EDUCATORS' AUTHORITY AND STUDENTS' FIRST AMENDMENT RIGHTS ON THE WAY TO USING THE INFORMATION HIGHWAY: CYBERSPACE AND SCHOOLS

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I. INTRODUCTION

As more public school educators focus on access to electronic media, they are increasingly required to address concerns about information sent and received by students. Unlike traditional sources of communication such as newspapers, books, and current events publications, the electronic media has few controls, no continuous process of verification, and little in the way of accountability. The perceived need for some order and responsibility for the safety and welfare of students has led a growing number of school administrators to draft, or consider drafting "acceptable use policies" to monitor and control the use of school computers.[1] While courts

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1. *See* Bret A. Fauset, *Cyberspace, the Constitution, and the Law in Education* (last modified July 30, 1996) <http://www.choate.com/seminar> (presentation for the Third Annual Education Law Institute, Franklin Pierce Law Center).

traditionally have granted great deference to the authority of school personnel in managing the educational environment,[2] programs and policies controlling student communication may face a number of legal challenges.

This Article will present a brief history of the information superhighway, and a description of the organization and operation of cyberspace and the Internet, especially as it relates to schools. The authors will discuss the Communications Decency Act (CDA or "the Act"),[3] the arguments on both sides of the legal challenge to the Act, and the recent Supreme Court decision in *Reno v. ACLU*[4] declaring the Act unconstitutional.[5] This part of the discussion will reference First and Fifth Amendment case law influencing the Supreme Court's decision. The authors will also discuss schools' authority to promulgate acceptable use policies, paying particular attention to First Amendment and Fourteenth Amendment school-based decisions.

While the Supreme Court has ruled the CDA unconstitutional, a discussion of *Reno* is vitally important to a broad discussion of the legality of schools' acceptable use policies. First, the constitutional rights of students may be more limited in schools, and the interests of school officials themselves in the provision of a safe and orderly educational atmosphere may be heightened.[6] Second, should a challenge be filed against an acceptable use policy in the future, the arguments presented by both parties in *Reno* may be instructive to schools, parents, students, and lawyers in asserting claims based on the rich body of constitutional case law governing public schools and their decision-makers.

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2. *See generally* DAVID J. SPERRY ET AL., EDUCATION LAW AND THE PUBLIC SCHOOLS: A COMPENDIUM (2d ed. 1998).

3. Pub. L. No. 104-104, 110 Stat. 56, 132-35, § 502 (available at 47 U.S.C.A. § 223(a)-(h) (West Supp. 1997)).

4. 117 S. Ct. 2329 (1997).

5. *See id.* at 2350-51.

6. *See generally* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969); *see also* SPERRY ET AL., *supra* note 2.

II. CYBERSPACE AND THE INTERNET

A. A Brief History of the Internet

The Internet was developed in the 1960s as a Department of Defense experiment to link defense-related computers.[7] The goal was to create a network that could still function even if part of it were destroyed during a war.[8] The next decade witnessed the creation of non-military computer networks, linking researchers at universities worldwide.[9] Shortly thereafter, an information network available to the public evolved with the first newsgroups.[10] The information superhighway is now an international phenomenon,[11] linking people—young and old, professional and amateur, at home and at school or work—in a variety of ways, from electronic mail and newsgroups to "chat rooms" and the World Wide Web. With the advent of the World Wide Web, the 1990s became the decade of information retrieval. Those with computers have the ability to combine words, pictures, and sounds on "web pages." Many of these web pages are created by students or school personnel and are available to anyone with the appropriate technology. One hundred and fifty nations now visit and participate in maintaining this electronic library.[12] Users can search for, find, and download text documents, pictures, moving images, and sound recordings covering virtually every communicable topic. According to the Supreme Court in *Reno v. ACLU*, by 1999, an estimated 200 million users will drive on this information "highway."[13]

Many of these "drivers" enter the highway from school, and have been given licenses by the federal government via recent legislation.

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7. *See* Appellant's Brief, Reno v. ACLU, 117 S. Ct. 2329 (1997) (No. 96-511), *available in* 1997 WL 32931, at *3; *Life on the Internet*, <http://www2.pbs.org/internet/history>.

8. *See* Reno v. ACLU, 117 S. Ct. at 2334.

9. *See id.*

10. *See id.*; *Life on the Internet*, *supra* note 7.

11. Only about 60% of the Internet's host computers are located in the United States. *See* Appellees Brief, Reno v. ACLU, 117 S. Ct. 2329 (1997) (No. 96-511), *available in* 1997 WL 74378, at *17.

12. *See Life on the Internet*, *supra* note 7.

13. *See* 117 S. Ct. at 2334.

For example, in Goals 2000: Educate America Act[14] and the Improving America's Schools Act of 1994,[15] the federal legislature included provisions that directly and indirectly encourage and authorize the creation of funds for bringing technology into schools.[16] Goals 2000 funds may be used to integrate technology and education, as well as help satisfy student achievement and professional development goals.[17] Similarly, but more explicitly, Subchapter III of the Improving America's Schools Act authorizes federal grants to states and school districts to create or expand technology-related programs and curricula in all subjects, including math, science, history, reading, and the arts.[18]

B. Organization and Operation of Cyberspace and the Internet

Generally, *cyberspace* is a decentralized, global electronic environment where the user can view and manipulate text, pictures, and sound recordings as though they had the physical attributes of shape, color, and motion. Cyberspace links people, institutions, corporations, and governments around the world. These links are made possible by a network of linked computers—actually a network of smaller networks—called the Internet. As its name implies, the Internet is not a centralized source of information. In fact, it is not a tangible entity at all. No single institution operates it or controls it.[19]

The decentralized nature of cyberspace and the Internet, of course, has both positive and negative implications. Perhaps the most positive aspect of cyberspace is that the information available on the Internet is equally accessible to everyone. Every piece of data posted on the Internet, however obscure, is available to any properly

14. 20 U.S.C. §§ 5801-6084 (1994).

15. 20 U.S.C. §§ 6301-8962 (1994).

16. *See id.*

17. *See* KIRK WINTERS, U.S. DEP'T OF EDUC., AN INVITATION TO YOUR COMMUNITY: BUILDING COMMUNITY PARTNERSHIPS FOR LEARNING (1995).

18. *See* 20 U.S.C. §§ 6801-6979 (1994); *see also* U.S. Department of Education, *Challenge Grants Support Local Technology Partnerships*, Community Update No.42 (December, 1996), at 1.

19. *See* Reno v. ACLU, 117 S. Ct. at 2334-35; *see also* 929 F. Supp. 824, 830-49 (E.D. Pa. 1996). While the Supreme Court reviewed and summarized the facts presented by the district court, the district court opinion contains lengthy, developed findings of fact.

connected user who "surfs the Net" long enough and creatively enough to find it. In other words, there are no isolated points on the Internet; all points are somehow connected to one another. While the path between points A and B may not be a straight line, experienced "surfers" can get from A to B with minimal degrees of separation.

It takes no stretch of the imagination to discover that the most positive feature of the Internet—its accessibility—may also be its most negative. Point A, for example, could be a child at home or at school, and point B could be sexually explicit material that would be considered indecent or patently offensive. On the one hand, it is this negative aspect, the hundreds of thousands of questionable Web sites, and the alleged potential damage to children that led lawmakers to draft and pass the CDA.[20] On the other hand, it is, in large respect, the positive aspect of cyberspace that led other lawmakers to argue against passing the Act,[21] hundreds of thousands of Internet users to criticize the Act, and the ACLU and the American Libraries Association to lead the constitutional challenge against the Act.[22]

1. Communication over the Internet

The CDA was designed to outlaw the communication and display to children of obscene, indecent, or patently offensive information.[23] These communications and displays can reach great numbers of the American population over the Internet in any one of several ways. Each of these communication options is as easily used to access

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20. *See, e.g.*, 142 CONG. REC. S718 (daily ed. Feb. 1, 1996) (statement of Sen. Exon); 141 CONG. REC. S8345 (daily ed. June 14, 1995) (statement of Sen. Biden); 141 CONG. REC. S8088-89 (daily ed. June 9, 1995) (statement of Sen. Exon); *see also* Appellant's Brief, *Reno*, 1997 WL 32931, at *5-9.

21. Senator Patrick Leahy, who stood in opposition to the Act, argued that its language would chill a wide range of expression. As an example, he pointed out that great works of literature by world famous authors are currently on the Internet. *See* 142 CONG. REC. S694 (daily ed. Feb. 1, 1996). These works, he suggested, could offend the contemporary standard of conservative groups in the country and thereby violate the CDA. He argued that other areas also could be censored, including issues of gender, safe sex practices, birth control, and discussions about AIDS. *See* 141 CONG. REC. S18,098 (daily ed. Dec. 6, 1995).

22. As discussed at length below, the plaintiffs in *Reno* argued that the CDA violated the First Amendment free speech rights and the Fifth Amendment due process rights of computer users. *See generally Reno*, 117 S. Ct. 2329 (1997).

23. *See* 142 CONG. REC. S718 (daily ed. Feb. 1, 1996) (statement of Sen. Exon).

information, often by children, as it is used by adults to send or *display* information, often to children. For this reason, the district court in *ACLU v. Reno*, and the parties on both sides of the dispute, spent much time discussing the forms of communication available on the Internet.[24]

The first and simplest form of communication in cyberspace is electronic mail, or "e-mail." Electronic mail is similar to mail delivered by the Postal Service. Each person with an e-mail account has an "address" through which letters and documents may be sent or received.[25] In properly equipped schools, each student, teacher, and administrator may have an e-mail account that is accessible at school or from home. Naturally, e-mail enhances students' ability to share ideas and answer questions about school work.

Even more geared to the work of schools is one-to-many messaging, also called "mail exploders."[26] A teacher, for example, may require students to subscribe to an e-mailing list in order to receive feedback, assignments, and deadline dates. Through one-to-many messaging, subscribers receive messages and documents from headquartering institutions or organizations. It is also possible for a subscriber to send a message to many other subscribers simultaneously.[27]

Similar to one-to-many messaging, newsgroups are targeted to specific groups of Internet users, often based on particular topics.[28] However, users do not formally subscribe to newsgroups. Newsgroups work as suspended or protracted, rather than real time, "conversations" on certain topics among interested users. An individual user "posts" a message or document on a newsgroup server, and other interested users check the server periodically to receive them. Schools may use newsgroups in several ways. For example, a school may create its own site and encourage students to communicate with other students on various topics, regardless of

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24. *See* ACLU v. Reno, 929 F. Supp. 824, 830-38 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

25. *See id.* at 834.

