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SPEECH AND INDEPENDENCE: THE WRONGS OF CORPORATE SPEECH

Delivered by
Lawrence Lessig

Director of the Edmond J. Safra Foundation Center for Ethics at Harvard University and Professor of Law at Harvard Law School.

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Commentary by
Leonard S. Halpert ’44

Free Speech – Real and Virtual: Free at Last?

Professor Lawrence Lessig is an American scholar and political activist. He is known as a proponent of reduced legal restrictions on copyright, trademark, and radio frequency spectrum, particularly in technology applications.[1] He has written extensively about the new world of communications in cyberspace.

He has much to tell us about how the originally free area of cyberspace will develop and be restrained by government and by the "non-governmental" persons and entities. This he calls the CODE."[2] He sees these events as tending to weaken free speech values in cyberspace. Herein will be discussed how he sees free speech faring in this "brave new world" and, most importantly, what he believes should be the acceptable perimeters of a cyberspace code.

Before discussing his views on free speech, it is useful to know his views on the Constitution and its interpretation.

As to a written constitution's purpose and source, Lessig cites Francis Lieber, a Berliner who Lessig says was the first great constitutional scholar in America: "a written constitution of any value always presupposes the existence of an unwritten one." He continues, "in Lieber's view, this unwritten constitution [is] a set of norms, or understandings, latent within a political culture. They were constituted by practices, and by a history, that formed the ordinary ways of a people. They were constructed, but not plastic; describable, but not expressed. Without these "unwritten" norms, a written constitution was, "worthless."[3] [emphasis supplied]

So, too, cyberspace has a constitution with a set of institutions and practices, and an even richer set of understandings among its users that together are relatively unplastic, and constitute life in that space. And more importantly, cyberspace has an architecture, which itself embeds values and practices that constitute life in that space.[4]

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[1] *Wikipedia/Lessig*

[2] *CODE*, pp. 6, 88. "CODE" is defined as the freedoms and controls of cyberspace as built by us mortals.

[3] Lessig, Cyberspace's Constitution, Draft 1.1,Lecture at the American Academy, Berlin, Germany,February 10, 2000, p.1

[4] *Ibid*. p. 1

Today our Supreme Court is deeply divided over the appropriate concept to be used in interpreting provisions of the Constitution. The majority, led by Justice Scalia, apply a doctrine called "original intent", or variants thereof, of the Founding Fathers. In determining what they intended by the words they adopted, the Court needs to determine what the general public then understood such words to mean.[5] The Court's present minority, to a varying degree, follows a different path: that interpretation needs to be "transformative".[6]

Lessig summarizes the majority's approach as "what was the liberty or right to be protected as understood by the founders—this governs whether a current situation is covered if it was something unknown to them and therefore not protected." He sides with a more assertive concept of "transformative" interpretation. He says the "history of the Supreme Court's treatment of such questions lacks a perfectly clear pattern, but we can identify two distinct strategies competing for the Court's attention. One strategy is focused on what the framers would have done—the strategy of one-step originalism. The second strategy aims at finding a current reading of the original Constitution that preserves its original meaning in the present context—a strategy that [he] calls translation."[7]

Both strategies are present in the *Olmstead* wiretapping case. Lessig quotes Brandeis's dissent in *Olmstead v. United States*:

> "The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. <u>They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment</u>"[8]. [emphasis supplied]

And Lessig emphasizes the differences in the competing views:

> "Brandeis acknowledged that the Fourth Amendment, as originally written, applied only to

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[5] *American Constitutional Law* (3rd ed.) pp. 38-39 by Kommers, Finn & Jacobson

[6] Defined by the *The New Oxform American Dictionary*: "make a thorough or dramtic change in character" of the meaning.

[7] *CODE*, p. 160

[8] *Olmstead* , p.479. Although it should be noted that Brandeis' was speaking to the meaning of the 4th Amendment, his interpretational tool is equally applicable to the 1st Amendment. NOTE: In this Commentary here material in quotations contains footnote references, these have been omitted.

trespass. But it did so, he argued, because when it was written trespass was the technology for invading privacy. That was the framers' presupposition, but that presupposition had now changed. Given this change, Brandeis argued, it was the Court's responsibility to read the amendment in a way that preserved its meaning, changed circumstances notwithstanding. The aim must be to translate the original protections into a context in which the technology for invading privacy had changed.*** [The essence of what was the difference between the Court's majority (Taft) and the minority view (Brandeis)]: Brandeis's method accounted for the changed presupposition. He offered a reading that changed the scope of the amendment in order to maintain the amendment's protection of privacy. Taft, on the other hand, offered a reading that maintained the scope of the amendment but changed its protection of privacy. Each reading kept something constant; each also changed something."[9]

