers in the absence of a commercial transaction.³⁵ Visa or Mastercard might be unwilling to provide validation services to Bill Jones' Web page because Jones has nothing to sell. The court also found that the costs for Web pages to subscribe to credit card or adult access code validation services could be astronomical and cost-prohibitive.³⁶ One Web author testified that she pays \$1 per verification to the verification agency she uses.³⁷ The ACLU testified that it would have to shut down its Web site if it had to verify the credit card numbers of all visitors to its page.³⁸ Finally, Justice Dalzell in concurrence noted the perverse result of the CDA would be that commercial pornographers would be allowed to operate on the Internet because they already use credit card or adult verification.³⁹ Hustler Magazine would be permitted to continue to sell its fantasies of sex over the Internet while Bill Jones would have to stop his small crusade to educate the youth of America about the realities of sex.

The district court explored some of the mechanisms by which parents can control the material that their children have access to. It is not unreasonable for many parents to reject Bill Jones' strategy when it comes to curbing underage sex and pregnancy. The court noted that the major Internet access providers offered children-specific Internet access by which parents could be sure that their children are only accessing the best of what the Web has to offer.⁴⁰ The court also examined the practicality and affordability

³³ See *id.* at 847 (Finding 110). A witness from the organization Critical Path testified that it would be impossible to review all of its Internet site content because Critical Path only had one full and one part-time employee. See *id.*

³⁴ See *id.* at 847-47 (Findings 97-103, 107).

³⁵ See *id.* at 846 (Finding 98).

³⁶ See *id.* at 846 (Finding 102).

³⁷ See *id.* at 846 (Finding 99).

³⁸ See *id.* at 846 (Finding 100).

³⁹ See *id.* at 879.

⁴⁰ See *id.* at 842 (Finding 69).

of two representative software programs, Cyber Patrol and SurfWatch.⁴¹ The court found that these devices cost families between \$50.00 and \$80.00 per year and provided a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material.⁴² Not only do these programs provide the same protection as the CDA, they can be tailored to a parent's personal tastes when it comes to raising his or her children—a benefit not afforded by the CDA's blanket prohibition.

1. Chief Circuit Judge Sloviter's Opinion

With 123 findings of fact in hand, each of the three Judges of the District Court examined whether the two provisions of the CDA violated the principals of the First Amendment. Chief Circuit Judge Sloviter began by establishing that, because the two provisions of the CDA restricted speech based upon its content, they would be subject to the strict scrutiny standard.⁴³ As such, the government was required to show that it was pursuing a compelling interest through a narrowly tailored regulation.⁴⁴ While Judge Sloviter questioned whether the government had a compelling interest in shielding minors from *all* of the material the CDA sought to ban,⁴⁵ the Judge rested her decision upon a belief that the statute was not narrowly tailored.

Judge Sloviter began her discussion of the CDA's narrow tailoring by noting, "[I]t is difficult to characterize a criminal statute that hovers over each content provider, like the proverbial sword of Damocles, as narrow tailoring."⁴⁶ Sloviter noted that several Web sites which offer critically important information for minors, such as Stop Prisoner Rape or Critical Path AIDS project, could be shut down.⁴⁷ The fact that adults would be deprived of otherwise protected speech because a minor might access an indecent Web site or chat room prompted Judge Sloviter to decide that the CDA

⁴¹. See *id.* at 839-42.

⁴². See *id.* at 841 (Findings 60, 67).

⁴³. See *id.* at 851.

⁴⁴. See, e.g., *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (applying strict scrutiny to a ban on sexual telephone recordings).

⁴⁵. Judge Sloviter noted such material as Francesco Clemente's painting *Labirinth* and information concerning female genital mutilation, which some parents might deem appropriate for older teens, but which the CDA might ban. See *Reno I*, 929 F. Supp. at 853.

⁴⁶. *Id.* at 855-56.