26. *See id.*

27. *See id.* One form of one-to-many messaging is a *LISTSERV*, by which Internet users may subscribe to lists of their choice based on the topics discussed. *See id.*

28. *See id.* at 834-35.

whether the communicating students share any classes. Teachers may also encourage students to check the Internet periodically for certain newsgroups that are relevant to school courses or projects.

Yet another type of Internet communication, real-time communication, allows computer operators to engage in immediate dialogue with other current operators in a manner similar to long-distance telephone conversations.[29] Much of this communication occurs in "chat rooms."[30] While there are many positive, educational reasons to communicate with people over the Internet, the variety of potentially harmful real-time communications was, of course, what most concerned many of the CDA detractors.

2. The World Wide Web

The World Wide Web contains the world's largest, most advanced single body of knowledge and information.[31] The World Wide Web, in effect, is an on-line library for teachers and students. Many schools have Web pages[32] and Web sites in order to advertise the school and promote school activities. Some of these Web pages provide links to other sites that allow searchers to look for information on other Web pages regarding individual school groups. Schools' Web pages may also permit users to broaden searches by linking them to Web pages describing the entire school district. Through the World Wide Web, members of the school community—students, teachers, administrators, parents, alumni, and other citizens—are kept informed about school progress and activities.[33]

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29. *See id.* at 835.

30. Generally, a "chat room" is a virtual room where a chat session—real-time communication between two users via computer—takes place. *See PC Webopaedia* (last modified May 12, 1998) <http://www.pcwebopedia.com/chat_room.htm>.

31. *See generally An Overview of the World Wide Web* (last modified Mar. 11, 1998) <http://www.pcweloopedia.com/World_Wide_Web.htm>.

32. Web pages are also referred to as "home pages." *See Reno*, 117 S. Ct. at 2335.

33. *See* Brian Monahan and Sue Tomko, *How Schools Can Create Their Own Web Pages*, EDUCATIONAL LEADERSHIP, Nov. 1996, at 37-38.

III. SCHOOL-BASED CONTROL OVER THE INTERNET: ACCEPTABLE USE POLICIES

Acceptable use policies are sets of rules, regulations, rights, and responsibilities that govern the use of the Internet and the World Wide Web in schools.[34] They inform students and teachers, and sometimes parents, about electronic media and how interactive computer facilities should and should not be used. These policies spell out the benefits of proper use of the Internet and the pitfalls and punishments of improper use. Acceptable use policies typically are drafted by school board members, administrators, and teachers, but students, parents, and community members are often consulted in the drafting process. While school personnel have the inherent authority to create acceptable use policies, the policy drafters must be careful to outline the rules and regulations precisely enough to withstand constitutional challenges.[35]

Typical acceptable use policies separate "Dos" from "Don'ts," rights from responsibilities, and work priorities from game-playing. In addition, some acceptable use policies may distinguish rules regulating document creation and distribution from those regulating document retrieval. Examples of what responsible student Internet users are permitted to do include research for assigned classroom projects and communication by electronic mail to other users both in and outside the school. Schools are also very careful to require that students take necessary security measures: schools encourage students to change passwords frequently and advise students not to store confidential information on a school-sponsored computer account.[36]

Along with a list of what students are permitted to do, acceptable use policies typically contain a non-exhaustive list of forbidden

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34. Most schools place acceptable use policies on the Internet as a separate Web site or as part of the school's home page. Some Web sites provide examples and analyses of several acceptable use policies. *See, e.g.*, Fausett, *supra* note 1.

35. Acceptable use policies face constitutional challenges similar to those lodged against the CDA, including vagueness and overbreadth under the Fourteenth Amendment. Obscenity, free expression, viewpoint discrimination, and related curriculum issues are also often issues under the First Amendment. *See infra* Part VI.

36. *See generally* Fauset, *supra* note 1.

activities. Generally, students may not engage in illegal activity over the Internet; use, communicate, or send impolite, abusive, vulgar, lewd, indecent, or obscene language or pictures; use e-mail to hinder the ability of others to work, or to harass or intimidate another person; or use the computer system for personal financial gain or profit.[37] In addition, acceptable use policies may forbid students from sending or receiving copyrighted material without the permission of the relevant authors or creators, and from copying commercial software in violation of copyright laws.[38] Many schools combine acceptable use policies with filtering and blocking software, such as Cyber Patrol, Net Nanny, and Surf Watch, installed on classroom computers or on the district server.[39]

The lists of forbidden activities found in many acceptable use policies are similar in several ways to the disputed provisions of the Communications Decency Act. Both restrict the speech and expression of Internet surfers, covering material received and material sent. In addition, both were drafted with the safety and protection of children in mind, and both legitimately aim to encourage use of the Internet by children.[40] Because of these similarities, the Supreme Court's declaration of the

37. *See id.*

38. *See, e.g., Nation's Schools Developing Internet Guidelines for Students*, WEST'S LEGAL NEWS, Aug. 27, 1996, *available in* 1996 WL 480010; Michelle V. Rafter, *Students Told to Abide by Rules of the Superhighway Guidelines*, L.A. TIMES, Aug. 26, 1996, at D1, *available in* 1996 WL 11638423.

39. *See* Andrew Trotter, *Decent Exposure: Should Schools Limit Access to the Internet?*, AM. SCH. BOARD J., Sept. 1996, A12, A14.

40. When Congress enacted the Communications Decency Act, it recognized that interactive computer services represented "an extraordinary advance in the availability of educational and informational resources ... [and] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues of intellectual activity." 47 U.S.C. § 230(a)(1), (3) (Supp. 1996). At the same time, proponents of the CDA sought to ensure that the "brave new world" of these computer services would not be "hostile to the innocence of ... children," and noted that children are now the "computer experts" in this country's families. 141 CONG. REC. S8332-34 (daily ed. June 14, 1995) (statement of Sen. Coats); *see also* Appellant's Brief, *Reno*, 1997 WL 32931, at *6-7. The appellants in *Reno* feared that with potentially harmful sites in cyberspace—and without the CDA—many families and schools would be less likely to provide Internet access to children. *See id.* at *30. The proponents of the CDA, therefore, fought for the Internet as a family-friendly resource. *See id.* at *6-7. Similarly, schools that promulgate acceptable use policies often include education on computer and Internet use and may require classes and exams before granting students Internet use. *See generally* Fauset, *supra* note 1.

unconstitutionality of the Communications Decency Act could influence the drafting and enforcement of acceptable use policies. One commentator has proposed a rather negative similarity between acceptable use policies and the CDA: "Almost without exception, [acceptable use policies] read like field-trip permission slips on steroids—pumped up policies that, like the Communications Decency Act itself, try to cover all contingencies and inevitably fail. Perhaps the most insidious problem with these policies is the false sense of security they promote."[41]

The critical difference between the Communications Decency Act and acceptable use policies is that the users who would have been subject to penalties under the CDA (had the Act passed constitutional muster) are largely adults, while the target audience of acceptable use policies is children.[42] Because the constitutional law applicable to adults and children differs in many fundamental respects, a discussion of the law influencing *Reno v. ACLU* and of the law currently applicable in school situations is necessary, as both of these discussions impact the future of acceptable use policies and Internet activity by school students.

IV. STATUTORY CONTROL OVER THE INTERNET: THE COMMUNICATIONS DECENCY ACT

A. Legislative History and Congressional Findings

The Communications Decency Act was a small but controversial part of the Telecommunications Act of 1996.[43] The full

41. David A. Splitt, *Decency vs. Free Speech: There is No Substitute for Supervision*, AM. SCH. BOARD J., Sept. 1996, at A17.

42. *See generally* Communications Decency Act, Pub. L. No. 104-104, 110 Stat. 56, 132-35 (available at 47 U.S.C.A. § 223(a)-(h) (West Supp. 1997)). Note, though, that an exhaustive reading of the CDA reveals that minors are not explicitly exempted from prosecution under the CDA.

43. Pub. L. No. 104-104 §§ 502-52, 110 Stat. 56, 133-42 (1996). Although the Supreme Court declared the Communications Decency Act unconstitutional in *Reno v. ACLU*, a discussion of the decision and the arguments on both sides is important in the context of public schools and acceptable use policies. First, in comparison to the control that a general government actor has over its citizens, public schools may exercise greater control over the activities and expression of their students. Therefore, unconstitutional provisions in the CDA do not dictate that acceptable use policies in public schools suffer the same fate. Second, if the

Telecommunications Act contains language concerning the provision of advanced universal telecommunications services, at affordable rates, to schools and libraries.[44] The Act also authorizes the allocation of funds to the National Education Technology Funding Corporation, a new private non-profit corporation that, in part, encourages states to create and upgrade Internet access in schools.[45] In addition, the Act authorizes the Federal Communications Commission to offer guidelines for the identification and rating of television and video programming that contains sexual or violent material.[46] Under the Act, the FCC requires televisions to be equipped with a blocking service, the V-chip, permitting consumers to block the display of all programs with a common rating.[47]

As contentious as some of the other provisions of the Telecommunications Act may be, the most debated and most controversial provisions were those set forth in Title V, the Communications Decency Act. Enacted by Congress in 1996, the CDA was intended to protect minors from accessing indecent or patently offensive material and imposed criminal sanctions on knowing creators and transmitters of such material.[48]

Congress noted the necessity of its re-write of the Communications Act of 1934 by recognizing the overwhelming recent developments in computer technology. In its findings, Congress stated that the Internet "represent[s] an extraordinary advance in the availability of educational and informational resources," as well as "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues of intellectual activity."[49] In floor debates over the Act,

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language in a certain acceptable use policy is similar to the language in the CDA, the school that promulgated the policy could expect challenges and arguments similar to the ones presented by the plaintiffs in *Reno*.

44. *See* § 101, 110 Stat. at 73-75 (codified as amended in scattered sections of 47 U.S.C.).

45. *See* § 708, 110 Stat. at 157-60.

46. *See* § 551, 110 Stat. at 140.

47. *See* § 551(d)(1)(B), 110 Stat. at 141-42. This Article is limited to a discussion of the Communications Decency Act. For a discussion of how many other provisions of the Telecommunications Act may impact students in grade school and higher education, see Kenneth D. Salomon, et al., *Implications of the Telecommunications Act of 1996 for Schools, Colleges, and Universities*, 109 ED. L. REP. 1051 (1996).

48. *See* § 501-561, 110 Stat. at 133-43.

