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Free Speech in Cyberspace: Communications Decency and Beyond

Emanuel Emroch Lecture

T. C. Williams School of Law, University of Richmond

by: **Robert M. O'Neil**[*]

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<<http://www.richmond.edu/~jolt/v3i1/oneil.html>> [**].

Editor's Note: Since the time that Professor O'Neil delivered this speech, the United States Supreme Court has decided the validity of portions of the Communications Decency Act in *Reno v. ACLU* (Slip Opinion: 521 U.S.). Readers may want to review the Court's ruling after reading this speech to have a more current understanding of the issues discussed by Professor O'Neil. The decision is available on-line at: http://www.eff.org/pub/Legal/Cases/ACLU_v_Reno/HTML/970626_aclu_v_reno_decision.html

{1} It is a great honor to be this year's Emanuel Emroch Lecturer. Though I never had the privilege of knowing Mr. Emroch, I do feel on this occasion as though I were almost an honorary member of the Emroch family. And I am deeply grateful to that family for having continued a tradition which seems to me as fitting and as appropriate a memorial as one could imagine. It is a living memorial in the best sense and it gives those who gather in the name of the person being so honored a chance not only to carry on their own

conversations but to reflect on their debt to the person whose name and generosity made it all possible.

{2} Last Wednesday morning, as many of you know, the United States Supreme Court officially met the Internet. It is far from clear who won this first match. The Justices expressed a wide variety of views, and they cited rather far-ranging analogies as they grappled for the first time with the novelty of cyberspace. By sometime this summer, we will surely know what the Court thinks about speech in this brand new medium. One might have expected this encounter to have occurred earlier. Digital communication has, after all, been around for a decade or more. What's relatively new; however, is legislative attempts to restrict the content of speech in cyberspace. Yet within the last couple of years, both Congress and state legislatures seem to have made up for lost time. So I suppose it was inevitable that these issues would end up in the Supreme Court, just as most of the toughest legal questions of our time seem to at some point along the way.

{3} What is at issue of course is a particular provision of the Communications Decency Act^[1] which was passed and took effect now some fifteen months ago. In fact it regulates lots of facets of cyberspace, but the provision that's currently before the Court is the one that makes it a crime to display indecent material in a manner available to a person under 18 years of age.^[2] That provision has now been struck down by two lower federal courts, three judge courts, as an abridgment of free speech, pure and simple.^[3]

{4} Congress, when they passed the law, was so confident of early challenge that they built into it a "fast track" for judicial review.^[4] The test cases were heard by separate three judge courts in Philadelphia^[5] and New York.^[6] The Philadelphia court, the one from which this case comes, was actually quite fully wired, made into a kind-of high-tech computer laboratory so that the judges, by the time they came to rendering a decision, had been living with the technology for quite some weeks. That fact I think helps partly to explain the very sympathetic approach that the Philadelphia court took in their first encounter with the Internet. They handed down their judgments last spring. In December, the Supreme Court agreed to review the issue. Theoretically, even though it came from a three judge court, they could have declined to take the case. That's in fact, exactly what the Supreme Court did on Monday of this week, with respect to a completely different part of the Communications Decency Act, having to do with the scrambling of sexually explicit material carried on cable systems an issue which the Supreme Court, without comment, several days ago simply declined to review. But I think the country would have been baffled, and understandably so, and quite angry if the Court had ducked this issue as the most pressing one of the day, that part of the Communications Decency Act that most people think of when they recall the statute.

{5} Just a quick glance back through the legislative process might be useful. The Communications Decency Act passed both houses of Congress by overwhelming margins. Yet, its path across Capitol Hill was a surprisingly rocky one. The Senate early on coalesced behind the "indecent" ban that was urged by now former Senator James Exon of Nebraska. His version, the original version, actually was even more restrictive than what emerged. The House, meanwhile, was much more fragmented. At first it opted for a much milder essentially self-regulatory approach -- the Cox-Wyden Bill -- which basically left it up to Internet service providers to decide how to deal with indecent material.