⁴⁷. See *id.* at 853.

swept too far.⁴⁸ The affirmative defenses which the CDA afforded content providers were not enough to save the statute.

2. The Opinions of Judges Buckwalter and Dalzell

Rather than focusing upon the narrow tailoring of the CDA, the other two judges focused their attentions upon the vagueness⁴⁹ and overbreadth of the Act. Judge Buckwalter began his analysis of the CDA by noting that the statute did not offer a definition of what would be considered "indecent" on the Internet.⁵⁰ The Government's assurances that contemporary community standards would identify indecency and that the citizenry could rely upon prosecutors to apply the statute constitutionally did not persuade the Judge.⁵¹ Judge Buckwalter concluded that the absence of clear and precise standards was extremely damaging as even commonly understood terms could have different connotations or parameters in this new medium.⁵² The Judge found that enforcers of the statute were without any guidance and therefore upheld the injunction.

Judge Dalzell began his discussion of the CDA by commenting that the scales were tipped in the Plaintiffs' favor from the outset due to the strict scrutiny standard applied to content-based regulations.⁵³ Dalzell rejected Judge Buckwalter's holding that the CDA was unconstitutionally vague, arguing that "indecent" and "patently offensive" had the meaning enunciated in *Sable Communications of California v. FCC*⁵⁴ and therefore passed constitutional muster.⁵⁵ However, it was the broad reach of the CDA into protected speech which led Dalzell to concur in the issuance of the preliminary injunction. Dalzell commented that if an Internet speaker's content was even "arguably indecent" he would be forced to assess the risk of prosecution and the cost of compliance with the CDA.⁵⁶ This

⁴⁸ See *id.* at 857.

⁴⁹ While courts recognize that they can never expect mathematical certainty from the language of statutes, they are wary of vague laws because: they do not provide fair warning to citizens; they delegate basic policy matters to judges, juries, and the police to be decided on a subjective and ad hoc basis; and they inevitably lead citizens to "steer far wider of the unlawful zone" than if the boundaries were clearly marked. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1971).

⁵⁰ See *Reno I*, 929 F. Supp. at 861.

⁵¹ See *id.* at 863.

⁵² See *id.* at 865.

⁵³ See *id.* at 866.

⁵⁴ 492 U.S. 115 (1989).

⁵⁵ See *Reno I*, 929 F. Supp. at 869.

⁵⁶ See *id.* at 877-78.

dilemma would reduce the diversity of the Internet as speakers chose silence over risk.⁵⁷ The CDA would also skew the relative parity of the Internet, as only commercial entities would be able to afford compliance.⁵⁸ The Judge considered this an impermissible result and therefore concurred in the issuance of the injunction.

II. THE UNITED STATES SUPREME COURT CASE: *RENO II*

The Government appealed the district court's decision, arguing that the CDA's regulation of speech to protect minors was justified by First Amendment jurisprudence.⁵⁹ It argued that the protection of minors was a compelling interest, and that the CDA was appropriately tailored to that task. The Government presented opinions in which the Supreme Court had allowed indecent speech to be regulated to prevent it from reaching minors' ears,⁶⁰ permitted municipalities to regulate the zoning of adult movie theaters in order to prevent the secondary effects of such establishments,⁶¹ and allowed the regulation of material deemed indecent "with regards to minors" from reaching the minors' hands.⁶² However, it was the unique nature of the Internet, combined with the severity of scope and punishment of the CDA, which led the Supreme Court to invalidate the CDA. Ironically enough, it was the Internet's similarity to one of the oldest forms of mechanical communication, the telephone, which proved to be the CDA's downfall.

A. Justice Stevens' Majority Opinion

Justice Stevens and the majority of the Supreme Court agreed with Chief Circuit Judge Sloviter that the challenged provisions of the CDA were not narrowly tailored to the government's compelling interest.⁶³ Justice Stevens began his analysis of the provisions

⁵⁷. See *id.* at 878.