"Brandeis wanted to read the amendment so that it protected the 90 percent it originally protected—even though doing so required that it protect against more than simple trespass. He wanted to read it differently, we could say, so that it protected the same. This form of argument is common in our constitutional history, and it is central to the best in our constitutional tradition. It is an argument that responds to changed circumstances by proposing a reading that neutralizes those changes and preserves an original meaning. It is an argument invoked by justices on both the right and the left, and it is a way to keep life in a constitutional provision—to make certain that changes in the world do not change the meaning of the Constitution's text. It is an argument, we can say, that aims at translating the protections that the Fourth Amendment gave in 1791 into the same set of protections at any time later in our history. It acknowledges that to do this the Court may have to read the amendment differently, but it is not reading the amendment differently to improve the amendment or to add to its protections. It is reading the amendment differently to accommodate the changes in protection that have resulted from changes in technology. It is translation to preserve meaning."[10]

LESSIG'S GLOBAL VIEW OF FREE SPEECH PERIMETERS

Most scholarly discussion of the borders of free speech liberty dwells primarily on the legal aspect—the jurisprudence of free speech. Lessig takes an all-encompassing view that considers the interaction between the law and other factors. This interaction is illustrated in the following figure.

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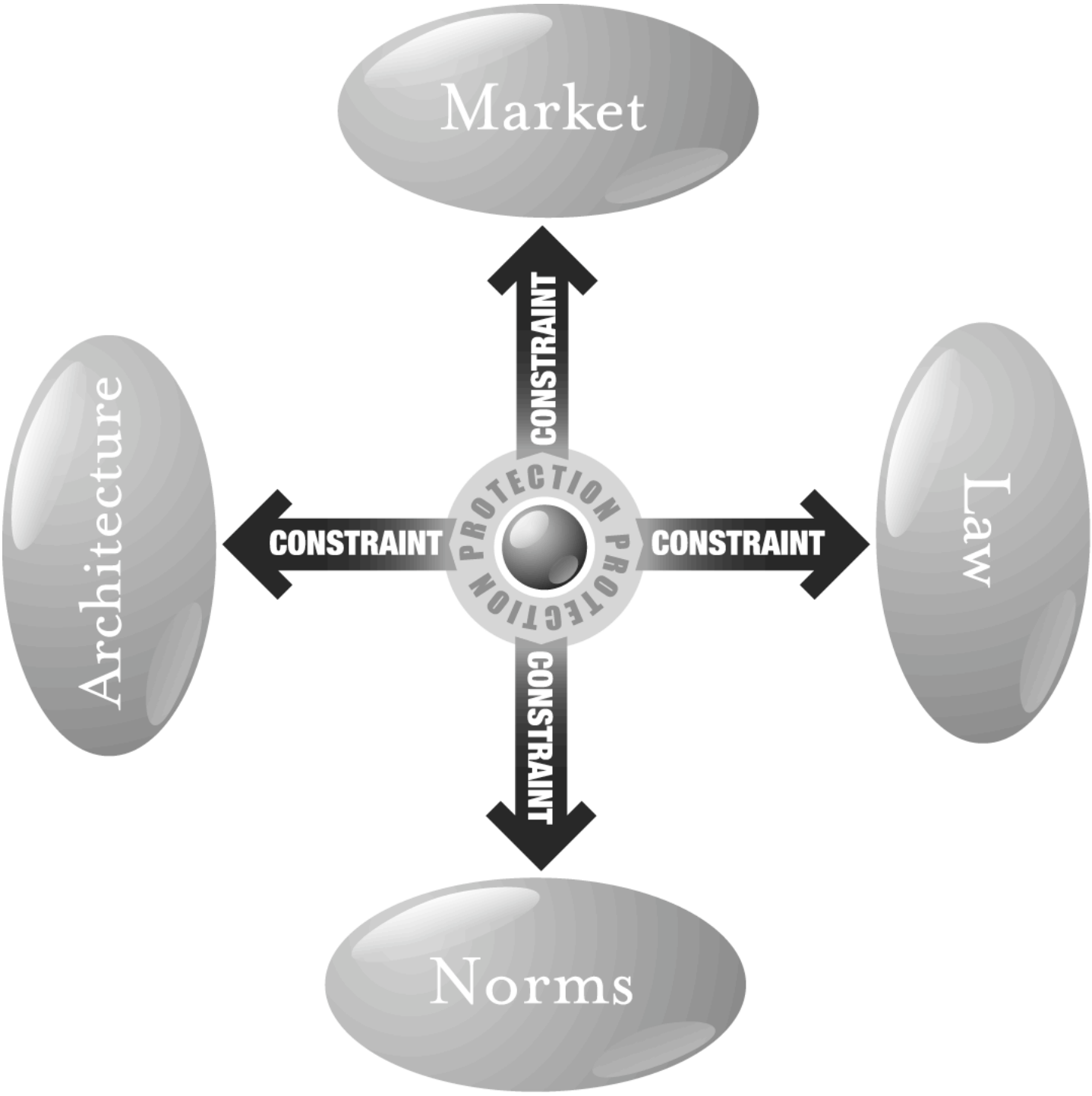
[9] *CODE*, p. 161

