REGULATING THE INTERNET: SHOULD PORNOGRAPHY GET A FREE RIDE ON THE INFORMATION SUPERHIGHWAY? A PANEL DISCUSSION*

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[EDITOR'S NOTE: On June 11, 1996, just before this Article went to press, a three-judge panel of the United States District Court for the Eastern District of Pennsylvania enjoined enforcement of the Communications Decency Act of 1996 ("CDA"), enacted as part of the Telecommunications Competition and Deregulation Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133-35 (1996) (to be codified at 47 U.S.C. § 223 (a)-(h)). *American Civil Liberties Union v. Reno*, No. 96 Civ. 963, 1996 U.S. Dist. LEXIS 7919 (E.D. Pa. June 11, 1996). Working from a broad and detailed factual record, the court struck down the CDA on numerous First Amendment grounds, including overbreadth, vagueness, and least restrictive means. Applying strict scrutiny, the court eschewed the low-level standard of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). The *Red Lion* Court held that regulation of broadcast radio and television, due to the scarcity of frequencies, receives the lowest level of First Amendment scrutiny. In reviewing the CDA, the Dis-

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trict Court held that the low standard articulated in *Red Lion* is inapplicable to the regulation of content on the Internet. The Government is expected to appeal the decision; section 561(b) of the statute provides for direct review of the CDA in the United States Supreme Court as of right.]

INTRODUCTORY REMARKS: FRANK J. MACCHIAROLA:[6]

Today we are living in a political environment in which the country is questioning anew the government's role in regulating all aspects of American life, from the economy to social programs and individual behavior. Recently, the changes to our communications infrastructure have become revolutionary, particularly with the emergence of the Internet. In 1987, only a few million Americans had Internet access.[7] Today, estimates of Internet users range up to twenty-five million.[8] The Internet is now present in all aspects of society— business, academia, and the home—and it continues to grow.[9] This growth has raised questions regarding the government's role in regulating the Internet.

Through the Internet, the nature of communications has changed from a few people speaking to the many, to the many speaking to the many. These changes have raised new issues concerning the material that is sent over the Internet.[10] Some have grown concerned about what the Internet provides, and legislation introduced by Senator James Exon (D-Neb.) reflects this concern.[11] The proposed bill would increase criminal penalties and

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7 *See* Paul Andrews, *Internet Gateways—New Doors to the Net are Opening Everywhere these Days, with Providers Ranging from Entrepreneurial Mom-and-Pop Shops to the 'Big Boys'*, SEATTLE TIMES, Jan. 28, 1996, at C1.

8 *See* Daniel E. Harmon, *The Big "I"—Hottest Topic at the ABA Techshow*, LAWYER'S PC, May 1, 1995, at 1; *see* Andrews, *supra* note 7.

9 *See* Robert F. Goldman, Note, *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, 1081 (1995).

10 *See* Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345 (1995); *see also* John Schwartz, *Language on 'Indecency' Sparks Telecommunications Bill Protests*, WASH. POST, Feb. 3, 1996, at A8; Philip Elmer-Dewitt, *On a Screen Near You: It's Popular, Persuasive, and Surprisingly Perverse, According to the First Survey of Online Erotica. And There's No Easy Way to Stamp it Out*, TIME, July 3, 1995, at 38 (cover story).

11 The bill, introduced with co-sponsor Sen. Dan Coats (R-Ind.) as the Communications Decency Act of 1995, S. 2525, 104th Cong., 1st Sess. (1995), was passed as part of the Telecommunications Competition and Deregulation Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133-35 (1996) (to be codified at 47 U.S.C. § 223(a)-(h)).

fines for individuals who transmit pornography on the Internet.[12] This proposal has generated significant debate in Washington, D.C. and around the country.[13] This discussion will engage in a portion of that debate.

MARCI A. HAMILTON:

The issue we are discussing is pornography and the Internet. Why choose this topic among the many topics one could choose about the emerging Internet? One reason is that it pushes the envelope; it forces us to face difficult issues and to try to devise creative answers. We have an outstanding group of panelists, with different perspectives, who will provide some guidance.

The internet is still an unknown quantity. What is the right metaphor for the Internet? What is the Internet really? Is it the wild west? Hackers could be viewed as the Billy the Kids of a new era. Or is the Internet anarchy? Many who have tried it in its fledgling form have concluded—perhaps prematurely—that it is a modern Tower of Babel. A common reaction for first time users is, "I was so excited. I got on it, and five hours later, I had done nothing productive. I talked to two people I did not even like, and I hope I never chat with them again."

Or is this a great moment in history? Perhaps we are shifting communications paradigms, witnesses of the emergence of a new world. Nobody really knows. This is one of the threshold issues our panelists will face—what life on-line looks like. All we know is what we can predict from observing our family and friends on-line, and seeing how it affects their lives.

To a large extent, this panel is premature. Our panelists can only outline potential ways of thinking—not answers, but ways of thinking about this new universe. The choice of a metaphor is difficult, for the following two reasons.

One is that on-line services introduce the possibility of universal information access. Do we want everybody to be able to get on-line? If so, the telephone system provides a likely metaphor. Do

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[12] *Id.* § 502(2) (to be codified at 47 U.S.C. § 223(d)).

[13] *See, e.g.*, 142 CONG. REC. S1646 (daily ed. Mar. 7, 1996) (statement of Sen. Exon); 142 CONG. REC. S1605 (daily ed. Mar. 6, 1996) (Sen. Leahy introducing bill to repeal Exon Amendments); 142 CONG. REC. E153 (daily ed. Feb. 5, 1996) (remarks of Rep. Dornan, characterizing Communications Decency Act of 1996 as a "political favor" to Internet access providers); Thomas R. O'Donnell, *Universities Worry Over Internet Content*, DES MOINES REG., Mar. 6, 1996, Metro Iowa, at 1; William F. Buckley, Jr., *Critics Out to Kill New Decency Law*, BUFF. NEWS, Mar. 4, 1996, at 3B; Amy Harmon, *Lobby Emerging to Fight Restrictions on the Internet; Court: A Civil Suit Filed Against the New Decency Act by a Coalition of 37 Groups Reflects a Mounting Opposition*, L.A. TIMES, Feb. 27, 1996, at D1.

we want to make sure developing countries have as much on-line access as everybody else? Who will pay? And who will control?

Second, in our society, especially American society, we have such a plethora of materials that can go on-line, that once you add universal access to the millions of works that can go on-line, you have many more interesting legal situations than you ever dreamed of. The original hackers' motto is "information wants to be free." That is a very common theme on the Internet, and if it is true, it should change the way we solve legal problems. Universal access and free information add up to one thing: a big, bold invitation to regulate. The issue is whether we are in favor of such regulation, and what should it accomplish if we had it?

Other countries have devised their own answers to these questions, raising some interesting concerns. In Singapore, the government is ensuring that everybody gets on-line.[14] Providing universal access is great for democratization and keeping up with the rest of the industrialized world, but the government may have other reasons for providing this access. In addition to allowing everyone to get a lot of information, the Singapore government now has an efficient means of monitoring and regulating every citizen's activity, thoughts, and expression.

Singapore's government is hoping to stamp out pornography and, at the same time, educate its citizens in the ideas the government promotes.[15] It is a system that hearkens back to the visionary novel, *Nineteen Eighty-Four*, and "Big Brother."[16] Does technological capacity justify increased regulation? That is the question we pose for our distinguished panelists today, who bring interesting and varied perspectives to the question of government control of pornography on the Internet.

[Professor Hamilton introduced the members of the panel.]

MIKE GODWIN:

In 1993, the cover of *Time* magazine featured an article on the information superhighway of 500 channels.[17] The hype about the Internet in 1993 was that it would turn everybody into a publisher.[18] It is 1996, and there is still a big fear that the Internet will

14 Philip Taubman, *Cyberspace in Singapore*, N.Y. TIMES, Nov. 8, 1995, at A24.
15 *Id.*
16 GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949).
17 Philip Elmer-Dewitt, *Take a Trip into the Future on the Electronic Superhighway; A New World of Video Entertainment and Interactive Services will be Available—Sooner than Many Think*, TIME, Apr. 12, 1993, at 50 (cover story).
18 *See id.*

turn everyone into a publisher—how terrible!

Because the Internet is a many-to-many medium, and it puts the power of a mass medium into the hands of anyone who can afford desktop computing machinery, the loci of control normally available with pornography, libel, or copyright infringement no longer exist. It becomes a lot harder to implement policy, because there are fewer choke points to use.

It is also immediately apparent that it is very different from the telephone system, which is obviously not a many-to-many medium. How do you know the telephone system is not many-to-many? Anyone who has ever participated in a conference call knows it is awkward. You never know when anybody is finished, you never know who is running the call; you are just glad when it is over! People in the many-to-many medium of the Internet and other kinds of on-line communications, however, enjoy a superior ability to talk to each other in groups, as well as one-to-one.

Fear of the Internet exists, though, and is manifesting itself in a number of ways. One place you see it is in the area of pornography.[19] There are three fundamental reasons for this. First, this is a pretty new technology, so we are nervous about computers. Second, baby boomers are nervous about children. Third, everyone is nervous about sex. When you put these three topics together, people are very, very nervous. But cyberporn is not the only thin entering wedge. One of the other issues lurking out there is the issue of intellectual property.[20] Recently, the Church of Scientology has made some headlines in advancing intellectual property rationales for silencing some of its critics.[21] They have called one of them a "copyright terrorist,"[22] a term that is difficult to understand. The Church of Scientology also uses a trade secret theory.[23] The question is, who are the Church of Scientology's competitors? If their

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19 *See* Steven E. Miller, *Cyberphobia; Congress has Irrational Fear of Cyberspace*, AUSTIN AMERICAN-STATESMAN, Nov. 17, 1995, at A15; Graeme Browning, *The Sturm und Drang Over Cyberporn*, 27 NAT'L. J. 2660 (Oct. 28, 1995); Jim Exon, *How Congress Can Help Protect Children from Computer Smut*, ROLL CALL, Oct. 23, 1995; *Only Disconnect*, THE ECONOMIST, July 1, 1995, at 16; Chris Allbritton, *Sex, Technology and the Law*, ARK. DEMOCRAT-GAZETTE, June 4, 1995, at 8J.

20 *See generally* Koren, *supra* note 10.

21 The Church of Scientology brought a copyright infringement suit against the Netcom on-line service in Religious Tech. Center v. Netcom On-line Communication Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995). The case received a good deal of media attention. *See, e.g.*, David Hoye, *Drawing a Line in Cyberspace; Group Raising Cries of Censorship as it Tries to Stop Spread of Church Secrets on Net*, STAR TRIB., Aug. 22, 1995, at 1D; David Hoye, *Suit Threatens Cyberspeech; Scientologists Target Internet*, PHOENIX GAZETTE, Aug. 21, 1995, at A1.

22 David Hoye, *Scientology May Muzzle Internet; Online Free Speech Challenged in Suit*, ARIZ. REPUBLIC, Aug. 21, 1995, at A1.

23 Trade secrets are a form of property. One characteristic of a trade secret is that it

secrets get out to the Catholics, will the Catholics get a greater market share? This is an illustration of how difficult it is to pick the right metaphor for the Internet. Thomas Kuhn, in *The Structure of Scientific Revolutions*,[24] discusses the notion of paradigm shift. Kuhn notes that there is really a revolution, a paradigm shift, when everybody who knows the old stuff has died and you are left with everybody who has grown up with the new stuff.[25] One of the things the law does, especially the common law, is it builds on our understandings of previous media. The telephone system and the telegraph system were grounded in such an understanding. They are based on a concept called "common carriage,"[26] which in turn was grounded in an understanding of how to run railroad systems and stagecoaches. It is understandable why they chose that metaphor at the time. Most people grew up with the telephone, though, and nowadays most people never think of stagecoaches when picking up the telephone. Metaphors are a way of bridging understanding and take you to the point where you are finally comfortable with the technology. That is what our society is facing now, because in Congress, and elsewhere, we are seeing attempts to regulate the Internet as if it were just like the phone system, movies, or newspapers.

The Internet, though, is not "just" like anything. One of the dilemmas we must face right now is a very fundamental issue. What, if any, regulatory regime should be imposed upon network communications?

