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INTRODUCTION OF THE PANEL ON FIRST AMENDMENT & REGULATORY CONCERNS

DAVID L. GREGORY*

Floyd Abrams is truly an impossible act to follow, but I think we have a trump card. What can keep—casting no aspersions—about 100 people in a law school auditorium on a beautiful Friday afternoon in April? Sex!

Now that I have your undivided attention, I will modulate that a bit—sex “talk.” Due to the pernicious technology of cyberspace—now you see I am not just one who has not surfed the net, I am perhaps the token contrarian today—we have the perversion of the Gospel of John. In interactive cyberspace, we have the flesh-made-word, and the digerati have assured me they are working on making interactive pornographic-word-made-flesh.

Yesterday afternoon I was invited to attend the National Congress of Luddites,¹ so for me to be up here today is, shall we say, just a bit intellectually schizophrenic. That was reinforced by one of my faculty colleagues who asked, incredulously, “What do you know about cyberspace?” I said, “Not much, but being a law professor, that won’t stop me.”

I am always inspired by Gilbert Keith Chesterton who reminded us that nothing fails quite as spectacularly as success. So, in the spirit of cyberspace’s virtual reality, I am Nicholas Roeg’s David Bowie, a “Stranger in a Strange Land.” I am your Kubrickian ape dancing around the obelisk. I am a veritable Fred Flintstone, not to say the Unabomber, of cyberspace’s metapostmodern, pre-platonic, chaotic, regime. The Gregory motto for today is “No mo po mo:” no more post-modernism.

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¹ See Dirk Johnson, *A Celebration of the Urge to Unplug: Technology is Unwelcome at Gathering of Modern Day Luddites*, N. Y. TIMES, Apr. 15, 1996, at A12 (describing information highway as “road to ruin”).

My Advanced Labor Law class this term is reading, among other things, *The End of Work*² by Jeremy Rifkin, and an equally, shall we say, "happy" book, *The Jobless Future*,³ and most appropriately for today's discussions, *Rebels Against the Future: The Luddites and Their War on the Industrial Revolution: Lessons for the Computer Age*.⁴ Despite the Unabomber, I am still not convinced that the Luddites were more wrong than right, but even I have to admit that some of my personal heroes, the Catholic Workers, are on the Internet.

So, without further qualifications—but with full disclosure as today's token contrarian and deeply skeptical alternative Cassandra to the repetitive stress injury, carpal tunnel syndrome, retina blown out, evangelistic, MIT lab groupies⁵—I will conjure up what little I remember from my former life as a constitutional law professor, when believe it or not, from 1984 to 1992, I taught constitutional law every semester.

For those lawyers and law students who perhaps do not remember, or perhaps do not want to remember, and for first year or

² JEREMY RIFKIN, *THE END OF WORK: THE DECLINE OF THE GLOBAL LABOR FORCE AND THE DAWN OF THE POST-MARKET ERA* (1995).

³ STANLEY ARONOWITZ AND WILLIAM DiFAZIO, *THE JOBLESS FUTURE: SCI-TECH AND THE DOGMA OF WORK* (1994).

⁴ KIRKPATRICK SALE, *REBELS AGAINST THE FUTURE: THE LUDDITES AND THEIR WAR ON THE INDUSTRIAL REVOLUTION: LESSONS FOR THE COMPUTER AGE* (1995).

⁵ Virtually all agree that the social, cultural, political, and economic influences of computer technology will be profoundly transformative for life in the early twenty-first century. There is considerable and increasing disagreement, however, as to whether computer technology will necessarily be unproblematically good means to good ends, or a potentially ominous and pernicious instrument for engineering Orwellian brave new worlds. Most commentators, thus far, have touted the advantages of computer technology. See, most especially, BILL GATES, *THE ROAD AHEAD* (1995); M. ETHAN KATSH, *LAW IN A DIGITAL WORLD* (1995); NICHOLAS NEGROPONTE, *BEING DIGITAL* (1995); NICHOLAS NEGROPONTE, *THE ARCHITECTURE MACHINE* (1970).

