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Gratis Dictum! The Limits of Academic Free Speech on the Internet

Ray August

GRATIS DICTUM! THE LIMITS OF ACADEMIC FREE SPEECH ON THE INTERNET

Ray August[*]

This article is about the right of university professors to exercise their academic freedom to speak out and to teach in a new forum: the Internet.[1]

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* Professor of Business Law, College of Business and Economics, Washington State University; J.D., the University of Texas at Austin; LL.M., Cambridge University; Ph.D., University of Idaho. The author is the editor of the on-line INTERNATIONAL LAW DICTIONARY AND DIRECTORY, posted at <http://august1.com/pubs/dict>, the webmaster for the International Law Section of the Academy of Legal Studies in Business, the home page of which is posted at <http://www.wsu.edu/~legal/alsb_ils>, and the webmaster for the Pacific Northwest Academy of Legal Studies in Business, the home page of which is posted at <http://www.wsu.edu/~legal/pnalsb>.

Beginning in the Spring of 1999, all of the courses the author teaches at Washington State University will be offered over the Internet through animated audio-video lectures and live interactive audio-video tutorials. The author's home page is posted at <http://august1.com>.

1. The Internet provides a special challenge to the traditional legal citation system. On August 6, 1996, the American Bar Association (ABA) adopted a resolution recommending the adoption of a Uniform System of Citation that will provide a simple and logical system to cite case opinions that are posted on World Wide Web and ftp sites on the Internet. *See* ABA, Legal Technology Resource Center, *Citations History* (visited Jan. 6, 1999) <http://www.abanet.org/citation/history.html>. As of December 23, 1998, eleven states had adopted the system. *Id.* at *Uniform Citation Standards* (visited Jan. 6, 1999) <http://www.abanet.org/citation/home.html>. Until the ABA's citation system is more broadly adopted, an ad hoc system based on the Uniform System of Citation, known as THE BLUEBOOK, has to be used. For on-line examples of the citation system established by THE BLUEBOOK, see Peter W. Martin, *Introduction to Basic Legal Citation* (1997-98 ed.) (visited Jan. 6, 1999) <http://www.law.cornell.edu/citation/citation.table.html>.

The citation system used for Internet Sources in this article is based on THE BLUEBOOK and on the system proposed by the Coalition of Online Law Journals (COLJ), which is itself modeled on the ABA system. *See* Coalition of Online Law Journals, *Citation Proposal: How to Cite Electronic Journals* (visited Jan. 6, 1999) <http://www.urich.edu/~jolt/e-journals/citation_proposal.html>.

The citations that follow consist of the traditional BLUEBOOK citation (as the ABA system is not yet consistently in place) followed by a hyperlink address for the World Wide Web site where the materials can be found. No BLUEBOOK citation is given for materials that

Although the Internet is a new forum, this article will attempt to show that the same basic rights and duties that apply to professors in the classroom and in the academic media apply to professors speaking out on the Internet. Part I sets the stage with a very brief history of the Internet. Part II examines the principal cases dealing with academic free speech as they relate to the Internet. Most of these cases deal with universities and with the Internet, but because this area is new, I also have included analogous cases dealing with high schools and the print media. Part III contains a description of the current limits of academic free speech on the Internet and of what I believe those limits should be.

I. A SHORT HISTORY OF THE INTERNET

The beginnings of the Internet can be traced to 1964, when a RAND Corporation staffer, named Paul Baran, proposed to set up a long distance network to interconnect computers that would be able to withstand nuclear attack.[2] As there would be no centralized switching station that could be knocked out, the network would be able to operate even if some of its connected computers were destroyed.[3] Moreover, the information exchanged by the networked computers would be sent in packets that would automatically be resent by a different route if they were not initially received.[4] The RAND Corporation was the consummate Cold War think tank, and its proposal struck a cord with the U.S. military.[5] The Defense Department's Advanced Research Project Agency (ARPA) agreed to sponsor this computer-sharing network.[6] ARPANET, as it was called, was built around supercomputers (or what passed for supercomputers at the time — they had twelve kilobytes of memory).[7] Each of these computers was a "node" on ARPANET.[8] The first node was installed at UCLA in the fall of 1969, and by the end of the year, there were three other nodes exchanging data on dedicated high-speed communications lines.[9] By 1971, there were fifteen

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are only available on the Internet.

2. Henry Edward Hardy, *The History of the Net* (unpublished M.A. Thesis, Grand Valley State University) (visited Jan. 6, 1999) <http://ocean.ic.net/ftp/doc/nethis.html>; *see also* Yahoo, *History* (visited Jan. 6, 1999) <http://www.yahoo.com/Computers_and_Internet/Internet/History/> (containing a bibliography of works dealing with the history of the Internet).

3. Hardy, *supra* note 2.

4. *Id.*

5. Bruce Sterling, *Science: Internet*, MAG. OF FANTASY & SCI. FICTION, Feb. 1993, at 99 (posted on the Internet as *Short History of the Internet*, <http://www.agen.tamu.edu/users/dale/atlanta/shist.html>).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

nodes, and by 1972, there were thirty-seven.[10]

According to Bruce Sterling, author of a "Short History of the Internet":[11]

> By the second year of operation . . . an odd fact became clear. ARPANET's users had warped the computer-sharing network into a dedicated, high-speed, federally subsidized electronic post office. The main traffic on ARPANET was not long-distance computing. Instead, it was news and personal messages. Researchers were using ARPANET to collaborate on projects, to trade notes on work, and eventually, to downright gossip and schmooze.[12]

ARPANET grew rapidly in the 1970s, and it was not long before someone came up with the idea of the "mailing list."[13] Mailing lists allowed an identical message to be sent automatically to large numbers of network subscribers.[14] By the late 1970s, other networks — private as well as government — were linking to ARPANET.[15]

ARPANET's original standard for communication was the Network Control Protocol (NCP).[16] The NCP was replaced by the Transmission Control Protocol (TCP)/Internet Protocol (IP).[17] The TCP converts a message into streams of packets at the source, reassembling them into the message at the destination.[18] The IP handles the addressing, making sure that the packets are sent across intermediate networks regardless of the communication standard they might be using, such as NCP, Ethernet, or Unix-to-Unix Command Protocol (UUCP).[19]

The UUCP was created by AT&T's Bell Labs in 1976.[20] It allowed machines running AT&T's UNIX software to send and receive mail, to provide for remote login and file transfers, and to conduct conferencing.[21] Most significantly, these tasks could be done with modems and existing telephone lines, rather than dedicated communication lines.[22]

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10. *Id.*
11. *Id.*
12. *Id.* at 100.
13. *Id.* at 101.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. Robert H. Zakon, *Hobbes' Internet Timeline* (1993-98) (visited Jan. 6, 1999) <http://www.isoc.org/guest/zakon/Internet/History/HIT.html>.
21. Michael Hauben & Ronda Hauben, *Netizens: An Anthology*, ch. 9, text accompanying n.115 (1996) (visited Jan. 6, 1999) <http://www.columbia.edu/~rh120/ch106x09>.
22. Hardy, *supra* note 2.

ARPANET and its connected networks were transformed into the Internet during the 1980s.[23] The military set up a separate MILNET in 1983.[24] In 1984, the National Science Foundation created its own network: NSFNET.[25] NASA, the Department of Energy, and the National Institutes of Health were not far behind.[26] Universities that were not connected to ARPANET established a Computer Science Research Network.[27] Private firms and foreign governments also got into the act.[28] Finally, in 1990, ARPANET itself went out of business,[29] replaced by various interconnected government and private networks.[30]

Among the connected networks that made up the early Internet was the Unix User Network, or Usenet, which used the UUCP protocol to send mail and news.[31] News was posted under a topic heading, and persons reading it could add their comments on postings connected hierarchically to the original posting.[32] Although these news groups may be moderated, most are not. Once news is posted about a particular topic, it is then automatically distributed and stored on all other Usenet servers around the world.[33]

Connectivity to the Usenet network was originally limited to a few node computers that were permanently interconnected and made up the "backbone" of the Usenet network.[34] The creation and posting of new news sites on the Usenet network was informally approved, or self-censored, by the individuals in charge of the backbone computers.[35] However, in 1987, when Richard Sexton's and Brian Reid's proposals to create sites to discuss sex, drugs, and rock'n'roll were voted down, they simply ignored the vote and created the sites.[36] Once a news group is established on one computer, the duplicate files that it automatically copies onto other computers cannot easily be

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23. *See* Sterling, *supra* note 5, at 101-02.

24. David Mayr, *History of the Internet* (1996-98) (last modified July 28, 1998) (visited Jan. 6, 1999) <http://members.magnet.at/dmayr/history.htm>.

