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Foreword

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The Supreme Court's first decision concerning the First Amendment in cyberspace, *Reno v. ACLU*,[2] was a landmark ruling, giving a broad affirmative answer to the question posed by this Symposium. Rejecting the U.S. Government's argument that online communications should receive only the truncated First Amendment protection that the Court traditionally has meted out to broadcast communications, all nine Justices agreed that cybermedia should receive the same full-fledged First Amendment protection as print media.

Just one week earlier, a federal district judge in New York issued a ruling[3] that is potentially at least as significant in curtailing government attempts to restrict cybercommunications.[4] In upholding the ACLU's challenge to New York state's Internet censorship law, Judge Loretta Preska held that the dormant commerce clause doctrine bars any state or local regulations of the Net, given its inherently interstate -- indeed, international -- nature.[5]

The ACLU also has brought and won lawsuits against three

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[2] 521 U.S. 844 (1997).

[3] ALA v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997). The defendants, New York's Governor George Pataki and Attorney General Dennis Vacco, decided not to appeal from this ruling. *See* ACLU Cyberliberties Update, *ACLU Victories Final, States Will Not Appeal ALA v. Pataki, ACLU v. Miller* (visited Jan. 7, 1999) <http://www.aclu.org/ issues/cyber/updates/ cluoct17.html#statecdas>.

[4] *See infra* p. 54 statement of Ronald K.L. Collins ("[T]he *Pataki* case is one of the most important constitutional cases we have seen in many decades. It certainly belongs in the casebooks . . . .").

[5] *See Pataki*, 969 F. Supp. at 173 ("The inescapable conclusion is that the Internet represents an instrument of interstate commerce . . . [so] regulation of the Internet impels traditional Commerce Clause considerations . . . . [The New York Act] cannot survive such scrutiny because it places an undue burden on interstate traffic, whether that traffic be in goods, services, or ideas."); *see also id.* at 170 ("The Internet is wholly insensitive to geographic distinctions.").

other state Internet censorship laws.[6] Moreover, the first lawsuit challenging a local cybercensorship law, mandating blocking software on public library computers -- in which the ACLU represented online speakers whose websites faced blocking -- was likewise held to violate the First Amendment.[7]

Despite this perfect courtroom record for freedom of cyberspeech to date, however, government officials at all levels continue to devise new schemes for restricting such speech,[8] and legal questions abound as to which such schemes -- if any -- can pass constitutional muster. Likewise, policymakers and citizens continue to debate the wisdom or desirability of such schemes in terms of various concerns, some of which at least appear to be in tension with each other: for example, parental control and societal protection of

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[6] *See* ACLU v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997); *see also* Urofsky v. Allen, 995 F. Supp. 634 (E.D. Va. 1998); ACLU v. Johnson, 4 F. Supp. 2d 1029 (D.N.M. 1998), *appeal docketed*, No. 98-2199 (10th Cir. 1998). Georgia declined to appeal the decision in *ACLU v. Miller*. *See* ACLU Cyberliberties Update, *supra* note 3. Virginia's appeal of the *Urofsky* ruling was argued in the summer of 1998. *See Virginia Appeals Ruling on Internet Porn Law* (visited Jan. 5, 1999) <http://www.freedomforum. org/speech/1998/7/28porn.asp>. *Johnson* is currently being appealed by the New Mexico Attorney General's Office. Telephone Interview by Amy L. Tenney with J.C. Salyer, Justice William Brennan First Amendment Fellow, ACLU, New York, N.Y. (Jan. 6, 1999).

[7] *See* Mainstream Loudoun v. Board of Trustees, 24 F. Supp. 2d 552 (E.D. Va. 1998). Judge Leonie M. Brinkema held that the library's mandatory blocking requirement violated the First Amendment rights of the library patrons who initiated the lawsuit, as well as of the online speakers that the ACLU represented, who were intervenors in the suit. *See id.* at 570; *see also id.* at 795 (denying the government's motions to dismiss and ruling that, to sustain the blocking policy, the government would have to satisfy the heavy burden of proof imposed under the "strict scrutiny" standard of review, showing that the policy is "narrowly tailored to achieve" "a compelling governmental interest").

