Journal of Civil Rights and Economic Development

Volume 11, Summer 1996, Issue 3 Article 17

First Amendment and the Internet: Will Free Speech Principles Applied to the Media Apply Here?

C. Edwin Baker

FIRST AMENDMENT AND THE INTERNET: WILL FREE SPEECH PRINCIPLES APPLIED TO THE MEDIA APPLY HERE?

C. EDWIN BAKER*

Thank you, Professor Gregory.

I will refrain from correcting the appreciated inaccuracies in your introduction. I like your reference to Luddites;[1] often I hope to advance to that level of activism but fear I am too late in cyberspace.

Yesterday evening, I went over to the apartment of the person who earlier that day had asked me to be on this panel. She had assured me that there was great porn on the Internet. I asked her to show me, and she logged on and began searching but every time we got someplace the message was, "this has been taken down due to the Communications Decency Act."[2] So, I did not get my quota of porn for the evening. The Luddites did not appear outdated. Apparently, they had already struck.

I want, though, to talk more generally about how the First Amendment[3] should be understood in the context of cyberspace or the Internet. In *Joseph Burstyn, Inc. v. Wilson*,[4] a case dealing with film from the early 1950s,[5] the Court made an oft-quoted

* Professor of Law, University of Pennsylvania. The notes to this talk have been prepared by the *Journal* with input by Professor Baker.

[1] *See* David L. Gregory, *Introduction of the Panel on First Amendment & Regulatory Concerns*, 11 ST. JOHN'S J. LEGAL. COMMENT 709, 709 (1996).

[2] *See* Telecommunications Act of 1996, Pub. L. No. 104, 110 Stat. 56, 56 (1996). With a sense of irony, the Communications Decency Act was enacted as part of the larger Telecommunications Act of 1996, which, according to the Act's synopsis, was enacted "[t]o promote competition and reduce regulation" in order to reduce prices and facilitate rapid availability of new telecommunications technology to consumers. *Id. But see* ACLU v. Reno, 1996 U.S. Dist. 1617 (E.D. Penn. June 11, 1996) (reasoning that term "indecent" as used in Communications Decency Act is vague; Due Process requires more than use of vague terms in order to prosecute criminality).

[3] U.S. CONST. amend I. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . . *Id.*

[4] 343 U.S. 495 (1952).

[5] *Id.* at 503. The Court in *Burstyn* found that a New York statute that authorized a Board of Regents to review films and license them unless they were "sacrilegious" was unconstitutional. *Id.* at 505-06; *see also* F.C.C. v. Pacifica Found., Inc., 438 U.S. 726, 747 (1978) (citing *Joseph Burstyn*, 343 U.S. at 502-03) (noting that Supreme Court has long

statement: "Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method of expression tends to present its own peculiar problems."[6]

What is usually not quoted is the language that immediately follows. The Court stated, "but the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule."[7]

Recently, it has been popular to think that long debated issues are suddenly changed once turned into a question of speech on the Internet. It seems to me, as a general matter, that this view is wrong. For the most part, whatever the principles of free speech are, and of course they are widely disputed, those principles will apply to all media. For instance, I believe early last year there was a serious concern about stalking on the Internet.[8] I am not sure exactly what amounts to stalking in terms of the criminal code,[9] but if it can be done by telephone or by the mail, then I assume that it can also be done by the Internet. Similarly, if speech over the phone or sent through the mail would not constitute stalking, then that speech would not turn into stalking when you move to the Internet. The same is true with libel, obscenity, and with most other questions about what speech is protected. The same general principles of the First Amendment apply to each media.

recognized that each medium of expression presents special problems in constitutional analysis).

[6] *Id.* at 503.

[7] *Id.*

[8] *See* Dan Morales, *Internet Gives Savvy Con Artists One More Place to Stalk Victims*, SAN ANTONIO EXPRESS NEWS, May 29, 1996, at 2, 1996 WL 2834789 (discussing increased access of con-men to public due to anonymity of Internet); *see also On-line Stalking/Writer Finds Words on Internet are Open Book*, HOUSTON CHRON., Mar. 10 1996, at 24 (same); Elizabeth Weise, *Searched, Stalked on Internet*, ROCKY MOUNTAIN NEWS, Mar. 10, 1996, at 74A (discussing Internet stalking case).