25. Sterling, *supra* note 5, at 102.

26. *Id.*

27. Hardy, *supra* note 2 (citing Douglas Comer, *The Computer Science Research Network CSNET: A History and Status Report*, 26 COMM. OF THE ACM 747-53 (1983)).

28. Sterling, *supra* note 5, at 102.

29. Mayr, *supra* note 24.

30. Sterling, *supra* note 5, at 102.

31. Lee S. Bumgarner, *The Great Renaming FAQ* (visited Jan. 6, 1999) <http://www.nottowayez.net/~leebum/gr.html>; Hardy, *supra* note 2.

32. Hardy, *supra* note 2.

33. *Id.* (citing Sydney S. Weinstein, *Where to Get the Sources*, 10 C USERS J. 115 (1992)).

34. Bumgarner, *supra* note 31; Hardy, *supra* note 2.

35. Bumgarner, *supra* note 31; Hardy, *supra* note 2.

36. Hardy, *supra* note 2 (citing G. Wolffe Woodbury, *Re: Famous Flame Wars, Examples Please?* (originally posted Nov. 30, 1992 on Usenet newsgroups: <news:alt.folklore.computers>, <news:alt.culture.usenet>, and <news:news.admin.misc>)).

deleted.[37] As a consequence, the sex, drugs, and rock'n'roll chat rooms have remained on-line ever since.[38]

Today, there are more than 80,000 news groups worldwide where individuals may exchange information and share text or graphic files.[39] Among the most popular are the alt.sex and the alt.binaries.pictures.erotica news groups. These feature descriptions of erotic acts performed with persons, animals, and inanimate objects, as well as easily downloadable amateur photographs that leave absolutely nothing to the imagination.

The University of Texas at Austin web servers, for example,[40] host the following:

- Sixty-nine web pages with links to the alt.sex news group.[41]
- Seventeen web pages with links to the alt.binaries.pictures.erotica news group.[42]
- Four thousand plus web pages have the single word "sex" written on them.[43] The most frequently reoccurring usage is the scientific description of how one determines the sex of flies.[44]
- Eighty-three web pages contain a four-letter scatological reference.[45]
- Ninety web pages are named "humor" or "jokes."[46] Most of the humor and jokes on these pages is politically incorrect.[47]
- One hundred forty-two web pages use a four-letter word describing intercourse, including one that describes the word's many and varied grammatical usages.[48]
- One very worthwhile web page that critiques and then reproduces a truly scary University of Georgia page entitled "Holocaust Disbelievers."[49]
- One web page entitled "Dykes for Dental Dams," which encourages

37. *See Hardy,* supra note 2.

38. *See* Bumgarner, *supra* note 31; Hardy, *supra* note 2.

39. Daily Usenet Statistics for Dec. 29, 1998 lists 82,490 Usenet groups. <news:ucb.news.stats> or <http://www.dejanews.com/[ST_chan=cpu]/bg.xp?level=ucb.news>.

40. University of Texas at Austin, *Home Page* (visited Nov. 5, 1998) <http://www.utexas.edu/>. I used the University of Texas because of its easily searchable web site, and because it is my juris doctoral alma mater.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Jose Flores, *Popeye's "What Does the Word Mean, Mummy?" Series No. 1* (visited Sept. 1, 1998) <http://www.ece.utexas.edu/~flores/fuck.html>.

49. Catherine Curtiss, *Hate Groups on the Internet* (visited Nov. 6, 1998) <http://www.cwrl.utexas.edu/~syverson/309spring96/studentwork/project1/curtiss/Holocaust_Disbelievers_985.html>.

lesbians to engage only in safe sex.[50]

- One web page of quite tasteful and very beautiful nude photography.[51]

To put these web pages in perspective, consider the following materials, which can be found in the open stacks of the Washington State University library:[52]

- Seven books on scatology.[53]
- One book with a four-letter word for intercourse in its title.[54]
- One thousand four hundred and eighty-one humor books.[55]
- Twenty copies of Adolph Hitler's *Mein Kampf*, three of which are English translations.[56]
- Four hundred and forty-five books with the word "lesbian" in their titles.[57]
- Every copy of *Playboy* every published.[58]

This means that while much titillating and challenging material is available on-line, there is also an equal amount of provocative and dangerous reading in the typical university library.

II. INTERNET FREE SPEECH CASES

The question, of course, is who should have access to these pages and who should be able to put them on-line? Or, for that matter, one might ask, who should have access to the books in a university library and who should choose which books belong there?

Consider a few examples of attempts to suppress what some considered to have been inappropriate postings on the Internet. In 1988, the following politically incorrect joke was posted to a news group known as rec.humor.funny.[59] The joke was this: "A Jew and a Scotsman have dinner. At the end of dinner the Scotsman is heard to say: 'I'll pay.' The newspaper headline next morning says: 'Jewish ventriloquist found dead in alley.' "[60]

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50. Molly Williams, *Dykes for Dental Dams* (visited Sept. 1, 1998) <http://www.utexas.edu/students/cwiforum/issue1/dykes.html>.

51. Albert Rouzie, *Photography* (visited Sept. 1, 1998) <http://www.cwrl.utexas.edu/~rouzie/e306fall/Project3/Final_Versions/BGJ-proj3/nature.html>.

52. The Washington State University library catalog can be searched on-line at <http://www.systems.wsu.edu/griffin/wsugate.htm> (visited Dec. 9, 1998).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. John McCarthy, *Beating Down Censorship at Stanford* (visited Sept. 1, 1998) <http://www-formal.stanford.edu/jmc/history/rhf.html>.

60. *Id.*

An MIT student found this joke tasteless and offensive, and he complained to the news group.[61] Stanford University's Vice-President for Information Resources, who was in charge of Stanford's computer centers, took the complaint to heart, and he banned the entire news group from the computers he controlled.[62] Stanford's President, Donald Kennedy, told the Academic Senate that he supported the ban, but that he would defer to the Senate.[63] The Senate's Committee on Libraries called for removing the ban, citing the University's existing statement on academic freedom: " 'Expression of the widest range of viewpoints should be encouraged, free from institutional orthodoxy and from internal or external coercion.' "[64] When the Vice-President for Information Resources was given the choice of reinstating the news group or debating the matter with the full Senate, which was not sympathetic to the ban, he chose to reinstate the group.[65]

In 1996, a similar incident occurred on the University of Oklahoma campus.[66] David Boren, the President of the University of Oklahoma, after hearing complaints from a state legislator and a local director of the Center for a Family Friendly Internet, acted to deny access through the university's computers to about 100 news groups that were thought to contain graphic sexual materials, including the alt.sex group.[67] In April of 1996, Bill Loving, an assistant professor of journalism at the University of Oklahoma, who was teaching a course on censorship, brought a lawsuit in a federal district court against the University of Oklahoma claiming that his First Amendment rights to free speech had been violated.[68]

Just before *Loving v. Boren* went to trial, the University revised its news group access policy and set up a second on-campus news server.[69] The "A" server provides access to only news groups that the university has approved.[70] The "B" server provides unlimited access to all news groups on the Internet.[71] Anyone who wants to use the "B" server has to be over

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61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* (quoting Stanford University, Preamble to the Statement on Academic Freedom (1974)).
65. *Id.*
66. *See* Loving v. Boren, 956 F. Supp. 953, 959 (W.D. Okla. 1997) (visited Dec. 2, 1998) <http://www.gse.ucla.edu/iclp/loving.html>.
67. Stuart Biegel, *Service Call: The Battle Heats Up as a Court Allows a Public University to Restrict Internet Access*, L.A. DAILY J., Feb. 27, 1997 (posted on The UCLA Online Institute for Cyberspace Law and Policy) (visited Jan. 6, 1999) <http://www.gse/ucla.edu/iclp/feb97.html>.
68. *Id.*
69. *Loving*, 956 F. Supp. at 954.
70. *Id.* at 955.
71. *Id.*

eighteen and has to certify that he or she is using it to access the Internet "for academic and research purposes."[72]

At trial, Loving argued that the Internet is a public forum and that he had suffered irreparable harm by being denied access to it.[73] The court disagreed.[74] Noting that the University had "effectively mooted" Loving's claim by creating its B server, the court held that the University's computer and Internet services did not constitute a public forum and that Loving had not suffered any irreparable harm.[75] Quoting the Supreme Court's statement in *Adderley v. Florida* that " 'the state has the right to preserve the property under its control for the use for which it is lawfully dedicated,' "[76] the court explained that the University's computer and Internet services were "lawfully dedicated to academic and research uses."[77]

The Tenth Circuit Court of Appeals affirmed the trial court's decision in January 1998.[78] It did so, however, only on very limited grounds.[79] Because Loving presented no evidence that he had ever tried to access any news group for any purpose that was not academic or educational, he had failed to show that he had been injured by the University's actions.[80] His case, accordingly, was dismissed for lack of standing.[81]

The Tenth Circuit's decision was reasonable, but frustrating. It was reasonable because Loving declined to show that he had been injured.[82] To do so, he would have had to show that he had tried to access the Internet for a purpose that was unrelated to his job, and this might have made him liable for misuse of his employer's property. The decision is frustrating because it leaves undecided the issue of whether a state university may specify the purposes for which the Internet may be accessed by its professors. This issue will have to wait for another time to be resolved.