[8] *See generally ACLU Cyberliberties Update* (visited Jan. 5, 1999) <www.aclu.org/issues/cyber/updates.html>. In October, 1998, Congress passed, and President Clinton signed, a new federal cybercensorship law, the Child Online Protection Act -- dubbed "CDA II" -- which the ACLU promptly challenged in a lawsuit called, appropriately, *ACLU v. Reno II*. On November 19, District Judge Lowell A. Reed, Jr., issued a temporary restraining against enforcement of the law. ACLU v. Reno, 1998 U.S. Dist. LEXIS 18546 (E.D. Pa. 1998). On February 1, 1999, Judge Reed issued a preliminary injunjction against enforcement of the law. ACLU v. Reno, 1999 U.S. Dist. LEXIS 735 (E.D. Pa. Feb. 1, 1999). The government must decide within sixty days whether to proceed with a full trial or appeal the preliminary injunction. *ACLU v. Reno, Round 2: Rejecting Cyber-Censorship, Court Defends Online "Marketplace of Ideas"* (visited Feb. 3, 1999) <www.aclu.org/features/f101698a.html>.

children,[9] other law enforcement goals, business interests in developing and utilizing new communications technology and in competing effectively in global markets,[10] and individual interests -- on the part of minors[11] as well as adults -- in opportunities to express and receive a broad, diverse range of ideas and information.

This Symposium draws together leading protagonists in the past and ongoing struggles to chart the First Amendment regime for cyberspace, ranging from ACLU lawyers and witnesses in *Reno v. ACLU* and state Internet censorship battles, to a Justice Department attorney and New York District Attorney who played leading roles in defending Congress's and New York's Internet censorship laws,[12] respectively. Other participants represent leading creators and distributors of online communications -- including an executive with a major media corporation and the director of a large public library system -- as well as civic organizations that are seeking to shape government and corporate policies concerning access to various types of online information, from a range of perspectives. For example, Parolewatch is seeking to expand Net users' access to information about violent felons who are in prison but coming up for parole, with a goal toward prolonging their incarceration. As another example, Gay & Lesbian Alliance Against Defamation (GLAAD) seeks to expand online resources for gay, lesbian, bisexual, and transgendered individuals.

In short, the Symposium speakers are diverse not only in terms

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[9] *See, e.g.*, Nadine Strossen, *Children's Rights vs. Adult Free Speech: Can They Be Reconciled?*, 29 CONN. L. REV. 873 (1997); Nadine Strossen, *Regulating the Internet: Should Pornography Get a Free Ride on the Information Superhighway?*, 14 CARDOZO ARTS & ENT. L.J. 343 (1996).

[10] *See, e.g.*, Nadine Strossen, *Regulating Cyberspace: What Are the Concerns of the Business Community and Civil Libertarians?*, VITAL SPEECHES OF THE DAY, Dec. 15, 1997, at 153.

[11] *See, e.g.*, Nadine Strossen, *Schoolgirls, Sex and Speech* (visited Oct. 3, 1998) <http://www.intellectualcapital.com/issues/98/0618/icopinions2.asp>.

[12] *See Pataki*, 969 F. Supp. at 169 ("Jeanine Pirro, the Westchester County District Attorney, wrote a letter to Governor George Pataki dated February 13, 1996 that similarly reflects the expectation of the Act's proponents that it would apply to interstate communications.").

of their legal views and ideological perspectives, but also in terms of the expertise, experiences, and interests they bring to bear on Internet free speech issues. In a lively, provocative exchange, the panelists explore the legal and policy issues with which lawmakers and citizens are grappling, in trying to chart a course for this new medium that will respect both individual freedom and community concerns.