⁵⁸. See *id.*

⁵⁹. The district court's decision was directly appealed to the Supreme Court pursuant to section 561(b) of the Telecommunications Act.

⁶⁰. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

⁶¹. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). "Secondary effects" are the impacts which the presence of purveyors of certain kinds of speech can produce. Rather than being concerned about the moral impact which adult movie theaters have upon their clientele, the City of Renton was working to prevent the crime and decrease in property values which often attend the arrival of an adult movie house. *Id.* at 51.

⁶². *Ginsberg v. State of New York*, 390 U.S. 629 (1968).

⁶³. Justice Stevens was joined by Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer. JJ. O'Connor, J., filed an opinion concurring in judgment in part and dissenting in part, in which Rehnquist, C.J., joined.

by commenting that the cases upon which the Government had relied to support their claim of constitutionality—*Ginsberg v. New York*,⁶⁴ *FCC v. Pacifica Foundation*,⁶⁵ and *City of Renton v. Playtime Theatres, Inc.*⁶⁶—served to raise, rather than lower, doubts concerning the constitutionality of the CDA.⁶⁷ Stevens addressed each of these three cases and explained why they damaged the Government's case, before proceeding to discuss how the nature of the Internet compelled the Court to protect information communicated through it in the same manner as the Court protected indecent material communicated by telephone.

1. *Ginsberg v. State of New York*

In *Ginsberg*, Sam Ginsberg had been convicted under a New York statute that prohibited sales of obscene material to minors under the age of seventeen.⁶⁸ Ginsberg argued that the statute's definition of obscenity, "harmful to minors," was too vague for the honest distributor of publications to know when he might be convicted under the statute.⁶⁹ The Court held that while the "girlie" picture magazines at issue would not be considered obscene for adults,⁷⁰ a state may ban the sale of such literature to minors if it finds that it appeals to a minor's prurient interests and is without redeeming social importance for minors.⁷¹

The Government relied upon *Ginsberg*, arguing that the case gave it the right to prevent speech from reaching minors which would otherwise be protected if communicated between adults. It noted that the interests which New York in *Ginsberg* and Congress in the CDA sought to protect—the welfare of minors—were identical. The Attorney General also argued that if New York could validly ban "girlie" magazines from reaching minors because they were obscene to minors, then the federal government should likewise be able to prevent "indecent" or "patently offensive" material from reaching minors' computer screens via the Internet.

Justice Stevens and the majority were not persuaded by the Government's reliance upon *Ginsberg* for several reasons. First, the

⁶⁴ 390 U.S. 629 (1968).

⁶⁵ 438 U.S. 726 (1978).

⁶⁶ 475 U.S. 41 (1986).

⁶⁷ See *Reno II*, 117 S. Ct. 2329, 2341 (1997).

⁶⁸ See *Ginsberg*, 390 U.S. at 636 (the material's appeal to adults was irrelevant).

⁶⁹ See *id.* at 643.

⁷⁰ See *id.* at 634.

⁷¹ See *id.* at 639.

Court noted that, unlike the New York statute, the CDA eliminated a parent's ability to fully regulate the content of her child's exposure.⁷² Stevens commented that, while the statute in *Ginsberg* prevented minors from purchasing certain magazines, it did not prevent parents from purchasing the magazines for their children if they deemed it appropriate.⁷³ The CDA, on the other hand, served to prevent *any* minor from accessing certain material, even if the child's parent desired it.⁷⁴ For instance, if a parent in Small Town, in an effort to fully communicate the dangers and concerns of underage sex to his son, wanted to utilize Bill Jones' Web page, he would be prevented from doing so. Citing to a passage in *Ginsberg*, Justice Stevens noted that the Supreme Court has often held that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."⁷⁵ Justice Stevens questioned the validity of a statute that would peer into an e-mail sent by a parent to her 17-year-old college student about birth control because such a topic offended the college town's sensibilities.⁷⁶