United States v. Baker[83] is another case dealing with offensive on-line materials. This is the case of Jake Baker, a quiet, small, nerdy, but strange undergraduate at the University of Michigan who enjoyed posting gruesome

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72. *Id.*
73. *See id.*
74. *Id.*
75. *Id.*
76. *Id.* (quoting 385 U.S. 39, 47 (1966) (visited Jan. 6, 1999) <http://laws.findlaw.com/US/385/39.html>).
77. *Id.*
78. Loving v. Boren, 133 F.3d 771, 773 (10th Cir. 1998) (visited Dec. 2, 1998) <http://lawlib.wuacc.edu/ca10/cases/1998/01/97-6086.htm>.
79. *Id.*
80. *See id.*
81. *Id.*
82. *See id.*
83. 890 F. Supp. 1375 (E.D. Mich. 1995) (visited Dec. 2, 1998) <http://ic.net/~sberaha/baker.html>.

stories to the alt.sex news group.[84] In January 1995, he posted a story that had a simple plot: stalk a victim and sadistically torture and murder her.[85] The first-person protagonist was something of a cross between Hannibal Lector, Charles Manson, and a teenage pedophile.[86] The fantasy victim — innocent and harmless — had the name of a classmate of Jake's upon whom he had a crush.[87] Unfortunately for Jake, the story came to the attention of a U.S. lawyer working in Moscow, Russia, who was a Michigan alumnus.[88] The lawyer telephoned the President of the University of Michigan to find out why this story, which he thought "cross[ed] the line from bad taste to the pathological," was posted with the umich.edu identifier of his alma mater.[89]

James Duderstadt, President of the University of Michigan, sent the campus police to interview Baker in his dorm room.[90] Baker waived his *Miranda* rights, and the police searched his room and e-mail, discovering that he had shared electronic fantasies with a Canadian named Arthur Gonda.[91] A few days later, President Duderstadt summarily suspended Baker from the University, citing a little-used Regents Bylaw that gives him such authority whenever it is necessary to maintain "order among students."[92] The campus police then escorted Baker off the campus.[93]

Baker immediately consulted an attorney, who sought to get Baker reinstated.[94] Unfortunately for Baker, University of Michigan law professor and scholar Catherine MacKinnon was then leading an attack on pornography, arguing that pornographic speech in and of itself is violence and should be illegal.[95] The University administration, not unsympathetic to this argument, refused to reinstate Baker.[96]

In the meantime, the University showed Jake Baker's story to "Jane

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84. JONATHAN WALLACE & MARK MANGAN, SEX, LAWS, AND CYBERSPACE 63 (1996). For an on-line summary of this book, see <http://www.magnet.ch/serendipity/cda.html#slac> (visited Dec. 2, 1998), and for a summary of Chapter 3, on Jake Baker, see <http://www.spectacle.org/freespch/baker.html> (visited Jan. 6, 1999).

85. *Baker*, 890 F. Supp. at 1379. The story is currently posted on-line at <http://www.mit.edu/activities/safe/cases/umich-baker-story/Baker/stories/doe.html> (visited Dec. 2, 1998).

86. WALLACE & MANGAN, *supra* note 84, at 64.

87. *Id.* at 66.

88. *Id.* at 63.

89. *Id.*

90. *Id.* at 66.

91. *Id.*

92. *Id.* at 67.

93. *Id.*

94. *Id.*

95. *Id.* Professor MacKinnon's comments about the *Baker* case are posted at the following University of Michigan Law School web site: <http://www.law.umich.edu/mttlr/archives/bakerconf/mack.htm> (visited Dec. 2, 1998).

96. WALLACE & MANGAN, *supra* note 84, at 67.

Doe," the fantasy victim, who said she felt threatened by it.[97] The University also contacted the FBI to find out if Baker had broken any laws.[98] At first, the FBI thought that his story might be obscene, but the U.S. Attorney's Office quickly informed the FBI that since the Supreme Court's 1973 decision in *Miller v. California*,[99] the courts have never found writings, as opposed to pictures, obscene.[100] The federal government, however, decided to charge Baker with threatening "Jane Doe."[101] They also charged him with conspiracy to sodomize, rape, and murder Jane Doe.[102] The conspiracy charge flowed from the e-mail exchanges between Baker and Gonda, which described how they wanted to abduct and "snuff" a fellow student.[103]

The FBI arrested Baker on the day he was to attend a University of Michigan suspension hearing.[104] The magistrate before whom Baker was arraigned ordered him to be held without bond.[105] The magistrate said that Baker's story was more than a story because Baker had named "Jane Doe," and he ordered Baker to undergo psychiatric evaluation.[106] When the psychiatrist reported that Baker was not a threat and only had a highly active imagination, the magistrate ignored the psychiatrist's report and continued to deny Baker bail.[107] A grand jury then returned an indictment against Baker for issuing a threat in interstate or foreign commerce in violation of title 18 section 875(c) of the U.S. Code.[108] Later, the indictment was amended to include five separate charges based on five separate e-mail messages.[109]

The FBI asked the Ontario, Canada police for help in locating Arthur Gonda, who had an e-mail account with a Toronto Internet service provider.[110] The Canadian police reported back that Arthur Gonda was a fictitious name, and the Internet service provider refused to reveal the true owner of the e-mail account.[111]

In the federal district court, Baker's attorney moved to have the charges

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97. *Id.* at 68.
98. *Id.*
99. 413 U.S. 15 (1973) (visited Jan. 6, 1999) <http://laws.findlaw.com/US/413/15.html>.
100. WALLACE & MANGAN, *supra* note 84, at 68.
101. *Id.* at 68-69.
102. *Id.* at 69.
103. *Id.*
104. *Id.*
105. *Baker*, 890 F. Supp. at 1379.
106. WALLACE & MANGAN, *supra* note 84, at 71 (citing *Baker*, 890 F. Supp. at 1379).
107. *Id.* at 72.
108. *See Baker*, 890 F. Supp. at 1380; Peter J. Swanson, *Jake Baker Information Page: Timeline of Events in Baker Case* (visited Jan. 6, 1999) <http://www.mit.edu/activities/safe/cases/umich-baker-story/Baker/timeline.html>.
109. WALLACE & MANGAN, *supra* note 84, at 76.
110. *Id.* at 74-75.
111. *Id.*

against Baker dismissed, because the government had no evidence that Baker had done anything but write down fantasies.[112] In order to prosecute Baker, his attorney argued, the government would have to show that he made a "true threat" and had not engaged in mere "speech."[113] The government argued that it was enough that Baker had carried on an international conversation and devised plans to carry out violent acts.[114] The government said: "This case is a classic threat prosecution undertaken to prevent violence before it occurs. The alternative — waiting for people in Baker's position to act on their stated intentions — is simply not acceptable in a civilized society."[115]

The district court judge, Avern Cohn, who in 1989 had struck down the University of Michigan's hate speech code "on the grounds that it was too broad and too vague,"[116] came to the same conclusion with respect to the government's indictment of Jake Baker.[117] Judge Cohn said that the government had failed to make a sufficient showing that Baker's on-line fantasy constituted a "true threat."[118] Indeed, he said that the government's case was, at best, far fetched.[119] For a statement to be a "true threat," he explained, it must be "on its face and in the circumstances in which it is made . . . so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and [an] imminent prospect of execution."[120] In this case, it was not clearly foreseeable to Baker that "Jane Doe" would ever see the story he had posted to the alt.sex news group.[121] Thus, it could not be said that Baker had intended to threaten her.[122] Judge Cohn dismissed the charges against Baker.[123]

The U.S. Congress should have read Judge Cohn's 1995 opinion in *Baker* dismissing the charges against Jake Baker. When Congress adopted the Communications Decency Act of 1996 (CDA), it attempted to criminalize the kind of conduct that Baker had engaged in.[124] As the Supreme Court

