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REDRAWING THE BATTLE LINES IN THE WAR AGAINST SMUT: FILTERWARE IN PUBLIC LIBRARIES AFTER *Reno v. ACLU*

*Susan Roberts**

I. INTRODUCTION

On June 26, 1997, the United States Supreme Court ushered in a new era of First Amendment jurisprudence with its landmark decision in *Reno v. ACLU*[1] and tripped the trigger on a new round of lawsuits. At issue is the appropriate use of a technology that both sides in *Reno* applauded in principle: user-based blocking and filtering software. No one disputes that products like Cyber Patrol and Net Nanny can help parents set boundaries for children's Internet use at home. The trouble starts when public libraries use software to selectively block access for all patrons.

Reno v. ACLU struck down parts of the Communications Decency Act of 1996[2] aimed at "protect[ing] minors from 'indecent' and 'patently offensive' communications on the Internet."[3] The Court held the Act to be a content-based regulation of speech and invalidated the two challenged provisions as overbroad.[4] This Note recounts the history of *Reno v. ACLU*, highlights the supporting case law, and sets out the issues and arguments the Supreme Court considered. Finally, this Note demonstrates why mandatory use of Internet blocking software in public libraries is destined to fail.

II. FACTS AND PROCEDURAL HISTORY

On February 8, 1996, President Bill Clinton signed into law the Telecommunications Act of 1996.[5] Most of the 103-page statute consisted of provisions designed to promote competition among local providers of telephone service, as well as in the multichannel video and the broadcasting markets.[6] Title V of the legislation was the notable exception.[7] Known as the Communications Decency Act of 1996 (CDA or Act), this portion of the Telecommunications Act drew a bead on minors' access to "'indecent' and 'patently offensive' communications on the Internet."[8]

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* The author gratefully acknowledges Professor Matthew Steffey's guidance and encouragement during the development of this Casenote.

1. Reno v. ACLU, 521 U.S. 844 (1997).
2. Pub. L. No. 104-104, § 502, 110 Stat. 56, 133-35 (1996) (amending 47 U.S.C. § 223, originally enacted as part of the Telecommunications Act of 1934).
3. *Reno*, 521 U.S. at 849.
4. *Id.* at 874.
5. *Id.* at 861.
6. *Id.* at 857-58.
7. *Id.* at 858.
8. *Id.* at 849.

No sooner had the President signed the legislation than twenty plaintiffs[9] filed suit against Attorney General Janet Reno and the Department of Justice, challenging the constitutionality of two sections of the CDA.[10] Section 223(a), known as the "indecent transmission" provision, "prohibit[ed] the knowing transmission of obscene or indecent messages to any recipient under 18 years of age."[11] Section 223(d), the "patently offensive display" provision, "prohibit[ed] the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age."[12] The plaintiffs argued that these provisions would "ban[ ] a substantial category of protected speech from most parts of the Internet."[13] One week after the original plaintiffs filed suit, Judge Buckwalter of the Eastern District of Pennsylvania entered a temporary restraining order against the government.[14] Twenty-seven more plaintiffs[15] filed a second suit, which was consolidated with the first.[16]

The CDA itself provided that challenges to the law be heard by a three-judge district court panel, which held an evidentiary hearing and then entered a preliminary injunction against enforcement of both challenged provisions.[17] Although the judgment was unanimous, Chief Judge Sloviter, Judge Buckwalter, and Judge Dalzell each wrote separate opinions.[18] The Supreme Court's subsequent opinion incorporated much of the district court's "extensive" findings of fact, as well as a summary of each district judge's reasoning.[19]

A. Chief Judge Sloviter

Chief Judge Sloviter first pointed out the statute's "criminal provisions, subjecting violators to substantial penalties."[20] She identified the CDA as "patently

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9. The American Civil Liberties Union; Human Rights Watch; Electronic Privacy Information Center; Electronic Frontier Foundation; Journalism Education Association; Computer Professionals for Social Responsibility; National Writers Union; Clarinet Communications Corp.; Institute for Global Communications; Stop Prisoner Rape; AIDS Education Global Information System; Bibliobytes; Queer Resources Directory; Critical Path AIDS Project, Inc.; Wildcat Press, Inc.; Declan McCullagh dba Justice on Campus; Brock Meeks dba Cyberwire Dispatch; John Troyer dba The Safer Sex Page; Jonathan Wallace dba The Ethical Spectacle; and Planned Parenthood Federation of America, Inc. *See* ACLU v. Reno, 929 F. Supp. 824, 827 n.2 (E.D. Pa. 1996).

10. *Reno*, 521 U.S. at 861.

11. *Id.* at 859.

12. *Id.*

13. *ACLU*, 929 F. Supp. at 854. The plaintiffs did not challenge the statute as it applied to obscenity or child pornography, for which Internet speakers could already be prosecuted under existing law. *See id.* at 829.

14. *Reno*, 521 U.S. at 861.

15. The American Library Association; America Online, Inc.; American Booksellers Association, Inc.; American Booksellers Foundation for Free Expression; American Society of Newspaper Editors; Apple Computer, Inc.; Association of American Publishers, Inc.; Association of Publishers, Editors and Writers; Citizens Internet Empowerment Coalition; Commercial Internet Exchange Association; CompuServe Incorporated; Families Against Internet Censorship; Freedom to Read Foundation, Inc.; Health Sciences Libraries Consortium; Hotwired Ventures LLC; Interactive Digital Software Association; Interactive Services Association; Magazine Publishers of America; Microsoft Corporation; The Microsoft Network, L.L.C.; National Press Photographers Association; Netcom On-Line Communication Services, Inc.; Newspaper Association of America; Opnet, Inc.; Prodigy Services Company; Society of Professional Journalists; and Wired Ventures, Ltd. *See ACLU*, 929 F. Supp. at 827-28 n.3.