Justice Stevens articulated several other reasons why the Government's reliance upon *Ginsberg* was unavailing. He noted that the New York statute regulated commercial activity—the sale of magazines—whereas the CDA encompassed communication of a noncommercial nature.⁷⁷ The majority also pointed out that the statute in *Ginsberg* specifically required that the offending material be "utterly without redeeming social importance for minors," whereas the CDA contained no such limitation.⁷⁸ As a result, material concerning the dangers of premarital sex could be protected under the New York statute in *Ginsberg* due to its social importance to minors, but would be prohibited under the CDA if any community's standards found it indecent or patently offensive,

⁷² See *Reno II*, 117 S. Ct. at 2341.

⁷³ See *id.*

⁷⁴ Neither section 223(a) nor section 223(d) of the CDA qualifies the circumstance under which the minor receives any indecent or patently offensive material. Likewise, the affirmative defenses in § 223(e)(5) do not include a parental ability to waive the CDA's applicability to her child.

⁷⁵ *Reno II*, 117 S. Ct. at 2341 (quoting *Ginsberg*, 390 U.S. at 639); see also *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

⁷⁶ See *Reno II*, 117 S. Ct. at 2348.

⁷⁷ See *id.* at 2341.

⁷⁸ See *id.*

regardless of its aims or social significance.

2. *FCC v. Pacifica Foundation*

The Government also argued that the prohibitions of the CDA were justified by the Supreme Court's ruling in *FCC v. Pacifica Foundation*. The Court in *Pacifica*, which dealt with the midday broadcast of comedian George Carlin's "Filthy Words" monologue,⁷⁹ allowed the FCC to threaten administrative sanctions against the service that had broadcast the lewd program at a time when minors were likely to hear it. The Court rejected *Pacifica*'s contention that the FCC was constitutionally forbidden to regulate "indecent" speech by stating that the Commission has the power to review the content of broadcasts in making its decisions to renew licenses.⁸⁰ The Court also held that the imposition of administrative sanctions does not constitute censorship.⁸¹

The Government in *Reno II* argued that the sanctions of the CDA should be upheld in the same manner as the FCC's sanctions in *Pacifica*. The Government argued that it should be allowed to regulate "indecent" speech in the same way because the protection of minors was at stake. The Government also argued that the punishments of the CDA would only be meted out *after* the publication of offensive material on the Internet in the same manner as the FCC's post-broadcast review in *Pacifica*.

Justice Stevens and the majority were once again unmoved by the Government's analogies to constitutional speech regulations. The first difference the majority noted was the difference between the media and their varying histories of regulation. Stevens commented that the FCC had been regulating radio broadcasts for decades and was quite familiar with the unique characteristics of the medium.⁸² The majority also pointed out that the FCC targeted only those specific broadcasts which deviated from the traditional program content, and then only to determine *when*—rather than

⁷⁹ *Pacifica* aired a monologue by George Carlin in which he, interestingly enough, listed words that one cannot say in a broadcast. The monologue detailed various profanities which would "curve your spine [and] grow hair on your hands." *FCC v. Pacifica Found.*, 438 U.S. 726, 751 (1978) (Appendix to Opinion).

⁸⁰ *See id.* at 735 (stating that section 27 of the Radio Act of 1927 "has never been construed to deny the Commission the power to review the content of completed broadcasts").

⁸¹ *See id.* at 737.