{6} During those early skirmishes, one of the sharpest House critics of the Exon approach was none other than Speaker Newt Gingrich. He insisted on several occasions that government had no business telling people what they could and could not access on their personal computers. One is never quite sure why Speaker Gingrich took this view, he did after all come out of the academic community, we don't often claim him as one of our own, but perhaps it was the perspective of a seasoned historian. There may have been other reasons. Whatever the reasons, he was an early and staunch opponent but one who ultimately, along with most of his colleagues, felt the political momentum coming out of the Senate simply too strong to resist and so he, like many others, signed on.

{7} As we await the Court's ruling, we have one other fascinating glimpse into what might be called the

politics of porn-bashing. Last weekend, last Saturday I believe, Senator McCain, who now chairs the Commerce Committee told a group of reporters that if the Court strikes down the indecency provision, and if the Senate tries to patch it up, which he rather expects, he doubts that there would be the votes even within his own Commerce Committee, let alone both houses of Congress, to reenact essentially similar provisions. If Senator McCain is correct in the way he reads his colleagues -- and I doubt very much he would have misspoken on so important an issue -- that tells us that what happened in Congress last winter may have been a one-time accommodation of Internet content foes, designed almost more to toss a politically hot potato from Congress to the Supreme Court than genuinely to resolve for all time the issue of young people accessing salacious material on the Internet.

{8} Well, the Statute, in its final form, does have a few palliatives for service providers. Networks and systems for example, can't be held liable for offending material they did not originate, and the content of which they had no knowledge.[7] It is for that reason that the plaintiffs in these cases are *not* the networks or Internet service providers, but rather the actual speakers who would be directly at risk, if these sanctions were upheld and applied.[8] The law also suggests several ways in which those who post sexually explicit images could reduce the risk that such material will get into the hands or before the eyes of young viewers.[9] Even so, the bottom line was a criminal ban on the posting of "indecent" or "patently offensive" materials at sites where minors could access and download it.[10]

{9} Well, as Congress anticipated, there was no shortage of groups ready to rush to court the morning after the statute became law. The lead plaintiffs in the Philadelphia case were the American Civil Liberties Union and the American Library Association. Now, the central issue there and the central issue still is whether content restrictions of that kind on Internet communication do or do not abridge free speech under the First Amendment.

{10} The lower court in substantial part found the term "indecent" too vague to be applied to fully protected speech.[11] That court also invoked, as courts periodically do, a Supreme Court precept which was announced actually 41 years ago -- that government can't shield or protect children at the cost of denying to adults literary or visual material to which they have a First Amendment right.[12] Well, that conclusion obviously meant the court first had to make some rulings, as it did, on the nature of speech as fully protected communication as much on the Internet as in more traditional and familiar forms. Now that conclusion is far from obvious, it deserves a little more attention and I want to come back to it in just a moment.

{11} The government has argued all the way along that even if the key terms are vague or imprecise, Internet image providers after all have adequate means by which they can continue to communicate with adults, while keeping suspect material away from minors.[13] The judges of the district court, in fact both district courts, sharply disagreed.[14] Whatever the future might hold, they felt the technology simply wasn't there yet.[15] They closely observed that technology throughout the trial. They became convinced that in the current climate, none of the three proposed methods really gave providers or Internet speakers adequate means to keep material away from young viewers when it was entirely lawful for adult users. In so doing, of course they left open the possibility that the technology might improve in the future in ways that would change that finding.[16] So the judgment of the district courts has a curious kind of "not yet", more than a "never" feel to it.[17]

{12} The issues that the Supreme Court has just taken on are momentous and complex. At the very least, the Justices are going to have to decide what sort of a medium the Internet is for First Amendment purposes. As a guide to that process, it might be useful to take a few minutes reflecting on what's happened to other new media as they come before the Court in the past. Take motion pictures, for example. The first movie censorship case reached the Court in 1915.[18] The Justices of that day had little patience for free speech claims advanced by distributors and exhibitors.

{13} In fact, they warned of all sorts of evils that could occur when images were displayed on screens in darkened theaters, places where, as they observed, children and adults might be present together.^[19] Besides, they said, movies are just a form of entertainment and at that they are produced for commercial profit just like any other business.^[20] So when the Court got through, there was very little to be said for speech in the form of motion pictures.