49. Section 509(1),(3), 110 Stat. at 137-38 (*available in* 47 U.S.C.A. § 230(a)(1), (3)

Senator James Exon noted that computers are "wonderful ... for arranging, storing, and making it relatively easy for anyone to call up information or pictures on any subject they want. That is part of the beauty of the Internet system."[50] However, Exon also argued that the same technology that permits productive educational uses also allows sexually explicit materials to be "only a few click-click-clicks away from any child."[51] Senator Joseph Biden echoed these concerns: "some of the information traveling over the Internet is tasteless, offensive, and downright spine-tingling."[52]

Educators were similarly nervous. They feared that with the introduction of the Internet in schools, students would become "preoccupied with pornography, participate in hate groups, form relationships with pedophiles, and gather recipes for bombs."[53] Therefore, and perhaps against the broad authorizations of Goals 2000 and the Improving America's Schools Act, Congress found that a legislative response was necessary to ensure that the Internet would remain a family-friendly resource.[54]

B. Major Provisions of the CDA

The three most disputed provisions of the CDA—and the subjects of the case that came before the United States Supreme Court—consisted of the "transmission" provision, the "specific person" provision, and the "display" provision. The provisions, in pertinent parts, are as follows:

The Transmission Provision:

> [Any person] (1) in interstate or foreign communications [who,] ... (B) by means of a telecommunications device, knowingly ... makes, creates, or solicits and initiates the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene or *indecent*,

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(West Supp. 1997)); *see also* Appellant's Brief, *supra* note 7, at *5.

50. 141 CONG. REC. S8089 (daily ed. June 9, 1995) (statement of Sen. Exon).

51. 141 CONG. REC. S8088.

52. 141 CONG. REC. S8345 (daily ed. June 14, 1995) (statement of Sen. Biden).

53. Trotter, *supra* note 39, at A12.

54. *See* 142 CONG. REC. S718 (daily ed. Feb. 1, 1996) (remarks of Sen. Exon); Brief for the Appellants, at *7, *ACLU* (No. 96-511).

> knowing that the recipient of the communication is under 18 years of age ... shall be [criminally] fined ... or imprisoned."[55]

The Specific Person Provision:

> [It is a crime to use an] interactive computer service to send to a specific person or persons under 18 years of age ... any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms *patently offensive*, as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication.[56]

The Display Provision:

> [It is a crime to use an] interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms *patently offensive*, as measured by community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication.[57]

Each of these provisions could have been applied easily in school settings. For example, if a computer operator outside of a school creates and initiates the transmission of indecent material to a person he or she knows to be a school student under the age of eighteen, then the computer operator could have been liable under the Act. This material could be a part of a Web site created by the operator. Similarly, if this communication were part of an on-line dialogue or electronic mail message sent directly to a student, then the computer

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55. Communications Decency Act, Pub. L. No. 104-104, § 502(2)(1)(B), 110 Stat. 133-34 (1996) (available at 47 U.S.C.A. § 223(a)(1)(B) (West Supp. 1997)) (emphasis added).

56. Section 502(d)(1), 47 U.S.C.A. § 223 (d)(1)(A) (West Supp. 1997).

57. Section 502(d)(1), 47 U.S.C.A. § 223 (d)(1)(B). According to the Appellants in *Reno v. ACLU*, Congress intended for the terms "indecent" and "patently offensive" to be used interchangeably. *See* Appellant's Brief, *Reno*, 1997 WL 32931, at *10.

operator could have been liable under the specific person provision.

The broadest and, therefore, the most contentious of the provisions, was the display provision. This language could have subjected schools to liability for permitting students to read or view indecent or patently offensive material on the Internet. Under the display provision, a school official could have been liable even if the communication or display to students was indirect, unintentional, or unknowing.

To combat the breadth of these provisions and to limit the number of computer users subjected to federal criminal prosecution, Congress also enacted several statutory defenses, many of which would have been important in school settings.[58] First, a defendant prosecuted under the CDA would not have been liable "solely for providing access or connection to or from a facility, system, or network not under that person's control."[59] In a school, it is likely that all computer facilities and equipment available for student use are under the control of the school.[60] However, the outside computers or networks to which school computers may be connected are not under school control. This defense could have protected schools and school officials who permitted students to access the Internet while at school. This defense may also have worked as an incentive, or at least as security to school officials who contemplated the installation of Internet access for schools.

Second, a defendant accused under the CDA may have contended that the statutory violation was committed by an employee or agent acting outside the scope of the agent's employment.[61] For example, a teacher may have improperly made available to students a list of questionable Web site addresses. If one of these sites contained material prohibited by the CDA, then the teacher could have been liable. However, the school district, as the teacher's employer, could have escaped liability if the teacher's actions were not within the scope of employment. Exceptions to this defense included: (1) the employer's authorization or ratification of the employee's conduct,

58. *See* Section 502(e), 47 U.S.C.A. § 223(e) (West Supp. 1997).
59. Section 502(e), 47 U.S.C.A. § 223(e)(1) (West Supp. 1997).
60. An exception may be a portable computer owned by a student, but used at school.
61. *See* Section 502(e), 47 U.S.C.A. § 223(e)(4) (West Supp. (1997).

and (2) the employer's reckless disregard of such conduct.[62]

The CDA's third statutory defense the "good faith" defense, relieved defendants of liability if they had taken: (1) "reasonable, effective, and appropriate actions . . . to restrict or prevent access by minors" to prohibited communications; or (2) if they had "restricted access to such communications by requiring the use of a verified credit card, debit account, adult access code, or adult personal identification number."[63] Despite the fact that the Supreme Court declared the CDA unconstitutional, the first part of this defense remains helpful to schools that have implemented and enforced acceptable use policies. As noted above, public schools may exercise control over the activities and expression of their students that the federal government may not exercise over its adult citizens. Therefore, provisions similar to those in the unconstitutional CDA may be constitutional when contained in a school's acceptable use policy. In light of this distinction, and in the absence of litigation involving constitutional challenges against acceptable use policies, school officials may argue that as long as these policies are reasonable, effective, and protective of the health, safety, and welfare of school children, they remain constitutional.

V. CHALLENGES TO STATUTORY CONTROL: *RENO V. ACLU*

A. The District Court Opinion

On the day President Clinton signed the Communications Decency Act into law, the American Civil Liberties Union and several other affected parties filed suit in the federal district court for the Eastern District of Pennsylvania, challenging the constitutionality of the CDA. The American Library Association, and several on-line service providers, such as America Online and Prodigy, filed a similar action. The two suits were consolidated, and the challenges were addressed by a three-judge district court.[64]

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62. *See id.*

63. Section 502(c), 47 U.S.C.A. § 223(e)(5) (West Supp. 1997).

64. *See* ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997). Section 561 of the CDA provided for the three-judge review of the Act in any civil action challenging the CDA's constitutionality. *See* § 561, 110 Stat. 142-143. Section 561 also

The district court granted the plaintiffs' motion for a preliminary injunction. In three separate opinions, the judges concluded that the plaintiffs had demonstrated sufficient likelihood of success in future litigation under the Act, that the potential harm to the plaintiffs without the injunction outweighed the harm to the defendants with the injunction, and that injunctive relief was in the public interest.[65] In its opinions, the court held that the contested provisions of the Communications Decency Act were prima facie unconstitutional, based on First Amendment freedom of speech claims and Fifth Amendment vagueness charges.[66]

B. The Supreme Court Decision

Pursuant to the CDA's special review provisions, the Government appealed the District Court decision directly to the United States Supreme Court.[67] In a 7-2 decision, the Supreme Court affirmed the district court's ruling and held the Communications Decency Act unconstitutional.[68] The Court's ruling is notable for at least two reasons. First, the Court based its entire decision on a First Amendment analysis. Second, much time was spent discussing the technology currently available on the Internet and recommended guidelines for the future regulation of this technology.

1. The Majority Opinion

The government, in its defense of the CDA, relied on several principles developed in earlier Supreme Court cases involving indecent communication.[69] Relying first on *Ginsberg v. New York*,[70] the government asserted that there is no First Amendment Right to

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provided for direct appellate review by the Supreme Court. *See id.*; *see also* 47 U.S.C.A. § 223 (West Supp. 1997).

65. *See* ACLU v. Reno, 929 F. Supp. at 849.

66. *See id.*

67. *See* § 561, 110 Stat. 142-43.

68. *See Reno v. ACLU*, 117 S. Ct. 2329 (1997). Note, however, that all nine Justices agreed that portions of the CDA were unconstitutional. *See id.* Justice O'Connor, joined by Chief Justice Rehnquist, dissented in part with respect to some applications of the "indecency transmission" and "specific person" provisions. *See id.* at 2351-57 (O'Connor, J., dissenting).

69. *See id.* at 2341.

70. 390 U.S. 629 (1968).

distribute indecent material to children.[71] In *Ginsberg*, the Supreme Court upheld a criminal statute that punished the sale to minors of sexually explicit magazines considered "'patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.'"[72] The Supreme Court in *Reno* rejected this argument, noting that the CDA was much broader than the constitutional statute at issue in *Ginsberg*.[73] First, the Court noted that parents under *Ginsberg* were not subject to prosecution for purchasing adult-oriented magazines for minor children, but that, under the CDA, they would have been guilty by simply providing access to similar material in cyberspace.[74] Second, the Court stated that the *Ginsberg* statute applied only to commercial transactions, while the CDA applied to any provider.[75] Third, the Court noted that the language in the CDA was not as well-defined as the language in the *Ginsberg* statute.[76] Finally, the Court stated that the *Ginsberg* statute applied to minors under seventeen, while the CDA applied to those under eighteen, broadening the scope of the statute even further.[77]

The government also relied on *FCC v. Pacifica*,[78] asserting that when the dissemination of indecent material to adults poses a substantial risk that children will be exposed to the material, the government may channel the indecent communications so as to minimize the risk of children being exposed, despite the fact that such a restriction is content-based.[79] In *Pacifica*, the Court upheld an FCC

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71. *See* Appellant's Brief, *Reno*, 1997 WL 32931, at *19-20.

72. 390 U.S. at 633 (quoting N.Y. PENAL LAW § 484-h (1965)). Applying *Ginsberg*, the government argued that the "transmission" and "specific person" provisions of the CDA did not prohibit communication among adults. The government argued that the provisions only prohibited communication of indecent material to users *known* to be under eighteen. *See id.* The government essentially argued, then, that these provisions were no different from the statute in *Ginsberg*. *See id.*

73. *See* 117 S. Ct. at 2341.

74. *See id.* In such situations, parents may have been guilty under the display provision. *See* § 502(d)(1), 47 U.S.C.A. § 223d(1)(B) (West Supp. 1997).

75. *See* 117 S. Ct. at 2341.

76. *See id.* The Court noted that the statute in *Ginsberg* required the restricted material to be "utterly without redeeming social importance for minors." *Reno* at *11 (citation omitted).