⁸² *See Reno II*, 117 S. Ct. at 2342.

if—the program would be broadcast.⁸³ In contrast, the provisions of the CDA did not create a regulatory body to monitor the Internet—a task presumably left to the various communities and their prosecutors. Additionally, the CDA's prohibitions were broad and constituted blanket prohibitions rather than time, place, and manner regulations. Justice Stevens also noted that the CDA imposed criminal sanctions, while the FCC in *Pacifica* only issued a declaratory order.⁸⁴ Finally, the Court had expressly refused to decide in *Pacifica* whether an indecent broadcast “would justify a criminal prosecution,” so reliance upon the case proved unavailing.⁸⁵

The nature of the Internet was the last difference the Court found between the two cases, and was the characteristic that later proved to be the foundation of the opinion. In *Pacifica*, the Court stated that the warning which the radio station had issued before the broadcast of Carlin's monologue was inadequate.⁸⁶ Listeners tuning in after the issuance of the warning would be affronted with unwelcome and offensive material simply by turning on their radio. The *Pacifica* Court noted that radio had, as a matter of history, “received the most limited First Amendment protection” because of this danger.⁸⁷ The Internet, on the other hand, had no comparable history and no analogous danger of accidentally receiving offensive material.⁸⁸ The district court had found that accessing information on the Internet required a series of somewhat sophisticated affirmative steps. Computer users will not turn on their computer or log on to the Internet and find indecent or patently offensive material on their screens unbidden. While term searches via an Internet search engine might accidentally turn up an offensive site, the occurrences are slim and sufficient warning is often given to alert the Internet surfer.⁸⁹

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ *Id.* (quoting *Pacifica*, 438 U.S. at 750).

⁸⁶ See *Pacifica*, 438 U.S. at 748 (“[P]rior warnings [in radio] cannot completely protect the listener . . . from unexpected program content.”).

⁸⁷ *Id.*

⁸⁸ See *Reno II*, 117 S. Ct. at 2342.

⁸⁹ See *id.* at 2343.

3. *City of Renton v. Playtime Theatres, Inc.*

Finally, the Government relied upon the Court's decision in *City of Renton v. Playtime Theatres, Inc.* In *Renton*, the Court upheld a zoning ordinance in the city of Renton which prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multi-family dwelling, church, park, or school.⁹⁰ Even though the ordinance only afforded the owners of the adult theaters 520 acres in the city (some of which was already in other commercial use),⁹¹ the regulation of the speech based upon its content was permissible because the city was attempting to eliminate the secondary effects of the theaters—crime, lower property values, diminished retail trade.⁹² The Court dismissed the argument that the City Council's motivation was really to eliminate unpopular speech by stating that "it is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."⁹³

The Government attempted to show that the CDA, like Renton's ordinance, was simply an attempt to "cyberzone" the Internet.⁹⁴ The Attorney General argued that Congress, through the CDA, was attempting to cordon off offensive material so that children would not be exposed to it and harmed. Like Renton, Congress was not eliminating the material from the Internet, but simply "locating" it in way inaccessible to those under age 18. Finally, the Government argued that, even if the restrictions required by Congress were burdensome, they were no worse than the 520 acres allowed to the adult theaters in the city of Renton.

The Supreme Court rejected the Government's references to *Renton* in like fashion. Justice Stevens held that the CDA was not a time, place, and manner restriction like the Renton ordinance because it was not seeking to regulate the secondary effects of the material on the Internet.⁹⁵ Rather, the Court found, the CDA's primary purpose was to protect children from "the primary effects of 'indecent' and 'patently offensive' speech."⁹⁶ As such, the

⁹⁰ See *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 43 (1986).

⁹¹ See *id.* at 53.

⁹² See *id.* at 48.

⁹³ *Id.* (quoting *U.S. v. O'Brien*, 391 U.S. 367, 383-84 (1968)).

⁹⁴ See *Reno II*, 117 S. Ct at 2342.

⁹⁵ See *id.*

⁹⁶ *Id.*

CDA's focus was on the direct impacts of the speech rather than on increases in crime or decreases in property values or retail trade.