{14} Now it seems to me, that the wonder isn't what the Court said on that subject the first time out. What I find striking is that the law didn't really change until 1952, the first break with that theory. For more than a third of a century, the prospect of essentially unfettered government censorship was a reality of life for the film industry. That may tend to make one a little more sympathetic with the efforts in the 1930's to develop and in the 1960's to modify the self-regulatory codes which eventually became the rating system. As a matter of fact, the Supreme Court never did strike down film censorship as such. It finally expired or essentially died a natural death only because the last censor in Baltimore retired and wasn't replaced and about the same time, the City of Dallas, which still had a film rating board until two years ago, faced a budget crunch and they decided one expendable activity was the now largely discredited but still functioning Dallas film review board. So I submit the experience with motion pictures as a not terribly happy harbinger of what might happen to other new media.

{15} If you look to licensed broadcasting, the experience actually bodes even less well. From the beginning of federal control, and really starts in the late 1920's, radio and television have always been treated as second class citizens. When it comes to content, the term "indecent" has actually been there from the very start. It has been upheld by the Supreme Court as a basis for content regulation and that's of course why they go after the use of certain words by George Carlin^[21] or more recently by Howard Stern, before he became a thoroughly reputable movie producer and star back in his infinity broadcast days. And why we still get this "beep" or "bleep" when a profane or vulgar or taboo word is about to be uttered on the air.

{16} Now, the contrast between media actually is quite startling. Any notion of banning taboo or profane or vulgar words in books, or magazines or newspapers is of course unthinkable. The Supreme Court once said of the printed and spoken word, "one man's vulgarity is another man's lyric," that in the course of making quite clear that profanity and scatology can't be outlawed in those media.^[22] The rationale for different treatment is said to be the "scarcity" of broadcast frequencies.^[23] That distinction persists, long after the number of radio and TV channels in every community exceeds by several fold the number of newspapers.

{17} Now we come to cable and cable actually suffered a somewhat comparable birth trauma. At first the courts thought cable was most nearly like licensed broadcasting.^[24] Later they went to the other extreme and drew analogies much closer to the print media.^[25] More recently, cable has found a niche of its own within the First Amendment. Several years ago, the Supreme Court finally rejected the licensed broadcast analogy, but interestingly they stopped short of treating cable just like newspapers because of some not fully defined so called "technical" distinctions.^[26]

{18} Well, cable is indeed different from other media in ways that do help us to come back to the Internet. The *business* of cable can be regulated in all sorts of ways -- poles, lines, rates, charges, and the like. And as a matter of fact, that sort of control isn't entirely different from telling newspapers where they can and can't put news racks for example or what percentage of recycled newsprint they have to use in pursuit of ecological goals. The critical in-between issue about cable -- it's one that quite coincidentally happens to be back before the Supreme Court this very same term -- is the so-called "must carry" issue - the extent to which cable networks and systems can be forced by law to carry local public and commercial broadcast stations. Obviously the Court has to approach the Internet indecency case very conscious that it has simultaneously before it the return, this is round two, of the cable "must carry" litigation.

{19} Well, what about banning "indecent" that's posted within reach of minors on the Internet? The

outcome I think will depend, in large part though not entirely, on how the Court ultimately views cyberspace. It's possible that the Supreme Court could simply part company with the two lower courts, and hold that digital speech is somehow less than fully protected. In order to do that however, they would have to start with a presumption, and it's a presumption that's reaffirmed periodically, that *all* speech is fully protected until and unless there are compelling reasons to deny or to limit protection. Denying full protection to speech in cyberspace would require a highly persuasive rationale -- something that's at least as convincing as the "scarcity" theory that still relegates radio and television to a sort of nether region.[\[27\]](#)

{20} Even so, the most ardent defender of the Internet would have to concede, as I certainly do, that there are differences. Of such differences, for example, we were graphically reminded, just a few weeks ago, by the posting in a Dallas newspaper's online edition, of the now obviously inaccurate and probably falsified Timothy McVeigh confession.[\[28\]](#) There are some other distinctive features that stand out. Speech in electronic form reaches millions in an instant. Many people seem to lose their inhibitions in cyberspace. They suddenly change from lambs in person to lions -- or wolves -- the moment they go online. Anonymous messages, which, through anonymous remailers and various other systems, can be posted in practical ways may be a lot more frightening if you have no idea whether the person who is saying these menacing things is at a keyboard halfway around the world or just around the corner.