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112. *Id.* at 76-77.
113. *Id.* at 77.
114. *Id.*
115. *Id.*
116. Doe v. University of Michigan, 721 F. Supp. 852, 866-67 (E.D. Mich. 1989).
117. WALLACE & MANGAN, *supra* note 84, at 77.
118. *Baker*, 890 F. Supp. at 1385, 1388.
119. *Id.* at 1389.
120. *Id.* at 1382.
121. *Id.* at 1386.
122. *See id.*
123. *Id.* at 1388-90. The University of Michigan would not rescind its suspension of Baker. WALLACE & MANGAN, *supra* note 84, at 80. On the other hand, Baker had no interest in returning to Michigan, and he now attends a community college in his hometown in Ohio. *Id.*
124. 47 U.S.C. § 223(a), (d) (Supp. 1996).

would subsequently reaffirm, Congress may not do so.[125] In particular, the CDA sought to criminalize the knowing transmission of "obscene or indecent" messages to any recipient known to be under eighteen years of age[126] and the knowing sending or displaying to a person under eighteen of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[127]

In *Reno v. ACLU*, the Supreme Court, in an essentially unanimous opinion, said that the government could outlaw obscenity, as it already has done, but that it could not criminalize "indecent messages" or sexual or excretory activities that are "patently offensive."[128] The word "indecent" and the phrase "patently offensive" are not defined and are therefore vague.[129] In addition, it held that the CDA was overly broad.[130] "In order to deny minors access to potentially harmful speech," the Court said, "the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."[131] Citing its 1996 decision in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,[132] the Court said that the government may not " 'reduc[e] the adult population . . . to . . . only what is fit for children.' "[133] The holding of *Reno* can be succinctly summarized as follows: (1) Adults have a constitutional right to exchange "indecent messages."[134] (2) Adults have a constitutional right to exchange and view "patently offensive messages" describing or showing sexual and excretory functions.[135]

Hazelwood School District v. Kuhlmeier is another case that is important to the topic at hand.[136] While it does not deal directly with the Internet, it is relevant because it limits the free speech rights of students.[137] The holding does not affect college and university students, but rather concerns

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125. Reno v. ACLU, 117 S. Ct. 2329, 2334 (1997) (holding the CDA unconstitutional) (visited Dec. 2, 1998) <http://www.laws.findlaw.com/US/000/96-511.html>.

126. 47 U.S.C. § 223(a)(1)(B)(ii).

127. *Id.* § 223(d).

128. *Reno*, 117 S. Ct. at 2344-46.

129. *Id.*

130. *Id.* at 2346-48.

131. *Id.* at 2346.

132. 518 U.S. 727, 759 (1996) (visited Dec. 2, 1998) <http://laws.findlaw.com/US/484/260.html>.

133. *Reno*, 117 S. Ct. at 2346 (citing *Denver*, 518 U.S. at 759 (quoting Sable Comm., Inc. v. FCC, 492 U.S. 115, 128 (1989))) (alteration in the original).

134. *Id.* at 2338, 2346.

135. *Id.*

136. 484 U.S. 260 (1988) (visited Dec. 2, 1998) <http://laws.findlaw.com/US/484/260.html>.

137. *See id.* at 270.

elementary and high school students.[138] That is, for *now* it does not limit the rights of college and university students.

In this case, student reporters on the *Spectrum*, the student newspaper at Hazelwood East High School[139] in Saint Louis County, Missouri, wrote articles describing their experiences with pregnancy and with the impact of divorce on their lives.[140] The high school's principal refused to let the articles be published, fearing that they were inappropriate reading for some of the school's younger students.[141] The students then sued, claiming their First Amendment rights had been infringed.[142] The trial court disagreed, the Court of Appeals reversed the trial court, agreeing with the students, and then the U.S. Supreme Court took the case on certiorari.[143]

The Supreme Court held that the First Amendment rights of students in public high schools are not "coextensive" with the rights of adults in other settings.[144] It said that a school does not have to lend its name or its resources to the dissemination of student speech.[145] Because the newspaper had not been opened by policy or practice for indiscriminate use by the public at large, or even a segment of the public, such as a student organization, the Court held that the newspaper at Hazelwood East High was not a public forum.[146] The newspaper was written by students in a journalism class under the supervision of the teacher and subject to the scrutiny of the principal.[147] The student reporters received grades for their work, with the purpose of the newspaper being to teach, not to communicate news.[148] In sum, the Court said that a high school may "refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order.' "[149]

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138. *Id.*

139. The high school's home page is posted at <http://www.hazelwood.k12.mo.us/~pridlen/index.html> (visited Dec. 2, 1998).

140. *Hazelwood*, 484 U.S. at 263.

141. *Id.*

142. *Id.* at 264.

143. *Id.* at 266.

144. *Id.*

145. *Id.* at 272-73.

146. *Id.* at 270.

147. *Id.* at 268-69.

148. *Id.* at 268.

149. *Id.* at 272 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (visited Jan. 6, 1998) <http:laws.find.com/US/478/675.html>). The Court distinguished a school's right not to lend its name and resources to the dissemination of speech from a school's right to punish student expression that may occur on the school's premises. *Id.* at 272-73. As to the latter, only speech that "materially and substantially interferes with the requirements of appropriate discipline" may be prohibited or punished. *Id.* at 269 n.2 (citing Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 505 (1969) (visited Dec.

It is worth noting that six states, Arkansas, California, Colorado, Iowa, Kansas, and Massachusetts, have passed student free expression laws that override the *Hazelwood* decision, and similar legislation is pending in Arizona, Illinois, Michigan, Missouri, and Nebraska.[150] Most states have not enacted such legislation, and consequently, their school officials may restrict the speech of elementary and high school students.[151]

On first blush, it might seem that the courts could not extend the *Hazelwood* holding to colleges and universities. The Supreme Court in *Hazelwood* expressly said that it was *not* deciding if its holding should apply at a university.[152] Moreover, the holding is based on the premise that high school students do not have the same rights as adults.[153]

In *Kincaid v. Gibson*, however, a district court in Kentucky held in November 1997 that college media — the student yearbook at Kentucky State University, in the case at bar — is subject to the same restrictions as was the high school media in *Hazelwood*.[154] The court argued that so long as a student publication is not a public forum, which the court held the yearbook was not, a college or university does not have to lend its name or resources to students and thereby support their freedom of speech.[155]

If a publication is allowed to become a public forum, however, even a public high school may not restrict what is said in the publication. In *Yeo v. Town of Lexington*, the First Circuit Court of Appeals held that a high school's newspaper and yearbook could not refuse to print an advertisement calling for sexual abstinence because the newspaper and yearbook had an established practice of accepting advertisements from the local business community.[156] Distinguishing *Hazelwood*, the First Circuit said that in the

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2, 1998) <http://laws.findlaw.com/US/393/503.html>).

150. *Free Expression Laws Kept from High School Students*, STUDENT PRESS L. CTR. REP. 12 (Fall 1996) (visited Jan. 6, 1999) <http:/www.splc.org/report/f96report/f96p12.html>.

151. *See id.* A student newspaper called the *Bolt Reporter* went on-line in November 1997 at <http://www.bolt.com> (visited Jan. 6, 1998). *Id.* It is an underground paper run by students that is not affiliated with any school. *Id.* One of its features is called "Banned on Bolt," which runs stories that high school newspapers have censored. *Id.* So, even if a school chooses to keep its students from speaking out using the school's media, the "pernicious stuff" is going to get out there anyway. *Id.*

152. *Hazelwood*, 484 U.S. at 274 n.7.

153. *Id.* at 266.

154. No. 95-98 (E.D. Ky. Nov. 14, 1997) (unpublished opinion) (visited Dec. 14, 1998) <http://www.nacua.org/documents/Kincaid_v_Gibson.txt>.

155. Charles Kincaid and Capri Coffer, the losing plaintiffs in *Kincaid*, have appealed. Associated Press, *Journalism Groups Fear Kentucky Case Could Rewrite College-Press Rights*, FREE PRESS, Aug. 3, 1998 (visited Jan. 6, 1999) <http://www.freedomforum.org/press/1998/8/3yearbook.asp>.