[9] *See* N.Y. PENAL LAW § 120.14(3) (McKinney 1994). The New York Penal Law defines "Menacing in the second degree" as occurring when a person follows another person or otherwise repeatedly engages in conduct that is intended to place the person menaced in reasonable fear of physical injury, serious injury or death. *Id.*; *see also* William C. Donnino, *Stalking, printed in*, N.Y. Penal Law § 120.14 (Mckinney 1996), Practice Commentary, 1996 Interim Update. Donnino's practice commentary describes the difference between "menacing" and "harassing" for purposes of the Penal Law. *Id.* He notes that in contrast to "menacing," "harassment" punishes the consequence of the actor's having placed a person in reasonable fear of injury as a result of the harassment, regardless of the actor's intent. *Id.*

With more time, I would describe a number of areas where different media may raise distinct problems. I would not, however, rely on the most obvious and the most frequently asserted distinction, that between broadcast and print media, as an example of differing media leading to differing constitutional treatment.[10]

I recently argued that a careful analysis shows, at least at the Supreme Court level, that the constitutional approach is generally the same for print and broadcast media.[11] Often, principles which recognize government power to engage in structural regulation and which are identified more with the broadcast media have, in fact, controlled lesser known Supreme Court decisions in the print area.[12] Moreover, *Red Lion*[13] relied repeatedly on a structural regulation of print decision, *Associated Press v. United States*,[14] in sustaining broadcast regulation.

If I am right that all forms of media are treated similarly, the real question is: What types of First Amendment principles apply? This is the question that should be hotly contested. I will briefly discuss the question of relevant principles in one area, that of indecency. What are the general principles of limiting the government's power to regulate indecency?[15] The view that I believe best describes the Supreme Court decisions is that, first, any regulation must be consistent with the principle set forth in *Butler v. Michigan*.[16] In *Butler*, the Court stated that the government cannot reduce adults to reading only what is fit for children.[17] No matter how it regulates, the government must leave constitutionally protected expression substantially available to the adult audi-

[10] *See* Red Lion Broadcasting v. F.C.C., 395 U.S. 367, 396 (1969) (holding right to reply requirement applied to broadcasting); *cf.* Miami Herald v. Tornillo, 418 U.S. 241 (1969) (same).

[11] C. Edwin Baker, *Turner Broadcasting Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57 (1994).

[12] *See, e.g.*, F.C.C. v. National Citizens Comm. for Broad., 436 U.S. 775 (1978); Lewis Publishing v. Morgan, 229 U.S. 288 (1913); *see also* Committee for an Independent P-I, 704 F.2d 467 (9th Cir. 1983).

[13] 395 U.S. at 396.

[14] 326 U.S. 1 (1945).

[15] *See, e.g.*, Barnes v. Glen Theatre, 501 U.S. 560 (1991) (live performance); Sable communications v. F.C.C., 492 U.S. 115 (1989) (telephone); Bolger v. Youngs Drugs Prods. Corp., 463 U.S. 60 (1983) (mail and advertising); F.C.C. v. Pacifica Found., Inc. 438 U.S. 726, 740 (1978) (broadcasting); Young v. American Mini Theatres, 427 U.S. 50 (1976); Ginsberg v. New York, 290 U.S. 629 (1968) (print).

[16] 352 U.S. 380 (1957).

[17] *See id.* at 526.

ence.[18] If the government pursues a valid regulatory goal in a particular medium by means that do not substantially reduce the expression available to adults in such medium, the government may proceed. It must not, however, pursue that goal by means that violate the basic free speech rights of adult citizens.[19]

For example, the Court has recognized an interest of parents in their ability to control the upbringing of their children, in particular, to control what type of expression their children receive.[20] In a society where many parents cannot be beside their children day and night, but believe that indecency will be harmful or be undesirable for their children to see, the government may have a legitimate interest in providing these parents with a "safe zone" during which they do not have to worry about their children's viewing.[21] For instance, the government might help parents who do not want their child exposed to indecency by assuring them that in the afternoon, after school, television programming will not contain indecency. I believe, however, that *F.C.C. v. Pacifica Foundation*,[22] the George Carlin dirty words case, where the Court allowed regulation of indecency at two o'clock in the afternoon, does not justify limits on indecency that go much beyond this after-school ban.[23] In fact, much of the language in *Pacifica* suggests that the Court would treat any channeling that violates the *Butler* principle as presenting a much different issue and that such a restriction could very well be unconstitutional.