{21} There also are some interesting problems of attribution in cyberspace; it is one thing if the jacket of my book identifies me as a University of Virginia professor, but something rather different however if my message appears on a homepage or website that is reached through the University's home page[\[29\]](#) or by some other link to an established source. And when it comes to minors, let us be honest that accessing electronic images that are meant for adults probably isn't any harder. In fact, for most kids it is probably easier than the ancient time honored practice of getting an older sibling or friend to reach up to the top shelf behind the wooden barrier and grab the copy of *Penthouse* or *Hustler* in the cellophane wrapping.

{22} So there are important factual differences. The crucial question before the courts is whether and how far those differences warrant a different constitutional standard. My prediction, for what it's worth, is that the Supreme Court will not declare a lower First Amendment standard for speech on the Internet. On that issue we have just a glimmer, by way of a case the Court decided at the end of its term last summer.[\[30\]](#) The issue there was whether Congress could require or even permit those who operate leased and community access cable channels to restrict indecent matter. The very same issue, the very same word, that's before the Court in the Communications Decency cases.

{23} The opinions in this cable case are awful hard to read. The Court was all over the lot. On one issue, whether a cable channel is a public forum for example, there were three justices who thought it perfectly obvious it wasn't a public forum,[\[31\]](#) two others who thought perfectly obvious that it was a public forum,[\[32\]](#) and the other four who made up the plurality were sufficiently uncertain that they didn't even want to decide that case this time out.[\[33\]](#)

{24} It's a very complex case in many ways. But it does I think signal an appreciation on the Court's part of the need for sensitivity in regard to new technologies. Justice Souter, who really was alone in this regard, did address the close links among new technologies. In explaining why he felt the Court ought to suspend judgment about classifying media for free speech purposes, Justice Souter cautioned quote: "As broadcast, cable and the cyber-technology of the Internet . . . approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable effects, on the others."[\[34\]](#) Accordingly, Justice Souter warned his colleagues, that they in his words "should be shy about saying the final word today about what will be accepted as reasonable tomorrow."[\[35\]](#)

{25} Well in a sense Justice Souter's "tomorrow" did arrive last Wednesday morning. The challenge of

classification that the Court has been able to postpone up until now can't, I think, be avoided this time -- partly because as I mentioned a moment ago that "must carry" cable issue is before the Supreme Court at the very same time.

{26} In this context, and given what the lower courts have already said, I would be amazed if the Justices were to find in the abstract as a matter of principle that the Internet is less than fully protected. Surely there is nothing that is at all comparable to the "scarcity" rationale that has plagued or bedeviled radio and television. [36] To the contrary, the very genius of the Internet is that anyone who has a keyboard, and a modem, and of some kind of connection can speak to anyone and everyone at any time. Nor, I think, are there anything like the elusive "technical" factors that the Court has several times cited in regards to cable and drawing distinctions between cable and fully protected media. [37]

{27} There may though be some other forces at work. The Government, in its brief with the Supreme Court, analogized Internet sites to adult bookstores and adult theaters, which as I'm sure most of you know, cities and counties have been able to regulate under zoning laws because of the so-called "secondary effect" on the surrounding community. [38] That strikes me as an ingenious theory, but one that is seriously flawed. Somehow I don't get the suggestion that the content of certain web sites or home pages can be banned because they might run down the "neighborhood" in some way and that's the point in which the analogy to the zoning cases breaks down.

{28} If there are significant differences that would justify a lesser treatment of speech in cyberspace, they have got to lie elsewhere. Actually the Court has done fairly well with some other new media kinds of issues. For example, the protection that was early on conferred on "symbolic" or "non-verbal" communication first presented in the context of the silent wearing of black armbands in protest against the Vietnam war. [39] If the First Amendment means that expression is completely and fully protected until and unless there are compelling interest for any limitation or dilution, then it seems to me we have the answer unless there is something else out there that has not yet occurred to us or at least that I have not mentioned.

{29} Meanwhile, there are some positive reasons and some positive signs with respect to the case for full protection. One of the most intriguing comes out of the context of encryption or cryptography. We have three major encryption cases already in the federal courts. In the most significant of them, a federal district judge in San Francisco, has now twice held not simply that papers or courses dealing with cryptography are fully protected speech. [40] That seems pretty straight forward. But she has gone on to say that the encryption programs themselves are fully protected speech as much as a book or a magazine or a newspaper. [41] To the extent therefore we get guidance from areas such as encryption it seems to me those are very positive signs indeed. There are two other encryption cases pending and obviously a long way to go before they catch up to where indecency is at this point.