16. *Reno*, 521 U.S. at 861-62.

17. *Id.* at 862.

18. *Id.*

19. *Id.* at 849-64.

20. *ACLU*, 929 F. Supp. at 850.

a government-imposed content-based regulation on speech" and noted that the Constitution protects both "indecent" and "patently offensive" speech.[21] Consequently, a strict scrutiny standard of review applied, requiring a compelling government interest and a narrowly tailored statute to uphold the regulation as constitutional.[22]

In response to the government's asserted interest in protecting minors, she noted that no compelling interest had been shown in preventing seventeen-year-olds from accessing such non-obscene material as "[p]hotographs appearing in National Geographic or a travel magazine of the sculptures in India of couples copulating in numerous positions, a written description of a brutal prison rape, or Francesco Clemente's painting 'Labyrinth.'"[23] Furthermore, she continued, technology did not exist to enable many Internet content providers to identify minors who access their materials.[24] The Chief Judge compared the CDA to "the proverbial sword of Damocles" hovering over content providers who could be held criminally liable for miscalculating community standards or misjudging indecency.[25]

Judge Sloviter then proceeded to dispose of the government's argument that new technology would soon be available: "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 bounds."[26] She treated in like manner the government's argument that the concerns of the plaintiffs (and the court) were exaggerated and "that we should, in effect, trust the Department of Justice to limit the CDA's application in a reasonable fashion . . . . That would require a broad trust indeed from a generation of judges not far removed from the attacks on James Joyce's Ulysses as obscene."[27]

She concluded that the CDA was not narrowly tailored and that the terms "indecent" and "patently offensive" were vague.[28] Therefore, the challenged provisions were facially invalid under both the First and Fifth Amendments.[29]

B. Judge Buckwalter

Judge Buckwalter declared the statute overbroad.[30] He then summarized his concerns: (1) that the challenged provisions of the CDA violated both the First and Fifth Amendments because of vagueness, and (2) that technology could not yet provide a "safe harbor" for most Internet speakers.[31] He agreed with Chief Judge Sloviter that the statute failed a strict scrutiny analysis and was thus unconstitutional.[32] He analyzed the terms "indecent" and "patently offensive" to

21. *Id.* at 851.
22. *Id.*
23. *Id.* at 853.
24. *Id.* at 855.
25. *Id.* at 855-56.
26. *Id.* at 857.
27. *Id.*
28. *Id.* at 856-57.
29. *Id.* at 857.
30. *Id.* at 858.
31. *Id.* at 859.
32. *Id.*

support his premise that the "fundamental constitutional principle . . . of simple fairness . . . is absent in the CDA."[33] Referring to the statute's reliance on "contemporary community standards," Judge Buckwalter questioned whether "the contemporary community standards to be applied [were] those of the vast world of cyberspace."[34] Like Chief Judge Sloviter, he dismissed the government's argument that the court should trust prosecutors' judgment: "Such unfettered discretion to prosecutors . . . is precisely what due process does not allow."[35] He also acknowledged "the vagaries of politics. What may be, figuratively speaking, one administration's pen may be another's sword."[36]

C. Judge Dalzell

Judge Dalzell wrote the most expansive of the three opinions, concluding that "the First Amendment denies Congress the power to regulate protected speech on the Internet."[37] He parted company with Judges Sloviter and Buckwalter, finding that Congress intended "indecent" and "patently offensive" to be synonymous.[38] Furthermore, he concluded that the concept was not unconstitutionally vague.[39] However, since lack of technology rendered defenses unavailable, the effect of the statute was a total ban on protected speech—an issue of overbreadth.[40]

Like the other two judges, he refuted the government's argument that the plaintiffs' claims were exaggerated: "[E]ven though it is perhaps unlikely that the Carnegie Library will ever stand in the dock for putting its card catalog online, or that the Government will hale the ACLU into court for its online quiz of the seven dirty words, we cannot ignore that the Act could reach these activities."[41]

Finally, borrowing a metaphor from *Butler v. Michigan*,[42] Judge Dalzell proclaimed that "[a]ny content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig."[43] He characterized the Internet as "a never-ending worldwide conversation [that t]he Government may not, through the CDA, interrupt."[44]

D. Significance of the District Court Opinion

After its defeat at the district level, the government appealed to the United States Supreme Court under the CDA's special review provisions.[45] Not only did the Supreme Court agree with the district court that the CDA "abridge[d] 'the

33. *Id.* at 861.
34. *Id.* at 863.
35. *Id.* at 864.
36. *Id.*
37. *Id.* at 872.
38. *Id.* at 868-69.
39. *Id.* at 869.
40. *Id.* at 870.
41. *Id.* at 871.
42. 352 U.S. 380, 383 (1957).
43. *ACLU*, 929 F. Supp. at 882.
44. *Id.* at 883.
45. Communications Decency Act of 1996, Pub. L. No. 104-104, § 561, 110 Stat. 133 (1996).

freedom of speech' protected by the First Amendment,"[46] it also agreed with the lower court's methodology in the case.

That methodology included 410 findings of fact[47] related to "the character and the dimensions of the Internet, the availability of sexually explicit material in that medium, and the problems confronting age verification for recipients of Internet communications."[48] The district court opinion included 123 paragraphs of those findings,[49] which the Supreme Court summarized and acknowledged as "the underpinnings for the legal issues."[50] In addition to accepting the district court's factual material, the Supreme Court also embraced the lower court's legal analysis[51]—one that failed to resonate with the government's view of the case.[52]

III. HISTORY OF THE LAW

The Supreme Court's historical approach to freedom of speech questions includes two inquiries. One relates to the medium of the speech and the other to its message.