77. *See id.*

78. 438 U.S. 726 (1978).

79. *See* Appellant's Brief, *Reno*, 1997 WL 32931, at *20-21.

decision that a radio station could be sanctioned for an afternoon broadcast of a comedy routine containing several sexually explicit words.[80] The *Pacifica* Court stated that "broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home . . . ."[81]

In rejecting the government's *Pacifica*-based argument, the Court first noted the availability of and accessibility to potentially harmful materials: "Though such material is widely available, users seldom encounter such content accidentally .... A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended."[82] The Court then held that the FCC regulation at issue in *Pacifica* was aimed at a *specific* radio broadcast and not at a loosely defined set of potentially harmful communications.[83] In addition, violation of the FCC regulation did not subject the offending party to a criminal sanction.[84] Finally, the Court held that radio has historically been the most regulated medium of communication and, therefore, has received the most limited First Amendment protection.[85] With this assertion, the Court stated that "[n]either before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the

80. *See Pacifica*, 438 U.S. at 748-51.

81. *Pacifica*, 438 U.S. at 748. The government argued in *Reno* that *Pacifica* was directly applicable. *See* Appellant's Brief, *Reno*, 1997 WL 32931, at *31-32. While the danger of "inadvertent exposure" to indecent material is higher on the radio than it is on the Internet, the government urged the Court to look at other factors such as the seriousness, pervasiveness, and volume of material, as well as the ineffectiveness of parental and teacher supervision. *See id.*

82. *Reno*, 117 S. Ct. at 2336. Some critics may disagree, however, and assert that it is not difficult to encounter material that the CDA aimed to keep from children. For example, a net search with the keywords "little women" or "snow white" could yield a very wide variety of material—some expected and perfectly appropriate for children and some unexpected and under the umbrella of the CDA. Vocabulary well within the range of children may result in "hits" on the Net that involve pornographic material. Furthermore, these critics may argue that the Court has underestimated both the reading ability and the computer operation skills of young net surfers.

83. *See id.* at 2342.

84. *See id.*

85. *See id.*

broadcast industry."[86] According to the Court, factors present in radio broadcasting[87] and telephone communication[88]—like a history of governmental regulation, scarcity of available frequencies at the industry's inception, and an overall invasive nature—are not present in cyberspace.[89]

The next major cases the government relied on were *City of Renton v. Playtime Theatres, Inc.*[90] and *Young v. American Mini Theatres*.[91] The decisions in these cases permit the government to adopt reasonable zoning schemes to address the secondary effects of sexually explicit communications.[92] In both *Renton* and *Young*, the Supreme Court upheld zoning restrictions that prohibited adult theatres within a certain distance from residential dwellings, churches, parks, or schools.[93] Restrictions like these are constitutional when they are geared at secondary effects like crime, loss of retail trade, reduction in property value, and reduction in quality of life.[94] According to the government in *Reno*, the display provision of the CDA operated as a zoning provision, channeling indecent material to other "neighborhoods" in cyberspace where only adults may communicate.[95] However, the Court in *Reno* made relatively easy work of this argument, holding that the CDA was a content-based

86. Id. at 2343.

87. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

88. *See, e.g.*, Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989).

89. *See* 117 S. Ct. at 2343. This final argument by the Court is not entirely convincing. It is obviously difficult to compare the regulatory histories of two media when one of them—the Internet—has an extremely limited history. Clearly, regulation of radio broadcasts had to start somewhere as well. With statements like the Court made here, it is a wonder any new regulation in any industry is ever upheld. It is difficult to understand how the Court could argue that the Internet, cyberspace, and the World Wide Web are not pervasive—or invasive—today. *See id.* It is, however, convincing that the radio regulation in *Pacifica* and the dial-a-porn regulation in *Sable Communications* dealt with different media and did not effect complete bans on protected speech among adults. *See Sable Communications*, 492 U.S. 115 (1989). In *Sable*, the Court struck down a prohibition against the dissemination of indecent telephone messages for commercial purposes (dial-a-porn). *See id.* Those regulations, according to the *Reno* Court, were narrower than the prohibitions in the CDA. *See Reno*, 117 S. Ct. at 2343.

90. 475 U.S. 41 (1986).

91. 427 U.S. 50 (1976).

92. *See* Appellant's Brief, *Reno*, 1997 WL 32931, at *21-22.

93. *See* 475 U.S. at 54; 427 U.S. at 70.

94. *See Renton*, 475 U.S. at 49 (quoting *Young*, 427 U.S. at 71 n.34).

95. *See* Appellant's Brief, *Reno*, 1997 WL 32931, at *32-33.

regulation aimed at the *primary* effects of the speech.[96] Consequently, the Court stated that a time, place, and manner analysis was not appropriate.[97] Ultimately, the *Reno* Court agreed with the district court's statement that "the content on the Internet is as diverse as human thought."[98] The Court stated, therefore, that previous decisions involving other media "provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[99]

Despite the arguments from both sides addressing Fifth Amendment vagueness and overbreadth concerns, the Supreme Court based its entire decision on the First Amendment, stating that Fifth Amendment principles could be addressed, instead, under a First Amendment analysis.[100] First, the Court noted that the disputed provisions of the CDA contain different, undefined terms: "patently offensive" and "indecent."[101] According to the Court, the absence of definitions and the use of different terms "will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean."[102] The Court stated that the effect of such a content-based restriction with vague terms and potential criminal liability would be to chill speech that is constitutionally-protected under the First Amendment.[103] In addition, the Court noted that "[t]his uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials."[104]

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96. *See* 117 S. Ct. at 2342.
97. *See id.*
98. *Id.* at 2344 (quoting 929 F. Supp. at 842).
99. *Id.*
100. *See id.* at 2341, 2344.
101. *Id.* at 2344.
102. *Id.* (citations omitted).
103. *See id.*
104. *Id.* Finally, the Supreme Court rejected the governments arguments under the "obscenity" standard of *Miller v. California*, 413 U.S. 15 (1973), which requires answers to three essential questions: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 117 S. Ct. at 2345 (quoting *Miller*, 413 U.S. at 24) (citations omitted).

The government defended the CDA by arguing that the definition of "patently offensive"

A large part of the Supreme Court's analysis in *Reno* concentrated on whether the CDA was narrowly-tailored to meet its interests in protecting minors while respecting the constitutional rights of adults.[105] The Court found that the CDA's denial of minors' access to potentially harmful speech unconstitutionally suppressed a large amount of speech that adults have the right to receive.[106] Specifically, the Court stated that a "burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."[107]

The Court devoted much of its opinion to discussing available technology in cyberspace and how such technology relates to enforcement of the statute, protection of the constitutional rights of adults, and the existence of less restrictive alternatives that meet the government's interests.[108] Reviewing several facts presented by the district court, the Court first stated that there was no technology that would effectively prevent a minor from receiving potentially harmful materials without also preventing access by adults.[109] Second, the Court noted that the district court also found no effective means to verify age over electronic mail, newsgroups, and chat rooms.[110] Finally, the Supreme Court noted that while such age verification technology may exist on the World Wide Web through credit cards and adult passwords, the technology is prohibitively expensive for non-commercial providers.[111]

Notably, the Court distinguished between provider-based

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comes from the second prong of the *Miller* test. *See* Appellant's Brief, *Reno*, 1997 WL 32931, at *42. The Court rejected this assertion and noted the omission in the CDA of a critical phrase from *Miller*: the requirement that the proscribed material be "specifically defined by the applicable state law." *Reno*, 117 S. Ct. at 2345. The requirement that the restricted material be defined by state law reduces the vagueness inherent in the term "patently offensive." Furthermore, according to the Court, just because a three-prong test is not unconstitutionally vague does not mean that one of those prongs, standing separately, will be constitutional. *See id.*

105. *See* 117 S. Ct. at 2346-48.

106. *See id.* at 2346.

107. *Id.* at 2346.

108. *See id.* at 2347.

109. *See id.*

110. *See id.*

111. *See id.* The Court noted that it would cost as much as $10,000 for a non-commercial provider to accommodate adult users. *See id.* at 2348.

technology, designed to prevent communication of indecent material to minors, and user-based technology (software), designed to prevent minors' access to such material.[112] The government argued that while the above facts demonstrate the inability to screen for age in certain parts of cyberspace, additional facts demonstrated such control was better handled by the government than by parental control software.[113] In response, the Court held: "'Despite its limitations, currently available user-based software suggests that a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will *soon* be available.'"[114]

This distinction is interesting in that presently undeveloped or expensive provider-based technology for e-mail, newsgroups, chat rooms, and the Web was not enough to save the CDA; but presently unavailable user-based software was enough to strike it down.[115] Critics of the *Reno* decision could defensibly argue that the constitutionality of a statute should not depend upon unproven or unavailable technology. If computer scientists do not yet know of certain technology, how are members of Congress expected to know of such technology?[116] According to the Court, the government failed

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112. *See id.* at 2347.

113. In its brief to the Supreme Court, the government argued that commercial blocking software available for consumer purchase was not as effective as the CDA in meeting the government's interests. The governments argument was that, first, parents and schools should not have had the sole financial responsibility of blocking inappropriate material for children—the providers should have had to bear some of the costs. Next, the government argued that commercial software could not keep up with the new Web sites constantly entering the Internet. Finally, the government argued that there was no particular guarantee that all the indecent material would be caught and blocked anyway. *See* Appellant's Brief, *Reno*, 1997 WL 32931, at *23.

114. *Reno*, 117 S. Ct. at 2347 (quoting 929 F. Supp. at 842) (emphasis added).

115. *See id.*

116. A brief exchange between Bruce J. Ennis, the lead attorney for the appellees, and Justice Scalia demonstrates the confusion concerning the future constitutionality of legislation designed to protect minors from questionable materials on the Internet:

> JUSTICE SCALIA: Mr. Ennis, ... I throw away my computer every 5 years. I think most people do .... Is it possible that this statute is unconstitutional today, or was unconstitutional 2 years ago when it was examined on the basis of a record done about 2 years ago, but will be constitutional next week? ... Or next year or in two years?
>
> MR. ENNIS: Not as it is presently worded, Justice Scalia. Because the way it's worded now, it makes it a crime for a speaker to make available on the Internet speech that

to meet its burden of demonstrating an absence of less restrictive alternatives.[117] As a result, the Court held that the CDA was not tailored enough to meet the government's interests of protecting children and protecting the constitutional rights of adults.[118]

2. The Dissenting Opinion

In a separate opinion, Justice O'Connor, joined by Chief Justice Rehnquist, concurred in part and dissented in part.[119] Justice O'Connor admired the soundness of the purpose of the CDA, but agreed with the majority that the constitutionality of the CDA must be judged against the state of the Internet today, not at some point in its future.[120] Justice O'Connor also agreed with the majority that the "display" provision was unconstitutional.[121] O'Connor noted that until gateway technology is available throughout cyberspace, a speaker cannot be reasonably assured that the speech he displays will

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would be—to display speech that would be available to a minor.

