

## LOVING V. BOREN

By Natalie A. Kaniel

A seventeen-year-old college freshman, intrigued and confused by the novel experience of living away from home, questions his decision to refrain from premarital sex. One afternoon, while working in the university computer lab, the student searches for a Usenet discussion group addressing premarital sex.<sup>1</sup> After a brief search, the student locates the alt.sex.abstinence group. When he attempts to retrieve the list of recent postings to the group, however, he discovers that his access is denied.

A university professor, known by her colleagues as a great purveyor of e-mail jokes, performs a newsgroup search for jokes involving the latest White House scandal. Among other newsgroups, the professor finds the alt.sex.clinton group. When she attempts to retrieve a few jokes, however, she finds that her access to the newsgroup has been blocked.

At the public University of Oklahoma (OU), under a new Internet access policy, the above individuals would be denied access to their seemingly innocent newsgroups.<sup>2</sup> OU recently implemented a policy restricting Internet access for students under the age of eighteen, and for faculty and staff using the Internet for non-academic purposes.<sup>3</sup> The Tenth Circuit upheld an Oklahoma district court's decision that OU's restrictions were constitutional.<sup>4</sup> The district court looked to the public forum doctrine, which affords heightened First Amendment protection for forums traditionally used for public communication, and found that the university-owned computer facilities and Internet services did not represent a public forum.<sup>5</sup> As such, the university's restrictions on Internet and newsgroup use were deemed constitutional.<sup>6</sup> Analyzing the Internet service under traditional public forum categories mischaracterizes unique attributes of the

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1. Usenet, a subset of the Internet, is host to over 50,000 different newsgroups. Newsgroups can be conceptualized as giant, worldwide bulletin boards where users both post messages and read messages posted by others. *See Free Advice on Usenet News* (visited Feb. 1, 1999) <<http://www.islandnet.com/~tmc/html/articles/usentnws.htm#Introduction>>.

2. *See Loving v. Boren*, 956 F. Supp. 953, 955 (W.D. Okla. 1997), *aff'd*, 133 F.3d 771 (10th Cir. 1998).

3. *See id.*

4. *See Loving v. Boren*, 133 F.3d 771 (10th Cir. 1998).

5. *See Loving*, 956 F. Supp. at 955.

6. *See id.*

Internet and newsgroups and represents an attempt to place a new medium into outdated and ill-fitting categories.

## I. BACKGROUND

OU, like many universities, provides computer access and Internet services to students, faculty, and staff. In early 1996, an Oklahoma state representative who was also the Director of the Center For a Family Friendly Internet<sup>7</sup> contacted David Boren, the President of OU.<sup>8</sup> The representative told Boren that offensive material was carried on the OU server through interactive news groups.<sup>9</sup> Concerned about the potential violation of an Oklahoma law against the distribution of obscene material, Boren ordered a number of news groups blocked on the OU server.<sup>10</sup> There was no thorough evaluation of the disapproved sites prior to the blocking, and the university blocked several groups devoid of any obscene material.<sup>11</sup>

OU denied all access to the disapproved newsgroups for eight months.<sup>12</sup> In January 1997, OU implemented a new policy, creating two separate news servers, "A" and "B".<sup>13</sup> The "A" server allowed access to only the news groups approved by OU.<sup>14</sup> The "B" server allowed access to all news groups, but had the following restriction: anyone who wished to access news groups on the "B" server must be over eighteen years old, and must agree to only use the server for academic and research purposes.<sup>15</sup>

Bill Loving, a journalism professor at OU, brought suit in an Oklahoma district court against OU.<sup>16</sup> Loving alleged that in blocking access to certain news groups, OU violated Loving's First Amendment right to free speech.<sup>17</sup> The district court ruled in favor of OU.<sup>18</sup> In just one short paragraph, the district court stated that OU's computers and Internet services

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7. See UCLA Online Institute for Cyberspace Law and Policy, *Top Cyberspace Law Cases of 1998* (visited Nov. 16, 1998) <<http://www.gse.ucla.edu/iclp/98cases.html>>.