{30} There actually are a lot of other cyber-speech issues pending before lower courts. The states have had a field day in this area because interestingly the Communications Decency Act not only is not preempted, as many other communications laws are, but even seems to contain a kind of invitation to states to regulate. [42] At least a dozen states have done so, several of these laws are under challenge. Georgia passed last year a law that makes it a crime for any person to use a name which "falsely identifies" a speaker on the Internet, whether it was ever intended to deceive or defraud, or simply to exercise a constitutionally protected right to remain anonymous. [43] That case went to trial a few weeks ago, judgment would be expected sometime this spring.

{31} There are some curious laws in other states. Connecticut passed an "anti-flaming" statute which makes it a crime to send an electronic message quote: "with intent to harass, annoy or alarm another person". [44] Pennsylvania and Montana have banned the Internet posting of instructions for making explosives, including a good deal of material that can readily be found in U.S. government publications. Florida's digital child

pornography law^[45], one of the toughest of the new state laws, would not only reach material that could be banned in print as child pornography but would also forbid dissemination of a lot safe-sex materials for teenagers.^[46] And our own General Assembly last year directed all state agencies to make certain that state computers were not being used to access sexually explicit material.^[47] Well, given what the states have done, and others are likely to do, in this essentially vacuum, there is an even more urgent need for clear guidance from the Supreme Court on the status of Internet speech.

{32} Let me address briefly, two final, closely related issues: If digital speech really is free speech, is that the end of the indecency provision? And if "indecency" can't be forbidden on the Internet, are there really no limits?

{33} Well, we do need to ask on the first question whether granting full protection for online speech automatically dooms the indecency provision. You'll recall that the lower courts felt they had to look at those three defenses, which are contained in the statute in which the government has said give adequate protection to those who wish to make such material available to adults but keep it out of the hands of children.^[48] The trial judges looked at each of the three -- digital passwords, credit card verification, and so-called "tagging" of posted material -- and they found that none would work, at least in the current state of the technology.^[49]

{34} They also recognized that technology is moving with lightning speed. Indeed, just in the two months last spring between the time the record closed in the Philadelphia case, and the last day of testimony in New York, there were significant changes. We are now almost a year from the closing of the record. When the judgment comes down, it will be fifteen months out of date. Normally of course, the Supreme Court takes the facts as the trial court found them even though there may have been some minor changes and essentially takes that record as a given except for a few things that are so obvious that a reviewing court can take "judicial notice." The Communication Decency Act I think poses a unique challenge. How can there be an authoritative judgment in June, 1997, based on April, 1996, technology, about a case where the validity of statutory defenses, and thus of constitutional rights, turns on the latest technology?

{35} Suppose the Court finds the defenses inadequate to help providers sort out much as the district court did. And suppose, the next week, or the next month, somebody comes up with a new technology, a real breakthrough which for the first time does provide a fully effective way of shielding minors from "adult" material. Well, the Court's decision would still be technically valid in terms of the record on which it was based. But that judgment wouldn't have a whole lot of value in the real world of online communications under a new and dramatically different technology.

{36} There are not many options. The Court could, of course, give to "indecency" so sweeping a rebuke that the statutory defenses would simply be legally irrelevant. That's the outcome for which the plaintiffs fervently hope. It is certainly possible. And that would essentially moot the question of whether these defenses are or are not technically adequate.

{37} Alternatively, I suppose the Court could set forth standards for what it believes would be constitutionally adequate defenses, and then say in effect to the parties, "when you think the technology has reached this level, come back and see us again." There is some precedent for retaining a case in which additional facts are needed -- as when you appoint a special master or hearing officer for example.

{38} Finally, I suppose the Justices could follow the "not yet" approach taken by the district court.^[50] That might cause them to send the case back to the trial judges, with directions to keep the record open as technology evolves. If and when the trial court found the technology capable of doing what the Government has claimed, then -- and only then -- would the Supreme Court face the ultimate First Amendment issues.