There is a growing contrarian literature, however, that is considerably more nuanced and skeptical, and often thoroughly critical, of the supposed advantages of computer technology. See NEIL POSTMAN, *TECHNOPOLY: THE SURRENDER OF CULTURE TO TECHNOLOGY* (1992); SALE, *supra* note 5; MARK SLOUKA, *WAR OF THE WORLDS: CYBERSPACE AND THE HIGH-TECH ASSAULT ON REALITY* (1995); SHERRY TURKLE, *LIFE ON THE SCREEN: IDENTITY IN THE AGE OF THE INTERNET* (1995); SHERRY TURKLE, *THE SECOND SELF: COMPUTERS AND THE HUMAN SPIRIT* (1984). Mark Slouka, for example, argues that it is increasingly difficult to separate real life from virtual existence, and he warns of the uglier aspects of the seemingly unproblematic progress through computer technology; he urges the reaffirmation of human connections to the non-computer-affected world.

The popular press is echoing these complex themes. See Michael Krantz, *The Great Manhattan Geek Rush of 1995*, N.Y. MAG., Nov. 13, 1995, at 34; see also *New York Cyber Sixty*, N.Y. MAG., Nov. 13, 1995, at 44, 52 (quoting Mark Stahlman, co-founder of New York Media Association, stating that some people want to replace Constitution with different form of government using this new technology, but warning that technology will ultimately fail because of human boredom with technology).

prospective law students who have not yet had constitutional law, I read the First Amendment in pertinent part: "Congress shall make no law . . . abridging the freedom of speech or of the press."⁶

To bore the panelists—all of whom are nationally prominent experts in this field—just a few minutes longer, bear in mind that the First Amendment became part of the Constitution of the United States in 1791, the year Mozart died and the year Napoleon was a 22-year-old lieutenant in the French Army. The salient question is, as Floyd Abrams suggested, whether the First Amendment of the nation-state is increasingly antiquated in the global village, and whether the First Amendment still has any resonance or relevance.

The United States Supreme Court obviously does not interpret the First Amendment in black letter fashion. The Court removes some speech and some press from the First Amendment—especially obscenity. Let me read the governing parameters of *Miller v. California*,⁷ a Supreme Court decision in 1973, where the Supreme Court said:

This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. The basic guidelines for the trier of fact must be: (a) whether the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interests; (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.⁸

On February 8, 1996, President Clinton signed into law the Telecommunications Act,⁹ part of which incorporated the Communications Decency Act.¹⁰ Almost immediately thereafter, the federal District Court in Pennsylvania provided a temporary re-

⁶ U.S. CONST. amend. I.

⁷ 413 U.S. 15 (1973).

⁸ *Id.* at 22-23 (citations omitted).

⁹ 47 U.S.C. § 609 (1996).

¹⁰ 47 U.S.C. § 233 (a)-(h) (1996).

straining order against that portion of the law that presumed to prohibit "indecent" speech.¹¹

The Supreme Court has never definitively defined what "indecent" speech is,¹² at least not for adult audiences, and certainly not to the extent that they defined "obscenity" as they had in *Miller* in 1973, and have in subsequent decisions.

So now, as we see flesh-made-word in the cyberspace regime, and as we are promised by the virtual reality masters—we PONAs, which means "persons of no account," *i.e.*, me, Freddy Flintstone—the cyberspace masters say, "Just wait, Fred, because we can turn flesh-into-word—we have already done that—and, soon word-into-flesh . . . we are going to bring virtual bodies to you all in cyberspace." How can the First Amendment—or the regulatory law of any nation state—possibly begin to cope with all of this?! Well, purportedly intervening to do so is the Communications Decency Act of 1996.

Our panelists today are national experts. Hopefully, the audience is situated in the language of the First Amendment, and in what the United States Supreme Court, thus far, has said about some governing parameters. The first speaker today is C. Edwin Baker, a 1972 graduate of the Yale Law School, and one of the most prolific authors in the United States on the First Amendment. He is the author of two major books, numerous law review articles, and, at the University of Pennsylvania Law School, he is generally considered by most students to be one of the most dynamic teachers. It is a genuine honor to introduce him to you today. Thank you.

¹¹ *ACLU v. Reno*, 929 F. Supp. 824, 827 (E.D. Pa. 1996) (granting plaintiff on-line service providers' request for temporary restraining order against enforcing parts of Communications Decency Act).

¹² See, *e.g.*, Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard*, 9 HARV. J.L. & TECH. 87 (1966) (implying court should apply new standard for defining obscenity in cyberspace).