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Restricting Speech on the Internet: Finding an Appropriate Regulatory Framework

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Panel III: Restricting Speech on the Internet: Finding an Appropriate Regulatory Framework

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MR. SIMS: Good afternoon. I am Professor Andrew Sims. Our third panel of this symposium is entitled Restricting Speech on the Internet: Finding an Appropriate Regulatory Framework. We have some fabulous and very knowledgeable panelists for you to enjoy.

Our first speaker is Richard Kurnit, a partner in the law firm of Frankfurt, Garbus, Klein & Selz. He has discussed the regulation of pornography on the Internet at other symposia,[1] and he repre-

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1. *See* Mike Godwin, Richard A. Kurnit, et al., *Regulating the Internet: Should Por-*

sented Prodigy in *Stratton Oakmont, Inc. v. Prodigy Services Co.*.[2] Following Mr. Kurnit, Lisa Fantino will give her remarks. She is a reporter and writer for the CBS's flagship radio station: WCBS-AM in New York City. Ms. Fantino will be followed by Barry Steinhardt, who chaired the Cyber Liberties Task Force for the American Civil Liberties Union ("ACLU") and has been very active in coordinating the ACLU's campaigns to keep cyberspace free from censorship. You also will hear from Robert Peters, president of Morality in Media. In that capacity, he works to combat illegal hard-core pornography and uphold decency standards in the media. Parry Aftab will be our final speaker this afternoon. She is a well-known attorney who has written extensively on cyberspace and technology law, including the recently published book *A Parent's Guide to the Internet: How to Protect Your Children in Cyberspace*.[3]

Each panelist will speak for several minutes on the issue. After all of the panelists have presented, we will have a roundtable discussion and open the floor for questions from the audience. Thank you and I would like to present Rick Kurnit.

MR. KURNIT: As a starting point to a discussion of regulation of the World Wide Web we must understand that it is not like the Wild West.[4] The rule of law is very much available to those who venture onto the Internet. The issue is not how to regulate, but whether to add regulations to the existing body of laws: criminal as well as private rights of action that already are in place. To the extent that there is frustration about lawless activity, it is the difficulty of apprehending culprits in an anonymous and free floating environment and the fact that, with no cost or barrier to entry into the marketplace, the culprits are often judgment proof. More regulation will not answer those problems. Nevertheless, it is ill ad-

nography Get a Free Ride on the Information Superhighway? A Panel Discussion, 14 CARDOZO ARTS & ENT. L.J. 343 (1996).

2. Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. Dec. 11, 1995).

3. PARRY AFTAB, A PARENT'S GUIDE TO THE INTERNET: HOW TO PROTECT YOUR CHILDREN IN CYBERSPACE (1997).

4. *See* Digital Equip. Corp. v. Altavista, 960 F. Supp. 456, 463 (D. Mass. 1997); Nicholas W. Allard & David A. Kass, *Law and Order in Cyberspace: Washington Report*, 59 HASTINGS COMM. & ENT. L.J. 563, 569 (1997).

vised to succumb to the impulse to hold liable the more or less innocent bystanders who have the means to pay a judgment.

Let us look at the private rights of action that already regulate the content of the Internet and the degree to which they reach the on-line service provider or other responsible parties. On-line material may give rise to all of the potential liability faced by conventional publishers and advertisers. These include copyright, trademark, publicity rights, privacy rights, and defamation.

All existing copyright protections are applicable to the Internet.[5] There is not likely to be any significant exception carved out of the law of copyright infringement in order to facilitate the new media. Thus, there is a very real risk of being held liable as a contributory infringer even where you have not originated the offending material.[6] All that is necessary to establish liability for contributing to infringement by another is knowledge of the copyright infringement and significant help or assistance.[7] Therefore, merely providing the server into which the infringing material is stored and facilitating transmission to others may be sufficient assistance, requiring only proof of knowledge of the infringing nature of the material to establish liability.[8] Thus, in the few cases decided to date on this issue, courts have held that the operators of computer networks can be held liable for acts of copyright infringement by users of the networks, even when the operators do not participate in the acts of infringement or intend to infringe copyright.[9]

In *Playboy Enterprises v. Frena*,[10] the defendant was the operator of a subscription computer bulletin board service ("BBS"), accessible via telephone modem to customers.[11] The BBS included unauthorized copies of 170 photographs, in which the plaintiff Playboy Enterprises, Inc. ("Playboy") owned the copyright, up-

5. *See* 17 U.S.C.A. §§ 101, 107 (West 1998 & Supp. 1998); *see also* Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 923 F. Supp. 1231 (N.D. Cal. 1995).

6. *See* Playboy Enters. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 512-13 (N.D. Ohio 1997).

7. *See id*. at 514.

8. *See Religious Tech.*, 923 F. Supp. at 1231.

9. *See* Sega Enters. v. Maphia, 948 F. Supp. 923, 932-33 (N.D. Cal. 1996).

10. 839 F. Supp. 1552 (M.D. Fla. 1993).

11. Playboy Enters. v. Frena, 839 F. Supp. 1552, 1554 (M.D. Fla. 1993).

loaded by customers from their home computers.[12] Customers of the BBS could browse and download the computerized copies of the photographs and store the copied image from the host computer in their home computer.[13]

Although the defendant in *Playboy* stated that he never himself uploaded or downloaded the copyrighted photographs, and removed the unauthorized copies from the BBS as soon as he was sued by Playboy, the court nonetheless held him liable for copyright infringement.[14] The display of the copyrighted photographs over the computer network constituted "public distribution" of the photographs and therefore infringement of Playboy's exclusive right, as the copyright owner, to distribution.[15]

In *Sega Enterprises v. Maphia*,[16] the court held the operators of a BBS, whose customers could also upload and download material between the host computer and their own computers, liable for copyright infringement.[17] The BBS in *Sega* contained unauthorized copies of plaintiff Sega Enterprises' ("Sega") copyrighted video games, which were uploaded and downloaded by customers of the BBS.[18] There was evidence that the defendants encouraged and even solicited customers to download games, and charged fees for downloading privileges or required customers to upload games in exchange for downloading other games.[19] Consequently, the defendants directly profited from the infringement. The court held that the unauthorized copying of the video games, that is, uploading and downloading the games, by customers was copyright infringement and that Sega's role in the copying—including provision of facilities, direction, knowledge, and encouragement—constituted contributory copyright infringement.[20] The court found it was irrelevant that the defendants did not know exactly when the

12. *See id.*
13. *See id.*
14. *Id.* at 1556.
15. *Id.* at 1556-57.
16. 857 F. Supp. 679 (N.D. Cal. 1994).
17. *Id.* at 686.
18. *Id.* at 683.
19. *Id.* at 683-84.
20. *Id.* at 687.

programs would be uploaded or downloaded by customers.[21]

Given the unsettled state of the law, we generally recommend that to reduce exposure, wherever appropriate take steps to ensure downloading of files is difficult or impossible and include an on-line copyright notice.[22] A claim of infringement of another's copyrighted work may lead to an award of damages as well as attorneys fees.[23] It is the copyright owner's option to collect either actual damages, which in this context would be difficult for a plaintiff to prove, or statutory damages, that is, damages fixed by statute in the range of $200 to $100,000 per infringement.[24]

Generally, courts award statutory damages in the lower portion of this range for innocent infringers.[25] The higher amounts are awarded only in exceptional cases involving willful infringers.[26] Willfulness requires an alleged infringer's knowledge that certain conduct is infringing.[27] Because it is unlikely that a copyright owner will be able to prove substantial actual damages from customers' infringement, your precautionary measures can influence a court to view you as, at most, an innocent infringer, hence liable only for statutory damages at the lower end of this range.

Now, on to trademarks. The Lanham Act prohibits the use of another's trademark, symbol, or name in a way that falsely suggests the affiliation, connection, association, or sponsorship by that person of the alleged infringer's goods or services.[28] Specifically, section 43(a) of the Lanham Act imposes liability on the infringer.[29]

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21. *Id.* at 686-87.

22. *See generally* Mary Ann Shulman, *Internet Copyright Infringement Liability; Is an Online Access Provider More Like a Landlord or a Dance Hall Operator*, 27 GOLDEN GATE U. L. REV. 555, 596-600 (1997) (discussing online access provider liability).

23. *See* 17 U.S.C.A. §§ 504, 505 (West 1998 & Supp. 1998).

24. *See id.* § 504.

25. *Cf.* Pinkham v. Sara Lee Corp., 983 F.2d 824, 827 (8th Cir. 1992) (stating that trial courts take innocence into account when fixing statutory damages because they are "equitable in nature").

26. *See* Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1010-11 (2d Cir. 1995); Peer Int'l Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1336-1337 (9th Cir. 1990).

27. *See Knitwaves*, 71 F.3d at 1010-11; *Peer Int'l*, 909 F.2d at 1336 n.3.

28. 15 U.S.C. § 1125(a) (1994).