[10] *CODE* , 162-63. Taft's opinion became law and his narrow view of the Fourth Amendment prevailed. It took forty years for the Supreme Court to embrace Brandeis's picture of the Fourth Amendment overruling *Olmstead in Katz v. United States*, 389 U.S. 347 (1967)



"In the center is the object regulated—the pathetic [center]. Surrounding the individual now is a shield of protection, the net of law/norms/market/architecture that limits the constraints these modalities would otherwise place on the individual. [he has] not separated the four in the sphere of the shield because obviously there is no direct match between the modality of

constraint and the modality of protection. When law as protector conflicts with law as constraint, constitutional law overrides ordinary law." [11]

"The right to free speech is not the right to speak for free. It is not the right to free access to television [Market], or the right that people will not hate you for what you have to say [Norms]. Strictly speaking—legally speaking—the right to free speech in the United States means the right to be free from punishment by the government in retaliation for at least some (probably most) speech [Law]. You cannot be jailed for criticizing the President, though you can be jailed for threatening him [Law]; you cannot be fined for promoting segregation [Law], though you will be shunned if you do [Norms]. You cannot be stopped from speaking in a public place [Law], though you can be stopped from speaking with an FM transmitter [Law]. Speech in the United States is protected—in a complex, and, at times convoluted, way—but its constitutional protection is a protection against the government. Nevertheless, a constitutional account of free speech that thought only of government would be radically incomplete. Two societies could have the same 'First Amendment'—the same protections against government's wrath—but if within one dissenters are tolerated while in the other they are shunned, the two societies would be very different free-speech societies. More than government constrains speech, and more than government protects it. A complete account of this—and any—right must consider the full range of burdens and protections."[12]

"Thus, the effective protection for controversial speech is more conditional than a view of the law alone would suggest. Put differently, when more than law is reckoned, the right to be a dissenter is less protected than it could be. *** "[13]

Lessig explains:

"The 'right' to promote the decriminalization of drugs in the present context of the war on drugs is an example. The law protects your right to advocate the decriminalization of drugs. The state cannot lock you up if, like George Soros, you start a campaign for the

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[11] *CODE* , Appendix pp. 340-42 Lessig defines the four modalities as follows: (1) Law is a command backed up by the threat of a sanction, a legislative expression of community values, rules that constitute or regulate structures of government, or establish rights that individuals can invoke against their own government; (2) Social norms are those normative constraints imposed not through the organized or centralized actions of a state, but through the many slight and sometimes forceful sanctions that members of a community impose on each other. and govern socially salient behavior, deviation from which makes you socially abnormal; (3)The Market constrains through price. A price signals the point at which a resource can be transferred from one person to another; and (4) Architecture—the way the world around us is, or the ways specific aspects of it are. These taken together are the Code. By code, he simply means the software and hardware that constitutes cyberspace as it is—the set of protocols, the set of rules, implemented, or codified, in the software of cyberspace itself, that determine how people interact, or exist, in this space. This code, like architecture in real space, sets the terms upon which one enters, or exists in cyberspace.

[12] *CODE*, p. 235

[13] *Ibid*, p.235

decriminalization of marijuana or if, like the Nobel Prize–winning economist Milton Friedman or the federal judge Richard Posner, you write articles suggesting it. If the First Amendment means anything, it means that the state cannot criminalize speech about law reform [Law].