Consistent with this emphasis on protecting adult speech rights, I have argued that the channeling approved in *Pacifica* may make sense.[24] Channeling that would, however, keep inde-

[18] *Id.* at 382-83. The precise issue in *Butler* was whether a Michigan statute which criminalized making a book that has a potentially deleterious effect on children was unconstitutional, which issue was decided affirmatively. *Id.* at 380, 383.

[19] *Cf.* Shea v. Reno, 930 F. Supp. 916, 942 (E.D.N.Y. 1996) (holding that Communications Decency Act was overbroad due to its complete ban on constitutionally protected speech between adults).

[20] *See, e.g.*, F.C.C. v. Pacifica Found., Inc. 438 U.S. 726, 744 (1978) (upholding F.C.C.'s ban on afternoon broadcast containing expletives).

[21] *See, e.g.*, D. Adreano, *Cyberspace: How Decent is the Decency Act?*, 8 ST. THOMAS L. REV. 593, 594 (1996). The Telecommunications Act of 1996, Pub. L. No. 104, 110 Stat. 56, was enacted in an attempt to protect children from the dangers of certain inappropriate adult oriented user groups. *Id.* An original version of the Act, introduced by Senator Exon, was attacked for being overly broad as its language was considered not narrowly tailored to meet the government's purpose. *Id.* at 593-94.

[22] 438 U.S. 726 (1978).

[23] *Id.*

[24] *See* C. Edwin Baker, *The Evening Hours During Pacifica Standard Time*, 3 VILL. SPORTS & ENT. L.J. 15, 25 (1996).

cency off the broadcast system from six o'clock in the morning till ten or twelve o'clock at night should be unconstitutional.[25] Such regulation would reduce the availability of indecency to people like me, who go to bed early in order to take the train from New York to Philadelphia. It would mean that I could not watch indecency on broadcast at 8 or 9 in the evening, when I am still somewhat awake.

The regulation is constitutional if the government can pursue a legitimate interest of aiding parents by regulating in a way that does not substantially interfere with adults' rights, or the rights of parents who want a broader range of materials made available to their children. A modest channeling, similar to that of the *Pacifica* case, does not amount to an abridgement. If, however, a regulation interferes with adults' rights, then it amounts to an abridgement of freedom of speech.

There are other approaches to indecency. One approach, accepted recently by the United States Court of Appeals for the Federal Circuit *en banc*,[26] utilizes a balancing analysis, and asserts that society as a whole, not just parents as a subset, has an interest in keeping children away from indecency. With children watching so many hours of television, this interest will require more stringent regulation. The Court balanced the First Amendment interest of adults and those parents who want broader availability for their children, against society's interests in keeping indecency from children. In this balance, the Court allowed abridgement of adults' speech rights, a result that, in my view, was quite contrary to the leading Supreme Court precedents.

Whether the D.C. Circuit's *en banc* decision would be sufficient to justify the Communications Decency Act[27] is not an issue that I will address now. I suspect that the other panelists will show that implementation of the Communications Decency Act would effec-

[25] *See id.* at 55. In his article, Baker concluded that two reasons why the Supreme Court may conclude that the F.C.C. can impose only restricted channeling of broadcasts are that channeling during the afternoon, but not in the evening, is most consistent with the legitimate purposes that justify channeling and that only limited channeling is consistent with a strong free speech principle. *Id.*

[26] Action for Children's Television v. F.C.C., 58 F.3d 654 (D.C. Cir. 1995) (en banc).

[27] Communications Decency Act of 1996, Pub. L. No. 104, §§ 501-602) (and other scattered sections within the *Telecommunications Act of 1996*). The Communications Decency Act provides, *inter alia*, that whoever "initiates" the transmission of any communication which is obscene, lewd, lascivious, filthy, or indecent with knowledge that the recipient of such communication is under the age of 18 will be fined or imprisoned up to two years. *Id.* §§ 502 (1)(a), (A)(ii), 502 (D)(2).

tively take indecency off the Internet, a result that would be quite troublesome from the perspective of the *Butler* principle.[28] My key argument is that First Amendment principles do not change with the medium even if their content continues to be contested. I will continue to believe that the Supreme Court is committed to *Butler* and the D.C. Circuit will continue to balance.