29. Section 43(a) provides, in pertinent part, that:

Any person who, on or in connection with any goods or services, or any con-

Generally, liability under the Lanham Act will arise from the use of others' trademarks, symbols, or names in a manner that falsely or misleadingly suggests that the owner of the mark sponsors or otherwise is associated with your goods or services.[30] Thus, if others' trademarks are used in a manner that may suggest a tie-in, it is advisable to get permission from the trademark owner. It is also advisable to use other entities' trademarks in their full and proper form, not distorted or manipulated in any way, in order to avoid claims based on dilution of trademarks.[31]

To be held liable for contributory infringement, you must be found to "knowingly cooperate in illegal and tortious activity."[32] Therefore, although it is unlikely that customers will infringe the trademarks of others in the context of a chat service or bulletin board, if you are aware of such an infringement and you do not delete the infringing material, you may be held liable for your customers' trademark infringement.[33] In the event of a claim of this nature, you could take the position that given the volume of materials that appear in a chat service or on a bulletin board, you could not have known of or prevented any trademark infringement.[34] If, however, a determination is made to monitor chat services and bulletin boards for other purposes—such as obscenity, racial epithets, defamation, or copyright infringement—and in the process you gain knowledge of materials which infringe the trademarks of oth-

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> tainer for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact which—
>
> > (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such an act.

Id.

30. *See* Sega Enters. v. Maphia, 857 F. Supp. 679, 688 (N.D. Cal. 1994).

31. *See* Abdul-Jabbar v. General Motors Corp., 85 F.3d 407, 412 (9th Cir. 1996).

32. 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25.02 (4th ed. 1997).

33. *See* Playboy Enters. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 512-15 (N.D. Ohio 1997); *Sega Enters.*, 857 F. Supp. at 686-87; Playboy Enters. v. Frena, 839 F. Supp. 1552, 1556 (M.D. Fla. 1993).

34. *See Russ Hardenburgh*, 982 F. Supp. at 509-10.

ers, you risk liability for contributory infringement.[35]

Now, on to the right of publicity. The right of publicity permits anyone to sue for unauthorized use of his or her name or likeness in advertising.[36] But the First Amendment limits the extent to which state law claims for violation of the rights of publicity and privacy can be based on the use of a name or likeness in connection with information, news, and other editorial content.[37] Thus, state statute and common law requirements for permission to use a person's name or likeness are generally limited to use for trade and advertising.[38]

Advertising is basically defined as a communication whose principal purpose is to propose an economic transaction.[39] Editorial content is traditionally defined in terms of the control exercised by the editorial staff of the publication.[40] Alternatively, the distinction is made between a paid media insertion, namely, an advertisement, and the content of the publication which is generated by the staff of the publication or by freelance writers who are paid for the right to include their material in the publication. A conventional magazine contains editorial content, in which permission to use a person's name or likeness is not necessary, side by side with advertising where the use of a name or likeness must be with permission. The same principles apply to electronic media.[41]

A New York court addressed this issue in electronic media in *Stern v. Delphi Internet Services Corp.*,[42] which concerned adver-

35. *See* Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996) (citing Columbia Pictures Indus., Inc. v. Aveco, Inc., 800 F.2d 59 (3d Cir. 1986)); Gershwin Publ'g Corp. v. Columbia Artists, 443 F.2d 1159, 1162 (2d Cir. 1971).

36. *See* Cohen v. Herbal Concepts, 63 N.Y.2d 379 (1984).

37. *See* Zaccini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

38. *See* Stern v. Delphi Internet Servs. Corp., 626 N.Y.S.2d 694, 699-700 (N.Y. App. Div. 1995).

39. *See id.* at 696, 701

40. *See id.* at 698.

41. *See id.* at 698-699 ("Because Stern's name was used by Delphi to elicit public debate on Stern's candidacy, logically subsequent use of Stern's name and likeness in the advertisement is afforded the same protection as would be a more traditional news disseminator engaged in the advertisement of a newsworthy product.").

42. 626 N.Y.S.2d 694 (App. Div. 1995).

tising by an on-line service for one of its chat lines.[43] The chat line concerned Howard Stern ("Stern"), a talk-show personality who was running for Governor of New York at that time.[44] The court held that this advertising was incidental to the editorial content of the on-line service, hence it was permissible under New York law.[45]

The key holding is the determination that the chat line itself, which permitted subscribers to use Stern's name in discussing Stern and his candidacy, was editorial content fully protected by the First Amendment.[46] The court, citing the leading case that deals with on-line services, *Cubby, Inc. v. CompuServe, Inc.*,[47] agreed that an on-line service, even one where only paid subscribers may access the information services, is like a book store or a letter to the editor column in a newspaper.[48] No permission is necessary to use the name of an individual in connection with such material.[49] This of course goes to the chat service aspect of the defendant's service as opposed to a web site's editorial material, but a publisher's own editorial material is certainly entitled to the same protection as the letters to the editor.[50]

There is one case recognizing that the news and information aspects of on-line services are entitled to the same protection as newspapers.[51] Courts have gone pretty far in holding that just about any information is entitled to this protection. Perhaps the most dramatic instance involved a holding in which the court found that pictures illustrating a book entitled *World Guide To*

43. *Id.* at 695.

44. *See id.* at 695-696.

45. *Id.* at 697-698.

46. *See id.* at 701 (stating that "affording protection to on-line computers services when they are engaged in traditional news dissemination . . . is the desirable and required result").

47. Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

48. *Stern*, 626 N.Y.S.2d at 700.

49. *See Cubby*, 776 F. Supp. at 140 ("A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor . . . than that which is applied to a public library, book store or news stand would impose an undue burden on the free flow of information.").

50. *See id.*; *Stern*, 626 N.Y.S.2d at 700.

51. *See* Daniel v. Dow Jones & Co., 520 N.Y.S.2d 334, 340 (N.Y. Civ. Ct. 1987).

Nude Beaches constituted newsworthy matters of public interest and prohibited any claim for invasion of privacy.[52] Thus, the editorial material contained on-line, including chat lines, should be entitled to the same protection as the editorial content of a magazine.

The key issue would be to distinguish the advertising material from the editorial material. Just as a magazine contains articles of public interest next to advertisements so might a web site. The challenge here is to keep the advertising messages separate from the editorial content. Thus, even "advertorial" sections included in a magazine are deemed to include advertising and articles, although the articles are clearly approved by the advertiser or the sponsor of the "advertorial" as being conducive to the advertising they wish to attract. The reader's ability to distinguish articles from advertisements is crucial.[53]

In the leading case, *New York Magazine* had a feature each week called *Best Bets*, which featured items available for sale including the store location and the price.[54] The New York Court of Appeals held that it was editorial material under the control of the editors of the magazine and not an advertisement in disguise, thus defeating the claim by a model who was wearing a jacket depicted in such an announcement.[55] Therefore, under New York law, even an article about a product that extols the virtues of the product may be treated as an editorial and not an advertisement, where the material is not a paid media insertion or otherwise under the control of the manufacturer or the entity proposing a commercial transaction.[56]

A World Wide Web site that constantly and conspicuously depicts the logo of the sponsor may be viewed as being more like an infomercial than a typical medium of communication which contains editorial material and separate advertising material. Consequently, in developing such a web site, it is important to think

52. *See* Creel v. Crown Publishers, Inc., 496 N.Y.S.2d 219, 220-221 (App. Div. 1985) (prohibiting a claim for invasion of privacy).

53. *See Stern*, 626 N.Y.S.2d at 700.

54. *See* Stephano v. Newsgroup Publication, Inc., 474 N.E.2d 580, 582 (N.Y. 1984).

55. *Id.* at 585.

56. *See id*. at 585-86.

about the overall means of distinguishing the editorial content from the advertising message. Specifically, a web site developer should plan how to present logos, plugs, and commercial messages in order to avoid blurring the distinction between the editorial substance and the advertising messages. It is also important to develop the means for prohibiting advertising from bulletin boards and chat lines.

Now, on to defamation. Generally, defamation is the oral or written publication to third parties[57] of a false statement of fact about a person or business that causes the person or business to suffer reputational injury.[58] Ordinarily, "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."[59] In the context of libel, which are written as opposed to spoken defamatory statements, courts have traditionally distinguished between most distributors of materials containing defamatory material and publishers.[60] "[Most] courts have long held that vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation."[61] This requirement that a distributor have knowledge of the defamation is rooted in the guarantees of freedom of speech and of the press contained in the First Amendment.[62]

Sponsorship or operation of a chat service or bulletin board service raises significant, and as yet unresolved, issues of liability under defamation law. Because the very purpose of chat and bulletin board services is to permit customers to post messages and engage in dialogue,[63] as in the *Playboy Enterprises v. Frena*[64] action,

57. That is, parties other than the person making the defamatory statement, or the person or entity that is the subject of the defamatory statement.

58. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

59. Cianci v. New York Times Publ'g Co., 639 F.2d 54, 61 (2d Cir. 1980).

60. *See id.*; *see also* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 139 (S.D.N.Y. 1991).