"But that legal protection does not mean that I would suffer no consequences for promoting legalization of drugs. My hometown neighbors would be appalled at the idea, and some no doubt would shun me [Norms]. Nor would the market necessarily support me. It is essentially impossible to buy time on television for a speech advocating such a reform [Market]. Television stations have the right to select their ads (within some limits); mine would most likely be deemed too controversial. Stations also have the FCC—an active combatant in the war on drugs—looking over their shoulders. And even if I were permitted to advertise, I am not George Soros. I do not have millions to spend on such a campaign. I might manage a few off-hour spots on a local station.

"Finally, architecture wouldn't protect my speech very well either. In the United States at least, there are few places where you can stand before the public and address them about some matter of public import without most people thinking you a nut or a nuisance. There is no speakers' corner in every city; most towns have no town meeting. 'America offline,' in this sense, is very much like America Online—not designed to give individuals access to a wide audience to address public matters. Only professionals get to address Americans on public issues—politicians, scholars, celebrities, journalists, and activists, most of whom are confined to single issues. The rest of us have a choice—listen, or be dispatched to the gulag of social lunacy. Thus, the effective protection for controversial speech is more conditional than a view of the law alone would suggest. Put differently, when more than law is reckoned, the right to be a dissenter is less protected than it could be."[14] [emphasis supplied][15]

The foregoing comments were made in reference to "real space". Are the rules of the road different in cyberspace, which stretches around the world and across national borders? "As in real space, then, these four modalities regulate cyberspace."[16] The same balance exists, but local national differences in the modalities modify the protection given to speech.

As to Law: In the U.S., the right of "advocacy" is broadly protected, but in Germany more limited. In the U.S. one can promote the Nazi Party and its tenets, but in Germany it is illegal.[17]

As to Norms: "With the relative anonymity of Cyberspace and its growing size, norms do not

[14] *Ibid*, pp. 235-36
[15] *Ibid*, p.235
[16] *Ibid*, p.125
[17] *Ibid* , p. 235-36

function well there [to restrict speech]." Where there are large distances between people "they are likely to be more tolerant of dissident views."[18]

As to Market: Cyberspace provides a major protection of speech relative to real space, because the low cost of publishing is longer a barrier.[19]

Architecture: "[I]t is the real 'First amendment' in cyberspace." The best protection in cyberspace because of its relative anonymity, decentralized distribution and multiple point of access, no necessary tie to geography, no simple system to identify content, tools of encryption, and the consequences of the Internet protocol "make it difficult to control speech".[20]

Lessig is lyrical on the potential of free speech in cyberspace:

> "Just think about what this means. For over 60 years the United States has been the exporter of a certain political ideology, at its core a conception of free speech. Many have criticized this conception: Some found it too extreme, others not extreme enough. Repressive regimes—China, North Korea—rejected it directly; tolerant regimes—France, Hungary—complained of cultural decay; egalitarian regimes—the Scandinavian countries—puzzled over how we could think of ourselves as free when only the rich can speak and pornography is repressed."[21]
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> "This debate has gone on at the political level for a long time. And yet, as if under cover of night, we have now wired these nations with an architecture of communication that builds within their borders a far stronger First Amendment than our ideology ever advanced. Nations wake up to find that their telephone lines are tools of free expression, that e-mail carries news of their repression far beyond their borders, that images are no longer the monopoly of state-run television stations but can be transmitted from simple modem. We have exported to the world, through the architecture of the Internet, a First Amendment more extreme in code than our own First Amendment in law."[22]

What of this bright new world—does it really signal the dawn of an era of unfettered flow of communication? Alas, Lessig warns us of the pitfalls ahead. "Politics" is the key word.

> "[He] says 'politics' because this building is not over. As [he has] argued (over and over again), there is no single architecture for cyberspace; there is no given or necessary structure to its design. The first-generation Internet might well have breached walls of control. But

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[18] *Ibid*, p. 236
[19] *Ibid,* p. 236
[20] *Ibid*, p. 236
[21] *Ibid*, p. 236
[22] *Ibid*, p. 236

there is no reason to believe that architects of the second generation will do so, or not to expect a second generation to rebuild control. There is no reason to think, in other words, that this initial flash of freedom will not be short-lived. And there is certainly no justification for acting as if it will not."