156. No. 96-1623, 1997 WL 292173, *16 (1st Cir. June 6, 1997) (per curiam) (unpublished opinion) (visited Jan. 6, 1999) <http://laws.findlaw.com/1st/961623v2.html>. This holding was subsequently amended and reversed in an *en banc* decision on the grounds that the student editors of the newspaper and yearbook were not state actors, and therefore there was no state

absence of a "compelling state interest,"[157] a school may not limit the content of what appears in its publications if they have become public forums.[158]

The ruling in *Hazelwood*, which allows schools to limit what students may say when using state facilities, also has been applied to high school teachers, but so far not to university professors. In *Boring v. Buncombe County Board of Education*, the Fourth Circuit Court of Appeals held that a high school teacher did not have the right to have her students perform in the play of her choosing if the high school had a legitimate reason for censoring the play.[159] The play in question, entitled "Independence," depicted a dysfunctional, single-parent family: a divorced mother and three daughters; one daughter was a lesbian, and another pregnant with an illegitimate child.[160] When the teacher put on the play despite instructions from the principal to delete certain portions of the script, she was transferred to another school.[161] She sued on grounds that her right of free speech had been denied.[162] The Fourth Circuit disagreed. It held that the case was merely an employment dispute and raised no question of the exercise of free speech.[163] The high school teacher was obliged to carry out the curriculum set by the school, and when she failed to do so, she was in breach of her obligations to her employer.[164]

In *Cohen v. San Bernardino Valley College*, by comparison, the Ninth Circuit held that a professor of remedial English could *not* be disciplined for requiring students to read and critique articles he had written for *Playboy* and *Hustler* magazines; nor could he be disciplined for discussing controversial sexual topics or using profane language in his classroom.[165] The Ninth Circuit, however, explicitly declined "to define . . . the precise contours of

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action involved. Yeo v. Town of Lexington, 131 F.3d 241 (1st Cir. 1997) (visited Jan. 6, 1999) <http://laws.findlaw.com/1st/961623v3.html>.

157. *Yeo*, 1997 WL 292173, at *16. The court said that a public high school could ban "ads for liquor, drugs, X-rated movies or other products inappropriate for minors." *Id.* at *17 (citing Planned Parenthood of Southern Nev. Inc. v. Clark County Sch. Dist., 941 F.2d 817, 844 (9th Cir. 1991) (en banc) (dissenting opinion)).

158. *Id.* at *16. The First Circuit Court said that in the case before it the student publications were "limited public for[ums]" in that only their advertising pages were open to the public. *Id.* It nonetheless applied the same strict scrutiny/compelling state interest test that is applied in cases involving unlimited public forums. *Id.*

159. 136 F.3d 364, 370 (4th Cir. 1998) (visited Jan. 6, 1999) <http://laws.findlaw.com/4th/952593pv3.html>.

160. *Id.* at 366.

161. *Id.*

162. *Id.* at 367.

163. *Id.* at 369.

164. *Id.* at 370.

165. 92 F.3d 968, 972 (9th Cir. 1996) (visited Jan. 6, 1999) <http://laws.findlaw.com/9th/9555936.html>.

the protection the First Amendment provides the classroom speech of college professors."[166] Instead, it held that the college's sexual harassment policy was so unconstitutionally vague that the professor could not be disciplined.[167]

While neither the Ninth Circuit nor the Supreme Court have defined the free speech rights of university professors in the classroom,[168] the Second Circuit has. In *Jeffries v. Harleston,* Leonard Jeffries, the chair of the Black Studies Department at the City University of New York, made a speech at an off-campus symposium on black culture in which he described the bias he saw in New York State's public school curriculum.[169] During the speech, Jeffries made several derogatory statements, particularly about Jews.[170] The speech ignited a firestorm of controversy, the upshot being the decision by university officials to reduce Jeffries' upcoming term as department chairman from three years to one.[171]

Jeffries sued, claiming a violation of his First Amendment right of freedom of speech.[172] The trial court found in Jeffries favor, and the Second Circuit Court of Appeals initially affirmed.[173] It did so on the ground that a government agency "cannot take action against an employee for speaking on public issues, unless it first shows that the speech actually 'impaired the efficiency of government operations.' "[174] However, the Second Circuit reversed itself when the Supreme Court directed it to rehear the matter[175] following the latter's decision in *Waters v. Churchill.*[176]

The rule set out in *Waters* says that a public employee may speak out on a matter of public concern, but not about a personal grievance.[177] In matters of public concern, however, the employee's comments must be balanced against "the interest of the state, as an employer, in promoting the

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166. *Id.* at 971.

167. *Id.* at 971-72.

168. *Id.* at 971 (stating that "[n]either the Supreme Court nor this Circuit ha[d] determined what scope of First Amendment protection is to be given a public college professor's classroom speech").

169. 52 F.3d 9, 11 (2d Cir. 1995) (visited Jan. 6, 1999) <http://laws.findlaw.com/2nd/937876.html>.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 10.

174. *Id.* (quoting Jeffries v. Harleston, 21 F.3d 1238, 1245 (2d. Cir. 1994)).

175. *Id.*

176. 511 U.S. 661 (1994) (visited Jan. 6, 1999) <http://laws.findlaw.com/US/000/U10402.html>.

177. *Id.* at 668 (citing Connick v. Myers, 461 U.S. 138 (1983) (visited Jan. 6, 1999) <http://laws.findlaw.com/US/461/138.html> (holding that a public employee's "grievance" that does not involve a "public issue," *i.e.*, a personal grievance, is not protected by the First Amendment)).

efficiency of the public services it performs through its employees."[178] According to the Second Circuit:

> [When w]hittled to its core, *Waters* permits a government employer to fire an employee for speaking on a matter of public concern if: (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech.[179]

Because the jury at Jeffries' trial had found that the university could reasonably *predict* disruption on its campus and its action was not retaliatory, the Second Circuit reversed itself and reinstated the trial court's dismissal of Jeffries' original suit.[180]

There are two final cases I would like to describe. The first is *Cubby, Inc. v. CompuServe*.[181] CompuServe is an Internet service provider,[182] providing its customers with access to the Internet, an Internet address, and space on a computer where web pages can be stored.[183] It also provides a variety of other services, including news groups that it calls "forums."[184] One of these forums, created for journalists, was maintained for CompuServe by Cameron Communications, Inc. A newsletter called "Rumorville, USA" was posted on the Journalism Forum by Don Fitzpatrick Associates.[185] Don Fitzpatrick Associates had signed a contract with Cameron Communications and had no direct link with CompuServe.[186]

In 1990, Cubby, Inc. began publishing a competing on-line newsletter called "Skuttlebutt."[187] Soon thereafter the Rumorville newsletter posted news items claiming that Skuttlebutt was a "start-up scam" and was stealing stories from Rumorville. It also claimed that the publisher of Skuttlebutt had been fired from his previous job at WABC.[188]

Cubby sued Don Fitzpatrick Associates, who had posted the Rumorville newsletter, and CompuServe, the Internet service provider on whose

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178. *Id.* (quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (visited Jan. 6, 1999) <http://laws.findlaw.com/US/391/563.html>).

179. *Jeffries*, 52 F.3d at 13.

180. *Id.* at 14-15.

181. 776 F. Supp. 135 (S.D.N.Y. 1991) (visited Dec. 2, 1998) <http://host1.jmls.edu/cyber/cases/cubby.txt.

182. *Id.* at 137.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 138.

188. *Id.*

computer server the newsletter had been posted, for libel.[189] CompuServe moved for summary judgment, arguing that it was not a publisher or a republisher, but merely a distributor that had made no effort to screen the contents of the materials posted on its server.[190]

The district court judge, Peter Leisure, agreed with CompuServe and granted its motion.[191] He based his decision on the landmark U.S. Supreme Court case of *Smith v. California*.[192] In *Smith*, the Court struck down a law that imposed liabilities on a bookseller for possessing an obscene book whether or not the bookseller knew of the book's contents.[193] The Court said that a distributor must have knowledge of the contents of a publication before he can be held liable,[194] otherwise, "[e]very bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop."[195] This would be an unreasonable demand that would improperly impact the public.[196] The Court noted that "by restricting [the bookseller], the public's access to reading matter would [similarly] be restricted."[197]

Judge Leisure said that CompuServe no more controls the content of the messages and files it maintains on its computers "than does a public library, book store, or newsstand, and it would be [as much a restriction on] CompuServe to examine every publication it carries . . . [as] it would be for any other distributor to do so."[198] This same conclusion was recently reached in a similar case — *Marobie-FL, Inc. d/b/a/ Galactic Software v. National Ass'n Fire Equipment Distributors & Northwest Nexus*.[199] In *Galactic Software*, the Internet service provider was held to be not liable for clip art that was posted on its server in violation of a copyright held by Marobie-FL's subsidiary Galactic Software because Marobie did not screen what is posted there.[200]

The final case I want to discuss is *Stratton Oakmont, Inc. v. Prodigy Services Co.*[201] Prodigy, like CompuServe, is an Internet service