The prosecutors on the program argue that, notwithstanding the judicial rulings to date, uniformly invalidating all challenged national and state cybercensorship laws, some more narrowly tailored laws can be devised that should survive constitutional challenges. Other panelists contend that, even though direct government regulation of cyberspeech by Congress or state legislatures is inappropriate, some other types of regulation are appropriate -- for example, self-regulation by the computer industry, local controls imposed by community schools or libraries, or monitoring by citizen organizations. Still other participants maintain that all adults should have unfettered access to the Internet, and the right to decide for themselves and their children what to see and what not to see. Finally, some panelists take a still more libertarian view, concluding that even parents should be limited in making determinations about Internet access for their children, and that minors, as well as adults, should have autonomy in determining which online sites they will and will not view.

In addition to exploring policy questions about the optimal balance between individual autonomy and community control, the panelists also discuss a range of unresolved legal issues that underlie current and looming court battles about the contours of online free speech rights:

-- Whether Congress (or other government bodies) may constitutionally use spending powers to impose restrictions on cybercommunications – for example, by conditioning the award of funds to public schools and libraries for Internet access on the

recipients' installation of blocking software;[13]

-- Whether Congress (or other government bodies) may constitutionally subject cybercommunications to regulations comparable to the "harmful to minors" laws that the Supreme Court and other courts have upheld concerning other media, and whether such regulations are technologically feasible;

-- Whether Congress (or other government bodies) may constitutionally regulate certain commercial cybercommunications, and whether such regulations are technologically feasible;[14]

-- What types of restrictions government may impose on Internet access in its capacity as employer -- e.g., what restrictions may state universities impose on faculty members' use of university computers and networks to access the Internet;[15]

-- What type of content-neutral, "time, place, and manner restrictions" public institutions such as schools and libraries may impose on users' Internet access;

-- Whether public libraries may require minors to obtain parental consent before they can access all or some Internet sites through the libraries;

-- Whether public libraries and/or public schools may install blocking and filtering software on some or all of their computers with Internet access;[16]

-- Whether public libraries *must* install blocking and filtering

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[13] *See, e.g.*, S. 1619, 105th Cong. (1998) (the "Internet School Filtering Act," sponsored by Senator John McCain, would require blocking software in all federally subsidized public library and school computers with Internet access). *But see ACLU Condemns "Stealth" Movement of New Net Censorship Bills* (visited Jan. 5, 1999) <http://www.aclu.org/news/n072298a.html> (criticizing the McCain legislation as "nothing less than Big Brother in the classroom").

[14] These issues are presented in the ACLU's challenge to the Child Online Protection Act, or "CDA II," discussed *supra* note 8.

[15] These issues are presented in *Urofsky v. Miller*, discussed *supra* note 6.

[16] *See, e.g., Censorship In a Box: Why Blocking Software is Wrong for Public Libraries* (visited Jan. 5, 1999) <http://www.aclu.org/issues/cyber/box.html>; Nadine Strossen, *Filtering Out the Truth* (visited Jan. 5, 1999) <http://www.intellectualcapital.com/issues/98/0101/icopinions1.asp>.

software on some or all of their computers with Internet access;[17]

-- The extent to which parties other than content providers should be liable for illegal online material -- for example, the extent to which Internet Service Providers or Bulletin Board Service operators should be held liable for illegal material to which they provide access;

-- The extent to which filtering and blocking programs, which are offered by the computer industry with government encouragement and support, are subject to constitutional challenge, consistent with the "state action" doctrine;

-- Whether industry self-regulation may be "more dangerous and more insidious than government regulation;"[18]

-- The extent to which filtering and blocking programs, which are built into a computer system's architecture, effectively depriving users of the choice not to use such programs, are subject to challenge under antitrust laws;

-- The extent to which states (or localities) should be able to pass and enforce laws criminalizing certain online communications that allegedly harm individuals within the state (or locality), consistent with the dormant commerce clause doctrine;

-- Whether the Supreme Court should reconsider its medium-specific approach to the First Amendment,[19] given the convergence of

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[17] *See ACLU Defends California Library Against Internet Censorship* (visited Jan. 5, 1999) <http://www.aclu.org/news/n122398b.html> (stating that in October, 1998, the Alameda County Superior Court dismissed a complaint by a patron of the Livermore Public Library that the library's policy of providing unfiltered Internet access constituted a public nuisance). The patron has since filed an amended complaint asserting a constitutional right to force the library to install blocking software. In response, the ACLU of Northern California filed a second friend of the court brief in support of the Livermore Public Library's policy of providing uncensored access to the Internet. *See id.*

[18] *See infra* p. 76-77 statement of Graham Cannon ("At least with government regulation, there is due process. You can challenge it and be heard.").