4. The Internet: Just Like the Telephone?

After dismissing the Government's analogies, comparing the regulation of the Internet to regulation of magazines, adult theaters, and radio, Justice Stevens and the majority undertook the task of determining just what the Internet *is* and how it works. Much of the Court's analysis was grounded in the findings of fact of the District Court. The Court felt the need to make a detailed examination because it had noted in the past that "each medium of expression . . . may present its own problems."⁹⁷

The Court began by noting how the Internet is quite different from any communications medium to date. The Internet does not have the history of extensive government regulation that radio does.⁹⁸ Nor is there a scarcity of available frequencies at its inception. Indeed, the Internet can currently accommodate any user who can connect with an access provider. The most important characteristic of the Internet which distinguished it from television and radio is its "non-invasive" nature.⁹⁹ Citing the findings of the District Court, the Supreme Court agreed that users seldom encounter Internet content by accident. Rather, "[a]lmost all sexually explicit images are preceded by warnings as to the content," and "odds are slim that a user would come across a sexually explicit site by accident."¹⁰⁰

The affirmative steps a user is required to go through in order to access material on the Internet led the Court to analogize the Internet to the telephone. In its analysis, the Court relied upon *Sable Communications of California v. FCC*,¹⁰¹ in which a company engaged in offering sexually explicit prerecorded telephone messages ("dial-a-porn") challenged the constitutionality of an amendment to the Communications Act that imposed a blanket prohibition on indecent as well as obscene interstate commercial telephone messages.¹⁰² Like the Internet, the dial-a-porn compa-

^{97.} See *id.* at 2343 (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975)).

^{98.} See *id.* at 2342.

^{99.} See *id.* at 2343.

^{100.} *Reno II*, 117 S. Ct. at 2343 (citing *Reno I*, 929 F. Supp. 824, 844 (E.D. Pa. 1996) (Finding 88)).

^{101.} 492 U.S. 115 (1989).

^{102.} Section 223(b) of the Communications Act of 1934 proscribed "permitting a tele-

nies were unable to determine who was receiving their recordings.¹⁰³ Just as with the CDA, the Government had argued that the blanket prohibition was justified to protect the welfare of minors. And just like it would with the CDA, the Court struck down the amendment.

The Court in *Sable* found the dangers of other media which necessitated closer monitoring were not present with the telephone. A user was unlikely to pick up her phone and happen across offensive speech. Any speech which others might find "indecent" or "patently offensive" must be sought out. Phone numbers must be looked up and numbers consciously dialed. Only those who want to hear the messages will find them.

The *Reno II* Court was persuaded that the Internet operated in the same manner; therefore, it should be afforded the same protections. Similar to a telephone, users of the Internet must look up the address of a site or name of a chat room. The users must also consciously type in the requisite address in order to access the information. Because Internet information was more likely to be sought out like messages through the telephone than appearing unbidden upon one's screen like radio broadcasts, the majority opted to protect the Internet in the same way as the telephone.

B. Justice O'Connor's Concurrence

While concurring in judgment, Justice O'Connor dissented in part to the majority opinion. Specifically, O'Connor supported the CDA's attempt to create "adult zones" on the Internet, but decided that the breadth of the Act strayed too far from established precedent.¹⁰⁴ The Justice noted that most states have long denied minors access to speech and establishments which cannot be denied to adults.¹⁰⁵ As long as "zoning" provisions do not unduly restrict adult access and do not infringe upon minors' First Amendment rights, such laws are constitutionally valid.¹⁰⁶

phone under [one's] control" to be used to make "any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent." Communications Act of 1934 § 223(b) (codified as amended at 46 U.S.C. § 223(b) (1997)).

^{103.} The Court did recommend that *Sable* hire operators or otherwise implement a system which would determine the source of incoming calls. See *Sable*, 492 U.S. at 125. Internet Web sites currently do not have the option of such a system.

^{104.} See *Reno II*, 117 S. Ct. at 2351 (O'Connor, J., concurring in part and dissenting in part).

^{105.} See *id.*

^{106.} See *id.* at 2353.