What I will do now is briefly discuss some other issues that are particularly important for the Internet—two questions in particular. First, assuming that some speech is unprotected, whom can you hold liable when that speech is made available? The person who created it? The person who operates a computer bulletin board on which it is posted? Second, what jurisdiction's law applies? The second question is relevant if, for instance, constitutional protection varies from place to place because community standards are a relevant part of the obscenity definition, and often community standards differ.[29]

Given more time, I would offer arguments about how to approach these two questions. Here, however, I suggest a rule of thumb. The First Amendment requires the answers to be guided by the notion that the chosen rule not substantially restrict protected expression. Any rule that, in effect, substantially restricts the availability of expression protected by the First Amendment should be rejected. For instance, *Smith v. California*,[30] considered whether a book store owner could be prosecuted because there was obscene material in his book store.[31] The book store owner claimed that he did not know, and there was no evidence that he knew, the material was obscene.[32]

The Court held that whatever the permissible application of strict liability is in other cases, because of the First Amendment,

[28] *Cf.* ACLU v. Reno, 929 F. Supp. 824, 835 (E.D. Penn. 1996) (holding that provisions of Communications Decency Act were unconstitutional because they violated First Amendment protection of free speech); *see also* Shea v. Reno, 930 F. Supp. 916, 942 (E.D.N.Y. 1996) (holding that Communications Decency Act was unconstitutionally overbroad).

[29] *See* Miller v. California, 413 U.S. 15, 24 (1973) (holding that states may use community standards in determining what material is obscene); *see also* People v. Calbud, 49 N.Y.2d 389, 393 (1980) (holding that while United States Supreme Court has indicated that issue of what constitutes obscenity may be determined with reference to local community standards, contemporary standards of communities throughout New York state are proper measure of what is obscene within meaning of New York Penal Law).

[30] 361 U.S. 147 (1959).

[31] *Id.* at 148 (discussing California statute that provided that it is "unlawful for any person to have in his possession any obscene or indecent writing, [or] book . . . in any place of business where books are sold . . . .").

[32] *Id.* The statute contained no element of scienter in order to be prosecuted. *Id.*

the book store owner must have knowledge of the obscenity before he can be prosecuted.[33] Without that, book store owners would only make materials available that they had previously inspected and that they were relatively confident were not obscene. This would lead book store owners to reduce the availability of expression. The net result would be to substantially limit the communications environment.[34] *Smith v. California* illustrates the notion of choosing a principle that does not result in a substantial restriction on the availability of protected expression, even when the law deals directly with unprotected expression.

This principle is especially relevant in the Internet context. For instance, it might require that bulletin board operators not be liable for defamation or copyrighted materials posted on their server.[35]

As a final example, consider a sexually explicit posting made by a resident of California, where community standards would identify the posting as protected speech. Then someone downloads the material in Tennessee, where community standards would view it as obscene. Which state's law applies? A quick answer would be that perhaps Tennessee law applies to the downloader, the person who views it in Tennessee, and California law applies to the person who posted the material in a place where it is legal.[36] In contrast, allowing Tennessee to apply its standard to the California resident who posted the content would improperly restrict protected speech.

Thank you.

[33] *Id.* at 152.

[34] *Id.* at 153-54.

[35] *Cf.* Cubby, v. CompuServe, Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (concluding, in defamation case, that Compuserve was distributor, like bookstore or library, not publisher, because it would not be feasible for CompuServe to examine all material it carries for defamatory content); *see also* R.F. Goldman, *Put Another Log on the Fire, There's a Chill on the Internet: The Effect of Applying Current Anti-Obscenity Laws to Online Communications*, 29 GA. L. REV. 1075, 1083 (1995) (arguing that constructive knowledge standard for Internet providers is too burdensome).

[36] *Cf.* United States v. Thomas, 74 F.3d 701 (6th Cir. 1996) (applying community standards of recipient's locale to prosecution of downloader).