Oral Arguments for Appellees, Reno v. ACLU, 117 S. Ct. 2329 (1997) (No. 96-511), *available in* 1997 WL 136253, at *48-49.

117. *See Reno*, 117 S. Ct. at 2348.

118. *See id.* The Court also rejected several other arguments presented by the government. First, because the CDA criminalized speech based on its content, a time, place, and manner analysis was not appropriate. *See id.* Second, the requirement that the speaker have the "knowledge" that a minor is "listening" or accessing restricted material did not save the statute because, given the number of Internet users at any one time, it is almost a given that at least one of them is a child. *See id.* at 2349. Furthermore, most Internet fora are open to all comers, regardless of age. *See id.* Finally, the Court dismissed the argument that the statute's affirmative defenses provided enough protection for Internet speakers. *See id.* In response to the good faith defense, the Court emphasized the lack of technology currently available to ensure that "tagging" indecent material would effectively prevent children from accessing prohibited sites. *See id.* Similarly, the Court held that current technology limits the effectiveness of the age verification defense: "the District Court correctly refused to rely on unproven future technology to save the statute." *Id.* at 2350. This statement is interesting, considering that the Court relied on future technology—parental control software that will "soon" be widely available—to invalidate the statute.

119. *See Reno*, 117 S. Ct. at 2351-57 (O'Connor, J., dissenting).

120. *See id.* at 2354.

121. *See id.* Contrary to the majority, O'Connor argued that the disputed provisions of the CDA can and should be divided into three provisions—the "transmission" provision (section 223(a)(1)), the "specific person" provision (section 223(d)(1)(A)), and the "display" provision (section 223(d)(1)(B)). This separation matches that used by the district court. *See* 117 S. Ct. at 2354.

reach only adults,[122] because it is impossible to confine speech to an "adult zone." Thus, the only way for a speaker to avoid liability under the CDA is to refrain completely from indecent speech.[123]

Justice O'Connor parted from the majority in her discussion of the other two provisions of the statute. According to her dissent, while the "display" provision was facially unconstitutional, both the "specific person" and "transmission" provisions were not invalid in all applications.[124] Justice O'Connor would have imposed a knowledge requirement, holding the Internet speaker or provider responsible for knowing that the receivers were under eighteen years of age.[125] O'Connor stated that construing these provisions to require the transmitter to know the age of the receiver would have validated the CDA, as it applies to Internet communications involving one adult and one or more minors.[126] O'Connor stated that "in this context, these provisions are no different from the law we sustained in *Ginsberg*."[127] However, O'Connor noted that the analogy to *Ginsberg* collapsed when more than one adult was involved in the conversation.[128] In such an application, the CDA effectively chilled the protected speech of adults. Ultimately, Justice O'Connor stated:

> Because the rights of adults are infringed only by the "display" provision and by the "indecency transmission" and "specific person" provisions as applied to communications involving more than one adult, I would invalidate the CDA only to that extent. Insofar as the "indecency transmission" and "specific person" provisions prohibit the use of indecent speech in communications between an adult and one or more minors,

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122. *See* 117 S. Ct. at 2354.

123. *See id.*

124. *See id.* at 2354-55.

125. *See id.* at 2354. The "specific person" provision did not require "knowledge" precisely, as the transmission provision did, but it proscribed the same conduct. The government argued, and Justice O'Connor agreed, that a knowledge requirement should have been read into this part of the CDA. *See id.*

126. *See id.* at 2355. Such communications may occur over electronic mail or in chat rooms. *See id.*

127. *Id.* Because O'Connor determined that the CDA is constitutional in some applications, she argued that a "direct facial challenge" should be rejected. *See id.*

128. *See id.* at 2357.

however, they can and should be sustained.[129]

C. Reno v. ACLU *and Acceptable Use Policies*

As noted, many provisions of the Communications Decency Act coincide with rules and regulations in the acceptable use policies of schools. Consider the following hypotheticals, all based upon existing policies around the country:

> (1) No student shall use a school-owned, monitored, or accessed telecommunications device to knowingly make, create, or solicit and initiate the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent;
>
> (2) No student shall knowingly use a school-owned, monitored, or accessed interactive computer service to send to a specific person or persons any material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.
>
> (3) No student shall knowingly use a school-owned, monitored, or accessed interactive computer service to display in a manner available to another person or persons any material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.

Violators of any of the above provisions are subject to punishment, commensurate with the severity of the infraction, including suspension of computer privileges and expulsion from school.

On the basis of the decision in *Reno v. ACLU*, these school-based provisions are presumptively facially unconstitutional. However, this Article argues that just because "it can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or

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129. *Id.*

expression at the schoolhouse gate[,]"[130] a decision striking down the congressionally enacted CDA should not have consequences for similar policies created by public school districts. The Supreme Court's decision in *Reno* does not render a school district's acceptable use policies lifeless. Instead, such policies are supported by the rich and extensive First and Fourteenth Amendment case law granting public schools control over their student body. Relying on the judicial and statutory law discussed in the next section, the constitutionality of acceptable use policies in schools stands on relatively firm ground, despite the outcome in *Reno v. ACLU.*

VI. CHALLENGES TO SCHOOL-BASED CONTROL OVER THE ELECTRONIC MEDIA

A. Discipline and Fourteenth Amendment Concerns: Vagueness and Overbreadth

There are very few published legal critiques of acceptable use policies.[131] However, those that do criticize the attempts of school administrators to control and monitor students' use of the Internet typically challenge the policies, in part, on vagueness and overbreadth grounds.[132]

In most jurisdictions, education officials have statutory authority to adopt rules and regulations necessary for the governance of schools and the discipline of pupils.[133] This authority, however, is not unlimited; rules and regulations must still be reasonably clear and narrow.[134] In *Soglin v. Kauffman,*[135] for example, university students were expelled for protesting and blocking access of a chemical company recruiter.[136] The university charged the students under a rule

130. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969).

131. *But see, e.g.*, Nancy Willard, *A Legal and Educational Analysis of K-12 Internet Acceptable Use Policies* (visited May 9, 1998) <http://www.erehwon.com/k12aup/legal_analysis.html>.

132. *See, e.g.*, Dave Kinnaman, *Critiquing Acceptable Use Policies* (visited May 9, 1998) <http://www.io.com/~kinnaman/aupessay.html>.

133. *See, e.g.*, OHIO REV. CODE ANN. § 3313.20 (West 1997).

134. *See* Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969).

135. *Id.*

136. *See id.* at 165.

broadly prohibiting "misconduct" and argued in court that it had "inherent power to discipline" that need not be exercised through specific rules.[137] The court held that the vagueness principle was effectively argued by the students because school officials "did not base [student punishment] on student disregard of university standards of conduct expressed in reasonably clear and narrow rules."[138]

At the public school level, the Ohio Court of Appeals recently held that disciplinary rules must be written with greater specificity.[139] Under an Ohio statute, boards of education are required to adopt policies that specify the type of misconduct for which a pupil may be suspended.[140] In *Wilson v. South Central Local School District*, a student who was suspended for possession of tobacco complained successfully that his school's discipline policy was not specific enough to cover the alleged infraction.[141] The decision in *Wilson* may inform education officials that with the Internet and consistently new developments in computer technology, schools likely will be concerned about new offenses not formally specified in discipline policies.

At least one court has held that the "school has *inherent authority* to maintain order and to discipline students."[142] In *Esteban v. Central Missouri State College*,[143] students took part in a demonstration that caused damage to college property.[144] Two of the suspended students contested their punishment and challenged the school rule prohibiting "participation in mass gatherings which might be considered unruly or unlawful."[145] The students complained that the rule was vague and overbroad.[146] The United States Court of Appeals for the Eighth Circuit held that universities have inherent authority to maintain

137. *See id.*
138. *Id.* at 167.
139. *See* Wilson v. South Cent. Local Sch. Dist., 669 N.E.2d 277 (Ohio Ct. App. 1995).
140. *See* OHIO REV. CODE ANN. § 3313.661(A) (West 1997).
141. *See Wilson*, 669 N.E.2d at 278, 280.
142. Esteban v. Central Mo. State College, 415 F.2d 1077, 1088 (8th Cir. 1969).
143. *Id.*
144. *See id.* at 1079.
145. *Id.* at 1081.
146. *See id.* at 1083.

order and discipline.[147] The court stated that university conduct rules do not need to be drawn with the same specificity as criminal codes.[148] The court held that there is no constitutional infraction when university rules are created with flexibility and reasonable breadth; university punishment is part of the educational process and, as such, may be expressed in general terms.[149]

The terms of school rules may also withstand vagueness claims if they are generally understood by the target audience. In *Wiemerslage v. Maine Township High School District 207*,[150] high school administrators suspended students for loitering in an "off-limits area" immediately adjacent to the school.[151] The students alleged that the school's anti-loitering rule was void for vagueness.[152] The court disagreed and held that the simple dictionary definition of "loitering" was sufficiently clear to warn people of common intelligence of the prohibited conduct.[153]

The "overbreadth" doctrine relates to legislation or school rules that may be too sweeping in coverage. The doctrine proscribes overly broad polices that may have a deterrent or "chilling" effect on protected First Amendment expression. Under an allegation of overbreadth, schools must demonstrate that policies restricting student free speech rights further a compelling state interest and are no greater than necessary to further that interest. This means that the school policy must be narrowly aimed at meeting school objectives so as not to reach expressive conduct that would otherwise be constitutionally protected.