Congress has considered a large amount of indecency regulation.[27] What is "indecency?" One could say the term has no meaning at all, because it has never had a qualified statutory or court definition. It seems to be something like pornography.[28] It is different from obscenity, though, because it is legal. It troubles us, and we do not want our kids to have it, especially on television, radio, or through a phone sex service. The concept of "indecency" derives from a very narrow carve-out, having to do primarily with broadcast media, from the broad First Amendment protection. There are people who are uncomfortable with the fact that the

provides a competitive advantage to its owner. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1012 n.15 (1984).

24 THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1974).

25 *Id.*

26 *See* Amtrak v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 453-55 (1985).

27 *See, e.g.*, Communications Decency Act of 1996, *supra* note 11.

28 The twenty-nine word definition of indecency was created by the FCC. For background on indecency regulation, see John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329, 333-43 (1989).

carve-out in this area is so narrow. The anti-porn activists, for example, are quite willing and eager to extend the much broader content control seen in television, radio, and phone sex services.[29] They would like to have content control with all media. If they cannot have it with all media, though, they at least want to have it with the Internet, because the Internet is frightening to us. It is frightening for the three reasons mentioned previously—children, computers, and sex.

This is very disturbing, because for the first time in the history of our country we have a medium that makes the promise of freedom of the press come true—potentially for every individual. For five hundred dollars, or less, in capital and physical plant, an individual can reach audiences of hundreds of thousands, or perhaps even millions. This is a fundamental change, and it is very scary because it is so fundamental. In addition to this fear, there are a lot of people talking about the validity of government regulation and the efficiency of government regulation.[30] The fact is, while there are people who are quite willing to be laissez-faire about economic regulation, they want to have plenty of big government when it comes to social legislation.[31] Some of these people are on the religious right, and some are on the left, but certainly, the pornography wedge is pretty important. One thing these people rely on, in seeking support for this regulation, is the fact that when it comes to children, sex, and computers, it is hard to get people to always think clearly about these issues.

Typically, when you argue about these issues with someone in the media, or you argue with them face-to-face, their first response is to say something like this: "I am really afraid that my child is going to log in, and there is going to be some unsolicited sexual content that floods across the screen that offends or damages my child." This is a perfectly reasonable fear when it comes from someone who doesn't know the Internet, or who believes what the press and TV have been saying about it. But the Internet is the most programmable and filterable technology that we have ever had. Filtering computer content is not like the V-chip Congress approved for television, which requires a new television to make

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29 *See* John Schwartz, *Dispatches from the Cyber Front; In the Battle Against Internet Censorship, Brock Meeks is On-line in the Trenches*, WASH. POST, Mar. 16, 1996, at D1; Editorial, *Government's Indecency*, DET. NEWS, Feb. 18, 1996, at B2.

30 *See, e.g.*, Mike Mills & John Schwartz, *Judge Blocks On-Line Smut Law Enforcement; Order Sparks Confusion Over Definition*, WASH. POST, Feb. 16, 1996, at B1; *The Accidental Superhighway*, THE ECONOMIST, July 1, 1995, at S3.

31 *See* Ed Quillen, *Let's Retire the Word 'Conservative,' Because it Means Nothing*, DENV. POST, Feb. 18, 1996, at E-3.

use of it.[32] Internet users can program their existing computers to either filter out most offensive material or to work as a gatekeeper, admitting only e-mail from friends and relatives and selected news groups, topics, or discussion areas.[33] The same worried parents may say, "well, my child is really bright, and she is going to figure out a way to get around that." There is a logical disconnect in this argument. The first part of the argument perceives children as "innocent," passive recipients of dangerous material. The second part of the argument views children as clever hackers, who are able to get around anything parents want to do to block their access.

As far as children being passive recipients of this material, the Internet can be made safer than Disney World. As far as children being clever enough to get around protective barriers, if children really want to get around restrictions, they will do it, and parents cannot always stop them. No matter how clever a parent is in blocking out offensive material, children will go over to the next door neighbor's computer and find it. But if you teach your child to disapprove of porn, and you use those filtering tools, the already small chance that your child will spend some afternoon viewing porn on his computer becomes infinitesimal.

There are several concepts that tend to get blurred together in the course of this debate. The first is the issue of what pornography is. In general, pornography is material that presents sexual content of some sort with the intent to arouse.[34] *Playboy* and *Penthouse* qualify, and like other uses of the press, this material is presumptively legal under the First Amendment.[35] To be illegal, pornography must be either obscene or child pornography.[36] If it does not fall into either category, it is no more illegal than a Muppets movie.

Even nonlawyers know that "obscenity" has something to do

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[32] For a discussion of the V-chip and the recent telecommunications law, see Bill Keveney & Donna Larcen, *The New Letter of the Law; V-Chip; Now It's Up to Parents and Children to Decide How It's Going to Work Out*, HARTFORD COURANT, Feb. 15, 1996, at E1.

[33] George Avalos, *Limbaugh E-Mail Deluge Shows Internet's Prankster Potential*, ORANGE COUNTY REG., Mar. 17, 1996, at A24; Paul M. Eng, *Surfing's Biggest Splash?*, BUS. WK., Mar. 11, 1996, at 86; David D. Busch, *The Suite Smell of Access—Integrated Application Suites will Let You Finally Take Full Advantage of the Net*, NET GUIDE, Apr. 1, 1995.

[34] *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT 227 (1986) (defining central terms), 249 (modern history of obscenity law), 405 (child pornography).

[35] *See generally* Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589.

[36] *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 252 (1990) (Scalia, J., concurring in part and dissenting in part) ("Communities cannot close down 'porn-shops' by banning pornography (which, so long as it does not cross the distant line of obscenity, is protected) . . . ."). In New York v. Ferber, 458 U.S. 747 (1982), the Court made clear that child pornography is distinct from pornography involving adults and, like obscenity, is unprotected.

with community standards. There also has to be a state statute, describing certain kinds of forbidden acts.[37] And there are also community standards involving what a reasonable person perceives as patently offensive material.[38] There is an escape clause, however, which makes an exception for material with serious literary, artistic, or social value.[39]

The obscenity statute is conflated with areas of child sexual abuse, child pornography, child seduction, and exposure of children to inappropriate material. Child pornography is very interesting, because the only reason child pornography laws have withstood constitutional scrutiny is because they have been prohibitions on conduct rather than content.[40] If material is based on the actual sexual abuse of a child, it is illegal, and it does not matter what the community standards are, or if the material has serious literary, artistic, or social value.[41] In the interest of protecting children, the government can ban this material, because society wants to destroy the market for it. The Supreme Court has taken pains to try to construe the child pornography exception to the First Amendment narrowly,[42] while Senator Orrin Hatch (R-Utah) wants to expand the child-pornography statute to include what we might call "virtual child pornography."[43]

With virtual child pornography, the creator uses his computer to edit the image and make child pornography out of something that did not originally involve a child. Senator Hatch wants to

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[37] *See* Miller v. California, 413 U.S. 15, 23-24 (1973) (establishing test for determining obscenity); *see also* William K. Layman, *Violent Pornography and the Obscenity Doctrine: The Road Not Taken*, 75 GEO. L.J. 1475, 1486 (1987).

[38] *Miller*, 413 U.S. at 23-24.

[39] *Id.*; *see* Layman, *supra* note 37, at 1486.

[40] *See Ferber*, 458 U.S. 747 (establishing nonobscene child pornography is unprotected expression). Although the Court in *Ferber* discusses the statute in question as a content-based issue, *id.* at 763-64, some commentators, see, e.g., JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.61(b) (5th ed. 1995), as well as the Court itself, have subsequently interpreted child pornography prohibitions as based on conduct rather than content. *See* Osborne v. Ohio, 495 U.S. 103, 112-14 (1990).

[41] *See Ferber*, 458 U.S. at 761 ("[T]he question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work."); *see also infra* note 48 (state child sexual abuse laws). For a thorough discussion of the *Ferber* case, see generally Frederick Schauer, *Codifying the First Amendment*: New York v. Ferber, 1982 SUP. CT. REV. 285.

[42] *See* United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994); *Osborne*, 495 U.S. 103.

[43] 141 CONG. REC. S13,542 (daily ed. Sept. 13, 1995). Sen. Hatch introduced the Child Pornography Prevention Act of 1995, S. 1237, 104th Cong., 1st Sess. (1995), which would expand the child pornography statute in this manner. The bill is currently in committee. *See* David Johnston, *Use of Computer Network for Child Sex Sets Off Raids*, N.Y. TIMES, Sept. 14, 1995, at A1 (discussing S. 1237); *Bill Would Ban Child Porn Generated by Computers/Hatch Introduces Proposal in Senate*, S.F. CHRON., Sept. 14, 1995, at A1.

make this illegal too under the child pornography statute, even though this does not involve the actual sexual abuse of a child.[44] Senator Hatch asserts that this material would not otherwise be covered by federal law.[45] But virtual child pornography would still be covered by federal obscenity law,[46] even if it was not covered by the child pornography statute.[47] There are not too many communities whose standards allow for explicit pictures of children having sex with each other. The community standards provision of the federal obscenity law would seem to ensure that the types of content Senator Hatch says are currently legal would not in fact be legal.

Child sexual abuse is illegal in every jurisdiction of the country.[48] Child seduction often gets conflated with adult and child pornography on the theory that child seducers and child abusers use this material to seduce children. This may or may not be true, but child sexual abuse predates the liberalization of pornography laws.[49] In fact, sometimes children can be seduced by nothing more dangerous than a suggestion that "we meet at the corner for an ice cream cone" or "just to talk." If parents instruct their children not to meet with strangers,[50] nobody will ever be able to reach through the computer monitor and grab their child.

Indecency is a term that has never been defined by the Supreme Court, even though the Court discussed it quite a bit in *FCC v. Pacifica Foundation*.[51] Justice Stevens's attempt to define it won no more than two votes from the other Justices, so nobody

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44 S. 1237, *supra* note 43, § 3 (" 'Child pornography' means any visual depiction, including any . . . computer or computer-generated image or picture . . . of sexually explicit conduct . . . where the production of such visual depiction involves the use of a minor . . . .").

45 *See supra* note 43. Sen. Hatch introduced S. 1237, *supra* note 43, to address this perceived gap.

46 18 U.S.C. §§ 1461-1463 (1994).

47 *Id.* § 2252 (1994).

48 *See, e.g.*, ALA. CODE § 13A-6-66 (1995); ALASKA STAT. §§ 11.41.434, 11.41.436, 11.41.438, 11.41.440 (1995); ARIZ. REV. STAT. ANN. § 13-604.01 (1995); DEL. CODE ANN. tit. 16, § 902 (1995); D.C. CODE ANN. §§ 22-4103, 22-4108, 22-4109 (1995); GA. CODE ANN. § 19-14-2 (1995); IDAHO CODE § 18-1506 (1995); 720 I.L.C.S. §§ 5/11-6, 5/12-15 (Michie 1995) (Illinois); IOWA CODE ANN. §§ 709.1, 709.3, 709.8, 709.12, 709.14 (West 1995); KY. REV. STAT. ANN. § 510.110 (Baldwin 1996); ME. REV. STAT. ANN. tit. 17-A, § 254 (West 1995); MO. ANN. STAT. § 566.100 (Vernon 1996); N.M. STAT. ANN. § 32A-4-2 (Michie 1995); N.Y. PENAL LAW § 130.70 (McKinney 1996); OKLA. STAT. ANN. tit. 10, § 7006-1.1 (West 1996); OR. REV. STAT. § 163.427 (1994); TENN. CODE ANN. § 33-6-301 (1995); *see also* MODEL PENAL CODE §§ 213.3, 213.4.

49 *See* Marianne Szegely-Maszak, *Who's to Judge?*, N.Y. TIMES, May 21, 1989, § 6 (magazine), at 28.

50 The National Center for Missing and Exploited Children has some excellent guidelines, which are available on America Online and just about every other on-line system.

51 438 U.S. 726 (1978) (establishing that broadcast indecent speech is not entitled to as much protection as traditional speech and press).

actually knows what it means. Indecency has never been statutorily defined, and it is also questionable whether putting content controls in the hands of unelected bureaucrats of the FCC is wise in this era of suspicion about government efficiency.

This really is the first time in history that the power of a mass medium has been in the hands of potentially everybody. This is an immense opportunity for an experiment in freedom of speech and democracy. It is the largest scale experiment in freedom of speech and freedom of the press that the world has ever seen. It is up to us not to screw it up.

[Professor Hamilton introduced Mr. Kurnit.]