61. *Cubby*, 776 F. Supp. at 139 (quoting Lerman v. Chuckleberry Publ'g, Inc., 521 F. Supp. 228, 235 (S.D.N.Y. 1981)).

62. *See id.*

63. *See* Symposium, *Current Issues in Media and Telecommunications Law; Indecency on the Internet: Constitutionality of the Telecommunications Act of 1996*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 463, 505 (1997) (discussing chat room services); Niva El Kin-Koren, *Copyright Law and Social Dialogue on the Information Su-*

customers might commit acts of copyright infringement in posting messages, or in uploading material on-line.[65] Thus, you may wish to monitor or screen the services for copyright and trademark infringement issues and delete infringing material. You may also wish to (1) monitor the services for obscenity, racial epithets, and the like, (2) delete offensive material, and (3) prevent users from interfering with operation of the service or from harassing other users. This very monitoring, however, might expose you to liability for defamation.[66]

Two decisions addressed whether the operator of a bulletin board or chat service is a distributor as opposed to a publisher—both suggesting that the degree of editorial control exercised by the operator will be the determinative factor. In *Cubby, Inc. v. CompuServe, Inc.*,[67] the defendant CompuServe, Inc. ("CompuServe") contracted with a company not affiliated with CompuServe, to "manage, review, create, delete and otherwise control the contents of its Journalism Forum[68] in accordance with editorial and technical standards and conventions of style as established by CompuServe."[69] The court found CompuServe to be in the position of a distributor, rather than a publisher, and therefore not li-

perhighway: The Case Against Copyright Liability of Bulletin Board Operators, 13 CARDOZO ARTS & ENT. L.J. 346, 347 n.5 (1993) (defining bulletin boards and their use).

64. 982 F. Supp. 503 (M.D. Fla. 1993).

65. *See* Kin-Koren, *supra* note 63 (discussing potential liability for uploading and downloading material online); *see also* John F. Delaney & Adam Lichstein, *The Law of the Internet: A Summary of U.S. Internet Case Law and Legal Developments*, 505 PLI/PAT. 79, 94 (1998) (discussing Sega Enters. v. Maphia, 948 F. Supp. 923 (N.D. Cal. 1996)).

66. *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. Dec. 11, 1995). The court held that service monitors who choose to monitor and edit the content of their services should be viewed as publishers rather than distributors and thus should be subject to greater liability. *Id.* Congress voiced its displeasure with the decision by passing the Communications Decency Act, which removed disincentives for Internet service providers who choose to police themselves. *See* 47 U.S.C.A. § 230(b)(4) (West, WESTLAW through Pub. L. No 105-165, Mar. 20, 1998); *see also* Zeran v. America Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) (discussing the swift legislative response to the decision in *Stratton Oakmont*).

67. 776 F. Supp. 135 (S.D.N.Y. 1991).

68. CompuServe's on-line services include a series of forums that serve the needs of specific user groups by providing bulletin boards, computer file libraries, and other services.

69. *Id.* at 137 (citation omitted).

able for republication of defamatory statements unless it knew or had reason to know of the defamation.[70] Once CompuServe decided to carry a publication, it had little or no editorial control over that publication's contents, particularly when the publication was carried as part of a forum managed by a company unrelated to CompuServe.[71]

In *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[72] the court found the defendant Prodigy Services Co. ("Prodigy") was a publisher and could be held liable for republication of a defamatory statement, even without knowledge or reason to know the statement was defamatory.[73] The critical difference between CompuServe and Prodigy, and the reason behind the court's determination that Prodigy was a publisher, rather than a mere distributor, was that Prodigy had undertaken to monitor the bulletin board service.[74] The court relied on the following evidence to hold that Prodigy was a publisher.

First, the court relied on the fact that Prodigy promulgated "content guidelines" which requested users to refrain from posting "insulting" or "harassing" notes or those that were in "bad taste" or "grossly repugnant to community standards" or "harmful to maintaining a harmonious on-line community."[75] Prodigy stated it would remove such messages when they were brought to Prodigy's attention.[76] Second, the court relied on Prodigy's use of screening software that automatically pre-screened all bulletin board postings for offensive language.[77] Third, Prodigy's use of Board Leaders to, among other things, enforce the content guidelines was noted by the court.[78] And finally, the court acknowledged the use of an "emergency delete function," which enabled a Board Leader to remove a message posted and send to the message poster a notice

70. *Id.* at 141.
71. *See id.* at 140.
72. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. Dec. 11, 1995).
73. *Id.* at *6.
74. *See id.* at *10.
75. *Id.* at *5.
76. *See id.*
77. *Id.*
78. *See id.*

of explanation, ranging from solicitation to bad taste to insulting.[79]

My firm was retained by Prodigy following this decision. We moved for renewal and reargument in order to correct the factual record. Prodigy in fact did not edit the bulletin board as the plaintiff claimed. Prodigy's policing was limited to mechanical screening of obscenity and offensive words and, after material was posted, the policing of off-topic postings and illegal conduct, such as harassment and obstruction of the functioning of the bulletin board.

We contended that this limited policing is not tantamount to editing.[80] We argued that a publisher, for purposes of liability for defamation, must include the adoption or endorsement of an author's statement. It is the reader's assumption that the publisher elected to publish the specific statement that contributes to the injury. It is the opportunity to evaluate an author's statements and the author's reliability that gives a true publisher the chance to avoid the injury. Thus, without the suggestion of adoption or endorsement or the practical opportunity to evaluate the substance of the statement or the author's reliability, there is no publisher for purposes of defamation liability. Therefore, the operator of a bulletin board service should not be subject to liability for defamation merely because that operator policed illegal conduct, obscenity, fighting words, "time, place, and manner," but not the substantive content, that is, the truth or falsity of statements.

The Telecommunications Act of 1996,[81] which contained provisions attempting to address indecency on the Internet,[82] also contained a provision intended to override *Stratton Oakmont*.[83] In what has been called the "Good Samaritan Defense," it provides that actions taken by providers of Internet services to police inde-

79. *Id.* at *6.

80. *See* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991); Misut v. Mooney, 475 N.Y.S.2d 233, 236 (Sup. Ct. 1984).

81. Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996) (codified at scattered sections of 15 & 47 U.S.C. (Supp. 1997)).

82. *See* Communications Decency Act of 1996, Pub. L No. 104-104, tit. V, 110 Stat. 133 (Feb. 8, 1996) (codified at 47 U.S.C.A. §§ 230, 560-561 (West 1998 & Supp. 1998)).

83. *See* 47 U.S.C.A. § 230(c).

cent, violent, or otherwise objectionable material cannot be considered in determining whether a provider is liable as a publisher for information that was put up on their system by others.[84] The cases since the statute was enacted appear to suggest that it will work to minimize the tendency to hold liable those you can apprehend for the wrongful acts of others.[85]

Now, on to fraud and false advertising. The Federal Trade Commission ("FTC") had made absolutely clear that the full force of laws prohibiting false advertising and fraud is applicable to the Internet. Numerous actions have been instituted against the worst offenders and this activity will only increase as commerce on the Internet becomes increasingly significant.

As to indecency. Other panel members will address the subject of pornography and sex, the one area where commerce on the Internet has flourished most. But allow me one observation; the White House has recognized that, given the worldwide scope of the web, governmental regulation must be international to be truly effective. Given this additional reality, what can be gained by adding governmental oversight to the individual control, responsibility, and enforcement of rights that the law already provides? Given the rapidly changing technology, the ever-increasing capability of users to control what is in fact accessed, and the slow pace of the legislative process, any proposals for additional regulations or laws must be scrutinized in terms of real benefit. We must be careful not to enact legislation merely because of frustration arising from the reality that this technology makes publishers, as opposed to pamphleteers, out of individuals who may be difficult to locate, let alone hold accountable.

MR. SIMS: Thank you. Ms. Fantino is next.

MS. FANTINO: I come to this discussion wearing many hats: former schoolteacher, veteran journalist, and newly admitted attorney. Instructing children, informing adults, and defending rights are tenets I live by, and I do not believe they should suffer at the expense of the First Amendment in cyberspace. Our forefathers seem to have been more enlightened more than two hundred years

84. *See id.*

85. *See* Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997).

ago at guarding our liberty to speak freely in whatever form than today's legislators, who are hesitant to take baby-steps in adapting to new technology as it leaps past them.

It is the dawn of a new millennium and today's adults are giving birth to the leaders of the next century, all converging in a one-wire world, where your television is not only your source of entertainment but it's also your computer monitor, Internet connection, pager, and telephone. It is communications on a global, even galactic scale, considering that we can now talk to space shuttle astronauts orbiting the Earth through the Internet. The Internet has become a weapon of mass instruction and it would be a mistake to silence its influence in a world that is trying to promote democracy, especially when there are already numerous legislative and technological safeguards in place.