8. See *Loving v. Boren*, 956 F. Supp. 953, 954 (W.D. Okla. 1997), *aff'd*, 133 F.3d 771 (10th Cir. 1998).

9. See *id.*

10. See *id.*

11. See *id.*

12. See *id.*

13. See *id.* at 955.

14. See *Loving v. Boren*, 956 F. Supp. 953, 955 (W.D. Okla. 1997).

15. See *id.*

16. See *id.* at 953.

17. See *id.*

18. See *id.*

do not constitute a public forum and the state has the right to restrict use of its facilities to the use for which they were intended.<sup>19</sup>

Loving appealed his case, and the Tenth Circuit Court of Appeals affirmed the district court's ruling on procedural grounds.<sup>20</sup> The Tenth Circuit held that Loving lacked standing, in that he had failed to show that he had suffered an injury-in-fact.<sup>21</sup> Loving had not testified at the trial, and no evidence was presented that he had been denied access to any news groups.<sup>22</sup> In addition, the Tenth Circuit held that the recent implementation of the two separate news servers presented a valid resolution of the matter and rendered Loving's claims moot.<sup>23</sup> In so ruling, the court implicitly held that OU's two-track news group access policy presents a valid restriction on a user's First Amendment right to free speech. The court did not address, however, the issue of whether a university Internet service constitutes a public or nonpublic forum.

Since the Tenth Circuit decision focused solely on procedural issues such as mootness of claim and injury-in-fact, this Note will focus on the district court's decisions. This Note argues that the district court, in stating that a university Internet service is a nonpublic forum and not entitled to heightened First Amendment protection, overlooked special characteristics and policy considerations unique to the Internet and newsgroups. Analyzing the Internet service under the traditional categories of the public forum doctrine is an attempt to place the relatively modern Internet into categories best suited for real, and not intellectual, property.

## II. DISCUSSION

It is debatable whether the public forum doctrine is even applicable in the case of *Loving v. Boren*. The doctrine is intended to protect regulation of speech in government-owned places. It can be argued that the university Internet, and Internet access, are simply channels of communication and a means of accessing the communicative forum. Rather than creating a communicative forum, OU simply provided students and faculty with access to a preexisting forum: the Internet and newsgroups.

For purposes of this Note, however, the university Internet will be treated as if it is a metaphysical place where public communication takes place. The Internet access will be treated as an essential component of the

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19. *See id.* at 955.

20. *See Loving v. Boren*, 133 F.3d 771, 771 (10th Cir. 1998).

21. *See id.* at 773.

22. *See id.*

23. *See id.*, n.1.

Internet, the component without which communication could not take place, and without which the forum would not exist.

*Loving v. Boren* is the first case to address the constitutionality of a public university's restrictions on Internet access and use.<sup>24</sup> The principal flaw in the district court decision is the absence of discussion of public policy and the inapplicability of public forum analysis to new media. Due to the ill fit between traditional public forum analysis and new media, an alternative form of analysis should be established for non-traditional communicative forums.

### A. The Evolution of the Public Forum Doctrine and the Difficulties of Applying it to New Media

The public forum doctrine, "a fixture of free speech law since the beginning of the modern era of First Amendment jurisprudence,"<sup>25</sup> reflects the constitutional right citizens have to utilize certain forums to disseminate their messages to the public.<sup>26</sup> In *Hague v. CIO*,<sup>27</sup> decided in 1939, the Supreme Court reasoned,

Wherever the title of streets and parks may rest, they have been immemorially held in trust for the use of the public and ... have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.<sup>28</sup>

Between the late 1930s and the 1960s, the public forum doctrine afforded broad protection for speech in a wide variety of activities.<sup>29</sup>

In the 1970s and 1980s, the Supreme Court began identifying public forum exceptions for certain kinds of public property.<sup>30</sup> Time, place, and

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24. See Lisa R. Allred, *May a Public University Restrict Faculty Expression on its Internet World Wide Web Sites? Academic Freedom and University Facility Use Restrictions*, 24 J.C. & U.L. 325, 343 (1997).

25. Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1535 (1998).

26. RULES FOR THE ROAD FOR THE INFORMATION SUPERHIGHWAY: ELECTRONIC COMMUNICATIONS AND THE LAW, Part III, Chapter 12, §12.1(c).