He continues:

"We can already see the beginnings of this reconstruction. The architecture is being remade to re-regulate what real-space architecture before made regulable. Already the Net is changing from free to controlled space. Some of these steps to re-regulate are inevitable; some shift back is unavoidable. Before the change is complete, however, we must understand the freedoms the Net now provides and determine which freedoms we mean to preserve. *** And not just preserve. The architecture of the Internet, as it is right now, is perhaps the most important model of free speech since the founding. This model has implications far beyond e-mail and web pages. Two hundred years after the framers ratified the Constitution, the Net has taught us what the First Amendment means. If we take this meaning seriously, then the First Amendment will require a fairly radical restructuring of the architectures of speech off the Net as well."[23]

He illustrates how technology of cyberspace interacts with law to create policy with respect to free speech, which concept he says is the dynamic at the core of the argument of his book.

Several important areas on the battleground to maintain free speech in cyberspace (are the issues of blocking publication, anonymity, neutrality, and privacy. Three groups of players are identified: (1) the creator or publisher, (2) the transmitter or carrier ("server" or "browser"), and (3) the receiver of the material. At any one time a person could find oneself in anyone of the groups.

To illustrate the problems and Lessig's suggested solutions two subject areas are examined which many users of the Net confront daily: "porn", as it targets children, and "spam". [24] In these areas, how do the four modalities impinge on free speech?

HOW AND WHO REGULATES SPEECH

For the most part, presently no one regulates the Net. In real space there is a large body of law that delineates the perimeters of what is protected speech under the First Amendment. At law,

[23] *Ibid*, p. 237

[24] *Ibid*, p. 246. He defines "porn" as that which the Supreme Court calls sexually explicit speech that is "harmful to minors]", and "spam" as unsolicited commercial e-mail sent in bulk. "Unsolicited," in the sense that there's no relationship between the sender and recipient; "commercial" in a sense that excludes political e-mail; "e-mail" in the sense not restricted to e-mail, but that includes every medium of interaction in cyberspace(in cluding blogs); and "bulk" meaning many missives sent at once.

"prior restraint" has been a major avenue for blocking of publication by seeking a court order to restrain it. A cardinal principle of free speech denying this avenue to the government was firmly established in the Pentagon Papers case.

There the Supreme Court held there can be no prior restraint on publication unless the government can show "grave and irreparable injury to the public interest."[25] Lessig calls attention to the reality that in cyberspace that decision has little or no force. He cites Floyd Abrams, who represented the *New York Times*. After the dawn of the Net, Abrams asked, "Is the case really important any more? Or has technology rendered this protection of the First Amendment unnecessary?" It is pointed out that now the *Times* could leak the information to a number of Net venues, which would provide immediate worldwide publication. With the "news out", any *Times* publication could not be shown to create any grave and irreparable injury to the public interest, and therefore, there would be no basis for the issuance of an injunction. Lessig emphasizes that the Net, not the courts, is the driving vehicle that prevents the hiding of the truth. [26]

Thus, technology of cyberspace has interacted with law to assure a "value" of free speech and thwarts "the ability of the "regulators" of free speech to accomplish blocking truth when they deem it "necessary or in their best interest".

REGULATIONS OF SPEECH: SPAM AND PORN IN REAL AND CYBER-SPACE[27]

Candidly speaking, Lessig says "[f]or all our talk about loving free speech, most of us, deep down, wouldn't mind a bit of healthy speech regulation, at least in some contexts. Or at least,

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[25] *New York Times Co v. United States*, 403 U.S. 713 (1971). The decision *per curiam* held that the government had not over come the heavy burden of a presumption of unconstitutionality of a prior restraint on publication of the classified information. The invocation of the "clear and present danger" concept by Justices Stewart and White was sufficient to gain a six man majority to deny the issuance of an injunction against publication.

[26] *Ibid,* p. 239-41

[27] Lessig.org, unpublished paper, *What Things Regulate Speech* Draft 3.01: May 12, 1998. [At p. 13] "For our purposes here, we can understand free speech law to divide speech into three classes. One class is speech that everyone has the right to. Over this class, the state's power is quite slight: The state may effect reasonable time, place, and manner restrictions, but no more. The paradigm is political speech, but in effect it includes any speech not described in the next two classes. A second class is speech that no one has the right to. The model here is obscene speech, or more strongly, child pornography. Here the state's power is practically unlimited. With child porn at least, the state can ban the production, distribution, and consumption of such speech; and with obscene speech, the state can for example ban production and distribution. The third class is speech that people over the age of 17 have a right to, while people and under do not. This is sometimes, and unhelpfully called, "indecent" speech, but that moniker is plainly too broad. A more precise description would be speech that is "obscene community determined by age rather than geography.

more of us would be eager for speech regulation today than would have been in 1996. This change is because of two categories of speech that have become the bane of existence to many on the Net—spam and porn."[28] For him, "this is not an abandonment of the values of free speech, but a recognition that the Net, by its architecture, has changed the reality of how the current real space rules of free speech can be adapted to utterances of spam and porn."