The United States Supreme Court recognized schools' strong interest in maintaining order in *Grayned v. City of Rockford*.[154] In that case, a student was convicted of violating a local anti-picketing ordinance that prohibited such activity within 150 feet of a public

147. *See id.* at 1084-85.
148. *See id.* at 1088-89.
149. *See id.* at 1089.
150. 29 F.3d 1149 (7th Cir. 1994).
151. *See id.* at 1150.
152. *See id.* at 1150-51.
153. *See id.* at 1152.
154. 408 U.S. 104 (1972).

school.[155] The student, along with others, marched on a sidewalk, which was less than 100 feet from the school, carrying a placard that was visible from inside classrooms.[156] He challenged the city ordinance, arguing that it sought to regulate constitutionally protected activity and was overbroad and vague.[157] His conviction was upheld by the Court on the grounds that school officials have a legitimate government interest in preventing activity that materially disrupts classwork and involves substantial disorder or invasion of the rights of others.[158] The Court found no overbreadth as the ordinance was narrowly tailored to the school's compelling interest in having an uninterrupted school session conducive to student learning.[159]

Generally, public education authorities must create rules to maintain order and discipline and the rules must provide specific standards to guide student conduct.[160] Vague or overbroad rules may give school administrators too much discretion when disciplining students, and this may cause discrimination against some students.[161] However, courts considering issues of vagueness and overbreadth of school policies have determined that school disciplinary regulations do not have to be developed with as much specificity as other governmental regulations, and are best left to the discretion of school personnel. In this respect, the Fifth Circuit has noted:

> Some degree of discretion must, of necessity, be left to . . . school officials to determine what forms of misbehavior should be sanctioned. Absent evidence that the broad wording [of school rules] is, in fact, being used to infringe on [constitutional] rights . . . we must assume that school officials are acting responsibly in applying the broad statutory

155. *See id.* at 106.
156. *See id.* at 105.
157. *See id.* at 108.
158. *See id.* at 118-21.
159. *See id.* at 118.
160. *See Soglin*, 418 F.2d at 167.
161. *See, e.g.*, Sherpell v. Humnoke Sch. Dist. No. 5, 619 F. Supp. 670 (E.D. Ark. 1985)(finding that the combination of vagueness and discretion meant that African-American students were being disciplined for behavior for which white students were not being disciplined).

command.[162]

B. Acceptable Use and the First Amendment

No recorded court decision to date has directly addressed the issue of student First Amendment rights and access to the Internet by public school students. However, courts have confronted similar issues regarding obscenity and pornography, symbolic speech, lewd expression, the public forum doctrine, and whether a student has a constitutional right to receive information.[163] From these cases, we may extrapolate that the control which school personnel have over the use of the electronic media in schools may depend on the kind of access given to students and the purposes of such access.

1. Obscenity

In general, the First Amendment does not protect obscene speech or material; such speech is "utterly without redeeming social importance."[164] The standard for determining whether material is obscene was clarified by the United States Supreme Court in *Miller v. California*.[165] Under the *Miller* standard, obscenity is speech that the average person applying contemporary community standards would find to: (1) appeal to a prurient interest in sex; (2) depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable state law; and (3) lack serious literary, artistic, political, or scientific value.[166]

States may maintain different standards of obscenity for children and adults and, thus, prohibit the distribution to children of material that is acceptable for adults. The United States Supreme Court in *Ginsberg v. New York*[167] upheld a state statute prohibiting the sale of

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162. Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 1004 (5th Cir. 1975) (quoting Murray v. West Baton Rouge Parish Sch. Bd., 472 F.2d 438, 442 (5th Cir. 1973)).

163. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Board of Educ. v. Pico, 457 U.S. 853 (1982); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969).

164. Roth v. United States, 354 U.S. 476, 484 (1957).

165. 413 U.S. 15 (1973).

166. *See id.* at 24.

167. 390 U.S. 629 (1968).

sexually explicit magazines to school-aged children.[168] The materials were deemed not to be obscene for adults and, in fact, were freely sold to that population.[169] The Court held, however, that the materials could not be sold to children under seventeen years old where states have legislated a standard of obscenity for those below the age of majority, even if that standard is different for adults.[170] The Court declared that it was not an invasion of the free expression rights of children to adjust the definition of obscenity "to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . . of such minors."[171] The case acknowledged that free expression rights of children are evaluated on a standard that varies based on the age and maturity of the child. This "variable obscenity" standard gives the state great power to regulate the children's access to obscene materials based on the state's power to promote the societal value of morality.[172]

On the information highway, the definition of obscenity and the legal standards that emanate from it apply to students' creation of obscene materials and the distribution of obscene materials to students. In both cases, boards of education may successfully assert interests in promoting social morality and responsibility and civility in social discourse. Schools may prohibit the use of school computers for the transmission or receipt of obscene, vulgar, or indecent expression.

2. School Disruption

Tinker v. Des Moines Independent School District[173] is perhaps the most fundamental and universal of the school free speech cases. In *Tinker*, the school disciplined several students for wearing black

168. *See id.* at 645.
169. *See id.* at 634.
170. *See id.* at 636-37.
171. *Id.* at 638 (quoting Mishkin v. New York, 383 U.S. 502, 509 (1966).
172. *See* Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); FCC v. Pacifica Foundation, 438 U.S. 726 (1978). In *Bethel* the Court reiterated its position regarding obscenity and school children by holding that school personnel have the authority to regulate vulgar, indecent, or offensive speech that occurs on school grounds in light of the special characteristics of the school environment. *See* 478 U.S. at 686-87.
173. 393 U.S. 503 (1969).

armbands to protest the Vietnam War.[174] The United States Supreme Court held that such silent, passive speech neither violated the rights of other students and staff nor disrupted the smooth operation of the school.[175] The decision established the fact that public school students have constitutional rights, including those of expression.[176] The Court recognized that these rights are less pronounced than those of citizens outside of school, but found that they could not be curtailed by school officials except when such expression materially or substantially disrupted the smooth functioning of the school or interfered with other students' rights.[177] According to the decision, the burden for demonstrating "substantial interference" falls on school officials.[178] Therefore, school personnel are required to make a strong evidentiary showing before abridging student free expression rights.[179]

For a modern, technological example of *Tinker*, consider silent, passive, anti-war messages or pictures sent by a student to other students via e-mail or the Internet. Under the *Tinker* rule, silent expression is not necessarily free from disruption. If these e-mail messages materially and substantially interfere with the operation of the school, then the school may restrict such communication without an unconstitutional deprivation of the student's rights.

3. Inappropriate Expression

Likely the most talked-about link between young people and electronic communication involves lewd, indecent, and sexually oriented speech. The United States Supreme Court already permits school officials to control such expression—especially when the target audience includes younger children. In *Bethel School District No. 403 v. Fraser*,[180] the Court upheld a school's decision to suspend a student for delivering a lewd, indecent, and vulgar campaign speech

174. *See id.* at 504.
175. *See id.* at 508.
176. *See id.* at 511.
177. *See id.* at 513.
178. *See id.*
179. *See id.*
180. 478 U.S. 675 (1986).

at a student assembly.[181] The Court distinguished the speech of the student in this case from the passive demonstration at issue in *Tinker*.[182] Specifically, the Court found that inappropriate expression by a student implicated school officials' authority to determine socially appropriate behavior.[183] In upholding the disciplinary action against the student, the Court observed that the rights of children in public school are different from those enjoyed by adults in public discussion.[184] The Court fixed no specific standard for deciding what kind of speech in school was appropriate. Rather, a clear majority held that schools may define the kinds of expression by students that are consistent with their own pedagogical objectives.[185]

Based on *Bethel*, it is plausible to assume that lewd, offensive, indecent, or vulgar material accessed, created, and sent by school students to other students over the information highway may be restricted by school officials. As the *Bethel* Court recognized, schools must be permitted to educate students for citizenship and instill fundamental societal values,[186] and "[t]he determination of what manner of speech in the classroom or in the school assembly is inappropriate properly rests with the school board."[187]

Schools are not restricted to the *Tinker* and *Bethel* standards in prohibiting inappropriate speech. Federal law prohibits speech that threatens the physical safety of another person if transmitted in interstate or foreign commerce.[188] Such a statute was interpreted in the highly publicized case of *United States v. Baker*.[189] In *Baker*, a University of Michigan student (Jake Baker) was charged with communicating threats to injure and kidnap women, young girls, and a female classmate specifically named and described in e-mail

181. *See id.* at 685.
182. *See id.*
183. *See id.* at 685-86.
184. *See id.* at 682-83.
185. *See id.* at 685-86.
186. *See id.* at 681.
187. *Id.* at 683.
188. "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 875(c) (1994).
189. 890 F. Supp. 1375 (E.D. Mich. 1995), *aff'd*, 104 F.3d 1492 (6th Cir. 1997).

messages sent to another Internet user in Canada.[190] Earlier, Baker had written and posted to a publicly accessible Internet newsgroup a story that graphically described the torture, rape, and murder of a woman given the name of one of Baker's classmates.[191] Ultimately, the government abandoned this newsgroup story as a basis of prosecution because it did not constitute a threat.[192] The district court, therefore, addressed only those charges involving private e-mail messages sent by Baker to other Internet users.[193]

In his motion to quash the indictment, Baker argued that the application of the law to his e-mail transmissions violated the First Amendment.[194] The court held that the e-mail communications from Baker were not true threats and, therefore, dismissed the indictment against Baker.[195] The court noted that Baker's language appeared in private, inaccessible e-mail messages sent only to one other person.[196] While each of the e-mail letters cited in the charges graphically discussed and depicted sexual violence against women, the court determined that the letters failed to identify any specific threatened action or to limit the targets of his discussions to a specific person or class of persons.[197]

Baker was decided in a university setting and may have limited applicability in primary and secondary education settings. Under the *Bethel* analysis, schools probably have a broader range of restrictions over the speech of students than the government does over individuals like Baker. Schools have the obligation to prepare students for positive public discourse and compliance with fundamental societal values. That is, while the government may not be able to prosecute an individual for certain inappropriate speech he or she sends to other individuals by electronic media, school officials might be able to punish students for the same communication sent to other students or other persons over school computers.

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190. *See Baker*, 890 F. Supp. at 1378-79.
191. *See id.* at 1379.
192. *See id.* at 1379-80.
193. *See id.* at 1380.
194. *See id.*
195. *See id.* at 1381-90.
196. *See id.* at 1390.
197. *See id.* at 1385-86.

4. Legitimate Pedagogical Concerns

Student expression may be curtailed based on the authority of a school over curricular issues and a school's obligation to maintain a safe and orderly environment. A school's authority to regulate student rights may depend on the type of expression, whether the expression falls under the aegis of the school, and whether the expression has a negative impact upon the school's image or interferes with the rights of other students.

School districts have broad control over the content of curriculum, in effect giving them power tantamount to the exercise of prior restraint.[198] In *Hazelwood School District v. Kuhlmeier*,[199] a principal prohibited the publication of two pages of a school-sponsored newspaper that contained articles on teen pregnancy and divorce.[200] Because the identity of persons implicated may have been obvious from the stories, the principal believed the articles to be inappropriate for the paper.[201] In considering the ensuing First Amendment challenge, the Supreme Court held in favor of the school.[202] The Court held that the school newspaper and its associated journalism course were sponsored by the school and, therefore, subject to the rules, regulations, and administrative decisions of school officials.[203] The Court reasoned that the school had not established the newspaper as a public forum and, therefore, school officials could censor student expression if "their actions are reasonably related to legitimate pedagogical concerns."[204] Furthermore, the Court noted that the school-sponsored speech of students could be viewed by the public as

198. The term "prior restraint" is defined as:

> Any scheme that gives public officials the power to deny use of a forum for expression in advance of the actual expression. In constitutional law, the First Amendment of the United States Constitution prohibits the imposition of a restraint on a constitutionally protected publication before it is published.