Right now, the United States is the lone superpower and the world is looking to us, as the standard-bearer of free speech, to see how we handle the Internet. If we were to place restrictions on what can and cannot be said over the Internet, what kind of message would that send to repressive governments such as China, which prohibits the importation of modems and satellite dishes?[86] We are fortunate in that we only have to run down to our local Radio Shack store or electronics chain to buy this equipment.

The Internet was developed thirty years ago under the auspices of the United States Defense Department in an effort to allow computer and science experts to share experiences, ideas, and discoveries in a high-tech communications world.[87] It was designed to outlast a nuclear holocaust to enable the free flow of information to continue.[88] It has since expanded into a commercial vehicle where anyone can log onto the World Wide Web.[89] The implications of such a universal communications tool are overwhelming. Interestingly enough, the government that gave birth to the Internet

86. *See* Scott E. Feir, *Regulations Restricting Internet Access: China's Great Wall*, 6 PAC. RIM L. & POL'Y J. 361.

87. *See* Susan A. Mort, *The WTO, WIPO & the Internet: Confounding the Borders of Copyright and Neighboring Rights*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 173, 188 (1997).

88. *See id.*

89. *See id.* at 188-89

is now trying to bridle its wild child, where, it has been said, anarchy reigns.[90]

While Congress recognizes the international scope of the Internet and other interactive computer services as providing a unique opportunity for cultural and intellectual exchanges in addition to avenues for political discourse,[91] it is trying to control what can be said between adults who take affirmative steps to use such services, generally within the confines of their own homes. Yet the first congressional effort to reign in the masses through the Communications Decency Act[92] failed with a resounding dismissal by the Supreme Court, which saw the statute as an overly broad attempt to censor indecent speech.[93]

Free speech in the United States has become more of a protected speech than the unbridled ability to say whatever whenever. While the framers of the Constitution were intent on promoting the free marketplace of ideas through the guaranteed liberty of all United States citizens to express themselves,[94] judicial interpretation has modified the plain language of the First Amendment over the course of time. The United States Supreme Court has limited certain forms of speech to time, place, and manner restrictions, while prohibiting Congress from imposing content-based regulations that impede that freedom.[95] The Communications Decency Act of 1996,[96]—part of the larger Telecommunications Act of 1996[97]—was an unconstitutional expansion of federal authority, abridging what has been deemed a fundamental personal right.[98]

90. *See* Robert F. Goldman, *Put Another Log on the Fire, There's a Chill on the Internet: The Effect of Applying Current Anti-Obscenity Laws to Online Communications*, 29 GA. L. REV. 1075, 1075 (1996).

91. *See* H.R. REP. NO. 104-458, at 86 (1996).

92. 47 U.S.C.A. § 230 (West 1998 & Supp. 1998).

93. *See* Reno v. ACLU, __ U.S. __, 117 S. Ct. 2329 (1997).

94. *See* William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 93 (1984).

95. *See* Burson v. Freeman, 504 U.S. 191, 197 (1992).

96. Pub. L No. 104-104, tit. V, 110 Stat. 133 (Feb. 8, 1996) (codified at 47 U.S.C.A. §§ 230, 560-561 (West 1998 & Supp. 1998)).

97. Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996) (codified at scattered sections of 15 & 47 U.S.C. (Supp. 1997)).

98. *See Reno*, 117 S. Ct. 2329 (1997).

Congress overreached in the Communications Decency Act by attempting to suppress free expression under the guise of preventing child exploitation through computers, which is an act already prohibited by federal criminal statutes.[99] The government has a legitimate purpose in seeking to protect the interest of its young citizens but not at the expense of the fundamental freedoms of adults.[100] The conduct they sought to prohibit in the Communications Decency Act, to ban the use of interactive computers for any request, proposal, or other communications to minors that describes sexual or excretory functions or organs,[101] is already punishable under the Child Sexual Exploitation Protection Act.[102] In fact, the criminal sanctions under that statute go further in assuring society protection from offenders, by providing for longer jail terms than those allowed by the Communications Decency Act. The legislative purpose of censorship in the Communications Decency Act already can be achieved more effectively absent censorship and by means substantially narrower to achieving the legitimate governmental interest of protecting minors from sexual exploitation.[103] It thereby failed the requirement of narrow tailoring for any content-based regulations.[104]

Restrictions on obscenity, however, have been upheld by the Supreme Court when an offending expression, which taken as a whole, appeals to the prurient interest in sex in a patently offensive way and lacks any literary, artistic, political, or scientific value.[105] Yet the Supreme Court, in *Miller v. California*,[106] had a difficult time setting forth any national standards for obscenity. Instead, the

99. *See* Sexual Exploitation and Other Abuse of Children Act, 18 U.S.C.A. §§ 2251, 2252 (West 1998 & Supp. 1998).

100. *See Reno*, 117 S. Ct. at 2343.

101. *See* 47 U.S.C.A. § 230.

102. Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat 7 (Feb. 6, 1978) (codified as amended at 18 U.S.C. §§ 2251-2253 (West, WESTLAW through Pub. L. No. 105-165, Mar. 20, 1998)).

103. *See Reno*, 117 S. Ct. at 2346-48.

104. *See* Ward v. Rock Against Racism, 491 U.S. 781 (1988); *see also* Shea v. Reno, 930 F. Supp. 916, 940-41 (S.D.N.Y. 1996) (declaring the Communications Decency Act of 1996 to be an overly broad restraint on protected communication between adults).

105. *See* Miller v. California, 413 U.S. 15, 24 (1973).

106. 413 U.S. 15 (1973).

Court left it to jurors in the forum community to apply a contemporary local standard of morality and for state legislators to set forth specific sexual conduct they deemed to be pornographic within their jurisdiction.[107]

Although we are one nation, we are too culturally diverse to expect a national standard to apply to all communities. In *Miller*, the Court admitted that to do so would be an exercise in futility.[108] Imagine then, what it would be like to apply a global standard of morality where some nations permit and encourage bigamy, nudity, and the like. What may be accepted behavior on the streets of Times Square will not necessarily sit well in the Mormon communities of Utah. It would be an insurmountable task to monitor the Internet with cyber cops. The Communications Decency Act's attempt to sanitize the Internet of indecency would homogenize the unprecedented information exchange taking place in cyberspace.

The right to voice opinions, expressions, and the like is not confined to the isolation of a person in solitary confinement where the only voice heard is his own. The activity of interpersonal communication is so fundamental to the educational and developmental process of human interaction that society's future depends on a robust exchange in the marketplace of ideas. The way to promote the growth of the evils that live among us is to send them underground where they can fester unobserved. Is it not better for parents to monitor the activities of their children and foster in them some responsibility, rather than forcing them to seek knowledge in the lure of the forbidden? Today's parents tend to expect legislation to pick up the slack for the lack of the so-called quality time they spend being involved in the development of their children.

Limiting the dissemination of allegedly indecent material on the Internet restricts the adult population to exchanging material only suitable for children, thereby stunting the development of society. Even such restrictions, when applied to obscene material with which minors may have contact, have been staunchly overturned by the Supreme Court as manifestly against conditions nec-

107. *Id.* at 30.
108. *Id.* at 30-31.

essary for the maintenance and progress of a free society.[109] Although it has been noted that First Amendment protections do not apply to obscene materials, adults within the confines of their own homes have been shielded from the invasion of governmental control over their private reading materials.[110]

Little is more secluded than sitting in the privacy of your own home and turning on your computer to read, to write, or to browse the Internet. In *Stanley v. Georgia*,[111] the Supreme Court held that while states have a right to regulate obscenity, they do not have the power to infringe on an individual's primary liberty of freedom of expression behind closed doors.[112] Legislatures, therefore, have the difficult task of protecting the interests of children while simultaneously preserving the individual rights at the core of the Constitution.

The Internet is not an intruder. We invite it into our home. Just like the cable user described in *Cruz v. Ferre*[113] or the dial-a-porn user outlined in *Sable Communications v. FCC*,[114] the Internet explorer must make a monthly decision whether to continue his subscription to the Internet and, if dissatisfied, he may cancel his subscription at any time.[115] The Internet explorer is a pilot charting his own course. By virtue of the subscription-only access, innocent bystanders cannot be offended by the chance confrontation of indecent material, nor can children too young to read or write be able to access World Wide Web sites without the knowledge to type commands that will get them there.

Parents must take deliberate steps to bring the Internet and all it contains into their homes, thereby purposefully exposing their children to its contents with full knowledge of its global reach. The parents are the gatekeepers of the message and can easily

109. *See* Sable Communications v. FCC, 492 U.S. 115, 129 (1989); *see also* Butler v. Michigan, 352 U.S. 380 (1957) (finding that a law banning dissemination of books to general public, based upon protection of minors, was an unreasonable restriction on the fundamental liberties of a free society).

110. *See* Stanley v. Georgia, 394 U.S. 557 (1969).

111. 394 U.S. 557 (1969)

112. *Id.*

113. 755 F.2d 1415, 1419 (11th Cir. 1985).

114. 492 U.S. 115 (1989).