"Spam" and "porn" need to be treated differently. Lessig points out the four ways we can control speech in cyberspace: architecture, norms, law, or the market. We could change the code through (1) programs that filter out objectionable speech and encryption, which would allow us to isolate domains of objectionable speech; (2) norms like etiquette or moral duties (tell the truth) that represent the ideal way since good behavior would be generated from within the agents rather than be imposed on them from above; (3) the pricing (market) would restrict access to those willing and able to pay for it; and finally, (4) the legal option, such as has been pursued through legislation seeking to control speech, establishing a framework for anti-defamation suits, and fine tunings such as John Doe suits designed to pierce speaker anonymity.

LEGISLATION CONCERNING PORN

Congress responded in 1996 with the Communications Decency Act (CDA). A law of extraordinary stupidity, it practically impaled itself on the First Amendment. The law made it a felony to transmit "indecent" material on the Net to a minor or to a place where a minor could observe it. But it gave speakers on the Net a defense—if they took good-faith, "reasonable, effective" steps to screen out children, then they could speak "indecently". The CDA suffered from (1) overbreadth in that it outlawed some speech which the Supreme Court has held can not be regulated, with some exceptions, and (2) vagueness.[29]

The CDA was quickly followed by the Child Online Protection Act (COPA) of 1998. Lessig says that this statute was better tailored to the constitutional requirements. It aimed at regulating speech that was harmful to minors. It allowed commercial websites to provide such speech so long as the website verified the viewer's age. Yet in June 2003, the Supreme Court enjoined enforcement of the statute. He emphasizes that both statutes respond to a legitimate and important concern—parents certainly have the right to protect their kids from this form of speech, and it is perfectly understandable that Congress would want to help parents secure this protection. It is his view that both statutes were unconstitutional—not, as some suggest, because there is no way that Congress could help parents. Instead both are unconstitutional "because the particular way that Congress has tried to help parents puts more of a burden on legitimate

[28] *CODE*, p.245
[29] *Ibid*, p. 249

speech (for adults, that is) than is necessary."[30]

Lessig sets out the indicia of a law which should pass constitutional scrutiny: "Establish a class of speech that adults have a right to but that children do not: "States can regulate that class to ensure that such speech is channeled to the proper user and blocked from the improper user". Conceptually, for such a regulation to work, two questions must be answered: (1) Is the speaker uttering "regulable" speech—meaning speech "harmful to minors"? (2) Is the listener entitled to consume this speech—meaning is he a minor? With yes answers to these questions, then provisions blocking access to minors may be provided. He concludes that the least burdensome is for the speaker to answer "1" and the listening minor "2".[31] In his view, there is a perfectly constitutional statute that Congress could pass that would have an important effect on protecting kids from porn, and still protect speech that is not regulable.

But first, he poses the issue: Which is the better road to take—governmental regulation or action by non-governmental persons or agencies? Lessig emphasizes that key civil rights organizations have taken too long to recognize the latter private threat to free-speech values. The tradition of civil rights is focused directly on government action alone. He would be the last to say that there's not great danger from government misbehavior, but there is also danger to free speech from private misbehavior. An obsessive refusal to even consider the one and not the other does not serve the values promoted by the First Amendment.[32]

He asserts that the "focus should be on the liberty to speak, not just on the government's role in restricting speech. Thus, between two 'solutions' to a particular speech problem, one that involves the government and suppresses speech narrowly, and one that doesn't involve the government but suppresses speech broadly, constitutional values should tilt us to favor the former. First Amendment values (even if not the First Amendment directly) should lead to favoring a speech regulation system that is thin and accountable, and in which the government's action or inaction leads only to the suppression of speech the government has a legitimate interest in suppressing." [33]

REGULATING "PORN"

Lessig's proposal is as follows: by law the speaker is required to tag the content which would be hidden from the ordinary user—unless that user looks for it, or wants to filter that content. Speakers would not be required to block access; or to verify age. All the speaker would be