RICHARD A. KURNIT:

The *Stratton Oakmont*[52] litigation experience is both edifying and relevant to the problems with the Internet. Clearly, what we are dealing with is making virtually everyone a publisher.[53] Certainly, if a person has access to a university, she can widely publish without having access to her own modem. Through the Internet, individuals now have the ability to publish and widely disseminate their views without the resources of a university. All of this makes judges very uneasy. Judges deal with responsibility, and with the burden of attempting to do justice. In the past, if there was a publisher, it was likely that that publisher had some resources, the funds to publish, and conceivably even some income stream. This meant judges could have some comfort in the thought that there was, as much as the legal system can provide, a remedy in the sense of some money, to impose a sense of responsibility. The new media does not quite fit this. Anonymous individuals, and individuals who would have been without the means under the old media, now have the opportunity to widely disseminate their views. This bothers judges.

Stratton Oakmont concerned a posting on a Prodigy bulletin board that made some accusations about Stratton Oakmont. Counsel for Stratton Oakmont brought an action for a temporary restraining order, a prior restraint, and an injunction against libel. The people on this panel would find that somewhat amusing. The jurisprudence we live under does not recognize a right to enjoin a libel.[54] Furthermore, prior restraints, unless of course it involves

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[52] Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (Sup. Ct. May 24, 1995). *See* Peter H. Lewis, *Libel Suit Against Prodigy Tests On-Line Speech Limits*, N.Y. TIMES, Nov. 16, 1994, at D1.

[53] *See supra* text accompanying note 18.

[54] *See* Near v. Minnesota, 283 U.S. 697 (1931).

Procter & Gamble in Cincinnati,[55] are not to be granted.[56] Nonetheless, the judge in *Stratton Oakmont* did not know this. The plaintiff's lawyer, a securities lawyer, did not know this, and prior counsel for Prodigy seemed not to know it. As a result, the lawsuit focussed on the question of what are the technical capabilities of the system to respond to such a temporary restraining order.[57] This is kind of an exercise in Zen philosophy. The result was that the court granted partial summary judgment to Stratton Oakmont, concluding that an on-line service provider should be held responsible for what subscribers post on a bulletin board that service provides.[58]

The lesson is one that concerns me, as I am totally averse to any kind of limitation on the marketplace of ideas and on speech. The lesson is that unless some means is developed by the on-line industry, the Internet, to provide some protection with respect to this nervousness, we are going to find that there is a huge opening for regulation based upon protecting children. Politically, in the next several years we will have to contend with the religious right and its goals of protecting children and family values.[59] I certainly believe that government is the last place any kind of regulation should come from. Every time governments have tried to regulate, they have done it in the worst way possible. This raises a question that many devotees of the Internet find offensive in itself: whether there should be some type of self-regulation on the Internet or some way to make it more manageable. I do not have an answer to this question, but I have some thoughts on the issue.

The subtext of the *Stratton Oakmont* litigation is how far can an on-line provider go in regulating a bulletin board before courts will consider the provider the author and responsible party? Prodigy has voluntarily instituted a mechanical screen on its bulletin board that picks up obscene words. The system also screens out certain designated epithets and informs its subscribers when statements

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55 *See* Deirdre Carmody, *Magazine Pulls Article Under Order*, N.Y. TIMES, Sept. 15, 1995, at A16.

56 *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); New York Times Co. v. United States, 403 U.S. 713 (1971) (heavy burden for prior restraint).

57 *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229, at *7 ("[T]he critical issue . . . is whether . . . PRODIGY exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper.").

58 *Id.* at *13.

59 *Family Values, Christian Values: A Roundtable Discussion*, CHRISTIAN CENTURY, Jan. 31, 1996, at 104; Laurence I. Barrett, *Imposing Vision; Ralph Reed's Gambit for the Christian Coalition is Consistent with the Religious Right's Overall Goal—To Impose its Vision of Morality on the Nation. The Republican Party is the Chosen Vehicle*, SUN-SENTINEL (Ft. Lauderdale, Fla.), May 21, 1995, at 2G.

posted on bulletin boards are harassing, threatening, or promoting illegal conduct. Statements that are completely off-topic may also be deleted. An effective bulletin board must be policed in some way, because it is really quite simple for any group to decide to co-opt a bulletin board. For example, the Scientology people might find it amusing to take over a bulletin board devoted to the Catholic church. Those devotees of the Catholic church who want to talk about issues for the church will then leave that bulletin board. If an on-line service allows this, does it become a publisher? The argument we made in the Prodigy case is that the provider does not become the publisher for purposes of defamation.[60] Defamation law deals with responsibility, and the essence of defamation law, in terms of the publisher's responsibility, arises from two places. First, the publisher responsible for defamation is one who adopts or endorses the author's statements; he chooses to publish that particular author.[61] Second, the fundamental justification for holding a publisher responsible for an author's actions is the idea of "last clear chance." The publisher does have the ability to stop the publication before it is made. Neither of these rationales apply to an on-line provider of a bulletin board. Therefore, the on-line provider of the bulletin board should not be held responsible for what people put on the bulletin board.

That leaves us with the question of who should be responsible. One possible solution is for an on-line service to provide its services in a capacity that has the kind of blocking that most parents are not capable of programming themselves. The problem with telling people they can program their computers to limit their children's access to the Internet is the child usually does the programming and teaches the parent how to get on the Internet. Frequently, children are the primary computer users.[62] On-line providers can give people Internet access and on-line services designated for different family members.[63] A child may still hack through the code put in, but at least parents are empowered to have some control over what children can access to the extent that the industry provides a means to control access. This provides a strong argument that can give judges some comfort in deciding who is responsible:

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[60] *See Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229, at *6-7 ("A distributor or deliverer of defamatory material is considered a passive conduit and will not be found liable in the absence of fault.").

[61] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[62] *See* Kerry Fehr-Snyder, *In the Shadows; Women Struggle to Compute Equally in Male-Driven Field*, PHOENIX GAZETTE, Mar. 28, 1994, at C1.

[63] Chris Gray, *Pedophiles Find Lurid Haven on Internet; Online Lacks Restrictions*, TIMES-PICAYUNE (New Orleans), Feb. 26, 1995, at A1.

the parent. It also demonstrates why it is not necessary for the courts or Senator Exon to impose liability or come up with their own ways of structuring the Internet. Many people who believe in the open marketplace of ideas do not like the idea of the industry taking this kind of action. I simply suggest that if there is no other means to ameliorate that kind of responsibility, it is a problem.

Clients who have gone on the Internet magazines always ask, "What kind of a contract or disclaimer or specification should we put up, as far as people participating in chats and on-line services?" I usually suggest something that says, "Your use of this bulletin board is subject to your agreement not to post or transmit any unlawful, harmful, threatening, abusive, harassing, defamatory, vulgar, obscene, profane, hateful, racially, ethnically or otherwise, objectionable material; including, but not limited to any material which encourages conduct that would constitute a criminal offense, violates the rights of others, or otherwise violates any applicable law." After I tell these clients that this is what they should put up, they come back to me and say, "our editorial people absolutely and categorically refuse." This is not surprising, because I remember about fifteen years ago when *Playboy* refused to take condom ads. I represent advertising agencies and had a client who wanted to advertise in the time before AIDS, when condoms were not merely and exclusively used to prevent illness. We said to the people at *Playboy*, "You have the Hugh Hefner, *Playboy* philosophy of responsible sex? How can you possibly, of all people refuse this?" Their answer was, "It is our policy not to accept any advertising that would disturb the euphoria of the reader." Similarly, getting these kinds of statements about responsibility on the Internet is problematic.

MARCI A. HAMILTON:

Richard Kurnit is a hard act to follow. Trust me, however, when I say that Barbara Woodhouse will offer a fascinating alternative perspective. Barbara is currently a professor of law at the University of Pennsylvania Law School and, like myself, a former clerk to Justice Sandra Day O'Connor. She is also a widely known expert in the area of family law. She has advocated a child-centered perspective theory which is sure to rattle some of our civil libertarians's perspectives up here tonight.

BARBARA BENNETT WOODHOUSE:

My work as an advocate for children is not directly connected

with the question of free speech on the Internet. It is important, however, to bring some outside perspective to this discussion. While I have very little experience dealing with graphic depictions of children engaged in sexual activities, I am extremely knowledgeable about actual cases of child sex abuse. At the University of Pennsylvania Law School, I teach a class called "Child, Parent, and State." This course focusses not on the interaction of First Amendment artistic expression and depictions of child sexuality, but on how to deal with cases of neglect, physical abuse, and sexual exploitation of children.[64]

Such conduct is clearly illegal. There are a tremendous number of federal[65] and state laws[66] prohibiting sexual exploitation of children. The U.N. convention on the rights of the child also prohibits their sexual exploitation.[67] Nonetheless, though these laws exist, they are broken every day. Since the statistics on child abuse are hotly contested, I will use the very lowest estimate, which looks only at the substantiated cases.[68] In the United States alone, there are almost 130,000 substantiated cases of child sexual abuse in a given year.[69] In one study of women who were abused as children, sixty-two percent reported that they were involved in some kind of coercive sexual encounter during their childhood.[70] In Philadelphia, where I work with young lawyers representing children, parents, and the state, a large percentage of state protective interventions now involve child sex abuse. Statistics show that ten is the modal age for child sexual abuse and that twenty-five to thirty-five percent of child sexual abuse cases involve children

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64 The classic definition of sexual abuse was offered by Henry Kempe as "involvement of dependent, developmentally immature children and adolescents in sexual activities they do not fully comprehend, to which they are unable to give informed consent, or that violates the social taboos of family roles." Roger J.R. Levesque, *Sexual Use, Abuse and Exploitation of Children: Challenges in Implementing Children's Human Rights*, 60 BROOKLYN L. REV. 959, 988 n.149 (1994) (quoting Henry Kempe, *Incest and Other Forms of Sexual Abuse, in* THE BATTERED CHILD 198 (Henry Kempe & Ray E. Helfer eds., 1980)).

65 18 U.S.C. § 2252.

66 *See supra* note 48.

67 United Nations Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, U.N. GOAR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/736 (1989), *reprinted in* 28 I.L.M. 1448 (1989). *See* LAWRENCE J. LEBLANC, THE CONVENTION ON THE RIGHTS OF THE CHILD: UNITED NATIONS LAWMAKING ON HUMAN RIGHTS 124-30 (1995).

68 Substantiated cases are cases where there has been a report of child sexual abuse and it has been verified on follow-up investigation. "Unsubstantiated" does not mean no sexual abuse occurred. It means that the report could not be verified by competent evidence. [Remarks of Barbara Bennett Woodhouse.]

69 In 1992, the National Center on Child Abuse and Neglect reported 918,263 substantiated cases of child maltreatment, of which 14% involved sexual abuse. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 1992: REPORTS FROM THE STATES TO THE NATIONAL CENTER ON CHILD ABUSE AND NEGLECT 14 (1994).

70 SANDY K. WURTELE & CINDY L. MILLER-PERRIN, PREVENTING CHILD SEXUAL ABUSE: SHARING THE RESPONSIBILITY 1-3 (1992).

under seven.[71]

This is the unfortunate reality exposed by the studies and cases we read in my classes—cases we would rather believe could never happen. So, I come to this symposium as something of a voyager from another country—a country in which rape and sodomy of children are not mere images but are actually *happening* to seven-year-olds on a daily basis. What perspective can I bring to this discussion? I will try to focus on the First Amendment, the Internet, and the regulation of the Internet from the *children's* perspective.

One of the articles I came upon in preparing for this panel is an article by Cass Sunstein called *Half-Truths of the First Amendment.*[72] I loved the title of it so much, I thought I would grab it for myself. This title appropriately defines my perspective. Looking at the current debates, I detect a number of half-truths, and I see the danger of swallowing these half-truths whole.

The first half-truth is that it is the parent's, not the government's, responsibility to police the consumption of pornography by children. In our society, parents definitely have the first-line authority and obligation to police, review, or guide their children regarding the kind of materials they read or view on TV or the Internet. However, in my writing I have urged that we avoid the trap of applying economic laissez-faire principles to family policy. I have argued that we *all* have an obligation to take care of poor and hungry children. We also have an obligation to take care of children who need immunizations and children whose parents are inadequately caring for them.[73] As you can see, I do not believe in laissez-faire when it comes to families or that parents singlehandedly must take care of their children without any social or societal support.