115. *See Cruz*, 755 F.2d at 1420.

close the door to the world if they so choose.

Because content-based regulations are subject to strict scrutiny, the *Sable* Court looked at other ways to protect minors from exposure to indecent material. The *Sable* Court found that alternatives existed which were less restrictive than an outright ban, and held that cutting adult access to indecency is not narrowly tailored to meet the government's goal.[116] As the judicial view shifts the onus from the industry to parents to the industry again, in keeping a safe harbor for children to mature, perhaps the best solution would be to split the responsibility between the rapidly developing industry and the guardians of our young citizens.

Several alternatives have been explored, some with high success rates and others which are not as feasible in the current market. Time channeling for sensitive material, which has been upheld by the courts in narrow applications,[117] is not workable in a medium like the Internet, where both senders and receivers are located in different time zones and can simultaneously transmit or access information. Restricted use, on the other hand, is much more practicable as a shared responsibility between the industry and parents without placing a tremendous economic burden on either. Selective screening and blocking programs are currently available and do not require any extensive modifications to existing industry or home equipment.

The industry voluntarily developed screening computer programs to assist parents in limiting access by minors to questionable sites on the Internet. Programs, such as CyberPatrol from Microsystems Software, work by screening out access to questionable Web sites as rated by PICS, the Platform for Internet Content Selection: a ratings systems developed by major commercial content providers.[118] Other screening programs, such as SafeSurf, focus on child-friendly sites, again as rated by the software program developer.[119]

116. *Sable*, 492 U.S. at 129.

117. *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

118. *See* Farhan Memon, *How to Keep Your Children Away from this Stuff?*, N.Y. POST, Feb. 8, 1996, at 28.

119. *See id.*

The screening programs place more control in the hands of parents and allow them to supervise, directly or indirectly, their children's use of the Internet. Only the most ingenious minors with computer expertise far beyond the knowledge of the ordinary parent or adult will be able to hack their way through the blocking software. Screening software allows parents, who so desire, to shield their children from questionable material while simultaneously providing adults access to the unrestricted, constitutionally protected so-called indecent sites. It is the least restrictive method available to meet the government's dual purpose of preserving our nation's fundamental liberty of protected speech and shielding the nation's youth from indecency.[120]

If it is United States policy to preserve the vibrant market of the Internet, to maximize user control over what information is received by individuals, and to encourage industry development of filtering technologies to empower parents, then a censorship provision seems to defeat the goal. Placing shutters on the marketplace of ideas is not the way to keep material from seeping through the floorboards. Perhaps today's parents are looking to Congress to legislate away responsibility that is part and parcel of rearing children.

It is doubtful our founding fathers had planned on usurping parental authority in child rearing when setting forth the foundation of protected speech. Rather, it can be argued that the framers sought to firmly establish paternal protectionism by encouraging the marketplace of ideas and leaving it to parents to present it to their children in terms they see fit and at the appropriate time in their development. What better way to ensure the continuation of a freethinking society than by allowing an uncensored exchange of ideas between generations to come on a global basis.

PROF. SIMS: Thank you. Now, Mr. Steinhardt.

MR. STEINHARDT: In *Reno v. ACLU*,[121] the Supreme Court essentially said that the Communications Decency Act was overbroad, that it attempted to regulate speech or the access of adults to speech in the name of protecting children, and that it inevitably

120. *See* Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995).
121. 117 S. Ct. 2329 (1997).

would have that result.[122] The Court did not say that the statute was unconstitutionally vague, but it came very, very close. Justice Stevens, in his majority opinion, said that "the vagueness of the language of indecency and patent offensiveness" contributed to the overbreadth of the statute.[123]

The most interesting thing in light of recent developments was that the Court did not decide this case on the grounds that there were less-restrictive alternatives.[124] There had been much testimony at the trial before the special three-court panel in Philadelphia about less-restrictive alternatives, about various kinds of software filtering content locking-and-rating tools, but neither the lower court nor the Supreme Court saw the case as turning on that point. That is an especially important factor as we look at what has occurred within three weeks of this landmark decision, a sweeping decision.

We had the first White House summit on what some have come to call censorware. That summit involved discussion of an undifferentiated, non-critically examined set of tools for rating,

122. *Id.*

123. *Id.* at 2344 ("The vagueness of the [Communications Decency Act] is a matter of special concern . . . .").

124. In striking down the indecency provisions of the Communications Decency Act, the Supreme Court reapplied the categorical First Amendment analysis that appeared to have been abandoned in *Denver Area Educational TV Consortium v. FCC*, 518 U.S. 727 (1996), a fractured opinion that undermined the applicability of settled First Amendment tests. *See* ACLU v. Reno, 117 S. Ct. 2329 (1997). In *Reno*, the Court found that the Internet bears none of the characteristics that subject other media, such as broadcasting, to lesser First Amendment protection. *Id.* at 2343-44 ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]."). The Court found that the Internet does not suffer from the same spectrum scarcity as broadcasting. *Id.* (noting that the Internet has virtually unlimited potential for growth) (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (setting forth the spectrum scarcity rationale for broadcast regulation)). The *Reno* Court found that Internet is "not as 'invasive' as radio or television" or as accessible to children. *Id.* at 2343 (citing FCC v. Pacifica Found., 438 U.S. 726 (1978) (setting forth the invasiveness rationale for broadcast regulation)). Moreover, the Court found that Internet communications do not invade the home or appear on the computer screen "unbidden," as do television images, and Internet users, unlike radio listeners and television viewers, are unlikely to encounter indecent content by accident because "almost all sexually explicit images [on the Internet] are preceded by warnings as to the content." *Id.* at 2343. Accordingly, the Court subjected the Communications Decency Act to strict scrutiny, rather than the lower levels of scrutiny reserved for regulation of other media.

blocking, and filtering the Internet. A second summit occurred a few weeks ago and the White House participated again, although the summit was held in a hotel rather than facing the Rose Garden.

There has been a very shocking development. Although the Supreme Court explicitly rejected the analogy to broadcast, we have had a series of proposals that treat the Internet as if it were television or radio. Those proposals suggest regulations on content on the Internet that, under American theories of free speech, most people would never conceive of making in regard to the print. For example, some proposals advocate a labeling system or a series of self and third party rating systems.

The quizzical thing, from my perspective, is that no one would ever suggest that all of the publishers in the print world, namely, newspaper publishers, magazine publishers, book publishers, writers, and editors, get together and come up with a system for rating content. Here, you have the Supreme Court saying, on the one hand, that this medium is entitled to at least as much protection as the print world and is not analogous to broadcast. Nonetheless, three weeks later, we begin to discuss rating systems. In fact, the President has referred to the possibility of a V-chip for the Internet.[125]

Similarly, there have been proposals that search engines—which serve a function similar to the *Index to Periodicals* for the print world—adopt those rating systems and block out, that is, refuse to report on, the existence of either unrated or badly rated cites.[126] No one would ever suggest that for the *Index of Periodicals*.

Nor would anyone ever suggest for print, as has been suggested for the Internet, that everyone agree to rate their own content, that the government require the content to be rated, and that the government provide for punishment for punish those who mis-rate. No one would ever suggest that for the print world. Certainly no one would ever be able to successfully establish that for the print world.

125. *See* Laurie J. Flynn, *Child's Play on Web Includes Safety Net*, SAN DIEGO UNION-TRIB., July 1, 1997, at 18.

126. *See id*.

The first judicial challenge to the application of some of these new filtering and blocking technologies is taking place in Virginia, where the Loudoun County library system has adopted for all patrons, both adults and children, use of the X-Stop blocking software.[127] Although X-Stop has been marketed as a product which will block out pornography, bestiality, child pornography, and explicitly sexual materials, like many of the stand-alone blocking products that have been introduced in homes, libraries, and other public institutions, it in fact is a broad tool that blocks out, among other things, the Quaker web site, the American Association of University Women, and—my personal favorite—even a Mormon web site that cautions against masturbation.[128]

Nonetheless, my biggest fear is that these matters will not simply come up in the context of libraries or other public institutions, but that we are moving toward a view of regulating the Internet as if it were a broadcast medium. Such a view endangers free speech on the Internet. This is very dangerous, especially in light of the Supreme Court's characterization of the Internet as "the most participatory medium . . . the ultimate marketplace of ideas."[129]

We see the move by private industry toward the adoption of rating/filtering systems that could well result in a more commercialized, bland, and homogenized Internet. Such action by private industry may lead to an Internet in which quirky speech and individual home pages are either blocked from view or are rendered invisible by search engines, which refuse to report on their existence.

There is a real danger that restricting the potential of the Internet will rob individuals who, as was suggested earlier, do not own the print presses of the *New York Times* or the broadcast license of WCBS Radio in New York City, of the opportunity to use this medium to reach audiences great and small. We have to be very careful about that. My fellow panelist Parry Aftab, I am sure, will talk about this issue some more.