The current state of technology led O'Connor to concur in judgment because "zoning" of the Internet is impossible. The Justice commented that speakers and listeners on the Internet can mask their identities, and that it is currently impossible to exclude minors from accessing certain indecent or patently offensive messages.¹⁰⁷ O'Connor also found that current efforts to construct barriers on the Internet and restrict user access to certain areas is not yet available to all users nor feasible for Internet functions like chat rooms and USENET groups.¹⁰⁸ Justice O'Connor therefore held that the CDA must be found unconstitutional as it applied to the "display" provision of section 223(d)(1)(B).¹⁰⁹

Justice O'Connor did hold, however, that the "indecent transmission" and "specific person" provisions of section 223(a)(1)(B) were not unconstitutional in all of their applications, and would have upheld the section in those circumstances.¹¹⁰ In that section, the speaker knows that the listener is a minor¹¹¹ and the concerns about the incognito minor are eliminated. Therefore, Justice O'Connor held that she would uphold the CDA in situations in which the initiating party knows that all of the recipients of the message are minors.¹¹² With this requirement, the Justice hoped to avoid the "heckler's veto" of a minor entering a chat room uninvited and terminating any indecent or patently offensive discussion.

III. THE CDA'S BLANKET PROHIBITIONS SWEEP TOO FAR

A. *The Majority Accurately Perceives the Nature and Import of the Internet*

The majority's protection of the Internet is well-founded and provides an opportunity for unfettered, diverse communication the likes of which no one has ever seen. By not allowing moral guardians to monitor Internet communication for unsavory topics in the name of protecting the children, the Court has allowed the door to

^{107.} See *id.*

^{108.} See *id.* at 2354.

^{109.} See *id.*

^{110.} See *id.*

^{111.} See CDA § 223(a)(1)(B)(ii) ("Whoever . . . knowingly—initiates the transmission of . . .") (emphasis added).

^{112.} See *Reno II*, 117 S. Ct. at 2356 (O'Connor, J., concurring in part and dissenting in part).

remain open to completely democratic discourse. The price for such freedom is that uncultured people will say uncultured things or that quite educated people will choose to emphasize their points in rather crude terms. The Court appropriately recognized that, while the protection of minors is certainly a noble goal, avenues exist to pursue that goal which do not include silencing adults who wish to engage in otherwise protected speech.

Justice Stevens' rejection of the Government's reliance upon *Ginsberg*, *Pacifica*, and *Renton* is both well-founded and well-reasoned. The primary intrusion of the CDA which the Government failed to address is the regulation of parenting discretion. Parents, rather than Congress, ought to have the primary responsibility to determine what material their children are exposed to. Parents, not Congress, are better able to evaluate the maturity level of their own children, and better able to decide what their children can and should be able to handle. Parents, not the most easily offended community in America, ought to have discretion concerning the content of communication with their children over e-mail.

This position on a parents' authority is certainly constrained by the public's interest in the welfare of its children. As such, a parent has no right to expose his children to hard-core pornography or outright obscenity. A parent does not even have a right to have her child sell magazines on city streets to evangelize.¹¹³ However, these circumstances are strong ones which threaten severe harms. The possible offenses under the CDA need not threaten so much to risk prosecution. Discussions of explicit art, sexual practices, and sexual health have beneficial value to minors which outright obscenity does not. The majority accurately recognized that parents may agree with this proposition and ought to be allowed to exercise their parenting discretion. Parents are not left defenseless in the face of a sordid Internet, and do not need the CDA to do the parenting for them.

B. Misguided Concurrence

Justice O'Connor's opinion fails to address the mandates of *Ginsberg* and, as a result, misapprehends the communicative power of the Internet. The Justice ignores parents' prerogatives to control what their children are and are not viewing. Even the small piece

¹¹³ See *Prince v. Massachusetts*, 321 U.S. 158 (1944) (parent's conviction under child labor statute for permitting adopted child to sell magazines on the street upheld).

of the CDA that O'Connor would save would impermissibly limit the usefulness of the Internet for minors. Justice O'Connor need only have looked at the other provisions of the CDA, such as the "V-chip" section,¹¹⁴ to realize that parent empowerment, rather than blanket prohibition, is the answer to information overexposure.