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[71] Prevalence reports, which measure the percentage of the population reporting sexual victimization in childhood, consistently show that 25% to 30% of sexually abused children are under the age of seven. The modal age of such abuse is ten years. N. Dickon Reppucci & Jeffrey J. Haugaard, *Problems with Child Sexual Abuse Prevention Programs, in* CURRENT CONTROVERSIES ON FAMILY VIOLENCE 306 (Richard J. Gelles & Donileen R. Loseke eds., 1993).

[72] Cass R. Sunstein, *Half-Truths of the First Amendment,* 1993 U. CHI. LEGAL F. 25. Sunstein argues that the law of free speech is based on half-truths which distort important issues and ultimately disserve the system of free speech. His four most important half-truths are: (1) The First Amendment prohibits all viewpoint discrimination; (2) The most serious threat to the system of free expression consists of government regulation of speech on the basis of content; (3) Government may subsidize speech on whatever terms it chooses; and (4) Content-based restrictions on speech are always worse than content-neutral restrictions on speech. *Id.* at 25.

[73] *See generally* Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property,* 33 WM. & MARY L. REV. 995 (1992) (analysis of children's rights movement and the private versus the public child); Barbara Bennett Woodhouse, *Children's Rights: The Destruction and Promise of Family,* 1993 B.Y.U. L. REV. 497.

At this point, I should also interject that I am not coming to you from the Christian Coalition.[74] In fact, I just finished testifying against a piece of legislation, the Parental Rights and Responsibilities Act of 1995,[75] that the Christian Coalition strongly supports as part of the "Contract with the American Family." I oppose this bill because it undercuts the existing public/private partnership in protecting children and tends towards the privatization of children. It is aimed at empowering parents to control what ideas their children are exposed to in public schools and libraries. It is predicated upon the belief that my children are *my* responsibility; your children are *not* my responsibility. As Americans, we need to move beyond the privatization of children and take a collective responsibility for America's children. And that includes setting up some kind of community standard that protects all of our children from exposure to harm.

The second half-truth is that the Internet is different. The Internet is very different from other media of communication and I know that from merely playing on it myself. Today, we heard people who told us exactly why the Internet is different. That seems, however, not to call for complete deregulation, but for adopting a real sense of caution and hesitancy in how one goes about designing suitable regulations. In other words, I am not on the Exon side,[76] but I may be on the side of those Congresspersons who say:

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74 The Christian Coalition was founded in 1989 by Pat Robertson. It is made up of 1.8 million religious conservatives and supporters. The Christian Coalition made the protection of children from computer pornography the first plank in its ten point "Contract with the American Family." *See* Joannie M. Schrof et al., *Speak Up! You Can be Heard!*, U.S. NEWS & WORLD REP., Feb. 19, 1996, at 42 (cover story).

75 In 1995, the Christian Coalition began calling for laws and constitutional amendments guaranteeing "parental rights" so that parents could raise their children without governmental interference. Their efforts resulted in the introduction by Sen. Charles Grassley (R-Iowa) of the Parental Rights and Responsibilities Act of 1995, S. 984, 104th Cong., 1st Sess. (1995). *See infra* note 124 and accompanying text; *see also* John R. Cole, *The New "Parental Rights" Crusade by the Religious Right*, THE HUMANIST, Mar. 1996, at 41. For a description of other political positions supported by the Christian Coalition, see *Contract with the American Family*, FACTS ON FILE WORLD NEWS DIGEST, Sept. 28, 1995, at 715 A1, *available in* LEXIS, News library, Facts file.

76 The Communications Decency Act of 1996 is found in Title V of the Telecommunications Competition and Deregulation Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. at 133-35. It prohibits the transmission of "obscene, lewd, lascivious, filthy, or indecent" material by means of telecommunications device to any other person. *Id.* § 502(1). The Act also forbids the initiation of any "comment, request, suggestion, proposal, image, or other communication" to any person under the age of 18 regardless of whether the communication was prompted by that person. *Id.* The Act places liability on the individual service provider who, "with the intent that it be used for such activity," knowingly permits any of the above activities to occur on their services. *Id.* Simply stated, the Communications Decency Act makes it a crime to transmit or allow indecent material to be transmitted over public computer networks to which minors have access. The Act authorizes the government to restrict on-line speech and conduct. *See* Peter H. Lewis, *Protest, Cyberspace-Style, for New Law*, N.Y. TIMES, Feb. 8, 1996, at A16; Richard Raysman and Peter Brown, *Regulation of*

Study this new medium carefully before you do anything.

I was particularly interested in Rick's comments about the need to tailor laws to the special context of the Internet. We cannot simply take a law that applies in one context, slap it down in another, and expect it to work. However, the Internet and the World Wide Web are going to become a feature not only of our children's lives but of our grandchildren's lives. We cannot afford to step back and say that this technology is something we simply cannot control. And while we must recognize the differences between other media and the Internet and the World Wide Web, regulation is a reality we are going to have to grapple with sooner or later.

The third half-truth is that children cannot be victimized unless a particular child is photographed. I have heard people argue that legal regulation of sexualized depictions of children is only justified as a measure to protect the specific child being photographed. This issue comes up in the context of virtual reality and digitized images—creating an image depicting a child sexual abuse situation where there is no real child involved. The pornographic image is entirely a technological creation.

First Amendment case law has tended to focus on the state's interest in preventing or punishing harm to the specific child photographed or whose image was being disseminated.[77] In the con-

On-Line Services, N.Y.L.J., Aug. 22, 1995, at 3. When Sen. Exon introduced the Communications Decency Act, he stated, "I want to keep the information superhighway from resembling a red light district." Sunanda K. Datta-Ray, *Policing the Net*, STRAITS TIMES (Singapore), June 24, 1995, at 32.

[77] *See, e.g., Ferber*, 458 U.S. 747. The Court stated that "[t]he legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." *Id.* at 758. "[The pornographic] materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." *Id.* at 759. The Court further stated:

> [P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go throughout life knowing that the recording is circulating within the mass distribution system for child pornography.

Id. at 759 n.10 (quoting David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981) (footnote omitted)).

See also Osborne, 495 U.S. at 111 ("[T]he materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victim's continuing harm by haunting the children in years to come."); United States v. Knox, 32 F.3d 733, 749 (3d Cir. 1994) ("The use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. . . . The crime is an affront to the dignity and privacy of the child and the exploitation of the child's vulnerability . . . ."), *cert. denied*, 115 S. Ct. 897 (1995); United States v. Andersson, 803 F.2d 903, 907 n.3 (7th Cir. 1986) ("[T]he State's interests in regulating child pornography are radically different than those in regulating obscenity. The State's primary con-

text of digitized images, however, we are dealing with a completely new technology that poses a new question: can children be victimized by sexually explicit depictions of other children? I will be surprised if the Supreme Court, faced with such a case, fails to recognize some level of protection for children as a class against vivid wholesale depictions of acts that would be harmful if they involved a specific flesh and blood child instead of a digitized image.

Again, I think the Internet is different. It forces us to deal with this question of the harm to all children from sexual exploitation of images of children. I am sure I disagree with everyone on this panel in believing that such depictions risk the desensitization of taboos against sexual activity with children. A recent study by the Justice Department found that one third of sexual predators convicted of child sexual abuse use child pornography for arousal. To resolve these areas of disagreement, we need a tremendous amount of empirical research, and we have not had adequate research because sexual activity with children is a silent and secretive kind of crime.

Last, a fourth half-truth is this notion that if we cannot draw a clear bright line between art and exploitation, we must treat all sexual speech as equally protected. Recently, I co-organized and attended a conference at the University of Pennsylvania on "Women, Sexuality and Violence." At this conference, one panel was devoted to artists discussing the need to protect art from invasive regulations. The panel focussed on the difficulty of deciding what is and what is not pornography. You all know the image of the Coppertone girl with her bikini bottom being pulled down by the puppy. This was one of the images that was broadcast on the screen at the panel to illustrate the difficulty of defining child pornography.[78] The panelists also projected several Sally Mann photographs which were, while both fascinating and troubling, undoubtedly very high art.[79] The panel discussion stressed the

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cern is protecting the child participants from that type of sexual abuse."), *cert. denied*, 479 U.S. 1069 (1987); Rhoden v. Morgan, 863 F. Supp. 612, 618 (M.D. Tenn. 1994) ("In the child pornography context, the State is primarily concerned with protecting children from sexual abuse, both when the films or photographs are initially produced and when the films or photographs are distributed.").

[78] In 1953, Coppertone introduced the "Coppertone Girl" on a bulletin board in Miami. A decade later, the advertisement was broadcast, depicting a little girl in a bathing suit being pulled by a puppy, as she utters "Don't be a paleface!" and "Tan—don't burn." The "Coppertone Girl" advertisement series became the centerpiece of a campaign which made Coppertone the nation's largest selling and most recognized sun care product. *See The Bottom Line*, THE ECONOMIST, Sept. 14, 1991, at 33. Jodie Foster made her screen debut at age three as the Coppertone Girl. Martha Sherrill, *The Reign of Jodie Foster: Offscreen, She's in Charge. On Camera, She's Learned Not to Be*, WASH. POST, Dec. 25, 1994, at G1.

[79] *See* SALLY MANN, IMMEDIATE FAMILY (1992); Richard B. Woodward, *The Disturbing Pho-*

gray areas of judgment implicated in these kinds of images and we never did get to the third kind of image, the explicit or hard core images that are making many reasonable people nervous. I *do* feel that we *can* tell the difference between the Coppertone child and the very different images in the magazines seized during police searches of homes of persons caught sexually abusing children.[80]

We must balance the cost of complete social separation from any regulation of images of sexuality having to do with children and the benefits of free expression. I appear before this panel as a messenger bearing a note of caution. From children's perspective, it is a bad time to be pushing the envelope on sexualized images of children and I will tell you why. On one side, children face the conservative taxpayers' backlash against public support for children's programs and, on the other, a backlash against children among people who want to weaken legal protections against sexual abuse because they do not believe children's reports; yet, the statistics that I cited to you prove that child sexual abuse is not a figment of conservative hysteria. It is real. Perhaps we are approaching a point of social problem fatigue where it just seems too exhausting and complicated and ambiguous to deal with the sexual exploitation of children. The World Wide Web and the Internet could be part of a tremendous growth and the solution to many of our children's problems of communication.[81] Or they could be misused by extremists on either side.

There is a danger to advocates of free expression in failing to acknowledge some of the half-truths. Free expression will be safer if we are forced to regulate expression that ought to be protected

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tography of Sally Mann, N.Y. TIMES, Sept. 27, 1992, § 6 (magazine), at 29. Mann's work includes several controversial photographs of her seven-year-old son and four-year-old daughter in the nude. The work captures the fine line in the debate between what is obscene and subject to regulation, and what is free expression. For example, in response to the photos, Raymond Sokolov of the *Wall Street Journal* asserted that Mann's depictions were coequal national security threats to the Gulf War, and therefore, subject to media blackout. Raymond Sokolov, *Critique: Censoring Virginia*, WALL ST. J., Feb. 6, 1991, at A10; *see* Connie Samaras, *Feminism, Photography, Censorship, and Sexually Transgressive Imagery: The Work of Robert Mapplethorpe, Joel-Peter Witkin, Jacqueline Livingston, Sally Mann, and Catherine Opie*, 38 N.Y.L. SCH. L. REV. 75, 91 (1993).

[80] *See, e.g.*, *Ferber*, 458 U.S. 747. In this case, an owner of a bookstore sold two films almost exclusively depicting young boys masturbating. The Supreme Court noted that "such magazines depict children, some as young as three to five years of age . . . . The activities range from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sado-masochism." *Id.* at 749 n.1 (quoting S. REP. No. 438, 95th Cong., 1st Sess. 6 (1977)).

[81] For example, the Internet already is being used in creative ways that help children, such as Starbright Network's provision of virtual reality play spaces for lonely children confined in hospitals. *Morning Edition* (National Public Radio broadcast, May 5, 1996).

because we cannot find any middle ground between overregulation and the unacceptable alternative of no regulation at all.

MARCI A. HAMILTON:

Thank you very much, Barbara. Our fourth speaker is Nadine Strossen, president of the American Civil Liberties Union ["ACLU"] and professor at New York Law School. She is a national expert on civil liberties. Her most recent book is short-titled *Defending Pornography*.[82] I reviewed it[83] and think that she has effectively challenged Catharine MacKinnon's and Andrea Dworkin's theories about the suppression of pornography.[84] At the end of my review, however, I had to add a sentence in which I said, we now know the civil libertarian perspective, and we know the MacKinnon perspective; but we still don't know what either side would do about children and pornography.[85] And so, Nadine.