A. The Message

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[53] Those words from the First Amendment to the United States Constitution have been subject to continuing judicial construction over the years, so that there are, in fact, whole categories of speech that enjoy no First Amendment protection.[54] Obscenity is one kind of speech the First Amendment does not protect.[55]

Sixteen years after the Supreme Court first grappled with the obscenity issue in *Roth v. United States*, the Court finally settled on a standard in *Miller v. California*.[56] The case appealed a conviction under California's obscenity law for the mass mailing of unsolicited sexually explicit advertising brochures.[57] The obscenity test the Court set out in *Miller* contains three prongs:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[58]

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46. *Reno*, 521 U.S. at 849 (quoting U.S. CONST. amend. I).
47. *Id.* at 849 n.2.
48. *Id.* at 849.
49. *ACLU*, 929 F. Supp. at 830-49.
50. *Reno*, 521 U.S. at 849.
51. *Id.* at 874.
52. *Id.* at 864.
53. U.S. CONST. amend. I.
54. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (speech likely to incite imminent illegal action); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words).
55. Roth v. United States, 354 U.S. 476 (1957).
56. 413 U.S. 15 (1973).
57. *Id.* at 16.
58. *Id.* at 24 (citations omitted).

The constitutional waters get murky, though, for arguably objectionable speech that does not meet the *Miller* test for obscenity. Such "indecent" speech is constitutionally protected.[59] Even so, government may regulate indecent speech—but that regulation "is subject to strict scrutiny, and will only be upheld if it is justified by a compelling government interest and if it is narrowly tailored to effectuate that interest."[60]

As for what material is indecent, the Court has said that "the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."[61] Also, "indecency is largely a function of context—it cannot be adequately judged in the abstract."[62]

Notwithstanding the Court's reluctance to plainly define indecency, at least two cases provide guidance in the context of broadcast media.[63] Both involve definitions formulated by the Federal Communications Commission (FCC) in the course of its regulatory responsibilities. The government's interest in both cases was the protection of children.[64]

FCC v. Pacifica Foundation upheld an FCC declarative order that authorized administrative sanctions for a radio station's mid-afternoon broadcast of an indecent monologue.[65] The Court quoted the Commission's memorandum opinion, which identified indecency as "'the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.'"[66]

Denver Area Educational Telecommunications Consortium v. FCC upheld a statutory provision that permitted cable television operators to decide whether to broadcast indecent programs on channels leased to unaffiliated third parties.[67] The case also struck down another provision that required cable operators to segregate and block sex-related material on leased channels.[68] The FCC defined "indecency" in *Denver Area* as "descriptions or depictions of 'sexual or excretory activities or organs in a patently offensive manner' as measured by the cable viewing community."[69] The petitioners in *Denver Area* argued that the FCC's definition was too vague, but the Court sidestepped that issue, noting that the definition "uses language similar to language previously used by this Court for roughly similar purposes."[70]

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59. Sable Communications of California v. FCC, 492 U.S. 115 (1989).
60. ACLU v. Reno, 929 F. Supp. 824, 851 (E.D. Pa. 1996).
61. FCC v. Pacifica Found., 438 U.S. 726, 740 (1978).
62. *Id.* at 742. The word "pornography" has no fixed legal meaning; it may include materials that are either indecent or obscene. *ACLU*, 929 F. Supp. at 866.
63. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996); *Pacifica*, 438 U.S. 726 (1978).
64. *Denver Area*, 518 U.S. at 733; *Pacifica*, 438 U.S. at 749-50.
65. *Pacifica*, 438 U.S. at 729-30, 738.
66. *Id.* at 731-32 (citation omitted).
67. *Denver Area*, 518 U.S. at 733.
68. *Id.* at 760.
69. *Id.* at 736.
70. *Id.* at 750-51.

Pacifica and *Denver Area* implicitly assume that children cannot be separated out of the audience. Hence, these cases support regulation of indecent speech that also to some degree affects willing adult listeners, in spite of adults' full First Amendment rights to hear such speech. But when minors can be segregated, a different—and lower—First Amendment standard applies to them.[71]

Ginsberg v. New York upheld the conviction of a retailer who sold "girlie magazines" to a sixteen-year-old boy.[72] At issue was a New York obscenity law that barred "the sale to minors under 17 years of age material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults."[73] The Court required only "that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."[74]

The Court also has approved the use of zoning ordinances to regulate indecent speech.[75] *Young v. American Mini Theatres* upheld Detroit's "Anti-Skid Row Ordinance" that prohibited adult movie theaters from locating within 500 feet of a residential area or within 1000 feet of any two other "regulated uses" (including bars, adult book stores, and eight other kinds of businesses).[76] *City of Renton v. Playtime Theatres* upheld a zoning ordinance that prohibited adult movie theaters within 1000 feet of residential areas, churches, parks, or schools.[77] The professed goal of the ordinances in both cases was to combat the "secondary effects" of the theaters, including crime, prostitution, and declining property values.[78] In both cases, the Court saw zoning ordinances as "'content neutral' time, place, and manner regulations [that] are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."[79]

B. The Medium

1. Broadcast

Just as the Court has not treated all categories of speech the same, it has not treated all forms of speech the same.[80] Of all kinds of communication, broadcasting has received the least First Amendment protection.[81] The Court has given two reasons that are particularly important to the indecency discussion. First, broadcasting is uniquely pervasive in the lives of all Americans, so that even in the privacy of their homes, listeners and viewers tuning in and out may acciden-