127. *See* Amy Harmon, *Library Suit Becomes Key Test of Freedom to Use the Internet*, N.Y. TIMES, Mar. 2, 1998, at D1 (discussing background of case).

128. *See id.*

129. *Reno*, 117 S. Ct. at 2351.

It is an extremely complex issue: the issue of Internet filtering/blocking. It is more complex than the Communications Decency Act, which the Supreme Court obviously found to be a fairly simple issue in legal terms. But it is something that we are going to worry about, not only because it raises constitutional law questions when those technologies are employed by the government, but because it will shape the nature of the Internet itself.

MR. SIMS: Thank you, Mr. Steinhardt. Mr. Peters is next.

MR. PETERS: Because the title of this section is Restricting Speech on the Internet: Finding an Appropriate Regulatory Framework, it seems to me that there are two questions: first, whether there is a need for regulation, and second, whether a particular regulation is constitutional.

In brief, there is a need for regulation on the Internet, particularly in regard to obscenity and indecency. I should add that at Morality in Media, our primary focus is pornography. It is my opinion that regulation is needed because the home use of screening technology will not alone solve this problem.

The home use of screening technology will not work because first, no screening technology blocks all offending sites,[130] second, no screening technology is foolproof—kids can get around it,[131] third, not all parents will use it,[132] fourth, not all of the parents who do use it will use it wisely and carefully,[133] and finally, children can and will be able to access computers outside of the home.[134]

In New York City, children can access the Internet through school,[135] the library,[136] places of employment,[137] retail businesses,

130. *See* Dawn C. Chmielewski, *Parents Can Take Steps To Monitor Kids Online*, HOUS. CHRON., Aug. 14, 1997, at 4.

131. *See* Lance Gay, *Firms Found Ways to Keep Workers from Smut Sites*, STAR-TRIB., July 6, 1997, at D4 (stating that "computer-educated children can find backdoor ways of getting information they want.")

132. *See* Gil Klein, *Summit Debates Interact Risk to Youths*, RICHMOND TIMES-DISPATCH, Dec. 2, 1997, at A2.

133. *See id.*

134. *See* David S. Broder, *Gore in His High Tech Element in California, Promotes Science and Environment*, WASH. POST, Jan. 31, 1998, at A11.

135. *See* Abby Goodnough, *Internet Access Puts Burden of Control on Schools*, N.Y. TIMES, Apr. 19, 1997, § 1, at 1.

136. *See* Amy Harmon, *On Office PC, Bosses Opt for All Work, No Play*, N.Y.

a friend's home, and, in the future, pocket computers. Although I agree that pocket computers are not going to be great for viewing visual sex, they certainly would be excellent for chat rooms. Now, I do not know how anyone can say, with a straight face, that home use of screening technology is the answer to protecting kids from pornography on the Internet.

The second point in terms of the need for Internet regulation of indecency is that voluntary steps by the on-line services and Internet service providers ("ISP") will also not be sufficient. The reason for that, in my opinion, is that for the most part, the Internet industry has been unwilling to do everything it can do to curb pornography, and I do not see any reason to expect that to change.

Interestingly, when the computer on-line services world consisted of America Online, Prodigy, and CompuServe, only Prodigy made an honest effort to protect kids against the junk.[138] Prodigy really took strong action against all forms of pornography.[139] America Online and CompuServe did not. I've got a file filled with articles describing instances of sexual exploitation of children that involved America Online. I think I've got one article on Prodigy.

The point being that the Internet industry has not shown a willingness, to this point, to do what is needed to solve this problem voluntarily. My fellow panelist Barry Steinhardt raised points that indicate that solving this problem voluntarily would not be easy, even if the Internet industry were willing to do everything possible.

Related to this, there are thousands of ISPs already. Even if the major ones were willing to come up with some kind of voluntary, genuine solution to this, this would not protect the thousands of people using the other ISPs. It is safe to say that, given the nature

TIMES, Sept. 22, 1997, at A1.

137. *See id.*

138. *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. Dec. 11, 1995).

139. *See* Marc Jacobson, *Prodigy: It May Be Many Things to Many People, But it is Not a Publisher For Purposes of Libel and Other Opinions*, 11 ST. JOHN'S J. LEGAL COMMENT. 673 (1996); R. Hayes Johnson, Jr., *Defamation in Cyberspace: A Court Takes a Wrong Turn on the Information Superhighway in* Stratton Oakmont v. Prodigy Services Co., 49 ARK. L. REV. 589, 593-94 (1996).

of the Internet community, many ISPs will not go along with any voluntary plan.

So, Congress should try to draft intelligent legislation which, while it will not solve the whole problem by any means, will provide some protection in conjunction with the use of home screening technology and whatever else is available. That is the position that I have taken from day one. I have never felt that the law was the whole answer to this problem. I also concluded long ago that without the law, there will be no answer to protecting children on the Internet.

Now, I have some points on the impact of *Reno v. ACLU*.[140] I think that it depends in part on how you read the case. It can be read as validating the view that there shall be no regulation of indecency on the Internet; there are statements in Justice Stevens's opinion that would support that view.[141] Another way to look at the case is as striking down a particular law because of glaring defects in that law.[142]

Now, assuming that the second view is the correct interpretation of *Reno v. ACLU*,[143] I will just mention briefly three problems with the Communications Decency Act that we recognized at Morality in Media. I should add that although we did have some input in shaping the Communications Decency Act, we did not shape the entire piece of legislation. For the most part, it was out of our hands. But in terms of problems that we recognized, both early on and as time went along:

First, it is arguable that it was Congress's job, not the courts, to sort through the many technological complexities of the Internet and craft a piece of legislation that recognized that there are different forms of communication on the Internet. Some parts of the Internet function like broadcasting. Other parts of the Internet are similar to accessing a library.[144] There are all kinds of chat

140. 117 S. Ct. 2329 (1997).

141. *See id.* at 2332-33.

142. *See id.*

143. 117 S. Ct. 2329 (1997).

144. *See* Glenn Kubota, *Public School Usage of Internet Filtering Software: Book Banning Reincarnated?*, 17 LOY. L.A. ENT. L.J. 687, 692 (1997).

rooms,[145] which are kind of like party lines found on the telephone. The Internet also has news groups,[146] which might count as a totally different means of communication.

I hasten to add there was an article recently in the *Wall Street Journal*, describing how news groups were regulating themselves,[147] and another article in the *New York Times* about how chat lines were regulating themselves.[148] If self-regulation is possible, so is legal regulation.

But the point is that the Internet is a complex media, which presents the interesting legal question of who must sort out he complexities, and decide how to regulate the Internet. Is it Congress's job or the FCC's or the courts'?

I think a good case could be made, given the state of technology for the Internet, that it really was Congress's job, not the courts'. I do not think anybody would argue with the following statement: Congress did not do that job. Basically, Congress provided us with a blunderbuss statute with some specific defenses that admittedly would not always apply,[149] and presumably thought that the courts were going to work out this complex thing on a case-by-case basis.[150]

But given the fact that we were dealing with a criminal law,[151] that approach presented difficulties. In any case, it would have been better had Congress worked through most of the problems instead of throwing the thing in the lap of the courts.

145. *See* Note, *Keeping Secrets in Cyberspace: Establishing Fourth Amendment Protection For Internet Communication*, 110 HARV. L. REV. 1591, 1593 (1997).

146. *See* Jeffery M. Taylor, *Liability of Usenet Moderators For Defamation Published By Others: Flinging the Law of Defamation Into Cyberspace*, 47 FLA. L. REV. 247, 253 (1995).

147. *See* Timothy Hanrahan, *The Internet: The Moderator*, WALL ST. J., Dec. 8, 1997, at R26.

148. *See* Laurie J. Flynn, *Taking In the Sites; Web Discussion Forums Both Public and Private*, N.Y. TIMES, July 21, 1997, at D6; *see also* Lisa Bransten, *Companies Are Talking Up Chat Rooms. More Firms See Them As Way To Improve Service*, WALL ST. J., Dec. 15, 1997, at B10.

149. *See* Communications Decency Act of 1996, 47 U.S.C.A. § 223(e) (West 1998 & Supp. 1998).

150. *See* Reno v. ACLU, 117 S. Ct. 2339, 2345 (1997).

151. *See* 47 U.S.C.A. §§ 223(a), 223(d).

Part of my explanation for why Congress enacted such legislation is that there are some members of Congress who do not like the FCC. Congress should have handed the job of devising medium-specific regulations to the FCC. My suspicion, however, is that even that would not have worked. But a lot more progress would have been made in terms of coming up with an intelligent law.

A second problem with the Communications Decency Act was that neither the FCC nor the lower courts had adequately clarified the indecency definition.[152] Certainly, wealthy radio stations have been fined by the FCC for indecency violations, but because the fines were relatively small, the stations paid them and did not raise any legal challenges.[153]

And so, basically speaking, while we do have FCC rulings that address indecency, there is not much real law. In particular, the courts have seldom examined the application of the indecency standard and tried to set some limits or clarify some things. That was never done.