NADINE STROSSEN:

Well, I have to say I gave heartburn to the media relations staff at the ACLU when I wrote a book about the provocative subject of pornography. If I wrote a book about the even more provocative subject of child pornography, they would be even more fraught with anxiety! In fact, my book deliberately focusses on consenting adults, because the issues of freedom of choice are very different when you are talking about mature rather than immature individuals. The topic of children and pornography raises a whole different set of issues.

I want to start by commenting on the disclaimer that Rick had proposed to his client. I now understand why, when the ACLU set up our initial on-line forum, we negotiated a contract with one of

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82 NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX AND THE FIGHT FOR WOMEN'S RIGHTS (1995).

83 Marci A. Hamilton, Book Review, N.Y.L.J., May 2, 1995, at 2 (reviewing NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX AND THE FIGHT FOR WOMEN'S RIGHTS (1995)).

84 *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 3-4 (1989); ANDREA DWORKIN, INTERCOURSE 21-22 (1987). In her book *Defending Pornography*, Nadine Strossen refers to anti-pornography feminists such as Dworkin and MacKinnon as "MacDworkinites." STROSSEN, *supra* note 81, at 13. While Strossen defends the availability of pornography, arguing that it can be valuable sexual expression, MacKinnon asserts that the legal approach to pornography should consist of a balancing test that "gives as much weight to the right to equality as to the right to free speech." *See* Margaret McIntyre, Essay, *Sex: Panic or False Alarm? The Latest Round in the Feminist Debate Over Pornography*, 6 UCLA WOMEN'S L.J. 189, 191 (1995) (reviewing the contrasting perspectives of Catharine A. MacKinnon and Nadine Strossen).

85 *See* Hamilton, *supra* note 82, at 2.

his client's competitors, America Online ["AOL"]![86] This is because we certainly would not have wanted to abide by such terms.

In fact, we had to negotiate a special contract with AOL because it does limit the content of the expression that is allowed to be disseminated, albeit in far less sweeping terms than in Rick's hypothetical. Of course, any such limitation is completely antithetical to the ACLU's view that freedom of speech should never be restricted on the basis of a communication's content. That somebody might consider it to be offensive is also certainly no basis for suppressing it. Therefore, we negotiated special terms with AOL. And you will see that when you log onto our site,[87] by using keyword "ACLU" on AOL; the first thing that comes up on your screen is: "Warning: You are about to enter a free speech zone. Enter at your risk."

And that provides a nice segue to the first area I was asked to speak about—specifically, what the ACLU is doing in the area of cyberliberties. What we are doing on this issue parallels what we have always done on every issue. As always, the ACLU is working on a number of fronts and at various levels of government.

Because we are active at both the federal and state level, we have not focussed solely on the congressionally proposed Exon Amendment,[88] which has been the sole focus of the public discussion of cyber-censorship. This proposal is very troubling indeed. The ACLU, however, through its nationwide structure of affiliates, has been able to monitor much less publicized but equally dangerous legislation that has been proposed in at least a dozen states, and passed in at least seven so far.[89] This legislation has already

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86 There is a great deal of ACLU literature, including information located on both AOL and World Wide Web networks. One of the newest resources is an on-line cyberliberties newsletter. The on-line service provides a way to give up-to-date information about breaking issues on the legislative and litigation front all over the country. The Web site for the ACLU can be accessed at www.aclu.org.

87 *See supra* note 85.

88 *See supra* notes 11 & 76 and accompanying text.

89 A number of states have passed different kinds of legislation restricting what may be posted on the computer and imposing penalties for violations. Florida penalizes any individual who puts on a computer, or prints from his computer "any notice, statement, or advertisement, or any minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with any minor, or the visual depiction of such conduct." FLA. STAT. ch. 847.0135(2) (1995). Pennsylvania has also added to its laws regarding sexual offenses against children by making it illegal to have any "computer depictions" of minors "engaging in a prohibited sexual act." 1995 Pa. Laws 10. This is similar to an Illinois law against child pornography which prohibits the "depiction by computer" of a "child under the age of 18 or an institutionalized, severely or profoundly mentally retarded person" engaging in a variety of sexual activities. 720 I.L.C.S. 5/11-20.1(e) (Michie 1995). Mississippi's laws provide that "[n]o person shall, by any means including computer, cause or knowingly permit any child to engage in sexually explicit

enacted the threatened kinds of censorship that Congress is now considering. Thus, it is very important for the ACLU to have a state and local presence as well as its national offices.

In addition to operating at different levels of government, the ACLU also engages in a range of activities: lobbying, litigation, public education, and organizing. As I indicated earlier when discussing our site on AOL, public education and organizing activities can be undertaken in cyberspace. What better way to engage in public education and organizing activities on behalf of cyberliberties than by using cyberspace itself?

We have been diligently lobbying against the enactment of the Communications Decency Act.[90] Simultaneously, we are planning a lawsuit so that if the proposal is enacted, we will be in court immediately, seeking a prior restraint against the law.[91] This litigation planning is difficult, since we do not know exactly how the law is going to read in its final form, if adopted. Thus, it is a little hard to be working on your litigation papers simultaneously with the leg-

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conduct or in the simulation of sexually explicit conduct for the purposes of producing any visual depiction of such conduct." MISS. CODE ANN. § 97-5-33(1) (1995).

Other states have passed laws on the content of information that may be transmitted by computer in areas other than child pornography. Arizona does not allow certain computer activities if they are done "with the intent to devise or execute any scheme or artifice to defraud or deceive, or control property or services by means of false or fraudulent pretenses, representations or promises." ARIZ. REV. STAT. ANN. § 13-2316(A) (1995). Michigan passed a law that will try to accomplish the same goals as the Arizona statute. MICH. STAT. ANN. § 28-529 (Callaghan 1994). Connecticut has amended its harassment statutes to outlaw the use of computer networks to threaten to kill or injure people or to annoy them. *See* 1995 Conn. Acts 143 (Reg. Sess.).

90 At the time this panel discussion was held, the Telecommunications Act of 1996 had not yet been enacted. The Communications Decency Act of 1996, passed as part of the Telecommunications Act of 1996, punishes the use of telecommunications in an obscene, harassing, or otherwise wrongful manner. *See supra* notes 11 & 76. It criminalizes the online communication of "indecent" or "patently offensive" expression, as well as information about abortion.

91 The ACLU commenced such a suit minutes after the law was enacted. American Civil Liberties Union v. Reno, No. 96 Civ. 963, 1996 U.S. Dist. LEXIS 1617 (E.D. Pa. Feb. 15, 1996) (mem.). The court granted the ACLU's motion for a temporary restraining order insofar as the provisions of the statute extend to "indecency," as opposed to (unprotected) obscenity. *Reno*, 1996 U.S. Dist. LEXIS 1617, at *9-10. On June 11, 1996, the three-judge court enjoined enforcement of the Communications Decency Act. American Civil Liberties Union v. Reno, No. 96 Civ. 963, 1996 U.S. Dist. LEXIS 7919 (E.D. Pa. June 11, 1996).

For background regarding the law of prior restraint, see Alexander v. United States, 113 S. Ct. 2766, 2771 (1993) (stating that the term "prior restraint" is utilized "to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur."). Further, the Court held that "[t]he constitutional infirmity in nearly all of our prior restraint cases involving obscene material . . . was that Government had seized or otherwise restrained materials suspected of being obscene without a prior judicial determination that they were in fact so." *Id.* at 2771-72. *See also Near*, 283 U.S. 697 (invalidating a prior restraint against a publisher who was told never to publish his newspaper again because he had printed illegal articles in the past).

islative and lobbying process. Despite that problem, we are doing what we can.

As you will read in our Cyberliberties Newsletter,[92] we have been aggressively seeking out potential sympathetic plaintiffs. This leads to some of the points that everybody else discussed, about how pornography and indecency are very vague and subjective concepts. As I listened to Barbara, I was thinking that while she was very concerned about how some material with sexual content might have an adverse impact on children's welfare, a great deal of material that could fit those nebulous terms is supportive of children's welfare and well-being.

Much valuable information would come within the very broad description of expression that would be illegal under the Exon bill. This is, namely, anything that is not only obscene, but also lewd, lascivious, indecent, or filthy.[93] You can hardly get language that is more open-ended and subjective than that. Therefore, through our potential plaintiffs, the ACLU has demonstrated that many positive kinds of information can be "snuffed out" by this kind of legislation.[94] For example, we have as one of our would-be plaintiffs the largest distributors of sex education information on the Internet.[95] We also have the largest distributor of gay and lesbian information on the Internet.[96] This information is very positive for the welfare not only of adults, but also of teenagers and children.

Turning to the substantive points that I was asked to address, I heartily agree with Mike's overview and I will try to avoid repetition. Given the subjectivity of concepts such as indecency, we must ask: How do we define it? What is lewd? What is lascivious? What is indecent? And, as I illustrate in my book on pornography, the concept of illegal pornography is also inescapably subjective.

It is not surprising that if you give the government license to suppress any sexually suggestive or explicit material, whether it is labeled as obscene, pornographic, or indecent, the government will disproportionately enforce the law against expression of and

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92 The Cyberliberties Newsletter is a bi-weekly publication available on-line and put out by Ann Beeson of the ACLU. This publication focuses on censorship issues as they relate to the Internet, including state regulations, legislative developments in Congress, and pending litigation.

93 *See supra* notes 11 & 76 and accompanying text.

94 *See, e.g., Reno*, 1996 U.S. Dist. LEXIS 1617, at *3 ("There is . . . [a] concern by those plaintiffs who rely on on-line providers and other carriers that these providers will likely ban communications that they consider potentially 'indecent' or 'patently offensive' in order to avoid criminal prosecution themselves, thereby depriving plaintiffs of the ability to communicate about important issues.").

95 The "Safer Sex Web Page" can be accessed at www.safersex.org.

96 The "Queer Resource Directory" can be accessed at www.qrd.org/qrd.

about those individuals and groups who are relatively unpopular and relatively marginalized in our society. Thus, given homophobia and heterosexism in our society, it should shock no one that predominant targets of regulation are expressions by and about lesbians and gay men. The inevitably subjective judgments entailed in enforcing these laws invites enforcement that is at best arbitrary, and at worst, discriminatory.

As I indicated earlier, the ACLU strongly believes that no matter what the medium, there should not be any regulation of content merely because the content might be offensive to a particular individual. The arguments in favor of that kind of unrestricted free speech become particularly strong when you are talking about cyberspace and the Internet. This is because of some of the features that Mike referred to, including the fact that the expression is taking place in the privacy of your home.

Even though the Supreme Court has supposedly carved out a category of sexual expression that is not protected—namely, obscenity—I do not think the Court has ever been able to define it in any meaningful way other than Justice Potter Stewart's famous pronouncement: "I know it when I see it."[97] I think that is the only candid definition we have ever had. When it comes to carving out any category of sexually oriented expression for restriction or regulation, no matter what you label it, and no matter how you try to define it, it is always going to come down to the perceptions and value judgments of the particular government or industry bureaucrat who is making the determination.

Even though the Supreme Court has held that obscenity regulation is constitutional, it nonetheless has also held that possession of obscenity in one's home may not be constitutionally prohibited.[98] Justice Thurgood Marshall wrote the majority opinion, in which he stated: "If the First Amendment means anything, it means that a State has no business telling a man [or woman], sitting alone in his [her] own house, what books he [she] may read or what films he [she] may watch."[99]

Since our interaction with computers is in the privacy of our homes, we do escape some of those thorny issues that Professor Hamilton raised in the last paragraph in her review of my book.[100]

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[97] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ["hardcore pornography"]; and perhaps, I could never succeed in intelligibly doing so. But I know it when I see it.").

[98] *See* Stanley v. Georgia, 394 U.S. 557, 563-64 (1969).

[99] *Id.* at 565.

[100] *See supra* note 82 and text accompanying note 84.

The avoided issues are those that concern public spaces and the interest in protecting children from unwanted images being thrust upon them as they walk through certain public spaces. That problem is avoided altogether with the computer because it is used in the privacy of your home. Another feature of cyberspace that strengthens the arguments against content regulation of sexual content, over and above the anti-censorship arguments concerning other media, is its interactivity. With cyberspace, one has individual control. This will empower individual parents to determine what their children will have access to.