[19] Under the current, media-specific regime, print communications -- and now, thanks to *Reno v. ACLU*, also online communications -- are at the First Amendment apex. Therefore, some expressions that are perfectly permissible in print or online are outlawed from the broadcast media. For example, one four-letter word that appears in this Symposium transcript could well be "bleeped" from a broadcast transmission. *See infra* p. 53 statement of Maurice Freedman ("[W]ho needs it?").

media in the Internet context -- e.g., the advent of NetRadio;

-- Whether the Supreme Court should reconsider its "local community standards" approach to obscenity doctrine, given the special features of cybercommunications, including the countless geographical communities through which any Internet communication may travel and the absence of any tangible, physical impact on those communities;

-- Even if the current "local community standards" regime is maintained in cyberspace, whether there should be new, stricter limits concerning which local communities should be permitted to enforce their standards;

-- Whether existing laws that protect children against such crimes as solicitation for sexual contacts, stalking, or child abuse give prosecutors sufficient tools for protecting children against potential harm from online communications, or whether any additional, Internet-specific laws are needed to do so;

-- Whether currently available rating and blocking software empowers parents, enhancing their ability to make informed choices about Internet access for their children, or whether instead it limits the online information available to parents and children;[20]

It is particularly ironic that Westchester County District Attorney Jeanine Pirro, who advocates relegating online communications to second-class First Amendment status, along with broadcast expression, made statements during the Symposium that could well have been outlawed as "indecent" or "patently offensive" under the federal and state Internet censorship laws she supported. (*See infra* p. 6, describing sexually explicit e-mails between a 51-year-old male pedophile and a 13-year-old girl, which Pirro argued should be criminalized: "He would talk about his penis and her vagina. He told her how he was tingling and how his 'Love Bunny' – a nickname for his penis – wants to meet her vagina").

[20] The clumsiness of existing screening software, which blocks many sites from which most parents probably would not seek to bar their children, was illustrated, ironically, by a point made by Joe Diamond, Executive Director of Parolewatch. Although Mr. Diamond advocates the development and use of blocking software, and although Parolewatch has a "law and order" orientation, he noted that its site is blocked by "a lot of" screening software programs because it contains the phrase "sex offender." *See infra* p. 82 statement of Joe Diamond; *Fahrenheit 451.2: Is Cyberspace Burning? How Rating and Blocking Proposals May Torch Free Speech on the Internet* (visited Jan. 5, 1999) <http://www.aclu.org/issues/cyber/burning.html>; *see also* Nadine Strossen, *Burning Down the Net* (visited Jan. 5, 1999) <http://www.intellectualcapital.com/issues/97/1002/ icopinions1.asp>.

-- Whether future developments in rating and blocking software technology will increase the ability of such software to promote parents' informed choices, or whether software is inherently incapable of performing such a function, given both the inevitable subjectivity of the evaluations required and the constantly proliferating, mutating contents of cyberspace;

-- To what extent minors have First Amendment rights of their own, vis-a-vis not only the government, but also their parents or guardians;

-- How much autonomy public libraries should have in determining Internet access policies for adults and/or minors, and to what extent courts should defer to local libraries when ruling on First Amendment challenges to their Internet access policies; and

-- How to shape the online intellectual property regime in a way that respects the public domain, "fair use," and other limitations on intellectual property rights that are designed to foster free expression.

The U.S. Department of Justice fought very hard against the ACLU and other cyberlibertarians in *Reno v. ACLU*, and vigorously argued that the Supreme Court should uphold Congress's initial effort to censor the Internet, the Communications Decency Act ("CDA").[21] (Likewise, since President Clinton signed the "Child Online Protection Act" or "CDA II" in October, 1998, the Justice Department has been defending it against the ACLU's constitutional challenge.[22]). Therefore, it is ironic that the Justice Department attorney who spoke at this Symposium, Jacob Lewis (who worked on the *Reno* case),[23]

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[21] 47 U.S.C.A. § 223 (1996).