The Supreme Court was justified in recognizing that it is not wise to expect little Joe Citizen to have the same knowledge of the law as the FCC.[154] I guess, in hoping that the Court would uphold this law, Congress hoped the Court would do a better job clarifying the indecency standard than the FCC. But the Court declined to do so. I found it very interesting, however, that while the Supreme Court was unwilling to flesh out the indecency standard, the Court was willing to clarify the concept of sexual harassment by providing guidelines,[155] which were both criticized[156] and recognized as a step in the right direction.[157]

152. *See Reno*, 117 S. Ct. at 2345.

153. *See* Chris McConnell, *FCC Indecency Review Yields Few Fines*, BROADCASTING & CABLE, Jan. 27, 1997, at 26.

154. *See Reno*, 117 S. Ct. at 2329 (discussing reasons for invalidating portions of the Communications Decency Act on vagueness grounds).

155. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).

156. *See* Dawn M. Buff, Note, *Beyond the Court's Standard Response: Creating an Effective Test for Determining Hostile Work Environment Harassment Under Title VII*, 24 STETSON L. REV. 719 (1995).

157. *See* Susan Collins, Note, Harris v. Forklift Systems: *A Modest Clarification of the Inquiry in Hostile Environment Sexual Harassment Cases*, 1994 WIS. L. REV. 1515

Now, whether or not they were justified at this point in time in refusing that invitation is a question that I can not answer. At any rate, in a court case arising in the television medium a couple of years ago, the FCC was supposed to clarify the indecency standard and they did not.[158]

I just happened to read in *Broadcasting & Cable* magazine that the new FCC Commissioner considers that task a priority.[159] I hope that the FCC does a wise job in clarifying the indecency standard.

My point is that we recognized problems in the current indecency standard. Arguably, the Supreme Court could have provided the clarity that was lacking. But in its defense, the Court did not have much to work with. There was not a good, sound body of law available to consult. In large part, they would have had to craft the standard on their own. So, perhaps wisely, they chose not to do it.

The third problem with the Communications Decency Act concerns the choice between two standards: harmful-to-minors[160] versus indecency.[161] We fought for the indecency standard, but only because we felt there were also problems with non-consenting adults being exposed to indecency on the Internet. It has always been our position that the indecency standard is an indecent-for-all standard that is intended for what, in effect, is a mixed audience of adults and children.

If you look at the origins of the indecency concept, I think it is an honest statement to say that the main purpose of it was not to protect children.[162] It was a public morality and public sensibilities concern. Thus, in proceedings involving broadcast indecency, the FCC unilaterally decided that non-consenting adults, in the privacy

(1994).

158. *See* Becker v. FCC, 95 F.3d 75 (1996).

159. *See* Chris McConnell, *Channel Surfing with New FCC: Democratic Majority May Be More Willing To Regulate Content*, BROADCASTING & CABLE, Nov. 24, 1997, at 26.

160. *See* Ginsburg v. New York, 390 U.S. 629, 632-33 (1968).

161. *See The Communications Decency Act: A Cyber-Gag to First Amendment Rights on the Internet*, 75 U. DET. MERCY L. REV. 187, 205-09 (1997).

162. *See* Alec Harrell, Note, *Who Cares About Prior Restraint? An Analysis of the FCC's Enforcement of Indecency Forfeiture Orders*, 70 S. CAL. L. REV. 239, 240-41 (1996).

of their home, should not be protected against indecency. The only valid government concern that the FCC was willing to recognize was the concern for children.

That was the decision the FCC made, despite the fact that, in *FCC v. Pacifica Foundation*,[163] the Supreme Court had specifically, both in the plurality opinion and concurring opinion, recognized the valid interest of protecting adults in the privacy of the home from indecency.[164] But in our opinion, if the only concern was protecting children, particularly where pornography is concerned, clearly the obscene for minors standard was the one most appropriate.

In terms of what is next, clearly the answer depends on what is the correct interpretation of the Court's decision. Part of it also depends on what action, if any, is taken by Congress.

Many accused Congress of using the Communications Decency Act for political purposes.[165] I think there is some truth to that. Congress wanted to be on record in an election year as doing something about pornography on the Internet. It will now be interesting to see how committed Congress really is in protecting children.

A related issue is whether Congress will be able to swallow its pride and authorize the FCC to address the specifics of the Internet with specific regulations tailored to the specific problems, in contrast to Congress throwing out another general piece of legislation. If Congress does decide to try again, I suggest that it gets the FCC involved because the FCC is suited to address this problem. I would also say that it is pretty clear from *Reno v. ACLU* that someone must examine each form of Internet communication, the problems that may arise in particular forms of communication, and draft a proposed law or regulations aimed at particular problems.[166] Obviously, there will be some questions that have to be answered in specific cases. That is the job of the Supreme Court and the

163. 438 U.S. 726 (1978).

164. *Id.* at 731 n.2; *see also id.* at 764 (Brennan, J., dissenting).

165. *See* Patrick A. Trueman, *Porn on the Internet, Here and Abroad*, WASH. TIMES, Jan. 18, 1996, at A19.

166. *See* Reno v. ACLU, 117 S. Ct. 2329, 2331-33 (1997).

lower courts.

My last recommendation is that Congress avoid repeating the mistake of letting the on-line services and ISPs off the hook. In my opinion, the Internet content providers can do a lot more than the lower courts[167] and the Supreme Court[168] found that they can do. I previously mentioned articles in the *Wall Street Journal* and the *New York Times* about how different news groups and chat rooms are self-regulating.[169] Industry monitoring is possible, despite the findings of the district courts.[170] Even the Supreme Court has recognized the industry's potential role.[171]

But I do recognize that there will be no effective regulation if the whole onus is put on the content providers. In some cases, the only entity in the Internet that may be able to effectively block children's access is the Internet access provider. In my opinion, because those folks give Congress a lot of money, they got off the hook.

It is safe to say that efforts toward protecting children from indecency on the Internet will not succeed unless Congress holds on-line services and ISPs responsible for what they can realistically do. We were involved in the crafting of the Communications Decency Act, and I will tell you nobody was trying to put an obligation on anybody that would be, practically speaking, impossible. But clearly the Internet access providers can do something other than provide parents with the option of adding home screening technology.

If Congress lets them off the hook again, only kids with responsible parents who manage to inculcate their children with the necessary moral values will be protected on the Internet; and, just

167. *See* ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) (finding that Internet content providers cannot prevent material from reaching users once such material is posted on the web).

168. *See* Reno v. ACLU, 117 S. Ct. 2329 (1997).

169. *See* Weber, *supra* note 147.

170. *See Reno*, 929 F. Supp. at 863 (explaining that treating Internet content providers as publishers would expose them to liabilities against which they could not protect due to the difficulty of removing posted messages or preventing obscene material from reaching users once posted on the web).

171. *See Reno*, 117 S. Ct. at 2337 (recognizing that credit card verification systems can determine the age of the user).

plainly speaking, the rest of them be damned.

MR. SIMS: Thank you, Robert Peters. Our final speaker to set the stage for our open discussion is Ms. Aftab.

MS. AFTAB: I am going to take a different tack. Because you now understand everything you need to know about restricting speech in cyberspace, let me tell you a little bit about Fordham Law School.

Last year I sat on this panel.[172] It was just before the Communications Decency Act oral argument. I was thrilled to have been asked to speak. At that time, I ran a whole bunch of on-line legal discussions for lawyers, I was host of the Court TV Law Center's legal help line and America Online's ("AOL") legal discussions, and all these other things, which just means that I talked a lot on-line; it did not mean that I was necessarily an expert on free speech.

So I was invited and I learned an incredible amount at this panel because both the chief lawyer arguing the case for the ACLU[173] and the chief lawyer arguing for the government[174] were panelists. The brief of the ACLU[175] was going in the next morning and we were trying to find out what it was going to say. We were all very excited about this. I learned about the Communications Decency Act at that panel discussion.

A week later, I got a phone call from CNN. They asked me if I would cover the Communications Decency Act oral argument for them and talk about child-filtering software. I am a mother; I am forty-six years old; my kids are in college; what do I know about child-filtering software? I had no idea what they were talking about.

But I consulted last year's second issue of the *Fordham Intellectual Property, Media and Entertainment Law Journal*, and I went to the underlying decision. Sure enough, the opinion talked

172. *See* Symposium, *Current Issues in Media and Telecommunications Law: Indecency on the Internet: Constitutionality of the Telecommunications Act of 1996*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 463 (1997).

173. *See id.* Christopher A. Hansen was chief counsel for the ACLU.

174. *See id.* Theodore C. Hirt was the chief lawyer for the United States.

175. *See* Brief for Appellees, Reno v. ACLU, 117 S. Ct. 2329 (1997) (No. 96-511).

about child-filtering software.