And that leads to the heart of what Barbara and others have addressed: how do we protect children and address the whole child pornography controversy? I could not agree more with Mike's point that when you use even the term "child pornography," people really lose rationality. We certainly have seen that irrationality, and even hysteria, on the part of the many government officials and others who have endorsed an extremely overbroad concept of child pornography.[101]

Unlike Barbara, I do think that there is a very important distinction between protecting actual children from illegal exploitation in sexually explicit productions, and mere words and images. To my mind, there is a critical distinction between an actual child and images or words that describe or depict somebody under eighteen, in some sexually suggestive connotation. Unfortunately, that latter overly broad and distorted concept has become very widely equated with child pornography.

This overbroad, distorted, irrational concept was recently enforced by the U.S. Court of Appeals for the Third Circuit, and endorsed by the U.S. Senate, in connection with a case called *United States v. Knox*.[102] It involved a prosecution under the federal child pornography statute.[103] A graduate student in Pennsylvania had videotapes of pre-teen and teenage female cheerleaders, fully clothed in their little shorts and skirts, and dancing in poses that he apparently found sexually exciting.[104] There was no exhibition of the genitals since that area was covered by opaque clothing.[105]

The Third Circuit Court of Appeals held that the statute extended to any depiction of the genital area, even if it was com-

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101 *See supra* notes 11 & 76.

102 32 F.3d 733; *see* Steve Lohr, *The Net: It's Hard to Clean Up*, N.Y. TIMES, June 18, 1995, § 4, at 6.

103 18 U.S.C. § 2256(2)(E) (1994) (defining sexually explicit conduct as including "lascivious exhibition of the genitals or pubic area of any person").

104 *Knox*, 32 F.3d at 737.

105 *Id.* at 738.

pletely covered with opaque clothing.[106] Regarding the required statutory element of a lascivious exhibition, the Third Circuit said that lasciviousness can be in the mind of the beholder.[107] Now, think about that. With that broad a concept of criminal child pornography, there is no photograph of a person under eighteen years old, as long as that person's genital area is included, that could not be swept within this dangerously broad concept.

The U.S. Justice Department filed a brief asking the Supreme Court to overturn the Third Circuit's frighteningly overbroad construction of the federal child pornography statute. The Justice Department persuasively argued that this construction is inconsistent with the plain language of the statute itself, with the statute's legislative history, and also with important First Amendment principles. Yet, when they learned of this brief, President Clinton and the entire U.S. Senate displayed the widespread irrationality and hysteria pervading the child pornography debate by condemning the brief as insufficiently protective of children.

The United States Supreme Court eventually decided not to review the *Knox* case.[108] Thus, this holding stands only for the Third Circuit. However, there are anti-pornography groups going around stating that since the Supreme Court did not overturn the Third Circuit's (mis)interpretation of the federal child pornography statute, it is the law of the land. For example, that case has been cited by those groups that urged the Justice Department to initiate a child pornography investigation of Calvin Klein, because

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106 The Third Circuit stated that the statute contained no nudity requirement, and referred only to a "lascivious exhibition." *Id.* at 744.

107 The Third Circuit opined that "[i]n the context of . . . children, lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for the audience." The court thus concluded that a picture of a child engaged in sexually explicit conduct is lascivious if "so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur." The Third Circuit further concluded "that a 'lascivious exhibition of the genitals or pubic area' of a minor necessarily requires only that the material depict some 'sexually explicit conduct' by the minor subject which appeals to the lascivious interest of the intended audience." *Id.* at 747.

108 115 S. Ct. 897. The Court had initially remanded the case to the Third Circuit for reconsideration in light of the Justice Department's brief. 114 S. Ct. 375 (1993). Following the Third Circuit's reaffirmation of its original ruling, 32 F.3d 733, 737, 754 (3d Cir. 1994), *aff'g* 977 F.2d 815 (3d Cir. 1992), the Justice Department filed another brief diametrically opposed to its previous one. This second brief was as extraordinary procedurally as it was substantively. It was signed neither by the Solicitor General nor by any member of his staff, an almost unprecedented situation. Moreover, equally unusual was the fact that this second brief was signed by the Attorney General. Not surprisingly, this Justice Department turnabout has been attributed to political pressures. *See Pornography, Politics and Principle*, ST. LOUIS POST-DISPATCH, Nov. 22, 1994, at 10B; Linda Greenhouse, *U.S. Changes Stance in Case on Obscenity*, N.Y. TIMES, Nov. 11, 1994, at A15; David G. Savage & Ronald J. Ostrow, *U.S. Won't Fight Pornography Conviction; Supreme Court: Solicitor General Had Failed to Defend Prosecution. In Bid to End Controversy, Atty. Gen. Reno Publicly Overrules Her Position*, L.A. TIMES, Nov. 11, 1994, at A34.

of his controversial jeans ads.[109] Again, we are not talking about *any* sexual activity. We are not talking about *any* nudity either. We are simply talking about pictures of fully-clothed models who look like teenagers (although apparently only one was a minor, and her parents consented to her posing) that are sexually provocative to some viewers.

With that kind of overbroad concept at large, it is not surprising that we have had some tragic situations where artists and parents have been accused of being child pornographers merely for taking photographs of children who are nude or not fully clothed.[110] The respected photographer Sally Mann has been accused of child pornography because she takes photographs of her children, who habitually run around their family's large farm in the nude. Even worse, other serious art photographers have actually been arrested, interrogated, threatened with prosecution, and have lost custody of their children simply for taking pictures of them in the nude or scantily clothed.[111]

Let me describe just one recent tragic case in New Jersey. A man took nude photographs of his young daughter for a course he was taking at the International Center of Photography. He was arrested and dragged down to the police station in the middle of the night. For several months, he was kept away from his children and denied any opportunity to see them while he was the target of a criminal investigation. The children were also interrogated by the police. The child psychiatrists, however, ultimately testified that although one child was photographed in the nude, that did not do any psychological harm to either that child herself or to her siblings. Instead, the experts concluded, the children all suffered a great deal of harm because their father was accused of child abuse and was forcibly separated from them.[112]

From what I have already said, it should not surprise you that I am very nervous about an assumption that depicting or describing

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109 *See* Pierre Thomas & Paul Farhi, *Calvin Klein Ads Cleared*, WASH. POST, Nov. 16, 1995, at D7; Mary Deibel, *Probe of Klein Ads Raises Wider Questions*, THE PLAIN DEALER, Sept. 9, 1995, at 10A; *U.S. Starts Inquiry into Calvin Klein Ads*, N.Y. TIMES, Sept. 9, 1995, at 37.

110 *See* Steve Dollar, *Highlights from a Southern Photographer's Provocative and Evolving Family Album; Mann's World*, ATLANTA J. & CONST., Feb. 2, 1996, at 20.

111 *See* Kent Jenkins, Jr., *Artist Won't Be Charged in Child Photo Case*, WASH. POST, Aug. 4, 1988, at D1 (reporting on Alice Sims, an artist whose children were temporarily placed in foster care after police seized "sexually explicit" photos she took of two preschoolers). *See generally* Samaras, *supra* note 79.

112 *See No Trial Over Nude Photos*, NAT'L L.J., Feb. 13, 1995, at A10; Doreen Carvajal, *Family Photos or Pornography? A Father's Bitter Legal Odyssey*, N.Y. TIMES, Jan. 30, 1995, at A5; *Nude Photos Lead to Trial*, NAT'L L.J., Jan. 30, 1995, at A10; *Father to Be Tried Over Nude Photos of Daughter*, N.Y. TIMES, Jan. 13, 1995, at B6; *Indictment is Upheld in Nude Photo Case*, BERGEN RECORD, Jan. 13, 1995, at A11.

children in a way that has some sexual dimension is automatically going to be inconsistent with children's welfare. These judgments are very subjective, nuanced, and fact-specific. The same is true for the pictures Barbara was talking about, of a child being abused. Barbara said that such pictures lead to devaluation or desensitization, but that's not necessarily the case. Depending on the context and perception, there can be very positive uses for such pictures, including uses that specifically increase our ability to protect children's safety and welfare. For example, from what I have read about child sexual abuse, one of the reasons why children are so vulnerable is that they often do not know what is and what is not abuse. I can imagine a very constructive, positive use of pictures or descriptions of a sexually abused child, specifically for educational purposes, forewarning, protecting, and ultimately saving other children from being victimized by the sexually abusive conduct depicted.

Indeed, one of my colleagues at New York Law School, Carlin Meyer, contributed a piece to the now notorious issue of this summer's *Georgetown Law Journal*,[113] in which one of the other articles was the original, now notorious Rimm so-called "study" about the supposed proliferation of child pornography over the Internet.[114] Carlin emphasizes the positive aspects of cybersexual expression for children not only from a free speech perspective; she also discusses how the availability of sexual images on the Internet, including sexual words and images pertaining to children, can be positive from the perspectives of children's welfare, health, safety, and physical and psychological well-being. I would like to read you just one passage from her article, explaining that latter point.

> We should largely ignore the growing presence of cybersmut and concentrate instead on expanding access—especially for young people—to online sexual discussions and depictions and on joining them in discussion and criticism of what they see and "hear." Rather than focus on a few who harass, libel, or stalk online, we should remember that any technology can be ill-em-

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[113] Carlin Meyer, *Reclaiming Sex From Pornographers: Cybersexual Possibilities*, 83 GEO. L.J. 1969 (1995).

[114] Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1849 (1995). This article has since been exposed as a fraud. *See How Time Fed the Internet Porn Panic*, HARPER'S MAG., Sept. 1995, at 11; Brook N. Meeks, *The Story of How TIME Was Duped on Cyberporn, Author of Study Used Same Info. to Write Porn Handbook*, SAN DIEGO UNION-TRIBUNE, July 25, 1995, at 1; Donna L. Hoffman & Thomas P. Novak, *A Detailed Critique of the TIME Article: "On a Screen Near You: Cyberporn (Dewitt 7/3/95)"*, July 1; 1995, available on the Internet at http://www2000.ogsm.vanderbilt.edu/dewitt.cgi.

> ployed, but that this one, in particular, offers what is probably the safest sex available. . . . Lack of information about sex and sexuality, along with societal norms that treat it as unmentionable, private, and to-be-hidden contribute to societal problems from teen pregnancy to incest and sexual abuse. Children are loath to report intrafamilial sexual abuse and incest, as well as sexual abuse by teachers, priests, and scout masters.[115]

The final examples she gives of how children's welfare—and, indeed, lives—can be saved through cybersexual expression are that "[y]oungsters commit suicide because they have no access to information about homosexuality or ways to talk to other gay and lesbian youngsters. Or they develop psychiatric problems because they have no outlet to express nonconformist sexual longings."[116]

The appropriate response to speech that we disagree with is more speech. Rather than censorship, let us think of pro-child welfare, descriptions and depictions concerning sex that can be launched into cyberspace. In this way, we promote both free speech and children's well-being.

I was very happy to hear Barbara talk about all of the positive things that government should be doing for children's welfare. She clearly differentiates herself from those in the radical right who unfortunately account for many people currently active in our government today. Leaders of the radical right profess a concern about children as a rationale for censorship of cyberspace while simultaneously doing everything they can to decimate any actual constructive support for children's welfare. They are the ones who are eliminating health, welfare, educational, and nutritional benefits for children.

Barbara is certainly not in that category. And I want to distinguish her from so many of the leaders of the movement to censor cyberspace and other media. By focussing on images and words, they are not only endangering freedom of speech, but also creating a tragic diversion of attention and resources away from actual constructive measures to advance children's welfare and safety. There are all too many people in our government who say: "Oh, I'm doing something for children, I am supporting the Exon Amendment." And that is all they are doing "for" children.

Another aspect to this hypocrisy is that many who advocate cyber-censorship are not genuinely doing so to protect children, but instead are hiding behind an alleged concern for children.

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115 Meyer, *supra* note 112, at 1974-75 (footnotes omitted).
116 *Id.* at 1975 (footnote omitted).