71. Ginsberg v. New York, 390 U.S. 629 (1968).
72. *Id.* at 633.
73. *Id.* at 631.
74. *Id.* at 641.
75. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986); Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976).
76. *Young*, 427 U.S. at 52, 54.
77. *Renton*, 475 U.S. at 43.
78. *Young*, 427 U.S. at 55; *Renton*, 475 U.S. at 47.
79. *Renton*, 475 U.S. at 47.
80. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).
81. *Id.*

tally encounter objectionable material without warning.[82] Second "broadcasting is uniquely accessible to children, even those too young to read."[83]

Although the "pervasiveness" argument presumably applies to unwilling adult listeners too, it was concern for children that justified "special treatment" of indecent broadcasting in *Pacifica*.[84] The Court used the same reasoning in *Denver Area* when it concluded that "[c]able television broadcasting . . . is as 'accessible to children' as over-the-air broadcasting, if not more so."[85] This "accessibility" justified giving cable operators the option of not broadcasting indecent programming on leased access channels.[86] It did not justify requiring operators to "segregate and block" such material, because the Court found that less restrictive methods could protect children just as effectively.[87]

2. Telephone

The telephone is different from broadcast media as an avenue of indecent communication.[88] *Sable Communications of California v. FCC* invalidated a ban on indecent telephone "dial-a-porn" messages in part because the telephone, unlike radio in *Pacifica*, "requires the listener to take affirmative steps to receive the communication."[89] The medium eliminates the problem of unwilling listeners surprised by an indecent message.[90] The Court determined that there were less restrictive ways "to serve the Government's compelling interest in protecting children," including the use of credit cards, access codes, and scrambling rules.[91]

The Court's history of applying different levels of First Amendment protection to different forms of speech assumed critical importance for the resolution of *Reno v. ACLU*. The Court either had to analogize the Internet to other media in previous cases or declare the Internet a completely new species of communication with its own unique set of First Amendment rules.

IV. INSTANT CASE

The Supreme Court affirmed the district court's judgment concerning the CDA on First Amendment grounds of overbreadth only.[92] The Court specifically declined to reach the Fifth Amendment issue of vagueness, but nonetheless discussed it in some depth in connection with the overbreadth inquiry.[93] The Court also considered—and for the most part rejected—the government's contention that the statute could be saved by its severability clause[94] and narrow construction of nonseverable terms.[95]

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82. *Id.*
83. *Id.* at 749.
84. *Id.* at 750.
85. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 744 (1996).
86. *Id.* at 733.
87. *Id.* at 756-60.
88. Sable Communications of California v. FCC, 492 U.S. 115, 127 (1989).
89. *Id.* at 128.
90. *Id.*
91. *Id.*
92. Reno v. ACLU, 521 U.S. 844, 864 (1997).
93. *Id.*
94. 47 U.S.C. § 608 (1994).
95. *Reno*, 521 U.S. at 882.

Justice Stevens wrote the Supreme Court's seven-justice majority opinion in *Reno*.[96] Justice O'Connor, joined by Chief Justice Rehnquist, wrote a separate opinion that concurred in the judgment in part and dissented in part.[97] This section of the Note sets out the reasoning that the majority and the dissent used to address the main issues of the case, as well as the arguments advanced by the parties.

A. The Government's Arguments

The government contended that the CDA was constitutional under four earlier cases in which the Supreme Court upheld time, place, and manner restrictions on speech.[98] The government cited *Ginsberg* for the proposition that "there is no First Amendment right to disseminate indecent material to children."[99] It relied on *Pacifica* to argue that "Congress could channel indecent communications to places on the Internet where children are unlikely to obtain them."[100] Finally, the government invoked *Renton* and *Young* to assert that "[the CDA] operates as an adult 'cyberzoning' restriction, very much like the adult theater zoning ordinances."[101]

In response to the vagueness challenge, the government argued that three prior Supreme Court decisions "strongly support" the constitutionality of the CDA's wording.[102] The CDA's definition of indecency is similar to one prong of the *Miller* obscenity test and one element of the *Ginsberg* harmful-to-minors definition; and it is "almost identical" to the indecency definition that survived a vagueness challenge in *Denver Area*.[103] The government also argued that Congress intended the terms "indecent" and "patently offensive" to be synonymous.[104] "In other words, indecent is shorthand for patently offensive sexually explicit communications, and the latter is the definition of the former."[105]

The government acknowledged that "in the short run" the CDA could encumber constitutionally-protected indecent communication between adults.[106] Even so, no less burdensome approach would vindicate the government's interest in protecting children.[107] Five arguments addressed why those burdens should not signal overbreadth.

The CDA includes a scienter requirement, so that Internet speakers who use a "telecommunications device" to transmit indecent materials "need only refrain from disseminating such materials to persons *they know* to be under 18."[108]

96. *Id.* at 849.
97. *Id.* at 886.
98. Brief for Appellants at 15-16, Reno v. ACLU, 521 U.S. 844 (1997) (No. 96-511).
99. *Id.* at 15.
100. *Id.*
101. *Id.* at 16.
102. *Id.* at 17.
103. *Id.*
104. *Id.* at 10.
105. *Id.*
106. *Id.* at 17.
107. *Id.* at 16.
108. *Id.* at 24 (emphasis added).