D. SPERRY, P.T.K. DANIEL, ET AL., EDUCATION LAW AND THE PUBLIC SCHOOLS: A COMPENDIUM 1136-37 (2d ed. 1998).

199. 484 U.S. 260 (1988).

200. *See id.* at 263-64.

201. *See id.* at 263.

202. *See id.* at 266.

203. *See id.* at 268-69.

204. *Id.* at 272-73.

bearing the endorsement, or imprimatur, of the school.[205] Under *Hazelwood*, schools have control over the speech of students when the speech is faculty supervised, or when it involves the educational mission of the school.[206]

The *Hazelwood* decision is applicable to student use of the Internet in public schools. If student speech via computers is facilitated as part of a school's curriculum, then it is school-sponsored. Because Internet access in schools is provided primarily for educational purposes, school sponsorship of Internet speech is nearly a given. Furthermore, a school's Internet system will likely be considered a *limited* public forum, similar to the newspaper in *Hazelwood*. As a result, any speech generated over such a school's electronic media could easily be attributed to the school.

If such speech is not a specific part of a school's curriculum, but is communicated over the school's computer facilities or on school time, then it may bear the imprimatur of the school. A simple example of *Hazelwood's* application to the Internet is a school newspaper created on computer and "delivered" by e-mail. Another example may be a message sent by a student with an e-mail address linked to the school to someone outside the school who may believe the message to be supported by school leaders. Under *Hazelwood*, school districts are likely to have control over all such expression.

C. Restrictions on School Authority

1. Viewpoint Discrimination

The reach of *Hazelwood* and *Bethel* is not absolute. Recent decisions have held that some viewpoint discrimination by school officials may be prohibited, thus tempering the school's control over student expression. For example, a unanimous United States Supreme Court in *Lamb's Chapel v. Center Moriches Union Free School District*[207] upheld the right of a religious congregation to use public

205. *See id.*
206. *See id.* at 273.
207. 508 U.S. 384 (1993).

school facilities for a film series after school hours.[208] The film series was based on fundamentalist Christian views about how families in America are being undermined by media influences.[209] Ultimately, the Court ruled that because school access was extended to non- or quasi-religious groups representing similar viewpoints, permission also had to be granted to Lamb's Chapel.[210] The Court found that the school had created a limited public forum in permitting its facilities to be used for community events.[211] Moreover, while the subject of family values was not prohibited, the school prevented only religious organizations from delivering the message.[212] The Court found that school officials violate the First Amendment "when [they deny] access to [religious groups] solely to suppress the point of view [they espouse] . . . on an otherwise includable subject."[213]

The Supreme Court rendered a similar decision relating to higher education. In *Rosenberger v. Rector and Visitors of University of Virginia*,[214] the University of Virginia denied school funding to one of several student publications solely on the basis of the publication's religious philosophy.[215] The University sought to justify its decision on Establishment Clause principles and on limited availability of funds.[216] The Supreme Court concluded that the University engaged in unlawful viewpoint discrimination.[217] Following *Lamb's Chapel* and *Rosenberger*, it may be concluded that school officials cannot engage in viewpoint discrimination in promulgating or carrying out rules and regulations surrounding the use of electronic media equipment. This may be true not only for curricular issues, but extracurricular activities as well, given the facts of these two cases.[218]

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208. *See id.* at 397.
209. *See id.* at 388.
210. *See id.* at 395.
211. *See id.* at 392-93.
212. *See id.* at 394-95.
213. *Id.* at 394 (quoting Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 806 (1985)).
214. 515 U.S. 819 (1995).
215. *See id.* at 822-23.
216. *See id.* at 827.
217. *See id.* at 845-46.
218. The *Hazelwood* Court made it clear that it was not addressing extracurricular issues. However, it appears that schools can exercise prior restraint over student expression if the extracurricular activity could be viewed as carrying the schools "imprimatur." *But see* Romano

To apply the above cases to a situation involving the Internet in public schools, consider an example in which students send e-mail messages or post bulletins on the Web advertising student club activities. Under *Lamb's Chapel* and *Rosenberger*, if messages from some clubs are allowed, then messages from all clubs should be allowed. This may be the case, whether the notices are posted and supported by student members of the club (similar to *Lamb's Chapel*) or by the school as a whole, perhaps by a school home page (similar to *Rosenberger*).

2. State Law

School board authority to control the expression of students may also be moderated by state law. California, the state enacting the first statutory scheme for protecting student free expression rights on school campuses, has determined that the broad power to censor expression in school-sponsored publications for pedagogical purposes recognized in *Kuhlmeier* is not available to state educators. In *Lopez v. Tulare Joint Union High School District*,[219] high school students brought an action challenging the school board's authority to censor the script of a student-produced film.[220] The script addressed the problems of teenage pregnancy and contained profane language that school officials found highly offensive and educationally unsuitable.[221] The state appeals court upheld the school board's decision to delete the profanity from the script,[222] but stated that the board's power in this area is limited because editorial control of official student publications (as well as scripts) rests with the students alone.[223] The court noted that the state legislature intended only to restrict student expression when it fell below "professional standards of English," and there could be no prior restraint by school officials

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v. Harrington, 725 F. Supp. 687 (E.D.N.Y. 1989). In *Romano*, a federal district court interpreted *Hazelwood* narrowly and held that school officials may not exercise editorial control over student-based extracurricular publications.

219. 40 Cal. Rptr. 2d 762 (Cal. Ct. App. 1995).

220. *See id.* at 764.

221. *See id.*

222. *See id.*

223. *See id.* at 775.

except insofar as this provision was violated.[224] In concluding that the decision did not violate California's constitutional prohibition against prior restraint, the court stated, "[t]he Board has not censored the students' expression of ideas; rather the Board has prohibited their expression of those ideas by the use of profane language."[225]

The Massachusetts supreme court has decided, under a *Tinker* analysis, that public high school students have the freedom to engage in speech that might be considered vulgar, but that does not cause disruption or disorder in school. In *Pyle v. School Committee*,[226] two students claimed that a school dress code policy prohibiting "clothing that was obscene, profane, lewd, or vulgar" violated their First Amendment right to free expression.[227] The court found that a state statute governing this issue required school officials to demonstrate that student expression was disruptive in order to be prohibited:

> The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression shall include without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views through speech and symbols, (b) to write, publish and disseminate their views, (c) to assemble peaceably on school property for the purpose of expressing their opinions.[228]

The court declined to accept the school district's argument that *Bethel* or *Hazelwood* narrowed the holding in *Tinker*, thus granting broader authority to administrators in regulating student expression.[229] According to the court, the state legislature had ample opportunity over the years to change the statute to reflect new

224. *See id.* at 777.

225. *Id.* at 778. Other states have followed California's example by enacting statutes protecting students' right of free expression, limited only by issues of obscenity, defamatory expression or expression that creates a clear and present danger of the commission of unlawful acts. *See, e.g.*, COLO. REV. STAT. § 22-1-120 (1997); IOWA CODE ANN. § 280.22 (West 1996).

226. 667 N.E.2d 869 (Mass. 1996).

227. *Id.* at 871.

228. *Id.* (quoting Mass Gen. Laws ch. 71, § 82 (1994)).

229. *See id.* at 872.

trends.[230] Moreover, since the legislation was not ambiguous, the court saw no need for a judicial reinterpretation.[231]

Lopez and *Pyle* notwithstanding, many states follow the decision in either *Bethel* or *Hazelwood* in making decisions about student expression in schools. Ohio, for example, has determined that schools must be able to set high standards and, following the decision in *Hazelwood*, need not support any student expression that does not "reasonably" relate to legitimate pedagogical concerns. The state also has announced that public schools are not traditional public fora when there is no intent to create any sort of forum under school aegis that fosters unfettered expressive activity.[232] According to *Hazelwood*, a public forum is one where school authorities have "'by policy or practice' opened [school] facilities for 'indiscriminate use by the general public.'"[233] The Court in *Hazelwood* thus adopted a "reasonableness" standard, or the most minimal of judicial scrutiny, when examining constitutional issues.

The California and Massachusetts decisions, however, cannot be overlooked because they provide restrictions on the power of school authorities set by either the state judiciary or legislature. The California courts have ruled that student expression, in the form of school publications or student theatrical productions, falls into a "limited forum" category.[234] The "limited forum" is "property the state has opened for expressive activity by part or all of the public. In a limited forum, the [school district's] ability to regulate expression is greatly reduced, but it may restrict access to the forum consistent with the purposes for which it was created."[235] The court in *Lopez* declared that the script at issue was conceptually no different than a school yearbook or newspaper produced in a journalism class.[236] In

230. *See id.*

231. *See id.*

232. *See, e.g.*, Quappe v. Endry, 772 F. Supp. (S.D. Ohio), *aff'd*, 979 F.2d 851 (6th Cir. 1991).

233. *Hazelwood*, 484 U.S. at 267 (quoting Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 47 (1983)).

234. *See, e.g.*, Lopez v. Tulare Joint Union High Sch. Dist. Bd. of Trustees, 40 Cal. Rptr. 2d 762 (Cal. Ct. App. 1995).

235. *Id.* at 778. The court defined a "nonpublic forum" as "public property that is not a public forum by tradition or design, such as a military base or a jail." *Id.*

236. *See id.*

California, such expression is deemed to occur in a limited public forum. As such, educators must demonstrate that any regulation of student speech advances a compelling state interest—the highest form of judicial scrutiny.[237] The *Lopez* court noted that in the California educational environment, strict scrutiny or a compelling state interest is advanced when school authorities seek to promote "moral improvement" or teach students to refrain from using profane language.[238]

The Massachusetts Supreme Court in *Pyle* sustained the historic reach of *Tinker v. Des Moines Independent Community School District*[239] by reiterating that student rights of free expression could not be removed except when they substantially interfered with the work of the school or impinged upon the rights of other students.[240] This "substantial interference" or "valid state interest" standard[241] was extended by the state from toleration of silent protest of the Vietnam War (in *Tinker*) to toleration by school officials of student-worn clothing that is obscene, profane, lewd, or vulgar.