What they are really trying to do is deny access to these words and images for adults as well. This became dramatically clear to me this summer when I debated Ralph Reed, the Executive Director of the Christian Coalition, on *Crossfire*.[117]

There was a great deal of factual dispute about whether parents could filter out certain images from their children's computers. And Mike Kinsley[118] kept pressing Reed about whether this was *really* the basis for his support for cyber-censorship. Mike said: "[I]s your concern really just children's access? In other words, if they could develop a foolproof way to keep children out of it, would you say adults have the right to see anything they want, or do you want to censor stuff for adults, too?"[119] Ralph hemmed and hawed, and Mike came back to him three times with the same question. Eventually, Ralph was forced to admit that the Christian Coalition's ultimate goal is to make cyberspace "family friendly."[120] Thus, it is a fig leaf, an alleged concern about children, that is really being used to limit the marketplace of ideas for adults as well. I want to emphasize that I am not putting Barbara in that camp, but talking about many of those who are pushing this legislation in Congress and around the country.

But I do not want to paint with a broad brush all conservatives and everybody on the right. I agree with Mike when he talked about making an appeal to conservatives here. In my discussions across the country regarding my book, including on extremely right-wing talk shows, I have had ample agreement and support from conservatives who seem to share my concerns about keeping government out of our lives, living rooms, and bedrooms. No aspect of our lives is more personal and private than freedom of speech, particularly freedom of speech in the sexual arena. Let us not forget that it was no less a stalwart leader of the conservatives in Congress than Speaker Newt Gingrich, who spoke out last summer very strongly against the Exon Amendment and in favor of freedom of speech in cyberspace. He stressed that we must not, on the asserted rationale of protecting children, reduce adults only to seeing what the most conservative parents deem fit for their children.

I'd like to conclude by sharing with you a passage from an e-mail I recently received, which well sums up my position, and underscores why free speech in cyberspace should appeal to people,

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[117] *Crossfire: Cyber Censors* (transcript of CNN television broadcast, July 3, 1995), *available in* LEXIS, News library, Script file [hereinafter *Crossfire Transcript*].

[118] At the time this panel discussion was held, Michael Kinsley was a co-host of *Crossfire*.

[119] *Crossfire Transcript*, *supra* note 116.

[120] *Id.*

including parents, across a broad ideological spectrum. This e-mail was sent by a woman who described herself as a Christian Coalition member, "pro-lifer," and mother of two, after she saw my debate against Ralph Reed on *Crossfire*. Interestingly, she is a part-time computer programmer. Perhaps the major dichotomy in this debate, which the e-mail highlights, is not between liberals and conservatives, Republicans and Democrats, but between people who are computer proficient, and hence do not have anxiety about the technology, and those who are less comfortable with, and hence more anxious about, computer technology.

My Christian Coalition "e-mail pal" wrote:

> [A]s you can imagine, I have very rarely agreed with the ACLU until now. I saw you on *Crossfire*; you knew what you were talking about. I about fell off my chair when Mr. Reed referred to the Internet as a "party line."[121] I don't like pornographic material or some of the free speech on the net. But the First Amendment says it can be there, just as much as I can. I have e-mailed Mr. Reed, the 700 Club,[122] and Newt, to let them know how I feel. The Internet is like computer cable; if you don't want it, don't subscribe to it. If you do, but don't want the kids to see all of it, then get the free ware of Surf Watch [a software program that allows parents to block specified material]. It is my responsibility to take care of my kids, not the government. We, the voters, said that in the last election.
>
> I know this is a very strange letter to get, and even stranger to write, knowing both our stands on issues. But I wanted you to know that not all Christians want to be Big Brother. We are told to be caring, and show by our lives, the peace Jesus gives us. The actions of many Christians today don't show that. . . . Thank you for your time.

And then, she ends with that familiar and poignant quotation from Voltaire, which well summarizes my position too: "I may not agree with you, but I will defend to the death your right to say it."[123]

Thank you.

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121 Ralph Reed stated: "All the Internet is, in effect, is an old telephone *party line* . . . ." *Id.* (emphasis added).

122 Pat Robertson, founder of the Christian Coalition, hosts the "700 Club" television program. *See* James G. McManus, *Christian Coalition Takes Aim at Boston*, NAT'L CATH. REP., Dec. 22, 1995, at 3.

123 This statement paraphrases French philosopher Voltaire's sentiments in his *Essay on Tolerance*. The original phrase holds: "I disapprove of what you say, but I will defend to the death your right to say it." THE COLUMBIA DICTIONARY OF QUOTATIONS 851 (Robert Andrews ed., 1993).

MARCI A. HAMILTON:

At this point, we will have a couple of follow-up comments by the panelists and then open this up to questions from the audience.

BARBARA BENNETT WOODHOUSE:

That wonderful e-mail Nadine received emphasizes that there is significantly more agreement than disagreement regarding these issues. However, when Nadine speaks about the difficulty of line drawing, I'm with Potter Stewart and his statement, "I know it when I see it."[124] There is no question that people have subjective evaluations. As tough as line-drawing may be, the concept of line-drawing is something that occurs throughout every area of law.

A specific example of confusing tough issues of line-drawing with bad policy is found in the Christian Coalition's material attacking government investigations of child abuse. One of the knotty issues we thrash out in my course is how to differentiate between appropriate corporal punishment and battery. The Christian Coalition, in its Parental Rights and Responsibilities Act,[125] which I testified against last week, takes the position that the government should not be able to intervene in cases of corporal punishment.

The bill's supporters tell the following story as a cautionary tale about state intervention. A man was wrongfully accused of child abuse because a citizen, walking past on the street, saw him spanking his child and reported him. As it turned out, he had a valid reason for spanking his child. His older child had intentionally slammed the younger child's fingers in the car door. Most judges and social workers would agree that his actions fall within the arena of "appropriate corporal punishment." I do not believe such horror stories about persons wrongfully accused are proof that we must abandon any attempt to draw lines and simply walk by the child who is publicly being beaten. Rather, such cases indicate how critical it is to grapple with trying to draw lines, in the context of child abuse, between harmless and harmful conduct. In relation to line drawing, the question one must ask is: Where are we if we abandon this project as too ambiguous to provide clear cut bright lines? Are we left without any standards? Are we to be left totally

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124 *See supra* note 96.

125 Parental Rights and Responsibilities Act of 1995, S. 984, 104th Cong., 1st Sess. The bill styles itself as legislation intended to protect the fundamental right of a parent to direct the upbringing of a child.

deregulated? And that is up to the rest of you and the people on the panel. But as a specialist in child abuse, where drawing lines can mean the difference between life and death, health and lasting trauma, I must sound a cautionary alarm on deregulation.

As a final note, I want to express my dismay at having "family-friendly" used as a derogatory term. This worries me in the same way as when I saw neo-conservatives sarcastically referring to liberals as the "compassion crowd." Neither "compassion" nor "family friendly" should be dirty words. I hope "family-friendly" does not become a word associated with the religious right and intolerance. Family-friendly is a phrase that ought to be generally and honorably associated with our Nation's basic social and economic policies.

RICHARD A. KURNIT:

Well, the discussion has come full circle. If the standard is "I know it when I see it,"[126] the emphasis is on the "I." I guess I have great mistrust of the government even when Justice Potter Stewart is the one to be my "I." Rather, it is important to empower the user to select what comes into his or her home. As far as who controls certain portions of the Internet, the industry must address this issue.

When I speak about screening bulletin boards in terms of certain foul language, obscenity, fighting words, illegal conduct, and matters that are not on the topic, my assumption is that we are dealing with particular bulletin boards and that the bureaucrats cannot possibly police them. Nobody can effectively police the Internet other than through the criminal law which is limited in its effectiveness. Rather, the goal should be to try to discern different places in cyberspace where people can choose to go or not to go.

MIKE GODWIN:

I always get nervous and tend to wince when anybody says the words "Cass Sunstein" and "First Amendment" in the same sentence. On that note, let me just address what I believe are some half-truths about the half-truths. One of them is the idea that there are no lines that can be drawn. I do not know anyone who makes such an argument.

Furthermore, of those who argue that it should be the parents controlling the viewing for children, nobody claims that there should be no laws in place to protect children. Obviously, I think

126 *See supra* note 96 and accompanying text.

we all agree that there should be. That the Internet is different? Actually, I tend to argue that the Internet is the same. I prefer the First Amendment as it stands today. Current First Amendment protections are uniform across all media, except for a few carve-outs like broadcasting. We made a terrible mistake about half a century ago regarding broadcasting and have lived with that ever since. Still, I am ready to write off broadcasting. I think it is increasingly marginal and unimportant in our lives. The fact is that one of the things we have seen is a fragmentation of the broadcasting networks and an increasing fragmentation of the audiences. For example, many people are spending more time on the Internet and less time watching television. Cliff Stoll explains this in his book, *Silicon Snake Oil*.[127] He asks where are you taking the time from, when you get on-line? Are you taking it from time with your family or books? I think a lot of people did the same thing because it was actually a lot more interesting to talk to people on-line than it was even watching really good television shows. (And as you know, they are all really good.)

The notion that children are victimized in child porn unless they are used is one where a line has been drawn by the courts. The Court has stated that it does not want to create a new kind of obscenity.[128] The Court believes that obscenity has something to do with community standards, sexual depictions, and so on. But we want to protect children from being used in the creation of this kind of material. It's not that we want to create a new kind of forbidden content. What we want to do instead is protect children. Thus, courts have gotten out of the content analysis business when dealing with child pornography.

Furthermore, once you remove that element of the crime, that an actual child has been used, you are in effect creating a new kind of obscenity. With this, all the same problems that the courts dealt with for decades and continue to struggle in defining obscenity start coming into the child pornography context. I reject this role for the courts if it is the protection of children in child pornography that remains the goal. There are lines that are drawn and a social infrastructure in place to protect children, but I am concerned about children being used to justify the limitations on the availability of constitutionally protected material for everyone. This is not an accidental side-effect of the legislative proposals. They

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[127] CLIFFORD STOLL, SILICON SNAKE OIL: SECOND THOUGHTS ON THE INFORMATION SUPERHIGHWAY (1995).

[128] *See Ferber*, 458 U.S. at 756-64.

are quite conscious about doing that. This is the goal. Please understand that.

In 1955, no one would have met in public to watch an explicit sexual depiction of anything in a movie. Now couples rent videos, take them home, and watch them together. For adults, there has been a fundamental social change at least in dealing with sexual material. What that tells us is that the people who are opposed to pornography are definitely not going to get a lot of consensus behind them. They are certainly not going to get a national consensus behind them if they try to limit it in terms of adults. Yet, they are aware that if they frame the argument around children, they can bypass your higher-thinking centers and get you thinking with your gut. And that is what they hope to do to you. I ask you not to fall for that.

MARCI A. HAMILTON:

Let me just add a tiny footnote which should provide some perspective on our discussion. By focussing upon pornography, we obscure the fact that the Internet will carry many types of expression. One reason for this focus on pornography is that the Supreme Court has made pornography the focus of its First Amendment inquiries into aesthetic materials. The Court took the wrong turn over twenty years ago when it started to focus on whether or not suggestive material was obscene.[129]

They should have started from the premise that the First Amendment protects art.[130] But they did not do that and rather made obscenity their definitional focus. So we end up with an entire discussion about works on the margins rather than a discussion about all the wonderful things that will be on the Internet.

If you look at titles of panels on the Internet in the last couple of months, I hate to say it, but this was not the only one on pornography. There have been about five and I know Mike has probably been to more than one.

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129 *See* Miller v. California, 413 U.S. 15. The test for obscenity set forth in *Miller* is as follows:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

130 Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 108-11 (1996).

MIKE GODWIN:

Every one of them in fact. I have been to every one.

MARCI A. HAMILTON:

There has not been one called "Aesthetics and the Internet" or "Art and the Internet." Perhaps this new technology, with its capacity for unlimited numbers of visual and expressive works, will get us back on the right track.

Are there questions from the audience?

AUDIENCE MEMBER:

I have two questions. Does *Stratton Oakmont v. Prodigy*[131] stand for the proposition that on-line providers are responsible for what is uploaded onto their bulletin boards? And what does the industry feel can be done to cut down on the number of defamatory statements that are uploaded to their bulletin boards?

RICHARD A. KURNIT:

Well, certainly it does to the extent that one looks at the *Stratton Oakmont* decision, which came down before we were counsel on the case. It is a decision that says the degree to which the on-line provider is policing what is on the bulletin board is sufficient to make the on-line provider responsible for what is on the bulletin board.