27. 307 U.S. 496 (1939).

28. *Id.* at 515.

29. See generally *Schneider v. New Jersey*, 308 U.S. 147, 163-65 (1939) (holding that because the streets were a public forum, municipalities could not prohibit leafletting solely because of a desire to prevent littering); *Kunz v. New York*, 340 U.S. 290, 293-95 (1951) (holding that the state may not restrict the right to hold public worship meetings on its streets); *Brown v. Louisiana*, 383 U.S. 131, 141-43 (1966) (reversing the conviction of civil rights activists sitting in at a segregated public library).

manner restrictions were utilized as a means for circumventing the public forum doctrine. In 1983, the Court established a three-tier categorization of public forums in its opinion in *Perry Education Association v. Perry Local Educators' Association*.<sup>31</sup>

The first category articulated by *Perry* was the traditional public forum.<sup>32</sup> Traditional public forums consist of the streets, sidewalks, and parks discussed in *Hague v. CIO* as being held in trust for the public for communicative purposes.<sup>33</sup> In a traditional public forum, the state may not restrict speech based on content unless it can show that its regulation is necessary to serve a compelling state interest and is narrowly tailored to achieve such interest.<sup>34</sup>

The second category established by *Perry* was the limited public forum.<sup>35</sup> Such a forum is one which traditionally may not have been created as a public forum but which "the state has opened for use by the public as a place for expressive activity."<sup>36</sup> A limited public forum, once opened to the public, receives the same treatment as the traditional public forum: the state may not restrict speech unless it is narrowly drawn to achieve a compelling state interest.<sup>37</sup> An example of a limited public forum may be an auditorium or a meeting facility which the government makes available to the public.

Finally, public property which cannot be characterized as a traditional public forum, nor a limited public forum, receives a lower level of First Amendment protection.<sup>38</sup> In such a nonpublic forum, the state may regulate the time, place and manner of speech.<sup>39</sup> It may also place any regulations that assure the forum is used for its intended purposes, as long as the regulation is reasonable and not effected as a means for opposing the

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30. See Gey, *supra* note 25, at 1545.

31. 460 U.S. 37, 44-46 (1983). *Perry* dealt with a union's claim that teachers' mailboxes were a public forum, and that restriction of access to them was a violation of the First Amendment. See *id.* at 40-42. In holding that the mailboxes were not a public forum, the Court delineated three levels of forums, and indicated varying degrees of restriction the government could place on each level. See *id.* at 44-46.

32. See *id.* at 45.

33. See *Hague v. CIO*, 307 U.S. 496, 515 (1939).

34. See *Perry*, 460 U.S. at 45.

35. See *id.*

36. *Id.*

37. See *id.* at 46.

38. See *id.*

39. See *id.*

speaker's view.<sup>40</sup> An example of a government-owned, nonpublic forum is an office in a federal building or a military base.

1. *The Traditional Public Forum.*

It would be difficult for a court to find that a university Internet service falls within the definition of the first *Perry* category, the traditional public forum. Courts have read the streets, sidewalks, and parks definition espoused in *Perry* narrowly, and have looked to how long a forum has existed in evaluating whether it could be construed as a traditional public forum. Such evaluations would weigh heavily against a finding that the relatively modern university Internet service is a traditional public forum.

In *United States v. Kokinda*<sup>41</sup>, the Supreme Court held that a sidewalk which provided access from a parking lot to a post office did not qualify as a "public sidewalk traditionally open to expressive activity."<sup>42</sup> The Court explained that a protectable sidewalk is one which is continuously open, and serves as a place where people can "enjoy the open air or the company of friends and neighbors in a relaxed environment."<sup>43</sup> The Court held that the postal sidewalk was intended solely to provide access from the parking lot to the post office, and as such, was not a public forum.<sup>44</sup> Such a strict construction of the streets, sidewalks and parks definition indicates that a court would likely be reluctant to stretch the definition to include a university Internet service.

The Internet would also likely fall outside of the traditional public forum category because of its relative modernity. In *International Society for Krishna Consciousness v. Lee*,<sup>45</sup> which discussed the applicability of the public forum doctrine to an airport, the Supreme Court explicitly stated that, "given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having 'immemorially ... time out of mind' been held in the public trust and used for purposes of expressive activity."<sup>46</sup> The Internet, far more recently developed than the airport, is even more likely to be considered too modern to qualify as a traditional forum.