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189. *Id.*
190. *Id.*
191. *Id.* at 144.
192. 361 U.S. 147 (1959) (visited Jan. 6, 1999) <http://laws.findlaw.com/361/147.html>.
193. *Id.* at 154-55.
194. *Id.* at 153.
195. *Id.* (internal quotations omitted).
196. *Id.*
197. *Id.*
198. *CompuServe*, 776 F. Supp. at 140.
199. 983 F. Supp. 1167 (N.D. Ill. 1997) (visited Dec. 13, 1998) <http://www.cl.ais.net/lawmsf/Galactic.htm>, <http://www.loundy.com/CASES/Marobie_v_NAFED.html>.
200. *Id.* at 1178.
201. 23 Media L. Rep. (BNA) ¶ 1794, 1995 N.Y. Misc. LEXIS 229, 1995 WL 323710 (Sup. Ct. May 24, 1995) (unpublished opinion) (visited Jan. 6, 1999) <http://www.jmls.edu/

provider.[202] At the time of the case, it was a joint venture owned by International Business Machines and Sears, Roebuck and Company.[203] Unlike CompuServe and other Internet service providers, Prodigy promoted itself as a "family-oriented" service.[204] To this end, it sought to screen all of the messages sent to it for posting.[205] A good idea but one that was impossible to implement.[206] Eventually, Prodigy realized that the task was overwhelming, and it stopped screening messages.[207]

Soon after Prodigy had quit trying, but before it announced that fact widely, an anonymous hacker, using another person's password and account, got on line and posted a series of belligerent statement's on Prodigy's "Money Talk" news group about a stock brokerage firm named Stratton Oakmont.[208] According to the hacker, Stratton Oakmont was a "cult of brokers who either lie for a living or get fired"; the firm's president was a "criminal"; and a public offering that Stratton Oakmont had conducted for Solomon Page was a "major criminal fraud."[209] The hacker struck a couple of days later with more of the same.[210]

Stratton Oakmont sued both "John Doe" the anonymous hacker, whose identity is still unknown, and Prodigy for libel in a New York State court.[211] Unlike the decision in the *CompuServe* case, Prodigy was found liable.[212] The judge, Stuart L. Ain, said that he did not disagree with the decision in *CompuServe*.[213] "Let it be clear that this court is in full agreement with [the *CompuServe* decision] . . . ."[214] Computer bulletin boards should generally be regarded in the same context as bookstores, libraries and network affiliates . . . ."[215]

The difference in the cases, Judge Ain explained, was that "Prodigy's own policies, technology and staffing decisions . . . mandated the finding that

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cyber/cases/strat1.html>, *motion for renewal denied* 24 Media L. Rep. (BNA) ¶ 1126, 1995 WL 805178 (Dec. 11, 1995) (unpublished opinion) (visited Jan. 9, 1999) <http://www.jmls.edu/cyber/cases/strat2.html>.

202. WALLACE & MANGAN, *supra* note 84, at 83.

203. *Id.*

204. *Id.*

205. *Id.* at 83-84.

206. *Id.* at 84, 93.

207. *Id.* at 84. When Prodigy monitored messages, it would take 24 hours before a newly posted message would come on-line; when they no longer monitored the messages, it took only 10 minutes. *Id.*

208. *Id.* at 83.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 84, 87-91.

213. *Id.* at 87.

214. *See supra* notes 181-98 and accompanying text (footnote added).

215. WALLACE & MANGAN, *supra* note 84, at 87.

it [was] a publisher."[216] In other words, "Prodigy's conscious choice, to gain the benefits of editorial control, ha[d] opened it up to a greater liability than CompuServe and other computer networks that make no such choice."[217]

III. THE CURRENT AND PROPER LIMITS OF ACADEMIC SPEECH ON THE INTERNET

What, then, are the current limitations on free speech that the law allows universities to impose on their faculty? And, from a practical perspective, what should those limits be?

A university does not have to provide its faculty or its students with access to the Internet. Practically, however, all universities, whether they are public or private, must do so. Indeed, more and more universities are requiring their students to own computers.[218] Universities also clearly have to provide computers to their faculty because their students have to be computer literate to find jobs, and it is the faculty who will provide those students with that literacy.[219]

Once a university has provided access to the Internet, can it limit the scope of that access? Can it deny its students and faculty access to particular sites like alt.sex or rec.humor.funny?

Private universities, like Stanford, can infringe the speech of their faculty and students because the rights protected by the First Amendment[220] only relate to governmental conduct. Moreover, a provision of the CDA that was

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216. *Id.*

217. *Id.* at 90.

218. *See* Brian Geller & Will Vash, *Computer Policy Stirs Controversy*, INDEPENDENT FLORIDA ALLIGATOR, June 10, 1997, at A1 (visited Dec. 2, 1998) <http://www.alligator.org/edit/issues/97-sumr/970610/b01react.htm> (reporting that University of Florida freshman will be required to have access to a computer); Joseph Jeong, *Computer Ownership Policy to Make Impact in Classroom*, THE TECHNIQUE, Sept. 26, 1997 (visited Dec. 2, 1998) <http://www.cyberbuzz.gatech.edu/technique/issues/fall1997/sep26/news5.html> ("Owning a computer is a requirement for all incoming freshmen as of this [Fall 1997] quarter [at Georgia Tech]."); *Progress Report to State Council of Higher Education for Virginia: Restructuring Virginia Tech*, Sept. 30, 1997 (visited Dec. 2, 1998) <http://ate.cc.vt.edu/PROVOST/Plandoc/progress97.html> [hereinafter *Restructuring Virginia Tech*] ("[T]he university . . . will require all incoming students to own a personal computer beginning with the Fall 1998 semester."); Mandisa Templeton, *Computers Become Mandatory for WCU Freshmen*, BANNER, Dec. 4, 1997 (visited Dec. 2, 1998) <http://bulldog.unca.edu/banner/97-12-04/news/computers.html> (reporting that incoming freshman would be required to buy computers).

219. As the report to the State Council of Higher Education for Virginia has noted, there is a "growing demand for technological literacy in every walk of life." *Restructuring Virginia Tech*, *supra* note 218.

220. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

not struck down by the Supreme Court in *Reno*,[221] entitled "Protection for Private Blocking and Screening of Offensive Materials,"[222] overrules the holding in the *Stratton Oakmont* case with respect to private Internet service providers.[223] It provides:

> No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected . . . .[224]

Although many private universities, including Stanford, have chosen not to infringe the free speech rights of their faculty on the Internet,[225] many others strictly enforce what the faculty may access and what they can post on university provided web pages. For example, Regent University, a private Christian university, reserves the right to deny its faculty, employees, and students the right to maintain a personal home page if the page detracts from the university's mission and objectives.[226]

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221. *Reno*, 117 S. Ct. at 2329.

222. 47 U.S.C. § 230 (Supp. 1996). A portion of the text of the Communications Decency Act of 1996 is posted at <http://pot-pourri.fltr.ucl.ac.be/coursete/comdeca.htm> (visited Jan. 21, 1999).

223. *Id.*; *see Stratton Oakmont*, No. 310631/94, 1995 WL 805178, at *13-*14.

224. 47 U.S.C. § 230(c)(2)(A).

225. *See supra* text accompanying notes 59-65.

226. Regent University, *Web Page Publishing Policy* (last modified July 18, 1996) <http://www.regent.edu/rucs/info/policy/webpub.html>. There are other private universities that limit what faculty, staff, and students may post on university servers. Alfred University's "Policy on the Use of Computing Facilities at Alfred University" states:

> Obscene and/or abusive language is offensive to a large number of people; its use is considered a form of harassment by many. You may not use it in mail headers, process names, bulletin board messages, personal/organizational web pages, printer output to public printers, or in messages to Information Technology Services (I.T.S.) staff.

Alfred University, *Policy on the Use of Computing Facilities at Alfred University* (visited Jan. 6, 1999) <http://www.alfred.edu/its/html/policy.html>. Southern Methodist University's "Rules for Unofficial Web Pages" states:

> A Web page may be removed from an official SMU server or made inaccessible if it is found to be involved in criminal activities, copyright infringement, serious violations of the student code of conduct, violations of applicable codes of ethics or actions that reflect upon the integrity of the University. In addition, the offender(s) may also be subject to other actions as dictated by SMU policies.