School authority over the use of the Internet may face restrictions based on the above cited case law. There may also be additional restrictions to consider. This Article has previously noted that there is an absence of case law governing the use of electronic media in schools. This is important because the Supreme Court has ruled that the First Amendment cannot be uniformly applied across the board for all communication media; instead, the unique attributes of each medium must be understood and accounted for.[242] Hence, school regulations that are constitutional when applied to regular student speech in school may not be protected to the same degree when applied to use of the Internet. Presently, there are no definitive answers with regard to students' First Amendment protection of speech through electronic media.

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237. *See id.*
238. *See id.* at 778-79.
239. 393 U.S. 503 (1969).
240. *See Pyle*, 667 N.E.2d at 871.
241. *See Tinker*, 392 U.S. at 515, (White, J., concurring).
242. *See* Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989).

D. Cyberspace and the Curriculum

The United States Supreme Court has recognized that public schools are important for setting an academic foundation for students and for preparing students to become citizens in a democratic society.[243] Hence, school officials have been permitted to establish school curriculla that are designed to transmit community values and a respect for authority.[244] States possess broad power to determine curriculla in public schools, including the use of instructional materials in the classroom and the selection of information for school libraries. Courts generally give deference to these educational decisions and interfere only if decisions by school officials are arbitrary or impair the constitutional rights of students.[245]

In *Board of Education v. Pico*,[246] the United States Supreme Court held that local school boards have the authority to develop a curriculum that is consistent with community values.[247] This authority extends to decisions regarding which books to place on school library shelves. But these decisions must be made without inhibiting students' legitimate exercise of academic inquiry.[248] The *Pico* Court made a distinction between instructional materials for classroom use and materials available in the library.[249] In a plurality opinion, the Court ultimately held that school officials may not remove books from a school library simply because they disagree with the ideas contained in those books.[250] The Court opined that school boards may not prescribe what is acceptable in

243. *See* Ambach v. Norwick, 441 U.S. 68 (1979).

244. *See, e.g.*, Board of Educ. v. Pico, 457 U.S. 853 (1982).

245. *See Pico*, 457 U.S. 853; Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

246. 457 U.S. 853 (1982).

247. *See id.* at 864.

248. *See id. at* 866-67. The Court quoted from previous decisions concerning the First Amendment right to receive information: "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge," *id.* at 866 (quoting Griswold v. Connecticut, 381 U.S. 479, 482 (1965)); "[T]he Constitution protects the right to receive information and ideas," *id.* at 867 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)); "The right of freedom of speech and press ... embraces the right to distribute literature, and necessarily protects the right to receive it" *id.* at 867 (quoting Martin v. Struthers, 319 U.S. 141, 143 (1943)).

249. *See id.* at 868.

250. *See id.* at 869.

constitutionally protected areas such as religion, politics, or other matters of opinion and may not attempt to do so by censoring materials in the school library.[251]

School boards may, however, remove books from library shelves if the book's educational suitability is in question. In *Virgil v. School Board*,[252] school board members removed from the curriculum of an elective course a translation of *Lysistrata*, by Aristophanes, and *The Miller's Tale*, by Geoffrey Chaucer, because they deemed passages in the works to be sexually explicit and excessively vulgar.[253] Following students' allegation that the board members actions violated the First Amendment, the United States Court of Appeals for the Eleventh Circuit determined that the school board was empowered to make curricular decisions, such as the choice of a textbook and whether it could be used in a course.[254] This is true whether those materials are required for a mandatory or elective course, as such hegemony extends over "curriculum" within its broad definition.[255] The *Virgil* court deemed the removal of the books to be appropriate because school officials may take into account the emotional maturity of student audiences when curricular decisions are made, either in the classroom or in the school library.[256]

Recall that the Internet is not a tangible entity or organization. No one owns it or manages it. With this in mind, how do *Pico* and *Virgil* affect acceptable use policies? The other First Amendment cases presented in this Article—for example, *Bethel* and *Hazelwood*—can be applied to the Internet in schools without much loss of school control. Curriculum, however, appears to be a different situation. Before the inappropriate "books" are discovered by teachers and school administrators, the damage is done; the students, many of them still immature, have already "checked them out." On the Internet, a student's library is endless, without school (and perhaps parental) control, regardless of the social maturity of the user and the suitability of the material. With the Internet and the World Wide

251. *See id.* at 869-70.
252. 862 F.2d 1517 (9th Cir. 1989).
253. *See id.* at 1518-19.
254. *See id.* at 1523-25.
255. *See id.*
256. *See id.* at 1521.

Web, the free exercise of academic inquiry in *Pico* likely has been expanded beyond the reach of acceptable use polices—and beyond school control.

Challenges against classroom materials are waged, too, by teachers, students, and parents. In *Roberts v. Madigan*,[257] a teacher challenged a school's request that he stop reading the Bible in his classroom and that he remove two religious books from his classroom library.[258] Against the teacher's free speech and free exercise claims, the court held that the school district acted properly in removing the books from the classroom.[259] The district's purpose was to promote religious neutrality.[260] The primary effect of the district's action was to insulate students from undue exposure to the teacher's chosen profession.[261] If the Internet has made the world into a library now, who's to say that the world is not a classroom? Anyone with an e-mail address and account who can send material can surely receive it. Schools may need to be alert to personnel who use the Internet to communicate inappropriate material.

While *Roberts* involved a challenge against the removal of a book from a classroom, *Grove v. Mead School District No. 354*[262] involved a challenge against a school's refusal to remove a book from a course syllabus.[263] In *Grove*, a student and a parent found the book, *The Learning Tree*, by Gordon Parks, to be offensive to their religious beliefs.[264] The student was given an alternative assignment and was permitted to leave during classroom discussion of the book, but chose to remain.[265] The student sued the school board over its refusal to remove the book from the course's syllabus. On appeal, the court held that the book neither promoted a religion nor criticized a religion.[266] The court found that the goal of the book was to expose students to the lifestyles and experiences of Black Americans, a

257. 702 F. Supp. 1505 (D. Colo. 1989), *aff'd*, 921 F.2d 1047 (10th Cir. 1990).
258. *See id.* at 1508-09.
259. *See id.* at 1515.
260. *See id.*
261. *See id.*
262. 753 F.2d 1528 (9th Cir. 1985).
263. *See id.* at 1531.
264. *See id.*
265. *See id.*
266. *See id.* at 1534.

secular and legitimate educational purpose.[267]

Clearly, *Pico*, *Virgil*, *Roberts*, and *Grove* are applicable to the Internet. A central debate surrounding *Pico* and similar library book cases is a student's right to receive information. Information retrieval is likely the main reason students use the Internet and access the Web. The Internet and the World Wide Web are, in effect, a worldwide library or classroom. Remember, though, that there is no central control unit to monitor what "books" enter and exit this library. This is an increasing concern for public schools. In traditional school libraries, schools control which materials are placed on the school shelves, with only some restriction. On the Internet, this control is much more decentralized. Each user controls the materials that enter the system, again with only some restriction. In any case, to apply either *Pico* or *Virgil* literally, schools with computer systems in both libraries and classrooms would have to enforce different rules for computer use depending on where the computer is located and who controls it. Moreover, from the case law it is likely that school officials have the authority to determine the appropriateness of materials for school populations whether in the classroom or the library. That authority, however, does not extend to the regulation of ideas or viewpoints, particularly those that are politically or religiously based. This principle would seem to relate to the regulation of electronic media. This presents somewhat of a dilemma for school personnel in that issues of vulgarity and obscenity are, arguably, subject to school acceptable use policies. There is some question as to whether such policies control access by students to Web sites featuring racist hate speech, abortion, Satanism, and other controversial topics in contemporary society.[268]

VII. CONCLUSION

As the above discussions indicate, public schools will likely retain control over student use of electronic media, despite the Supreme Court's decision in *Reno v. ACLU*. This retention of control, however, does not eliminate all of the concerns and responsibilities

267. *See id.*

268. *See* 142 CONG. REC. S694 (daily ed. Feb. 1, 1996) (statement of Sen. Leahy).

educators may have. Of course, just as proponents of the Communications Decency Act have been forced into court, school leaders can expect acceptable use policies to come under similar legal fire. That is, acceptable use policies may be subject to First and Fifth (via the Fourteenth) Amendment challenges.

The appellees in *Reno v. ACLU* criticized the government's reliance on cases like *Pacifica* and *Ginsberg*, stating that those cases, unlike the CDA, did not address a complete ban on constitutionally protected speech among adults. According to the ACLU and the other plaintiffs, the CDA essentially requires adults to conform all of their Internet speech, from commercial and non-commercial sources, to speech that would be appropriate for children in the least tolerant community in the United States. This restriction is particularly true for newsgroups, LISTSERVs, and chat rooms, where it is not technologically possible to screen for age. Furthering the argument that the CDA is ineffective, the *Reno* appellees noted that the Act did not reach foreign-born communications, now comprising at least forty percent of the traffic on the Net. The appellees also argued that the CDA was vague and overbroad. According to the appellees, there are no consistent definitions of "indecent" and "patently offensive" speech. As a result, the Act would have targeted constitutionally protected expression about AIDS, rape, homosexuality, censorship, and human rights, much of which may be useful to older minors, as well as adults. Furthermore, the Act allegedly chilled the speech of adults in cyberspace; out of fear of prosecution, adults would curtail the use of their protected speech or refrain from communicating over the Internet altogether.

Despite the Supreme Court's decision in *ACLU v. Reno*, acceptable use policies can be constitutionally supported. Within its general authority to discipline pupils, and from a long, sturdy line of First Amendment case law, a school may restrict the expression of students, including speech over e-mail and the Internet, that (1) is materially or substantially disruptive to other people or to school activities, (2) is offensively lewd, indecent, vulgar, and inappropriate for children, and (3) is school-sponsored, or bears the imprimatur of the school, and when the restriction is related to legitimate

pedagogical concerns. In *Vernonia School District 47J v. Acton*,[269] the Supreme Court held that random, suspicionless drug testing of student athletes by school districts is not unreasonable under the Fourth Amendment.[270] In its opinion, the Court stated more generally that because public school students are committed to the temporary custody of school officials, those officials may exercise a greater degree of control and supervision over students than the degree of control to which adults are subject outside of schools.[271] According to the Court, school children need greater supervision than adults in order to establish "a proper educational environment,"[272] and to enforce reasonable, flexible, and effective rules against conduct that is unacceptable in such a school environment.[273] Naturally, in today's global and computerized society, it is not surprising to find such conduct while driving on the information superhighway.

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269. 515 U.S. 646 (1995).
270. *See id.* at 661.
271. *See id.* at 2392.
272. *Id.*
273. *See id.*