[22] *See supra* note 8 and accompanying text.

[23] In fairness, it should be stressed that Mr. Lewis issued the following disclaimer at the beginning of his remarks: "I must emphasize at the outset [that] the views I express in this forum are solely my own and don't necessarily correspond in any way to those of the Department of Justice or the United States Government." *See infra* p. 9 statement of Jacob Lewis. It should also be noted, though, that Seth Waxman, who presented the Government's oral argument in the Supreme Court (and who has subsequently become the U.S. Solicitor General), subsequently described *Reno v. ACLU* as "an easy case." Seth Waxman, Remarks during Panel Discussion, "Can Government Regulate Speech - On the Internet and In Tobacco Advertising?," Third Annual Conference of the American Bar Association's Forum on

now dismisses the CDA as "obviously unconstitutional."[24] Not only as President of the ACLU, but also as a taxpaying citizen, I am perturbed about the squandering of our government's resources -- in other words, *our* resources -- in struggling so mightily to defend an "obviously unconstitutional" law.[25] Perhaps Mr. Lewis's statement reflects the proverbial 20-20 hindsight; certainly, during the legislative discussion and litigation concerning the CDA, I debated many government officials and attorneys who seemed sincerely and strongly to believe that the law should be upheld as constitutional, and that the Supreme Court would do so. In any event, I do agree with Mr. Lewis that, despite the ACLU's victories thus far in *Reno v. ACLU* and the other Internet censorship cases, the dialogue about on-line free speech is far from over.[26] It continues not only in the legislatures and the

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Communications Law (Jan. 24, 1998); *see also* James Podgers, *Internet Regulation, Round Three*, 84 A.B.A. J. 99 (Mar. 1998) (reporting that Seth Waxman "suggested that the Court may have struck down the Internet regulations in the Communications Decency Act because they were as much 'a blunt instrument' as an overly intrusive regulation of free speech").

[24] *See infra* p. 50 statement of Jacob Lewis. *Accord, infra* p. 56-57 statement of Dan Burk ("When the CDA was first passed, there were law professor types . . . who looked at the text . . . and we said, 'Wow, this is fabulous. If we had sat down and purposely set out to write a statute that completely violated the First Amendment and will undoubtedly be struck down by the Supreme Court, we could not ourselves have come up with better language to accomplish that purpose.' The same could be said for most of other Internet statutes that [the ACLU has successfully challenged].").

[25] *See infra* p. 43 statement of Ann Beeson ("The New Mexico law . . . is word for word identical to the statute that was struck down in *ALA v. Pataki* here in New York last year. If I were a taxpayer in New Mexico I would be outraged by this, as I think all taxpayers should be, because they continue to have to pay the expenses generated by these clearly unconstitutional proposals."); *see also* ACLU v. Johnson, 4 F. Supp. 1029 (D.N.M. 1998) (granting a preliminary injunction enjoining New Mexico from enforcing its Internet censorship law after considering the ACLU's motion, live testimony, and counsel's oral arguments); *ACLU Challenges New Mexico Cyber-Censorship Law, Citing Commerce Clause and Free Speech Rights* (visited Jan. 5, 1999) <http://www.aclu.org/ news/n042298a.html> (discussing the ACLU's attempts to persuade the New Mexico State Attorney General to agree to not enforce the law).

[26] *See infra* p. 51-52 statement of Jacob Lewis.

> [O]ne of the concerns [in the *Pacifica* case, allowing regulation of broadcast transmissions] was that the material involved would have an impact on children too young to read . . . . It's the same thing with regard to graphic images on the Net . . . . [T]here will continue to be legislative efforts to see what can be done with the problems. That

courts, but also in the pages of this Symposium.

> dialogue is by no means finished. I am not sure that the five victories are going to end anything this year. Of course, [the ACLU] should feel proud . . . that you had five victories. You may have to have a few more, or a few losses, perhaps, before the dialogue is entirely over.

Id.