The industry generally has responded that unless we, in providing a bulletin board, do some modicum of oversight, it does not function for the subscribers. For example, if it is supposed to be on a particular topic, you need to sweep out things that are off the topic. If some disruptive force decides to get on a bulletin board and just repeat the same word over and over again repeatedly, it will wipe out the bulletin board. So it is a question in terms of practicality if you are going to have bulletin boards devoted to particular topics.

And apropos of what Professor Hamilton said, there are bulletin boards out there that are wonderful events. I spoke at a panel and someone came up to me who was counsel to a bulletin board exclusively for M.D.'s that I did not know existed. This bulletin board was used by doctors to communicate with each other about different diagnoses. With this communication, doctors can ask other doctors if they have any idea why their patients are dying.

[131] *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229.

Now, I do not think as a society that we want to preclude that particular bulletin board by imposing on them, and the people who foster them, liabilities which they cannot cope with.

As to your second question, this is something that is being wrestled with. It is a new industry and there is a great deal of debate about what should be done. I have suggested to some clients that, in the event of a personal attack, the first thing that should be done is to give access because the solution to speech we do not like is more speech. One should give free access to a person who says they have been attacked so that they can go onto that bulletin board and correct the record. And that is generally done.

There is a more difficult question. As you may know, you can go on a bulletin board with an assumed name or just your name but no address. And if your name is John Smith, lots of luck to the guy who wants to find and sue you. And one must ask at what point does the on-line provider enable someone to find whoever it is who has posted a message so that they can institute a lawsuit.

As much as I am opposed to the law of defamation, society generally does provide that. And what does that do to the tremendous value of anonymity that the Internet offers? That is a very difficult issue and there is a lawsuit currently pending against America Online. Here the plaintiff seeks only the identification of the individual they seek to sue for defamation.

MIKE GODWIN:

I also want to answer this question. I actually have an article coming out in *Wired*, with the lawyerly title "Let Libel Die."[132] One of the things that we know from *Gertz v. Robert Welch, Inc.*[133] is that the distinction between public figures and private individuals is access to media. Well, what do you have when you live in a world where suddenly everybody has access to mass media?

If the best remedy for bad speech is more speech, suddenly more speech becomes really cheap.[134] And in fact how many of you have ever participated in a libel suit in any way, shape, or form? Libel lawsuits are pretty much a game for the rich.[135] Most people do not ever participate in libel lawsuits. They are primarily public-figure litigation and those people tend to lose. Practically, it has turned out not to be a very satisfactory remedy. Therefore, for

132 Mike Godwin, *Libel Law: Let it Die*, WIRED, Mar. 1996, at 116.
133 418 U.S. 323 (1974).
134 *See* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).
135 *See* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA (1991).

legal and practical reasons, I think we ought to maybe revisit libel law and public figure doctrine and I anticipate that we will within my lifetime. I think the balance that has been struck between public figures and private figures makes assumptions about mass media that can no longer be supported.

The second thing is that, with regard to anonymity, one of the things you should be alert to is the number of people out there who just have an innate hostility to anonymity. They do not know why exactly. They are not very clear on the explanation. It is not that there is a quantifiable problem associated with anonymity, but they are pretty much ready to trade it away.

This issue will surface with legislative proposals that attempt to strike a balance whereby the Internet service providers are immune from the strict liability that normally exists for copyright. In return, it will prohibit anonymity. I do not see a lot of demand for this type of legislation actually emanating from Washington. One of the things that frightens people about anonymity is that those who use the Internet will be able to speak irresponsibly. In fact, we know that this society has a large amount of tolerance of anonymity. The law does not require return addresses on postal mail. There are still phone booths on many street corners; even in this city. One can wiretap them, but the phone booth ensures anonymity.

Arguably, one could anonymously defame someone and circulate that defamation to a hundred thousand or a million people. Anonymous defamation, however, is not effective. The public listens only to defamation from a relatively well-known and reputable person or publication. Anonymous defamation turns out not to be terribly significant. If you anonymously defame me on the Internet, and in return I send ten anonymous one-to-one postal mail messages to employees and friends of yours, I will likely do more damage to your reputation than you do to mine.

NADINE STROSSEN:

It is also important to note a case that the ACLU recently won in the Supreme Court.[136] The Court struck down as unconstitutional laws, which existed in the District of Columbia and every state except California, prohibiting anonymous distribution of literature in connection with campaigns. This particular campaign happened to involve a bond issue. The laws' rationale is that it is important for the voters to know the identity of the person who is

[136] McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995).

submitting campaign literature so that they can take this into account in exercising their right to vote in an informed manner. The Supreme Court had essentially the same reaction that Mike had. The voters can take into account the fact that the campaign literature is anonymous. But the reason for protecting anonymity goes back to those great cases from the civil rights movement in the late '50s and early '60s. Some states tried to force persons to disclose that they were members of the NAACP. But if this happened, or if the NAACP were forced to disclose its membership lists, many people would be deterred from exercising their freedom of association and their freedom of speech; specifically, they wouldn't join the NAACP or advocate its causes.[137] If we want to have free speech, the price that we pay is going to be some that is irresponsible and some that is anonymous. Nonetheless, as the Court has very resoundingly said, it is a price worth paying. And I think the Court will continue to so hold in the cyberspace context.

RICHARD A. KURNIT:

I think it actually even goes back further than *NAACP v. Alabama*.[138] There was this book called the *Federalist Papers*, as you may remember.

MARCI A. HAMILTON:

My students do not believe in the primacy of the *Federalist Papers*, but that is okay.[139]

AUDIENCE MEMBER:

Mike, would you please address the constitutional implications and justifications regarding the community standard doctrine in connection with the Internet.

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137 *See* NAACP v. Alabama, 357 U.S. 449 (1958) (holding that an order requiring the NAACP to produce its membership list violates its members freedom of association and speech rights).

138 *Id.*

139 I teach my students that the *Federalist Papers* are not the only authoritative legislative history of the Constitutional Convention. First, the *Federalist Papers* did not summarize the debates, but rather were political papers written to persuade the populace to ratify the product of the Convention. They were propaganda aimed at an audience for whom the Framers had marginal respect. Second, the *Federalist Papers* overemphasize James Madison's contributions to the Constitution at the expense of other important, innovative Framers, such as James Wilson. *See* Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 489 n.41 (1994).

MIKE GODWIN:

According to Chief Justice Burger, the justification for the community standard doctrine was that we should not have the most liberal jurisdictions in the country dictating what was acceptable for the most conservative jurisdictions.[140] If that is true, even if one totally accepts the justification for *Miller v. California*, which I know the ACLU does not, this has turned that doctrine on its head. With the internet, one has the most conservative jurisdictions in the country having the capability to dictate the standards of acceptability for the most liberal ones. That cannot be right either.

NADINE STROSSEN:

That is the point that we made in the amicus brief we submitted in *United States v. Thomas*.[141] In addition to the constitutional argument that Mike made, we also made several arguments that the statute is written in such a way that it should not be construed as applying to this kind of data transmission. We could well win on that ground since courts are enjoined to construe criminal statutes narrowly because of due process concerns.[142] If the statute was not written in a way that forewarns somebody that they would be facing criminal liability in a certain situation, it violates that person's due process rights to enforce the law against him. So that is an additional constitutional argument beyond the First Amendment one.

AUDIENCE MEMBER:

Our society restricts access that children have to cigarettes, alcohol, certain movies, and certain magazines. Why should the Internet be any different? Why when a kid gets on the computer should they have access to all kinds of pornography and smut that society thinks in other areas are not for their eyes?

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[140] *See Miller*, 413 U.S. at 32 ("It is neither realistic not constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." (footnote omitted)).

[141] 74 F.3d 701 (6th Cir. 1996). The Sixth Circuit decision, issued after this panel discussion, rejected the statutory and constitutional arguments against an obscenity conviction for an adults-only, subscriber-only bulletin board, operated in Milpitas, California; the conviction was based on the community standards in Memphis, Tennessee, where an undercover United States Postal Inspector subscribed to the bulletin board, logged-on, and downloaded sexually explicit files.

[142] The rule of lenity counsels courts to construe ambiguous penal statutes narrowly. *See* United States v. Campos-Serrano, 404 U.S. 203, 297 (1971) (requiring clear and definite language before choosing the harsher of alternative readings). The principle is rooted in due process notions, which require clear notice before the imposition of criminal liability. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 459 (1989).

MIKE GODWIN:

That is a classic mistake that you made by lumping cigarettes and First Amendment protected activity. I hope you know that. So let us concede, on the one hand, that you do not have a First Amendment right to smoke a cigarette, right? We all agree on that, do we not? Now, I will just follow through and answer every item that you have listed.

It certainly is the case that we can restrict content for children. I mean, those laws have been upheld and no one is really disputing that. The question is, that when you are in the First Amendment realm, there is another side to the issue, which is access for adults. And because of that, you work under some very strict requirements. Regarding things like access to alcohol, you unfortunately do not have to work under the least restrictive means test[143] when it comes to regulating its access. There is no First Amendment right to drink.

When you talk, however, about access to constitutionally protected material dealing with sexuality, you really do have to look at whether you are employing the least restrictive means. Now, the legislation that has been proposed[144] is not aimed at that at all. Clearly, it is far broader than that. In fact, most recently there have been letters from both Bruce Taylor[145] and Ed Meese[146] on which all the usual suspects sign up and say that we want to impose liability on the service providers because we want to turn them into policemen.

I think that is just wrong! Whatever you believe about the protection of children, you certainly believe that this is not the least restrictive means. I think balances can be struck or lines can be drawn that both prevent the exposure of children to inappropriate material and access of constitutionally protected material to adults.

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143 *See, e.g.*, Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

144 *See supra* notes 11 & 76.

145 Mr. Taylor is currently head of the National Law Center for Children and Families, formerly known as the Citizens for Decency through Law. The organization is located in Fairfax, Virginia.

146 Edwin Meese III served as Attorney General under President Ronald Reagan. In 1986, Reagan appointed Meese to head a Commission on Pornography. The Meese Commission concluded that "substantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of sexual violence." ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT, *supra* note 34, at 326. The Commission was created in response to increasing amounts of sex and violence in films and growing concern about child pornography. *See* Wendy Melillo, *Can Pornography Lead to Violence?*, WASH. POST, July 21, 1992, at Z10.

NADINE STROSSEN:

And just to give one concrete example, you did say somewhat erroneously that we have allowed the restriction of books and magazines to children. The reason I say "somewhat erroneously" is that those restrictions have been upheld only if they are, in fact, the least restrictive means, i.e., least restrictive of adult access. In the 1950s, in a case called *Butler v. Michigan*,[147] the Supreme Court struck down as overly broad a law that barred the sale of certain erotic literature on the rationale that it would be harmful for children to see that material. To convey the law's overbreadth, the Court likened it to burning the house in order to roast the pig.[148]

And so, we are not talking about creating a new standard for protecting rights of access to cyberspeech; we are talking about applying the same standard that we have used with respect to print material.

BARBARA BENNETT WOODHOUSE:

I was interested in the reaction to the question. The questioner was pointing out something that I think most people intuitively agree to—that children are different. When we talk about the various ways in which we regulate children's access to all kinds of noxious things, the regulation always is predicated on the concept that children are different. They are in a different situation from adults and are less able to judge for themselves what they will and should consume, be it food, drugs, or violent images.

I was fascinated with the description of the good things that the Internet can do. And part of what struck me in listening to that discussion is how different a child's use of the Internet could be if that child is a fifteen year old trying to explore his or her sexual orientation as opposed to a very young child. The response that Mike gave began by almost denying that the questioner had any kind of a point at all and throwing at him all sorts of counterarguments about how the First Amendment trumps the fact that children are different. Mike finished up, however, saying that we want to try to restrict access of young children to clearly obscene materials on the Internet. Am I right? That you kind of ended up there?

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147 352 U.S. 380 (1957).

148 *Id.* at 383 ("The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig.").

MIKE GODWIN:

I knew where I was going at the beginning.

BARBARA BENNETT WOODHOUSE:

Yes. Well, in some ways I think this conversation would go better if people acknowledged that there is a core or a kernel of social concern that is not bizarre or craziness on the part of the critics of complete deregulation. Through strategies like the supervised bulletin boards, families can feel that they can give children access to the Internet in a context that both the parents and the providers are comfortable with. We seem to be pulling apart at the extremes rather than seeing where there are, in fact, commonalities.

MARCI A. HAMILTON:

On that note, I think we will bring this to a close. I would like to thank the panelists for their cogent and helpful comments. Thank you for your attention.