Although Justice O'Connor's opinion avoids the "heckler's veto" of minors who enter chat rooms in which "indecent" or "patently offensive" conversation is being held, the Justice has not been able to avoid the veto of conservative or easily offended communities. As Stevens suggested, if a parent of a freshman college student, under age 18, wishes to communicate with her child via email about birth control, she may not be able to do so because she knows that it is a minor receiving the transmission.¹¹⁵ College professors teaching an art appreciation class to 17-year-old freshmen would have to avoid any on-line discussion of controversial artists. Bill Jones would have to remove his Web page because his intended audience is minors. The cost of lost speech is too great.

IV. VISION FOR THE FUTURE

John Stuart Mill wrote,

If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.¹¹⁶

Liberty is grounded in every citizen's freedom to express himself. The silencing of opinion commits robbery not simply upon the speaker who no longer has a voice, but upon the community at large which is then deprived of healthy debate. The missed opportunity to see a new facet upon an old notion is a missed opportunity to advance and grow. The lost ability to further define and clarify the community's philosophies or morals is a lost chance to further understand oneself. As it relates to each individual speaker or Web site creator, the costs may seem insignificant or quickly recovered. But as it relates in the aggregate, the loss of volumes of

¹¹⁴ See *supra* note 13 for an explanation of "V-chip."

¹¹⁵ Her actions would therefore violate section 223(a)(1)(B)(ii).

¹¹⁶ JOHN STUART MILL, *ON LIBERTY* 16 (Elizabeth Rapaport ed., Hackett Publishing Co., Inc. 1978) (1859).

discourse banned due to their potentially unsavory nature is staggering.

Continuing this protection of the Internet will have a large impact—one that extends beyond the nation's borders. Because over half of the world's Web sites are located in the United States,¹¹⁷ the protection afforded to their contents will be enjoyed worldwide. Due to the inability to screen files, images, and electronic conversations,¹¹⁸ citizens in foreign countries will gain a new perspective on what Americans enjoy as we discuss any topic without fear of governmental retribution. Foreign participants formerly constrained by state-run presses would also have new sources of information biased by different agendas and providing new perspectives. As the United States continues to push for the continuing development of democracies around the world, the Internet may be our most powerful weapon to topple oppressive regimes. One taste of freedom may produce an addiction.

The Court should continue its bold protection of the Internet. The Internet stands to become the ultimate democratic forum for communication—one in which Bill Jones and Bill Gates can both spread their respective messages regardless of the disparity of wealth. Few private citizens can publish newspapers, magazines, or books. Few citizens are capable of producing television or radio broadcasts to reach a wide audience. Many people, however, can access the Internet and state their case with relative ease and without relative expense. With most Internet access costing about \$20 per month, interested parties can interact in chat rooms, send each other e-mail, or produce Web sites. This unique opportunity ought not to be limited by the fears of parents who already have it within their power to control the content of their children's Web browsing. Legislation is already in place to eliminate the worst of the Internet—child and other graphic pornography. Congress should have no interest in prohibiting conversation because unintended third parties would be offended if included.

To protect the diversity and freedom contained on the Internet, courts should continue to reject the approach espoused by the Government and the concurrence in this case, no matter what screening technology is created in the future. The cost-prohibitive nature of "tagging" would create informational voids on the

¹¹⁷. See *supra* text accompanying note 23.

¹¹⁸. See *supra* note 31 and accompanying text.

Internet as large institutions are unable to maintain their Internet presence. Allowing a minor's "heckler's veto" in chat rooms or a community's veto with regards to all forms of Internet interaction would continue the CDA's trap for the unwary. The freedom to converse without the weight of criminal prosecution in the background leads to more diverse, more vibrant, more engaging interaction. This freedom is unique and deserves the Court's full First Amendment protection.

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