{39} Now if I were in the business of posting sexually explicit material at some online source I'm not sure

how long I would want to continue in business with that Damoclean sword poised up there at some place contingent on a technology that may or may not evolve in different directions.

{40} Let me close with one other question of a quite different sort. If not "indecenty", what can be banned on the Internet? Are there no limits? Well for starters, there is no doubt that Congress and the states can forbid the posting of material that is legally obscene or constitutes child pornography; those provisions aren't even challenged. They're simply accepted as being valid in cyberspace as they are in print. There is one interesting question about child pornography raised by Senator Hatch's bill which was tacked on to the Omnibus budget legislation last fall. And that's the degree to which one can criminalize in electronic form the computer simulated images of children which never actually involved a real child. That's one provision. There is also in Senator Hatch's bill the so-called "Calvin Klein" provision which makes it criminal to use models who are actually of legal age if they are portrayed as minors or underage.

{41} Apart from obscenity and pornography, there are lots of other cyber issues that are going to be in courts before long. In some areas, I think speech on the Internet will be treated pretty much the same as printed or spoken words. Libel seems to be headed more or less that way, although the courts are still sorting out whether an Internet provider or system is more like a publisher on one hand, or is more like a bookstore or newsstand on the other.

{42} There are other areas where speech in cyberspace is going to have to be treated quite differently. One of the few recognized exceptions to the First Amendment is for so-called fighting words -- insults and epithets hurled by one person in another person's face almost certain to start a fistfight or a brawl.[\[51\]](#) I don't think there is any such thing as electronic fighting words. "Flaming," even extreme outrageous "flaming" in a news group or a chat room, can be powerfully provocative, but that is hardly the same thing as shouting offensive words in someone else's face in ways that make a street brawl almost inevitable.

{43} When it comes to incitement -- speech that creates a clear and present danger -- here I think the issue is more problematic. The test is whether the speech in issue the inherited test amounts to direct advocacy of imminent lawless action.[\[52\]](#) Nothing less than that will suffice. Can you have such speech in cyberspace? Not easily. Proving an electronic incitement is, I think, likely to be a major challenge. Yet at this early stage, as Justice Souter cautioned, we are probably to suspend judgment on most issues on which we are not absolutely certain.[\[53\]](#)

{44} We will long before we have to resolve all these questions we'll have the benefit of the Supreme Court's guidance For that purpose and many others, I would urge that we stay tuned. And in doing so let me add my deep appreciation to my friends and colleagues at the T. C. Williams School of Law with whom I've had many happy collaborations over the years and look forward to many more for being most gracious hosts on this occasion and to the Emroch family for having been so generous and so gracious as benefactors of this splendid event.

{{END}}

Footnotes

[\[*\]](#) Robert M. O'Neil became founding director of the Thomas Jefferson Center for the Protection of Free

Expression in August 1990, after serving five years as president of the University of Virginia. He continues as a member of the University's law faculty and as University Professor. After serving as law clerk to U.S. Supreme Court Justice William J. Brennan, Jr., Professor O'Neil began his teaching career in 1963 at the University of California Law School at Berkeley. He served on the law faculty at the University of Buffalo and also as provost of the University of Cincinnati and as vice president of the University of Indiana at Bloomington. He served as president of the University of Wisconsin from 1980-85 and was appointed president of the University of Virginia in 1985.

Professor O'Neil is the author of several books, including *Free Speech: Responsible Communication Under Law*, *The Rights of Public Employees* (second edition, 1993), *Classrooms in the Crossfire*, and *Free Speech in the College Community*, as well as many articles in law reviews and other journals. He and his wife, Karen, have four children who are students or graduates of Duke, Stanford, Princeton, Harvard Law, and the University of Virginia.