Justice Kennedy, though concurring in the *Krishna Consciousness* decision, highlighted the major flaw in relying on an analysis that seeks to

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40. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

41. 497 U.S. 720 (1990).

42. *Id.* at 727.

43. *Id.*

44. See *id.*

45. 505 U.S. 672 (1992).

46. *Id.*

analogize modern forums to the traditional parks and streets.<sup>47</sup> Justice Kennedy recognized that the quaint concept of the speaker's forum in the local town square is largely irrelevant in the modern world.<sup>48</sup> "In a country where most citizens travel by automobile, and parks all too often become locales for crime rather than social intercourse, our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity."<sup>49</sup>

Kennedy provides the strongest argument for doing away with the Supreme Court's strict classification of property and disfavoring of modern forums. He states that "the policies underlying the [public forum] doctrine cannot be given effect unless we recognize that open, public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property . . . Without this recognition our forum doctrine retains no relevance in times of fast-changing technology and increasing insularity."<sup>50</sup> The Limited Public Forum doctrine, as discussed below, provides no greater protection for new media.

## 2. *The Limited Public Forum.*

Subsequent cases interpreting *Perry* virtually assure that any forum regulated by the government will not be deemed a limited public forum. *Perry* stated that if the government opens up a nontraditional forum for the purposes of discussion, it takes on the properties of a limited public forum and deserves the protection of the traditional public forum.<sup>51</sup> *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*,<sup>52</sup> clarified that the Court looks to "the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum."<sup>53</sup> In this case, the Court held that though the federal government had created a charity drive through which organizations could solicit donations from employees, it could restrict the participation of certain legal defense organizations.<sup>54</sup> The Court reasoned that

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47. *See id.* at 693 (Kennedy, J., concurring).

48. *See id.* at 697 (Kennedy, J., concurring).

49. *Id.* at 697-98 (Kennedy, J., concurring).

50. *Id.* at 697 (Kennedy, J., concurring).

51. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

52. 473 U.S. 788 (1985).

53. *Id.* at 802.

54. *See id.* at 793. The organizations banned included: the NAACP Legal Defense and Educational Fund, the Sierra Club Legal Defense Fund, the Puerto Rican Legal Defense and Education Fund, the Federally Employed Women Legal Defense and Education

because the government's policy was to limit participation in the charity drive to "appropriate" volunteer organizations, the charity drive was not a public forum.<sup>55</sup>

Analysis under the limited public forum category would look to the university's intent in providing Internet service, rather than looking at the attributes of the Internet service itself. Rather than evaluating the use to which the Internet service was put, the court would simply ask whether by providing Internet service, the university intended to create a public forum. Such an analysis is circuitous. Government entities are sued when they restrict access to arguably public forums, but the very existence of a restriction on access serves as proof that there was no intent to make the forum public. As one commentator noted, "[i]f a limited public forum is neither more nor less than what the government intends it to be, then a first amendment right of access to the forum is nothing more than the claim that the government should be required to do what it already intends to do in any event."<sup>56</sup> Under *Cornelius*, it is difficult to imagine a scenario where the government would not prevail. "If the reach of the forum is determined by the intent of the government, and if the exclusion of the plaintiff is the best evidence of that intent, then the plaintiff loses in every case."<sup>57</sup>

### 3. *The Nonpublic Forum Category*

Since the OU Internet service is both a modern medium of communication, and one that the university indicated an intent to regulate, it most likely falls into the category of the nonpublic forum. As such, the university is free to regulate the Internet service to ensure that it comports with its intended purposes.<sup>58</sup> The analysis, however, should not stop here. Placing restrictions on a medium of communication provided to students of a public university implicates important policy considerations which must be recognized and addressed.

## **B. Application of the Public Forum Doctrine in *Loving v. Boren***

It is difficult to determine how the district court applied the public forum doctrine to the OU Internet service and Internet policy. The court spent just one sentence expressing its position that, "The OU computer

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Fund, the Indian Law Resource Center, the Lawyers' Committee for Civil Rights Under the Law, and the Natural Resources Defense Council. *See id.*

55. *See id.* at 804.

56. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1756 (1987).

57. *Id.* at 1757.

58. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

and Internet services do not constitute a public forum.”<sup>59</sup> However, this supposedly obvious conclusion is the subject of great academic discussion and debate. For example, several cases have found certain non-physical forums to be public forums entitled to heightened protection.<sup>60</sup>

The court also stated that the university had never opened its services to the public or used it for public communication.<sup>61</sup> This is arguably a mischaracterization of Internet and newsgroup use. Sending and receiving e-mail requires interaction with the public. Reading a web site or posting a message to a newsgroup represents an interaction with a previous poster. The Internet, by its very nature, is a forum open to the public. It is true that the general public may not sign onto the Internet through the university’s own Internet services. However, the university Internet service does not restrict users to e-mailing students and faculty, reading faculty sponsored web sites, and posting to university moderated newsgroups. As such, a large amount of university Internet use involves communication with non-university Internet users. Allowing students and faculty to communicate with non-university users via the university Internet service thus represents a use of the service for public communication.

The court also maintained that the university has the right to reserve the use of its property to its intended purposes—educational purposes.<sup>62</sup> To say that a university’s purpose is education is a truism. The more relevant inquiry is defining the educational purpose.<sup>63</sup> Educational purposes could include discussions with people of variant backgrounds and interests, as well as research done for personal enrichment. A narrow interpretation of the educational purpose could have the unfortunate result of restricting Internet use to research of only topics assigned in university classes.

Furthermore, the Supreme Court has stated that while schools do have broad discretion in the management of school affairs, and the pursuance of

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59. *Loving v. Boren*, 956 F. Supp. 953, 955 (W.D. Okla. 1997), *aff’d*, 133 F.3d 771 (10th Cir. 1998).

60. *See Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995) (holding that a university’s student activities fund was a public forum); *see also Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788 (1985) (holding that a charity drive, not the physical workplace, was the relevant forum for purposes of public forum analysis).

61. *See Loving*, 956 F. Supp. at 955.

62. *See id.*

63. *See, e.g., John O. Mudd, Academic Change in Law Schools*, 29 GONZ. L. REV. 29, 37 (1993) (detailing proposed changes in law school education); John A. Beach, *The Management and Governance of Academic Institutions*, 12 J.C. & U.L. 301, 303 (1985) (discussing what a university is and what its purposes are).

educational purposes, such discretion must operate in conformity with the First Amendment.<sup>64</sup> As a research instrument, the Internet can be likened to a library. But even the library contains material intended to entertain—should this wing of the library be closed to students and faculty?<sup>65</sup>

Public forum analysis has developed through and is best suited for analysis of real property, and not intellectual property. Analysis of public forum issues is grounded in comparisons to physical property such as streets and parks. It is unfortunate that the court did not expand upon its conclusions regarding the university Internet service. The university, and the Internet community could have benefited from an in-depth analysis of these issues.

### C. Policy Considerations

OU's regulation specifically targeted student and faculty use of newsgroups, or Usenet, a subset of the Internet. The Usenet is a "system of public newsgroups which are 'neither owned nor subject to any central authority.'"<sup>66</sup> To preserve its unique nature as a highly democratic, non-intrusive and dynamic medium, the university should take care to avoid broad regulations that control more speech than is necessary.

Says one commentator, in discussing the Internet, "For the first time since the adoption of the First Amendment, the theoretical dream of a free marketplace for ideas has become a reality.... The Internet provide[s] anyone with access to a computer the opportunity to air his views on almost any subject imaginable."<sup>67</sup> A highly democratic system, virtually anyone with access to the internet can post messages to newsgroups, which are then relayed from computer to computer. This process was described by one commentator as "a million notes that classmates pass

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64. See Board of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. 853, 863 (1982).

65. One commentator writes, "Imagine if a public university cut off faculty access to salacious or explicit material in its library collection because a legislator complained to the president. The academic community would be outraged. If the issue went to court, any judge would set the university back on its heels. Yet, despite differences between digital and print materials, that is essentially what happened in Oklahoma." Robert M. O'Neil, *Free Speech on the Internet: Beyond Indecency*, 38 JURIMETRICS J. 617, 624 (1998).