Likewise, the provision that prohibits using "an interactive computer service" to send patently offensive materials "applies only to situations in which a person sends indecent material to someone *he knows* to be under 18."[109] The government denied that either provision prohibited such communication between adults.[110]

The government argued that selective enforcement of the statute would mean that "material having scientific, educational, or news value [would] almost always fall[ ] outside the CDA's coverage."[111] The statute's legislative history and the "historical meaning of the CDA's indecency definition" pointed to this result.[112]

The statute provides defenses.[113] Those defenses include requiring a debit or credit card or other age verification to access sexually explicit sites[114] or other "good faith, reasonable, effective, and appropriate actions under the circumstances."[115] Internet industry advances would flesh out details of these defenses; "tagging" and blocking devices illustrated the kinds of "technological solutions [that would] be created if the CDA's indecency restrictions are upheld."[116]

Finally, the government asserted that "reasonable opportunities to disseminate indecent material" would still exist under the CDA framework.[117] "Burdens and costs" do not create a flat ban, nor is it necessary for "most speakers [to be] able to communicate indecent speech over every possible Internet application."[118]

The government's fall-back argument on the issue of overbreadth was the severability clause contained in the Communications Act of 1934 that the CDA amended.[119] The clause provides that "[i]f any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby."[120] The government argued that the Court could use this clause to sever any unconstitutional provision of the CDA and narrowly construe the rest.[121]

B. Arguments of the ACLU, et al.

The ACLU urged the Court to apply strict scrutiny to the CDA based on two arguments: (1) The CDA operates as "a criminal ban" on protected speech, because Internet speakers cannot identify minors in their audiences; and (2) the

109. *Id.* at 25 (emphasis added).
110. *Id.* at 24-25.
111. *Id.* at 44.
112. *Id.* at 17.
113. *Id.* at 34.
114. 47 U.S.C. § 223(e)(5)(B) (Supp. 1996).
115. *See id.* § 223(e)(5)(A).
116. Brief for Appellants at 38, Reno v. ACLU, 521 U.S. 844 (1997) (No. 96-511).
117. *Id.* at 39.
118. *Id.*
119. *Id.* at 45.
120. 47 U.S.C. § 608 (1994).
121. Brief for Appellants at 45-47.

statute regulates speech on the basis of content.[122] To support these arguments, the ACLU relied primarily on *Denver Area*, which invalidated a "segregate and block" requirement for cable television channels;[123] and on *Sable*, which struck down a ban on indecent telephone messages.[124]

The ACLU argued that the CDA could not withstand strict scrutiny.[125] The defenses provided in the statute were unavailable to most Internet speakers, either because of prohibitive cost or nonexistent technology.[126] Therefore, the statute was not narrowly tailored.[127] In addition, the CDA "does not directly and materially advance the government's asserted interest in protecting minors" because it cannot be enforced against Internet content that originates outside the United States.[128] Moreover, more effective and less restrictive alternatives existed, including user-based blocking software, protections offered by commercial online services, and standards under development by an industry coalition.[129]

The ACLU characterized the CDA as overbroad and maintained that the defect could not be cured by narrow construction.[130] Even if the statute were applied only to commercial websites, such construction would violate the CDA's legislative purpose.[131] Resort to the severability clause would turn the judiciary into legislators.[132] Finally, the overbreadth extends to material that is constitutionally protected for minors and especially valuable to older adolescents, including information on HIV/AIDS.[133]

The ACLU pronounced the CDA fatally vague, particularly given the risk of criminal penalties for violations.[134] First, it was unclear what material the terms "indecent" and "patently offensive" encompass.[135] Second, the statute "fail[ed] to define the relevant 'community' that will set the standard for what is 'indecent' on the global Internet."[136]

C. The Majority Opinion

1. Similarities to the District Court Opinion

The district court opinion informed the high court's reasoning in several respects. The Supreme Court devoted two of the first three sections of its opinion to the disposition of the case in the court below.[137] One section summarized the

122. Brief for Appellees at 21-22, Reno v. ACLU, 521 U.S. 844 (1997) (No. 96-511).
123. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 760 (1996).
124. Sable Communications of California v. FCC, 492 U.S. 115, 131 (1989).
125. Brief for Appellees at 27.
126. *Id.* at 27-28.
127. *Id.* at 27.
128. *Id.* at 34.
129. *Id.* at 36.
130. *Id.* at 39.
131. *Id.* at 40.
132. *Id.* at 41.
133. *Id.*
134. *Id.* at 42.
135. *Id.* at 42-45.
136. *Id.* at 45.
137. Reno v. ACLU, 521 U.S. 844, 849-64 (1997).

district court's factual findings.[138] The other section highlighted the individual opinions of Chief Judge Sloviter and Judges Buckwalter and Dalzell.[139]

The Court's own analysis mirrored that of the district court in important ways. The Supreme Court agreed that the case demanded strict scrutiny, because "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[140] Those "cases" to which the Court referred included three that the government urged as analogous—*Ginsberg*, *Pacifica*, and *Renton*—which the Court rejected as inapposite.[141] The Court instead agreed with the district court's focus on *Sable*, concluding that issues presented by "dial-a-porn" telephone messages most closely resembled those raised by the CDA.[142] The Supreme Court's inquiries into vagueness and overbreadth also tracked much of the district court's analysis,[143] even though the high court stopped short of reaching the vagueness issue in its judgment.[144]

2. Rejection of the Government's Time, Place, and Manner Argument

The Court rejected the government's contention that the CDA was a time, place, and manner restriction and concluded instead that the statute was "a content-based blanket restriction on speech."[145] One by one, the Court disposed of the cases that the government offered in analogy.[146]