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1. 47 U.S.C.A. § 223 (a) to (h) (West Supp. 1997).
2. 47 U.S.C.A. § 223 (d)(1)(B) (West Supp. 1997).
3. *See* ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) and *Shea v. Reno*, 930 F. Supp. 916 (S.D. NY 1996).
4. Pub. L. 104-104, § 561 (a) and (b) (1996).
5. ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996).
6. *Shea v. Reno*, 930 F. Supp. 916 (S.D. NY 1996).
7. 47 U.S.C.A. § 223(e)(1) (West Supp. 1997).
8. *See* ACLU v. Reno, 929 F. Supp. at 827 n.2 and *Shea v. Reno*, 930 F. Supp. at 923.
9. 47 U.S.C.A. § 223(b)(3) (West Supp. 1997).
10. 47 U.S.C.A. § 223 (d) (West Supp. 1997).
11. ACLU v. Reno, 929 F. Supp. at 856 (Sloviter, Chief Cir. J., opinion) and 858-65 (Buckwalter, J., opinion).
12. ACLU v. Reno, 929 F. Supp. at 876 (citing *Butler v. Michigan*, 352 U.S. 380 (1957)).
13. ACLU v. Reno, 929 F. Supp. at 846-48 and *Shea v. Reno*, 930 F. Supp. 916, 931-34.
14. ACLU v. Reno, 929 F. Supp. at 846-48 and *Shea v. Reno*, 930 F. Supp. at 923.
15. ACLU v. Reno, 929 F. Supp. at 856 and 858-59 and *Shea v. Reno*, 930 F. Supp. at 923.

16. *ACLU v. Reno*, 929 F. Supp. at 856 and 858-59 and *Shea v. Reno*, 930 F. Supp. at 923.
17. *ACLU v. Reno*, 929 F. Supp. at 842 and 859 and *Shea v. Reno*, 930 F. Supp. at 923.
18. *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230 (1915).
19. *Id.* at 242.
20. *Id.* at 391.
21. *See Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978).
22. *Cohen v. California*, 403 U.S. 15, 25 (1971).
23. *ACLU v. Reno*, 929 F. Supp. 824, 873-74 (E.D. Pa. 1996).
24. *See U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968).
25. *See Leathers v. Medlock*, 499 U.S. 439 (1991).
26. *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 639 (1994).
27. *See ACLU v. Reno*, 929 F. Supp. 824, 873-74 (E.D. Pa. 1996).
28. Pete Slover, *McVeigh Admitted Bombing, Memos Say; His Attorney Disputes Documents' Credibility*, *The Dallas Morning News*, March 1, 1997, at <<http://www.dallasnews.com/bombhistory-nf/trial3-1-nf.htm>>.
29. <http://www.virginia.edu>
30. *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communication Commission*, 116 S.Ct. 2374 (1996).
31. *Id.* at 2426.
32. *Id.* at 2389.
33. *Id.* at 2384-85.
34. *Id.* at 2402.
35. *Id.*
36. *See ACLU v. Reno*, 929 F. Supp. 824, 873-74 (E.D. Pa. 1996).
37. *See Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994).
38. Brief for the Appellants at 3, *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).
39. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505-06 (1969).
40. *Bernstein v. United States Department of State*, 922 F.Supp. 1426 (N.D. Ca., Apr. 15, 1996) and *Bernstein v. United States Department of State* 945 F. Supp. 1279 (N.D. Ca., Dec. 09 1996).

41. *Bernstein*, 922 F. Supp. at 1436.
42. 47 U.S.C.A. § 223 (f)(2) (West Supp. 1997).
43. GA. CODE ANN. § 16-9-93.1 (Harrison 1997).
44. CONN. GEN. STAT. ANN. § 53a-183 (West 1997).
45. FLA. STAT. ch. 847.0135 (1986).
46. FLA. STAT. ANN. § 847.0135 (West 1997).
47. VA. CODE ANN. § 2.1-805 (Michie 1996).
48. *ACLU v. Reno*, 929 F. Supp. 824, 846-48 (E.D. Pa. 1996) and *Shea v. Reno*, 930 F. Supp. 916, 931-34 (S.D. NY 1996).
49. *ACLU v. Reno*, 929 F. Supp. at 856 and 858-59 and *Shea v. Reno*, 930 F. Supp. at 923.
50. *See ACLU v. Reno*, 929 F. Supp. at 842 and 859 and *Shea v. Reno*, 930 F. Supp. at 923.
51. *See Chaplinsky v. New Hampshire*, 315 U.S. 568. 571-72 (1942).
52. *See Brandenburg v. Ohio*, 89 S.Ct. 1827, 1829-30 (1969).
53. *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communication Commission*, 116 S.Ct. 2374, 2402 (1996).