66. Blake T. Bilstad, *Obscenity and Indecency in a Digital Age: The Legal and Political Implications of Cybersmut, Virtual Pornography, and the Communications Decency Act of 1996*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 321, 345 (1997) (quoting David Landis, *Sex, Laws & Cyberspace*, U.S.A. TODAY, Aug. 9, 1994, at 1D).

67. Jeffrey E. Faucette, *The Freedom of Speech at Risk in Cyberspace: Obscenity Doctrine and a Frightened University's Censorship of Sex on the Internet*, 44 DUKE L.J. , 1155, 1181 n.63 (1995).

across schoolroom aisles.”<sup>68</sup> Some newsgroups have a moderator—an intermediary to whom messages are sent, and who then relays the messages to the newsgroup for reading by other members. Other newsgroups are unmoderated, and users post messages directly to the newsgroup. Unmoderated newsgroups, while potentially achieving a highly democratic means of assuring that all opinions are heard, also run the risk of offensive, off-topic or simply inaccurate postings. Inappropriate newsgroup users will likely find themselves the subject of “flames,” negative responses from other users of the newsgroups, intended to shame and control errant users.<sup>69</sup> Newsgroups often have a built-in mechanism for controlling the content of postings to their group to assure that discussions remain on topic.<sup>70</sup>

A second important characteristic of the Internet is that it is a non-disruptive and unintrusive medium in which users have chosen to participate. The district court in *Loving* cited a concern that “[t]he limitation of OU Internet services to research and academic purposes on the ‘B’ server is not a violation of the First Amendment, in that those purposes are the very ones for which the system is purchased.”<sup>71</sup> It is reasonable to expect that a university would restrict speech that disrupts classroom activity, or speech intended to terrorize and intimidate fellow students: such activities blatantly frustrate the university’s purpose of providing a forum in which education is facilitated.<sup>72</sup> Internet use, usually done in a computer lab or on a personal computer, does not disrupt classroom activity. And while, on rare occasion, the Internet may be used to intimidate students,<sup>73</sup> such a rare

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68. Bilstad, *supra* note 66, at 345 (quoting William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 201 n.16 (1995)).

69. See Faucette, *supra* note 67 at 1162.

70. Deja News, for example, details a procedure for reporting “abusive” postings which violate the service’s “posting rules.” See Deja News, Inc., *Frequently Asked Questions* (visited Nov. 15, 1998) <<http://www.dejanews.com/help/faq.shtml#abuse>>.

71. *Loving v. Boren*, 956 F. Supp. 953, 955 (W.D. Okla. 1997), *aff’d*, 133 F.3d 771 (10th Cir. 1998).

72. See generally *Healy v. James*, 408 U.S. 169, 189 (1972) (stating that “Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.”).

73. One publicized incident involved a University of Michigan student, Baker, that posted a violent fantasy about a fellow student to a Usenet discussion group. While Baker was prosecuted under a statute preventing the use of interstate communication to threaten kidnap or injury, the court focused on Baker’s First Amendment rights. See *United States v. Baker*, 890 F. Supp. 1375, 1385 (E.D. Mich. 1995).

occurrence does not justify regulation of access for all students and faculty.

A final characteristic of the Internet and newsgroups is that expression is dynamic and uninhibited. Due to the unmoderated nature of most newsgroup postings, a university's regulations attempting to control subject matter would ultimately fail in its attempts to screen out all obscene messages. A Virginia court recently threw out a state statute that restricted state employees' access to sexually explicit materials on state-owned computers.<sup>74</sup> The state had asserted that the statute was necessary to maintain efficiency in the workplace and prevent the creation of a hostile work environment.<sup>75</sup> The court stated that the regulation was under-inclusive, because it did not ban the use of video games, news services, and financial information.<sup>76</sup> The statute also did not bar the reading of racially, religiously, or ethnically offensive material online.<sup>77</sup> The statute was over-inclusive because it restricted state employees access to constitutionally protected information regarding sexuality and the human body.<sup>78</sup>