[30] *Ibid,* p. 250
[31] *CODE*, p. 251
[32] *Ibid*, p. 256
[33] *Ibid*, p. 255

required to do is to tag content deemed "harmful to minors" with the proper tag. With the law in place, browser manufacturers would build a browser that recognizes this tag, thus enabling parents to activate platforms to control where their kids go on the Internet. The only burden created by this solution is on the speaker; this solution does not burden the rightful consumer of porn at all. To that consumer, there is no change in the way the Web is experienced, because without activating a browser that looks for the such material the tag is invisible to the consumer. Lessig finds it "hard to see why it would be unconstitutional, since in real space a speaker must filter content 'harmful to minors'". No doubt there's a burden. But the question isn't whether there's a burden. The constitutional question is whether there is a less burdensome way to achieve this important state interest.[34] The consumer's control over international sites could be handled by the same browser that filters out such domestic material. It could subscribe to an IP mapping service to enable access to American sites only.[35]

REGULATING "SPAM"

Lessig's broad view as to how spam should be handled: Spam is an economic activity. People send it to make money. Spam is perhaps the most theorized problem on the Net. There are scores of books addressing how best to deal with the problem, but they ignore the one important tool with which the problem of spam could be addressed: the law. The key to good policy in cyberspace is a proper mix of modalities, not a single silver bullet. The idea that code alone could fix the problem of spam is silly—code can always be coded around, and, unless the circumventers are not otherwise motivated, they will code around it. The law is a tool to change incentives, and it should be a tool used here as well.[36] The aim here, as with porn, should be to regulate in order to assure what we could call "consensual communication." That is, the only purpose of the regulation should be to block nonconsensual communication, and enable consensual communication. He does not believe that purpose is valid in every speech context. In this context—private e-mail, or blogs, with limited bandwidth resources, with the costs of the speech born by the listener—it is completely appropriate to regulate to enable individuals to block commercial communications that they don't want to receive.[37]

> "The present techniques for controlling spam are non-governmental code-based regulation by way of (1) filters or by (2) the 'server', who is forwarding the message, blocking it. [He says] these do not effectively work because clever spammers can defeat the filters and the creation

[34] *Ibid*, pp. 253-54
[35] *Ibid*, p.254
[36] *Ibid*, p. 262
[37] *Ibid*, p. 263

> of 'blacklists' of servers by rules of 'vigilantes' set up to rate the servers. [He says] that if either or both of these techniques were actually working to stop spam, [he] would accept them. [He is] particularly troubled by the process-less blocking of 'blacklists'. The only federal legislative response, the CAN-SPAM Act, while preempting many innovative state solutions, is not having any significant effect."[38]
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> "Not only are these techniques not blocking spam, they are also blocking legitimate bulk e-mail that isn't spam. The most important example is political e-mail. One great virtue of e-mail was that it would lower the costs of social and political communication. Thus, both because regulation through code alone has failed, and because it is actually doing harm to at least one important value that the network originally served, we should consider alternatives to code regulation alone."[39]

To save the day, Lessig offers alternate avenues of regulation to regulate spam—tagging commercial e-mail and a "bounty system." Here again, then, the solution is a mixed modality strategy. A LAW creates the incentive for a certain change in the CODE of spam (it now comes labeled). That law is enforced through a complex set of MARKET and NORM-based incentives—both the incentive to be a bounty hunter, which is both financial and normative (people really think spammers are acting badly), as well as the incentive to produce bounty credit cards. If done right, the mix of these modalities would change the incentives spammers face. And, if done right, the change could be enough to drive most spammers into different businesses.[40]

Lessig argues that such regimes to handle "porn" and "free speech" issues retain the values of the First Amendment:

> "The first is a point about perspective: to say whether a regulation 'abridg[es] the freedom of speech, or of the press' we need a baseline for comparison. The regulations [he describes] in this section are designed to restore the effective regulation of real space. In that sense, in [his view, they don't 'abridge' speech. Second, these examples show how doing nothing can be worse for free speech values than regulating speech. The consequence of no legal regulation to channel porn is an explosion of bad code regulation to deal with porn. The consequence of no effective legal regulation to deal with spam is an explosion of bad code that has broken e-mail. No law, in other words, sometimes produces bad code. [L]aw and software together define the regulatory condition. Less law does not necessarily mean more freedom' As code and law are both regulators (even if different sorts of regulators) we should be avoiding bad regulation of whatever sort. Third, these examples evince the mixed modality strategy that

[38] *Ibid*, p. 263
[39] *Ibid*, p. 264
[40] *Ibid*, pp. 264-66

> regulating cyberspace always is. There is no silver bullet. There is instead a mix of techniques—modalities that must be balanced to achieve a particular regulatory end. That mix must reckon the interaction among regulators. The question is for an equilibrium. But the law has an important role in tweaking that mix to assure the balance that advances a particular policy. Here, by regulating smartly, we could avoid the destructive code-based regulation that would fill the regulatory gap. That would, in turn, advance free speech interest."[41]