Southern Methodist University, *Rules for Unofficial Web Pages* (visited Jan. 6, 1999) <http://www.smu.edu/webmaster/standards/unofficialpagerules.html>. Vanderbilt University's "Computer Privileges and Responsibilites" states: "Users are expected to . . . [r]efrain from

In contrast to a private university, a public university cannot limit Internet access to adults. That is the holding of the *Loving*,[227] *Hazelwood*,[228] and *Reno*[229] courts, with *Reno* standing for the proposition that adults have the right to read and view all the "indecent messages" and "patently offensive" materials they want without interference from the government.[230] Thus, if a state university or a state legislature were to adopt a rule that state equipment or facilities were not to be used to view pornography or obscenity on-line, they would violate the holding in *Reno*. Recall, that in *Loving*, the university acted quickly to put a second server on-line to provide full access to the Internet for all of its adult students and faculty.[231] If the university had not done so, it would have infringed their First Amendment rights. Note, also, that the "Protection for Private Blocking and Screening of Offensive Materials" provision of the CDA does not apply — and would be unconstitutional if it did — to government agencies providing access to the Internet.[232]

Nevertheless, a public university can, at least in theory, forbid its faculty from accessing the Internet using the university's equipment or facilities for nonuniversity related business.[233] Practically, however, this may be difficult to do. What faculty member looking at the latest Playmate centerfold is not doing so for some research purpose? A public university will find it very difficult to monitor its faculty, as doing so would be an invasion of their rights, as well as the rights of third parties communicating with them, to privacy and freedom from unreasonable search and seizure.[234]

May a public university limit what its faculty can upload to university web sites? In other words, may a university restrict what a professor may

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using sounds or visuals that are disruptive to others." Vanderbilt University, *Computer Privileges and Responsibilities* (visited Jan. 6, 1999) <http://www.vanderbilt.edu/HomePage/aup.html>.

227. *Loving*, 133 F.3d at 771.

228. *Hazelwood*, 484 U.S. at 276; *see supra* text accompanying notes 136-53.

229. *Reno*, 117 S. Ct. at 2346-47; *see supra* text accompanying notes 128-35.

230. *Reno*, 117 S. Ct. at 2346-47.

231. *Loving*, 133 F.3d at 771; *see supra* text accompanying notes 66-81.

232. *See* 47 U.S.C. § 230 (Supp. 1996); *see supra* text accompanying notes 220-24.

233. *Loving*, 956 F. Supp. at 955 (citing *Adderley*, 385 U.S. at 47).

234. A university, or any other Internet service provider, may only surreptitiously monitor materials downloaded from the Internet to ensure that the university's computer system is operating properly, or on a strictly random and limited basis to ensure that its facilities are not being misused. Ray August, "Legal Primer on Privacy on the Internet," Paper Presented to Academy of Legal Studies in Business, National Convention (Quebec City, Quebec, Aug. 1996) (manuscript on file with the author). Alternatively, it may notify its faculty that all the materials they download from the Internet will be monitored. *Id.* at 3. This, however, can lead to other problems. The sender of downloaded e-mail, unaware of a university's policy of screening messages, may well be able to complain of an unreasonable search and invasion of privacy. *Id.* at 2 n.7.

put on a university-provided home page, send out as electronic mail, or post to a news group? According to *Reno*,[235] a university may not limit materials solely because they are pornographic.[236] Remember, adults have the right to exchange all of the "indecent messages" and "patently offensive materials" they want, and the government may not require "the adult population . . . to . . . [post] only what is fit for children."[237]

No one, however, may post materials that are defamatory. As *CompuServe*[238] and *Stratton Oakmont*[239] make clear, those who themselves post defamatory materials on the Internet are liable for the resulting damages.[240] Most worrisome for public universities is the holding in *Stratton Oakmont* that if an Internet service provider attempts to screen what is being posted, it is liable for the defamatory materials posted on its servers by others.[241] For private Internet service providers, the "Protection for Private Blocking and Screening of Offensive Materials" provision of the CDA eliminates this liability.[242] But public providers, including public universities, are liable if they attempt to screen materials posted on their servers and something defamatory is posted despite their best efforts.[243] For them, the best strategy to escape liability of this kind may well be to establish a policy of not screening materials posted by faculty, staff, or students on their personal web pages. Indeed, many public universities post notices on their official pages that proclaim support for academic freedom while disclaiming liability for the materials that are posted on the personal web pages of their faculty, staff, and students.[244] An example of such a disclaimer is the University of Wisconsin at Milwaukee's policy notice, which states:

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235. *Reno*, 117 S. Ct. at 2346-47.

236. *See supra* text accompanying notes 128-35, 165-67.

237. *Reno*, 117 S.Ct. at 2346.

238. *CompuServe*, 776 F. Supp. at 135.

239. *Stratton Oakmont*, No. 31063/94, 1995 WL 805178, at *1 (N.Y. Sup. Ct. Dec. 11, 1995) (citing *CompuServe*, 776 F. Supp. at 139).

240. *See supra* text accompanying notes 181-98, 201-17, respectively.

241. *Stratton Oakmont*, No. 31063/94, 1995 WL 805178, at *10 (citing *CompuServe*, 776 F. Supp. at 139).

242. 47 U.S.C. § 230; *see supra* text accompanying notes 222-24.

243. *See Stratton Oakmont*, No. 31063/94, 1995 WL 805178, at *12-*13 (citing *CompuServe*, 776 F. Supp. at 139).

244. In addition to the University of Wisconsin Milwaukee policy, cited *infra* note 245, *see* University of Alaska Anchorage, *CAMAI Policy for Personal Home Pages* (visited Jan. 6, 1999) <http://www.uaa.alaska.edu.aycamai/homepage_policy.html>; The University of Arizona, *UA Info: Policy Statement* (visited Jan. 6, 1999) <http://www.arizona.edu/uainfo/policies/shtml#150>. For additional examples, *see* the links to policy statements of fourteen universities listed at University of Alabama, *UA Web Policy* (visited Jan. 6, 1999) <http://www.ua.edu/webpol.html>.

> Personal home pages and documents (those of faculty, staff, students and student organizations) are not official publications and the author has full responsibility for the contents. This policy recognizes that . . . home pages developed by faculty, staff and students constitute an important means of formulating and conveying knowledge, including statements of belief and opinion, to the university community and to the world at large.[245]

Harassing and threatening materials also may be restricted. But as *Baker* shows, the threat contained in the materials must be a "true threat."[246] The threat has to be " 'so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and [an] imminent prospect of execution.' "[247] Otherwise, an individual has the right to speak freely, even if the speech is unsettling or alarming.[248]

In addition to defamation and harassment, faculty — and anyone else posting materials to a web page — are responsible for other torts and crimes they perpetrate on the Internet. This can include infringement (for example, copyright, patent, trademark, and trade secret infringement), fraud, and trespass.[249] Internet service providers, including public universities, do not

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245. University of Wisconsin Milwaukee, *Policies and Guidelines Concerning the Electronic Publication of Information* (visited Jan. 6, 1999) <http://www.uwm.edu/policy/ep.html>.

246. *Baker*, 890 F. Supp. at 1381.

247. *Id.* at 1382 (citing United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976) (quoting T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 329 (1970))).

248. *Id.* at 1386 n.16.

249. The Federal Bureau of Investigation's National Computer Crime Squad investigates violations of the federal Computer Fraud and Abuse Act of 1986, Pub. L. No. 99-474, 100 Stat. 1213 (1986), (amending 18 U.S.C. § 1030). According to the FBI's Internet web site, this includes the following: intrusions of the Public Switched Network (the telephone company); major computer network intrusions, network integrity violations, privacy violations, industrial espionage, pirated computer software, and other crimes where the computer is a major factor in committing the criminal offense. FBI, *National Computer Crime Squad* (visited Jan. 6, 1999) <http://www.fbi.gov/programs/compcrim.htm>. For information about a wide range of computer crimes, and a student drafted Model State Computer Crimes Code, *see* University of Dayton School of Law, *Cybercrimes* (visited Jan. 6, 1999) <http://cybercrimes.net/>. For a bibliography of Internet torts and crimes, *see* The UCLA Online Institute for Cyberspace Law and Policy, *Cyberspace Law Bibliography* (visited Jan. 6, 1999) <http://www.gseis.ucla.edu/iclp/bib4.html>.

For an example of one case where a university may have gone too far, *see* Steve Silberman, *University Kills Students' Security Site*, WIRED NEWS, Nov. 21, 1997 (visited Jan. 6, 1999) <http://www.wired.com/news/news/culture/story/8685.html>. Early in 1998, two University of Pittsburgh students — John Vranesevich and Rob Dailey — had their access to the Internet terminated because the University claimed that Vranesevich's computer, which was running as a server, hosted a web site that provided information potentially harmful to the university. *Id.* What it contained was information about the latest computer operating system defects and how to fix them — in other words, information on how to create viruses

have to aid or abet such illegal conduct, and they may, therefore, remove any materials used in committing a tort or a crime. As with defamation, however, a public university whose official policy is to screen out tortious and criminal materials from its server may well be liable in tort for any resulting injury to a third party if it fails to do so.[250] Its best bet for avoiding liability may well be, once again, to establish a policy of not screening any materials and to disclaim liability for any personal materials posted on its servers.