Similarly, OU's regulation, intended to halt the dissemination of obscenity online, is both over- and under-inclusive. A newsgroup discussion is merely a log of a conversation among a group of users that rolls over; with every new message posted, an old one is deleted.<sup>79</sup> A newsgroup discussing sexual harassment in the workplace could be discussing a recent piece of legislation one day, then discussing one member's graphic depiction of harassment the next. As such, an evaluation of the newsgroup in the former situation would deem the newsgroup uncontroversial, while an evaluation in the latter situation could be deemed obscene. If the assessment was made in the latter situation, a newsgroup that is largely innocent could be restricted from access by certain users of the OU Internet service. Hence, due to the dynamic nature of the newsgroup, any regulation of access would inevitably sweep broadly into protected or inoffensive speech.

Just as one cannot predict what the newsgroup will be discussing on a particular day, one cannot predict where a user will post a particular message. Simply blocking access to news groups that are sexually themed in their title does not restrict the advanced computer user from posting obscene pictures and messages to other, non-restricted newsgroups. As such,

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74. *See* Urofsky v. Allen, 995 F. Supp. 634, 644 (E.D. Va. 1998).

75. *See id.* at 639.

76. *See id.* at 640.

77. *See id.*

78. *See id.*

79. *See* Faucette, *supra* note 67, at 1162.

a regulation that restricts access to the "alt.sex" newsgroups will not insulate newsgroup users from all obscene postings. In fact, no regulating mechanism, other than reviewing every individual message posted to a newsgroup server, could completely eliminate the risk of obscene postings.<sup>80</sup>

The University of Oklahoma is not required to provide its faculty and staff with computer facilities and Internet access; rather, it chooses to do so.<sup>81</sup> It likely chooses to do so for several reasons. Internet access helps OU remain competitive with other universities that provide computer services. Also by providing access to the vast network of information present on the World Wide Web and in newsgroups, OU establishes an open channel for communication and information transfer between its own university community and other communities. There is an inherent conflict when a university provides access to such an expansive and dynamic network of information, and then attempts to restrict just what type of information may be read or sent.<sup>82</sup> "The nature of the Internet is not a mystery; the government should be on notice that when it allows the public to join ongoing discussions in cyberspace, the government has forsaken the authority to sanitize the forum to fit particular political or social sensitivities."<sup>83</sup>

Most importantly, a public university should be mindful of the chilling effects its Internet regulations may have on student and faculty speech.<sup>84</sup> Universities are held to be forums for learning and the open examination of often controversial ideas. Cutting off access to certain newsgroups, and proscribing what discussions may take place effectively censors student discussion and debate.

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80. *See id.* at 1164-65.

81. The OU Department of Computing and Telecommunications Services provides students and faculty with e-mail, web, ftp and imaging services, as well as a computer help desk and 24 hour Internet support and service. *See OU Department of Computing and Telecommunications Services* (visited Nov. 16, 1998) <<http://www.ou.edu/dcts/>>.

82. In *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, the court stated that while the public library need not have provided Internet access to its patrons, "Having chosen to provide access, however, the Library Board may not thereafter selectively restrict certain categories of Internet speech because it disfavors their content." 2 F. Supp. 2d 783, 795-96 (E.D. Va. 1998).

83. Gey, *supra* note 25, at 1632.

84. Overbroad Internet regulations and their potential chilling effects on speech have been discussed recently in light of the Supreme Court ruling in *Reno v. ACLU*, 521 U.S. 824 (1997). *See Debra M. Keiser, Regulating the Internet: A Critique of Reno v. ACLU*, 62 ALB. L. REV. 769 (1998); David K. Djavaherian, Note, *Reno v. ACLU*, 13 BERKELEY TECH. L.J. 371 (1998).

### III. CONCLUSION

The district court in *Loving v. Boren* was too quick to hold that a university Internet service was a private forum and that the university was reasonable in restricting access as it deemed necessary. The three public forum categories do not adequately address the complexities and intricacies of new media, including the Internet newsgroups. If the university is worried about offensive material in newsgroups, it should either rely upon the self-regulation imposed by users of the news groups, or it should simply not provide Internet access to its students.