NEUTRALITY, ANONYMITY, AND PRIVACY/KEY CONCEPTS AFFECTING THE ROLE AND DEVELOPMENT OF CYBERSPACE COMMUNICATION

The Net, originally conceived as an avenue of unfettered distribution of expression and information, had three keystones: "neutrality", "anonymity", and "privacy".[42]

> "Neutrality is "important: when the users were allowed to use the telephone for whatever use they wanted, and not the use the owner wanted—then users were free to connect to the Internet; free to connect to any one of the thousands of ISPs ***[and be fed by] them the Internet. A neutral platform created this; the government created the neutral platform." A handful of massive companies [are trying to] control access and distribution of content, deciding what you get to see [on the Net] and how much it costs."[43]

The battle for who controls continues before the FCC and in Congress.

There is no "anonymity" now. To use the Net one must go through a server and one is given an IP Address by which your computer can be identified. As Lessig puts it, "If you want anonymity use a pay phone."[44]

For purposes of this commentary "privacy" is an issue because it impinges on "free speech". Both ideas are important liberties in a democratic society. Considering the words of the First and Fourth Amendment on their face, it seems fair to conclude that the First's free speech is near to absolute in its command of no governmental action to abridge it. Whereas, the privacy protected by the Fourth is a limited freedom not from all or most searches, but only from "unreasonable search and seizures". Lessig states the difference pointedly by going to the values behind the Amendments' words. "The values of speech are different from the

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[41] *Ibid*, pp. 267-68
[42] *Lessig, Cyberspace's Consitution*, p. 9. "Perfect liberty. The original net was an unregulable place. Behavior, if controlled, was controlled by the norms of the net. The architect made possible no greater control."
[43] *Washington Post op. Ed, Lessig & McChesney*, June 8, 2006
[44] *Ibid*, p. 261

values of privacy; the control we want to vest over speech is less than the control we want to vest over privacy. We should disable some of the control over speech. A little bit of messiness or friction in the context of speech is a value, not a cost."[45]

He adds. "But are these values different just because I say they are? No. They are only different if *we* say they are different. In real space we treat them as different. [Since the Net is in flux] my core argument is that we [can] choose how we want to treat them in cyberspace. My point is that if we rely upon private action alone, more speech will be blocked than if the government acted wisely and efficiently."[46]

CITIZENS UNITED V. FEDERAL ELECTIONS COMMISSION[47]

From the title Professor Lessig has chosen for his lecture, it appears that the *Citizens United* case will be a focal point of the content. In anticipation his published views thereon seem relevant.

He has said:

> "We can disagree with the Court's view of the Framers (and I do); we can criticize its application of stare decisis (as any honest lawyer should); and we can stand dumbfounded by its tone-deaf understanding of the nature of corruption (as anyone living in the real world of politics must)."[48]

It seems obvious that Lessig supports the view of the four dissenters in *Citizens Union* that corporations are fictitious entities with rights specifically given them by law, but do not have the constitutional personal liberty of free speech protected by the First Amendment. He emphasizes, "of course I think corporations ought to have certain rights, [but] where all of a sudden the rights that they have are not the rights that we give them, but rights that they have, [include] certain inalienable rights as the Declaration of Independence put it. They've magically been given."[49]

CONCLUSION

Professor Lessig's message to us is that that free speech at the birth of the Net provided unfettered flow of informational content available to all that had the equipment to enter cyberspace. Time and intervention of four modalities, LAW, ARCHITECTURE, NORMS, and

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[45] *Ibid*. p. 261
[46] *Ibid*, p. 261
[47] Supreme Court, Case 08-205 January 21, 2010
[48] Transcript *Bill Moyers Jounal*, PBS 02/05/2010
[49] *Ibid*.

MARKET have eroded, and continue to erode, the Net's freedom.

Nevertheless, there still remains vastly more free speech on the Net than exists in real space. It still remains in our hands, as members of our democratic society, how free the informational flow will remain.

His bottom baseline for cyberspace speech are the boundaries now existing in real space free speech. He believes that by marshalling our forces we can bring about through legislation the retention of much of present Net freedom. If such is accomplished, we will broaden the present borders of real space speech by court and legislative adoption thereof. He also emphasizes that greater free speech depends not only on the facial words of the First Amendment but court interpretation thereof and new legislation which gives a full and robust meaning to the ideas and ideals behind the words.