The Court noted that the statute upheld in *Ginsberg* was narrower than the CDA in four ways.[147] First, the *Ginsberg* statute did not prohibit parents from buying their children sexually explicit magazines, whereas the CDA applied notwithstanding parental consent or participation.[148] Second, the *Ginsberg* statute applied only to commercial transactions; the CDA had no such restriction.[149] Third, the *Ginsberg* statute applied only to materials that were "'utterly without redeeming social importance for minors.'"[150] The CDA omitted this qualification.[151] Fourth, the *Ginsberg* statute defined persons younger than seventeen as minors; the CDA applied to persons younger than eighteen.[152]

Similarly, the Court found significant differences between the CDA and *Pacifica*.[153] The *Pacifica* order by the FCC targeted a particular broadcast "in order to designate when—rather than whether—it would be permissible to air such a program in that particular medium."[154] The order was declaratory, not

138. *Id.* at 849-57.
139. *Id.* at 862-63.
140. *Id.* at 870.
141. *Id.* at 864.
142. *Id.* at 875-76.
143. *Compare Reno*, 521 U.S. at 870-85 *with* ACLU v. Reno, 929 F. Supp. 824, 849-83 (E.D. Pa. 1996).
144. *Reno*, 521 U.S. at 864.
145. *Id.* at 868.
146. *Id.* at 868-70.
147. *Id.* at 865-66.
148. *Id.*
149. *Id.*
150. *Id.* (quoting Ginsberg v. New York, 390 U.S. 629, 646 (1968)).
151. *Id.*
152. *Id.* at 865-66.
153. *Id.* at 866-67.
154. *Id.* at 867.

punitive, and it was issued by an agency charged with regulatory responsibilities.[155] Finally, the order applied to a medium—broadcast—that historically had received limited protection under the First Amendment.[156] The Internet, on the other hand, has no First Amendment history.[157] Also, part of the original regulatory rationale for broadcast—the scarcity of frequencies—did not apply to a medium offering "unlimited, low-cost capacity for communication of all kinds."[158]

The Court also rejected the government's "cyberzoning" analogy to *Renton* and *Young*.[159] The CDA was different, according to the Court, for two reasons. First, the CDA applied "to the entire universe of cyberspace."[160] Second, the CDA was designed to protect children from the primary effects of the proscribed speech, not its secondary effects.[161]

3. Vagueness

The CDA's vagueness concerned the Court for two reasons. First, as a content-based regulation, its ambiguity chilled speech.[162] Second, the possibility of criminal sanctions increased the CDA's deterrent effect on "even arguably unlawful" speech.[163]

The Court rejected the government's contention that the CDA's language was no more vague than the obscenity standard in *Miller*.[164] First, the *Miller* prong at issue applied only to depictions of "sexual conduct" and required that proscribed material be "specifically defined by the applicable state law."[165] In contrast, the CDA reached "excretory activities," as well as sexual and excretory "organs"; and it included no state law reference to offset the inherent vagueness of "patently offensive."[166] Second, "[j]ust because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague."[167] The Court noted particularly that the other two *Miller* prongs "critically limit[ ] the uncertain sweep of the obscenity definition."[168] Consequently, the CDA presented a greater threat than *Miller* to speech that fell outside its scope.[169]

4. Overbreadth

The Court called the CDA's coverage "wholly unprecedented."[170] Its "broad suppression" of protected speech between adults resembled the "total ban" on

155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 870.
159. *Id.* at 867-68.
160. *Id.* at 868.
161. *Id.*
162. *Id.* at 871-72.
163. *Id.* at 872.
164. *Id.*
165. *Id.* at 873.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 874.
170. *Id.* at 877.

indecent communications invalidated in *Sable*.[171] Like dialing a phone, accessing the Internet "requires a series of affirmative steps more deliberate and directed" than turning on a radio or television.[172] Therefore, the chance of accidentally encountering indecent material was remote.[173] In *Sable*, the Court rejected the argument that only a total ban could prevent children from hearing indecent messages.[174] Likewise, the government would have to explain why a less burdensome approach than the CDA would not protect children on the Internet—a showing the government did not make.[175]

The Court dismantled all arguments the government advanced against the overbreadth challenge.[176] First, the statute's scienter requirement could not overcome the CDA's interference with adult communications.[177] Because "most Internet fora . . . are open to all comers," the knowledge requirement could confer a "heckler's veto" on any person who logged on and claimed his child was present.[178] Knowledge that one participant in a 100-person chat room was a minor "would surely burden communication among adults."[179]

Second, the Court found "no textual support" for the idea that educational or other valuable material would fall outside the statute's reach.[180] Third, the statute's defenses were illusory, since current technology either did not support them or made such defenses prohibitively expensive for most Internet speakers.[181]

Fourth, the government's time, place, and manner analysis was inapplicable to a statute that regulated content.[182] Providing "a 'reasonable opportunity' for speakers to engage in . . . restricted speech on the World Wide Web . . . is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books."[183]

Fifth, only one word—"indecent"—could be severed from the statute, and then only from the section proscribing obscene communications.[184] Moreover, the Court could not impose a narrow construction on the CDA, because its "open-ended character . . . provide[d] no guidance whatever for limiting its coverage."[185]

In another reference to the *Butler* metaphor, the Court warned that the CDA "threaten[ed] to torch a large segment of the Internet community."[186] Finally, the

171. *Id.* at 875.
172. *Id.* at 854.
173. *Id.*
174. *Id.* at 875.
175. *Id.* at 879.
176. *Id.* at 879-85.
177. *Id.* at 881.
178. *Id.* at 880.
179. *Id.* at 876.
180. *Id.* at 881.
181. *Id.* at 881-82.
182. *Id.* at 879.
183. *Id.*
184. *Id.* 882-84.
185. *Id.* at 884.
186. *Id.* at 882.