That being so, may a public university nevertheless require its professors to post only educational and academic materials on their personal web pages?[251] To answer this question we must first decide whether a university's computer facilities constitute a public forum. If a university's Internet computer facilities do not constitute a public forum, then a public university would be free to restrict the materials stored on and transmitted over those facilities. But if they are a public forum, a public university's ability to control the content of those materials is greatly restricted.

Recall that in *Loving* the court held that the University of Oklahoma computer and Internet services did not constitute a public forum.[252] The court made this conclusion because there was no evidence that those facilities had "ever been open to the general public or used for public communication."[253]

As I stated earlier, the *Loving* case is frustrating because of the lack of evidence presented to the court. Not only did Loving fail to show how he had been harmed, but also the court did not consider any evidence about the workings of computer networks.[254] While we can anticipate that the operation of computer servers and the function of the Internet will soon be a matter of judicial notice, and that ordinarily evidence as to how they work will not have to be introduced in court, that was definitely not so in the *Loving* case. I have to believe that had even the most basic information been introduced, the court's conclusion would have been different. To say, as the *Loving* trial court did, that a university's Internet computer facilities do not

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and how to prevent them. *Id.* While the dispute is being settled, a private Internet Service Provider, (http://www.antionline.com) (visited Dec. 2, 1998), is hosting Vranesevich's site. *Id.*

250. As a state agency, a public university would not ordinarily have criminal liability. *See, e.g.*, CAL. GOV'T CODE §§ 815, 815.3(g) (West 1995).

251. For example, in 1997, Washington State University proposed to limit its faculty's web pages to materials that relate to their professional academic fields. Andrea Vogt, *Widening Internet Access Poses Dilemma for Universities*, ASSOCIATED PRESS, Apr. 24, 1997 (visited Dec. 2, 1998) <http://the-duke.duq-duke.duq.edu/ARCHIVES/APR24/intern.htm>.

252. *Loving*, 956 F. Supp. at 955.

253. *Id.*

254. *Id.*

constitute a public forum[255] is to ignore the essence of the Internet. It is the largest public forum ever created. Any person using a computer connected to it, even to a limited extent, is a participant in that forum.

Using the trial court's test that the facilities cannot either be opened to the general public or be used for public communication,[256] consider the following:

- Every time a university computer is used to access a nonuniversity web page all of the information on that page is stored at least temporarily in the "cache" memory of the university's computer, which has to be opened in order to receive and display the page.
- Every time a university computer is used to access a nonuniversity web page that sets a "cookie,"[257] information from that nonuniversity computer is stored (often for many years) on the university's computer, which has to be "opened" for the storing of the cookie. For example, one cannot access Microsoft's informational web pages without allowing Microsoft's server to set cookies on the accessing computer.[258]
- Every time a university and nonuniversity individual send electronic mail to each other, the university's mail server is being used for public communication.
- Every time a nonuniversity individual uploads or downloads a file to the university's FTP[259] server, the server is being used for public communication.
- Every time a nonuniversity individual completes an open-ended form on a university web page, such as a form requesting enrollment information that allows the person completing it to add other comments or questions, the university's World Wide Web server is being used for public communication.
- Any news group posted on a university computer that is not restricted solely to university faculty, staff, and students (and the great majority, including alt.sex and rec.humor.funny, are not so restricted) is open both to

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255. *Id.*

256. *Id.*

257. A "cookie" is a single line of text permanently stored by the accessed computer on an accessing computer that the former can read if the accessing computer ever attempts to make another access. This allows the creator of a computer web site to track usage and to tailor information (usually advertising) displayed on that web site. *See Persistent Client State HTTP Cookies* (visited Jan. 6, 1998) <http://home.netscape.com/newsref/std/cookie_spec.html> (providing information about and specifications for creating "cookies").

258. To confirm this, set your Internet browser to disable the receipt of cookies. In Internet Explorer, this is done by clicking on the View menu, then the Internet Options selection, then the Advanced tab, and then setting the entry under Cookies to Disable All Cookie Use. In Netscape Navigator, click on the Edit menu, then select the Advanced Category, and then under the Cookies entry choose Disable Cookies. Having done so, then go to http://www.microsoft.com. The initial home page will load, but no other pages will.

259. FTP is a simple tool for transferring files over the Internet.

public access and public communication.

- Any university web page that contains any link to any nonuniversity web page is providing a means for communicating with that other page and is providing a central location (a "forum") from which those who post information to the nonuniversity page can publicly communicate with anyone accessing the university web page.

According to the Supreme Court's ruling in *Denver Area Educational Telecommunications Consortium*, "it is plain . . . that a public forum 'may be created for a limited purpose.' "[260] Thus, a public university *may* restrict the *purpose* for which its facilities may be used. It may, for example, forbid the use of its Internet computer facilities for any purpose other than furthering the educational and academic goals of the university. However, the Supreme Court in its *Denver* opinion quickly added that it has yet to decide whether a government agency must "show a compelling state interest" to restrict the *content* of the speech that may be published in a limited purpose public forum.[261]

The First Circuit Court of Appeals, however, has decided that a state agency must have a compelling state interest to restrict speech.[262] In *Yeo*, as we have seen, the First Circuit held that a high school must have a "compelling state interest" before it may censor the school's newspaper and yearbook — publications which the First Circuit classified as being limited public forums.[263] It could find no reason justifying a different treatment for such forums,[264] and unless one can be found, it is likely that the Supreme Court, if faced with deciding this issue, would follow the First Circuit's lead.

Thus, using the First Circuit's approach, a public university may limit the *purpose* for which faculty web pages may be used, but it must have a compelling state interest to censor the *content* of what is posted.[265] For example, an English professor can post pornographic and salacious writings that relate to his course assignments because, as the Supreme Court said in *Reno*,[266] adults have the right to communicate by such means. The professor, however, may not post obscene pictures, defamatory or harassing materials, or any other materials that may be tortious or criminal. Similarly, as *Jeffries* makes clear, a professor may not post materials that amount to the

260. 518 U.S. at 749 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 n.7 (1983)).

261. *Id.*

262. Yeo v. Town of Lexington, No. 96-1623, 1997 WL 292173, at *16 (1st Cir. June 6, 1997) (unpublished opinion).

263. *Id.* at *16, *19.

264. *Id.*

265. *See id.* at *16.

266. *Reno*, 117 S. Ct. at 2346.

airing of a personal grievance, or that are disruptive to the operation of the university.[267] Of course, a public university Internet service provider may censor all of these activities anyway, so a university actually gains very little by specifying the purposes for which faculty web pages may be created.

IV. CONCLUSION

A private university may censor what its faculty say on the Internet because the First Amendment prohibition against restricting speech only applies to government agencies. Moreover, following the adoption of the "Protection for Private Blocking and Screening of Offensive Materials" provision of the CDA, private universities will incur no liability if they unsuccessfully attempt to screen out defamatory and other materials from being stored on or transmitted over their Internet computer facilities. Nevertheless, private universities that honor the ideal of academic freedom ought to shun the role of censor. As Stanford University learned, the faculty of independent private universities abhor censorship.

A public university may restrict the purpose for which its Internet computer facilities may be used by its faculty, but it must have a compelling state reason to censor the content of what they post to web sites and news groups, or send by e-mail. Unlike a private university, however, a public university will incur liability — because of the decision in *Stratton Oakmont* — if it actively attempts to monitor what is posted or transmitted, and then fails to do so. As we have seen, the "Protection for Private Blocking and Screening of Offensive Materials" provision of the CDA does not protect public Internet service providers. And considering how successful hackers have been in getting into the military's Internet servers — an estimated sixty-five percent of the 250,000 attempts to hack into the Department of Defense's computers in 1995 were successful[268] — one can only conclude that it would not be very difficult for a hacker to invade a university server and post defamatory, harassing, or similar materials. Thus, even if a public university wants to censor the content of the materials its faculty put on-line, it would be well advised not to do so in order to avoid such potential liability.

In sum, the exercise of a professor's academic freedom to speak out on the Internet at independent private universities depends upon the willingness of the faculty to assert that freedom. At public universities, the law favors the free speech rights of professors, but they too must be willing to fully assert their rights and to fully present evidence at trial both to establish those

267. *Jeffries*, 52 F.3d at 9-10; *see supra* text accompanying notes 169-80.

268. Eunice Moscoso, *BoS: Hackers Hit Pentagon Computers* (last modified May 28, 1996) (visited Nov. 7, 1998) <http://www.njh.com/latest/9605/960528-01.html>.

rights and to show an injury. They also must be reasonably prudent so as not to engage in conduct that is disruptive to the operation of their university.

Finally, the basic free speech rights that apply in the classroom and in the academic media apply to professors speaking out on the Internet. I believe that the case law, although in its infancy in this area, is sufficiently advanced to confirm this.