Court affirmed the district court judgment, concluding that "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."[187]

D. The O'Connor and Rehnquist Dissent

The dissent saw the CDA as a law that conceivably could be—but was not—constitutional.[188] O'Connor, who wrote the opinion, conceptualized the CDA as an Internet "zoning law."[189] As such, it would be valid if (1) it did not "unduly restrict" adult access to the indecent material it targeted; and (2) it did not violate the First Amendment rights of minors to read or view the material.[190] The CDA failed the first prong of the dissent's test.[191]

The CDA restricts adult access to protected speech.[192] O'Connor acknowledged that cyberspace is "fundamentally different" from physical space, and that "it is not currently possible to exclude persons from accessing certain messages on the basis of their identity."[193] At the same time, the electronic world is "malleable"; that is, "it is possible to construct barriers in cyberspace."[194] Internet speakers can require adult identification codes or credit card numbers, and Internet listeners can screen for objectionable content—although technology does not fully support either option today.[195] But since current technology did not permit an Internet speaker to know that minors were not listening, the CDA forced adults to refrain from indecent speech.[196]

Unlike the majority, the dissent would use the scienter provision to find the CDA constitutional in certain narrowly-defined circumstances.[197] This limited application envisioned a conversation involving only one adult speaker who knows that the recipients of the communication are minors.[198] Analogizing to the law upheld in *Ginsberg*, O'Connor asserted that restricting adult speech in this setting leaves adults free to speak indecently to each other.[199] But the *Ginsberg* analogy breaks down as soon as another adult enters the conversation.[200] In that situation, the CDA was like "a law that makes it a crime for a bookstore owner to sell pornographic magazines to anyone once a minor enters his store."[201]

The dissent found that the CDA satisfied the zoning test's second prong concerning the right of minors to read or view indecent material.[202] O'Connor cited *Ginsberg*'s "harmful to minors" standard and noted that the CDA's "patently

187. *Id.* at 885.
188. *Id.* at 886.
189. *Id.*
190. *Id.* at 888.
191. *Id.*
192. *Id.*
193. *Id.* at 889-90.
194. *Id.* at 890.
195. *Id.* at 890-91.
196. *Id.*
197. *Id.* at 893-94.
198. *Id.* at 892-93.
199. *Id.*
200. *Id.* at 893.
201. *Id.*
202. *Id.* at 888-89.

offensive" wording overshot the mark in two respects.[203] The CDA banned speech that had some redeeming value for minors and speech that did not appeal to minors' prurient interest.[204] However, "the universe of speech constitutionally protected as to minors but banned by the CDA . . . is a very small one."[205] Therefore, the statute was not substantially overbroad in this area.[206]

V. ANALYSIS

A United States district court has already struck down one community's library filtering policy on constitutional grounds.[207] However, several states have passed filtering laws, and legislation is pending in ten others.[208] Consequently, more litigation seems likely.

Under *Reno*, mandatory use of Internet filtering software in public libraries should be constitutionally invalid. The Court in *Reno* presumed that content regulation of Internet speech would interfere with, rather than encourage, the free exchange of ideas.[209] Whether the regulatory means is the CDA or mandatory filtering, the outcome in the courtroom should be the same. Therefore, this section of the Note examines the *Reno*-based arguments under which mandatory filtering laws should be struck down.

A. Mandatory use of blocking software is subject to strict scrutiny as a content-based regulation of speech.

The Court in *Reno* established a strict scrutiny standard of review for content-based regulation of speech on the Internet.[210] Blocking and filtering software edit Internet speech based on content. Blocking software uses a "bad site" list to deny users access to certain websites.[211] For example, one popular software program uses "criteria [that] pertain to advocacy information: how to obtain inappropriate materials and or how to build, grow, or use said materials."[212] Filtering software maintains a list of certain keywords such as "butt" and "sex" to block sites containing those keywords.[213] A particular software program may use either or both methods to edit Internet speech.[214] Therefore, laws mandating use of blocking software in libraries actually mandate content-based regulation of Internet speech. Consequently, such laws should be subject to strict scrutiny under *Reno*.

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203. *Id.* at 895-96.
204. *Id.*
205. *Id.* at 896.
206. *Id.* at 896-97.
207. Mainstream Loudoun v. Trustees of the Loudoun County Library, 24 F. Supp. 2d 552 (E.D. Va. 1998).
208. At least thirteen states have passed legislation since 1995, and bills were pending in 1998 in these states: California, Illinois, Kansas, Kentucky, Missouri, New York, Ohio, Rhode Island, Tennessee, and Virginia. *ACLU Cyber-Liberties: Online Censorship in the States* (visited Nov. 15, 1998) <http://www.aclu.org/issues/cyber/censor/stbills.html>.
209. *Reno*, 521 U.S. at 885.
210. *Id.* at 870.
211. Parry Aftab, *A Parents' Guide to the Internet: Filtering Software Programs* (visited Nov. 15, 1998) <http://www.familyguidebook.com/filtering.html>.
212. *Cyber Patrol CyberNOT List Criteria* (last modified Nov. 5, 1997) <http://www.cyberpatrol.com/cp_list.htm>.
213. Aftab, *supra* note 211.
214. *Kids' Safety: A Parental Guidance Clearinghouse* (visited Nov. 15, 1998) <http://www.zdnet.com/familypc/safety/content/091098-spc-02.html>.

B. Strict scrutiny requires a compelling government interest and a narrowly tailored statute. Laws that mandate library use of blocking software fail strict scrutiny because they are not narrowly tailored.

The Court ruled that the CDA was not narrowly tailored, because it "effectively suppresse[d] a large amount of speech that adults have a constitutional right to receive and address to one another," including indecent speech.[215] The Court in this context noted the example of George Carlin's "seven dirty words" in the *Pacifica* monologue.[216] Blocking and filtering software also ban speech that is constitutionally protected for adults. In fact, blocking criteria could arguably censor even more protected speech than the CDA's "indecent" and "patently offensive" standard. Cyber Patrol, for example, specifically blocks "George Carlin's 7 censored words . . . intolerant jokes or slurs . . . advocacy of unlawful political measures . . . [and] pictures or text advocating the proper use of contraceptives."[217] Consequently, because mandatory blocking of the Internet in public libraries restricts such large amounts of adult speech, it is not narrowly tailored and thereby fails strict scrutiny.

A blocking statute might be cured of this facial overbreadth by a provision for disabling the software at adult request. Because the CDA could not be turned on and off, *Reno* does not address this possibility—but *Denver Area* does.[218] The Court in *Denver Area* found that a provision requiring cable operators to "segregate and block" indecent programming was not narrowly tailored to protect children.[219] Part of what the Court objected to in *Denver Area* was that subscribers had to request access to the indecent channel in writing.[220] The Court found that "the 'written notice' requirement [would] further restrict viewing by subscribers who fear for their reputations should the operator . . . disclose the list of those who wish to watch the 'patently offensive' channel."[221] Therefore, a mandatory blocking statute that included a provision for disabling upon *written* adult request probably would still fail. Even a provision that required an *oral* request could be troublesome under the reasoning of *Denver Area*, since other library patrons conceivably could overhear the conversation.

C. Blocking criteria are so vague that a mandatory blocking law could silence speech that is outside the scope of the software.

Although the Court in *Reno* did not reach the Fifth Amendment issue of vagueness in its judgment, it discussed the CDA's vagueness in relation to the overbreadth inquiry.[222] The Court concluded that "the vague contours of the coverage

215. *Reno*, 521 U.S. at 874.
216. *Id.* at 878.
217. *Cyber Patrol CyberNOT List Criteria*, *supra* note 212.
218. Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S 727, 754 (1996).
219. *Id.* at 760.
220. *Id.* at 754.
221. *Id.*
222. Reno v. ACLU, 521 U.S. 844, 864 (1997).

of the statute" meant that some speakers "unquestionably" would be silenced even though their speech fell outside the statute's scope.[223]

Whatever their ambiguity, the troublesome CDA terms "indecent" and "patently offensive" have their roots in case law.[224] Consequently, the government was able to at least argue their clarity on that basis.[225] In contrast, not only are software blocking criteria not based in case law, the criteria differ from program to program. For example: CYBERsitter uses "intelligent pattern recognition" to block sites.[226] Cyber Patrol blocks sites that fall into any of a dozen different content-related categories, including violence/profanity, partial or full nudity, gross depictions, satanic/cult, and others.[227] Surfwatch blocks five categories: Sexually Explicit, Drugs/Alcohol, Gambling, Violence, and Hate Speech.[228] Because there is no consistency from one product to the next, Internet speakers have no way of knowing what the criteria are. On the margin, where content would only arguably fall within the blocking criteria, speech not subject to blocking would be chilled. Consequently, vagueness would contribute to the overbreadth of a mandatory library blocking statute.

VI. CONCLUSION

Unfettered access to the Internet can be problematic for libraries. The American Library Association (ALA) reports that some fifteen percent of libraries that offer Internet access have installed filtering software,[229] notwithstanding an ALA resolution against blocking.[230] Still, embattled librarians may have other options besides the mandatory software solution.

The ACLU has suggested a variety of strategies, including "content-neutral time limits" on Internet use and privacy screens to protect both Internet users and passersby.[231] It is also possible that limited and judicious use of filtering software could withstand constitutional scrutiny. For example, the Austin, Texas, library system plans to maintain at least one unfiltered computer at each branch.[232] Meanwhile, the Boston Public Library limited installation of filtering programs to computers in children's areas.[233]

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223. *Id.* at 874.
224. *Id.* at 873-74.
225. *Id.*
226. *CYBERsitter Frequently Asked Questions* (visited Nov. 15, 1998) <http://www.cybersitter.com/cyberfaq.htm>.
227. *Cyber Patrol CyberNOT List Criteria, supra* note 212.
228. *SurfWatch Filtering Criteria* (last modified Sept. 1, 1998) <http://www1.surfwatch.com/filteringcriteria/core/>.
229. Katie Hafner, *Library Grapples with Protecting Internet Freedom*, N.Y TIMES ON THE WEB (Oct. 15, 1998) <http://www.nytimes.com/library/tech/98/10/circuits/articles/filt.html>.
230. *Resolution on the Use of Filtering Software in Libraries* (visited Nov. 15, 1998) <http://www.ala.org/alaorg/oif/filt_res.html>.
231. *ACLU White Paper: Censorship in a Box* (visited Nov. 15, 1998) <http://aclu.org/issues/cyber/box.html>.
232. Amy Harmon, *Virginia Library Lawsuit Seen as Litmus Test for Internet Freedom*, THE NEW YORK TIMES ON THE WEB (Mar. 2, 1998) <http://www.nytimes.com/library/tech/98/03/biztech/articles/02library.html>.
233. *Id.*

No one knows whether these kinds of compromises could survive a court challenge. Conceivably, they could be valid as less restrictive alternatives to mandatory filtering—or not. Time and the legal system will tell. A surer bet under *Reno* is that mandatory blocking will fail.