So I did the piece for CNN. We talked about free speech on the Internet and I recited everything I had learned at the panel and everything I had learned about children's Internet safety and filtering software.[176] I got more phone calls, e-mail, and letters from parents after that one appearance on CNN than I had ever gotten from any other appearances on CNN or anywhere else. They wrote, "This is great. How safe are my kids? I understand this argument and I appreciate free speech, but I've got kids and I don't know what to do with them, and I don't even know how to turn on a computer much less protect them in cyberspace."

So I called my sister, who is a pediatrician for AOL on Prime and for Parent Time, and I said, "Find a book that somebody has written and give me the title so that every time somebody sends me one of these e-mails, I'll tell them to go buy the book." She could not find one, but she is a doctor, and doctors do not read, so I called up my friends trying to find one. No one could find one. Then we figured out that there really was not a book out there to teach parents the basics in an efficient way.

So I decided to start an outline for such a book. In fact, we wrote the first definitive book that really covers all the topics.[177] Now I understand a lot more about filtering software. Let me tell you what I have learned over the last year.

I have learned that the statements I made on CNN and the statements that Robert Peters just made here, about how children can get around this stuff, is not as true as I thought it was when I first spoke on television. I located young hackers and promised them $100 for every one of the four software programs that we tested: CyberPatrol, Net Nanny, CyberSitter, and Surf Watch. I said, "This is the software. Get around it. I'll pay you $100, and you'll tell me how you did it."

In typical big mouth manner, I contacted the software companies and told them that child hackers could easily hack their filtering programs. They all panicked and wanted to know how the

176. *See CNN TODAY: Products Offered to Parents to Screen Internet* (CNN television broadcast, Mar. 19, 1997).

177. *See* AFTAB, *supra* note 3.

child hackers had done it. So I sent an e-mail to Chris, who was my child hacker, asking, "Hey, Chris, how did you break it?" He said, "Oh, I couldn't break it." So we had to change the text of the book. But I learned that it is not so easy to get around those programs.

I also learned that parents are not sure that they want to use those programs. Parents want to keep their children safe, but a lot of them want to know how to keep their children safe on their own.

I have spoken with various members of the United States Senate and the House of Representatives about Internet legislation and children Internet safety and filtering on-line. Every single one of them who has asked me to talk with them has asked me questions about filtering software and I have answered them. At the end, they typically remark how terrible the problem is and that the solution is to get children off the Internet. But I think that view is part of the problem, not the solution.

I started out as a free-speech advocate. Although I started writing the book very free-speech oriented, I recognized that parents have a legitimate concern. There has to be a way to give parents a handle on keeping their children safe without encroaching on the constitutional rights of other people. Indecency is constitutionally permitted for adults.[178] I did not want to rewrite the indecency standard, but I did want to rewrite the obscenity standard in this country.

I also have a lot of problems with the fact that obscenity standards were being based on where the material was read. For example, because material that was put on the Internet in California was read in Tennessee, it was judged under Tennessee standards.[179]

So I see a lot of those problems and as I got more involved and became one of the experts, reluctantly, of filtering software, I have learned that we really need structure.

Although I used to think that the filtering software was going to be the answer, I no longer think so. I really think that educating

178. *See* Sable Communications v. FCC, 492 U.S. 115 (1989).

179. *See* United States v. Thomas, 74 F.3d 701 (6th Cir. 1996).

parents is the answer. I do not think it is regulation.

I have seen the new "Son of CDA"[180] that Senator Coats has put out and, after discussing it with other cyberspace lawyers who think that it actually may pass constitutional challenge, a lot of us are uncomfortable with it. I do not like any regulations on the Internet because I see the beauty of the evolution of the Internet on an international basis.

There has been an evolution from last year, when I sat here in this room, to my involvement at the summit. I was brought in to help prepare most of the White Paper for the Child Advocacy Task Force because I was seen as a moderate. The religious right groups and some of the more protective groups recognized that they needed a broader base of people to support what they were doing, and I was brought in for that reason.

It was the first time I really had an open dialogue with a lot of groups. I have met a lot of groups who are actually doing things to try to clean up the parts of cyberspace that most of us agree should be cleaned up.

I met a group called Cyber Angels,[181] which until then I was not particularly thrilled about. I had read about them. They are affiliated with the Guardian Angels. But they actually find sites of child pornography and child abuse on-line and they try to shut them down. They will patrol chat rooms. They have 60,000 members worldwide patrolling chat rooms and trying to keep people from preying on others.

Regardless of your opinion, that kind of thing can be done. I think that there is a strong base of people trying to do something, which is fine because something must be done.

I think the answer might be a combination. When my children were growing up, I let them eat peanut butter and jelly, pizza, and Spaghetti-O's, and the only rule I had—against Welch's grape

180. Internet Material Harmful to Minors Amendment, S. 1482, 105th Cong. (1997) (amending Communications Act of 1934 to prohibit distribution on the web of material harmful to minors).

181. *See generally* Rachel Sylvester, *Vigilantes Keep Cyberspace Safe from Criminals*, DAILY TELEGRAPH (London), Nov. 5, 1995, at 21 (discussing vigilante groups in cyberspace).

juice—was to protect my carpet from stains I couldn't get out. But my younger sister has her children eating bananas and peanut butter, not on Wonder Bread but on celery, makes all of their bread and cookies homemade, and does not allow them to eat at McDonald's at all. It is not up to me to tell her how to parent her children and it is not up to her to tell me how to parent mine. I wrote the book *Parent's Guide to the Internet: How to Protect Your Kids in Cyberspace*[182] to teach parents what they need to know to make their own choices and then to implement and enforce those choices.

So I think that while we may be talking about laws that should be enacted or laws that should not be enacted, or whether PICS[183] is appropriate, or whether filtering software over-filters, I think we also need to keep in mind that we need practical solutions for people who want to know now what they can do to protect their children when they go on-line. For instance, some parents might think that they know how to be perfectly safe with their children, then they sit down next to a computer and the child asks to see the NASA site. The mother or father says, "Sure," and types in "nasa.com." Because that parent skipped over that part of the book where I explain that the ".com" means that it is a commercial site and not a government site, the parent types in "nasa.com" and finds a billboard site for six pornographic sites. It takes them right to it.

I found that site, which came out in CNN and in a couple of other places,[184] before they started covering up the pictures. A lot of unwilling viewers saw that site's graphic images. And a lot of young children who were looking for Pathfinder found themselves learning more about biology than space.

We need to put a lot more time and attention into educating people and giving them choices. The choices may include using

182. *See* AFTAB, *supra* note 3.

183. *See generally* Bruce Handy, *Why Johnny Can't Surf: How to Protect Kids from Online Smut?*, TIME, Dec. 15, 1997, at 75 (describing the controversy surrounding the Platform for Internet Content Selection, a world wide web consortium specification for labeling Internet content).

184. *See* Lawrence Magid, *Cyberculture Sex Cites Capitalizing on Misleading URLs*, L.A. TIMES, Mar. 2, 1998, at D3.

software at your desktop to keep your children out of trouble; it may include finding an on-line service provider or an ISP that has server-level blocking; it may include educating your children to be able to determine and value whatever they see, no matter what it is, so if it is the kind of thing you do not want them to see, they will click off of it; and it may be something in between.

But I think, as aspiring and practicing lawyers, we need to recognize that there is no one answer to this. The longer I am involved with it, the more I recognize that I do not have the answers. So I want you to keep your eyes, your ears, and your opinions open on this one, because my opinion has changed and I find myself in the middle of the road.

You need to recognize that we have to address people's concerns, and those concerns may be the same or different in other countries. You have got to keep your eyes open and your earns open and your brain functioning, so that the remedy fashioned will work for everybody who wants that selection choice.

Good luck, it is going to be your job.

MR. SIMS: Thank you, Ms. Aftab. I would like to thank all of our fine panelists for their excellent presentations.

Our format from here will be a roundtable discussion followed by questions from the audience. I had some questions, but, frankly, like the fisherman in the movie *Jaws,* I have a sense there is already a lot of chum in the water here. So, first, would any of you like to respond to anything that anyone else has said?

MR. PETERS: If Parry Aftab is correct, you will not have any worry because there will not be any law to uphold or defend.

MS. AFTAB: That's interesting.

MR. PETERS: She cannot talk to you like a young lawyer.

MS. AFTAB: I think that there will be law, I think there are laws, and I think the laws that we have now will be applied in cyberspace in the way the Supreme Court has told us:[185] that cyberspace is a library and it will be treated like print media.[186] Print

185. *See* Reno v. ACLU, 117 S. Ct. 2329 (1997).

186. *See id.* at 2347-2348.

media has laws that govern what you can do. I think that the laws that exist now, if we are smart about how we apply them and open-minded about the technology, with a little bit of twisting and turning, work well. I do not know that I want Congress fiddling around with something they do not yet understand.

MR. KURNIT: I would like to add to that. I am not sure that the laws work as well as they should. People say things are imperfect. Well, when it comes to the First Amendment, it means we err on the side of keeping the government out. We have laws dealing with child pornography[187] and pandering,[188] and there is the obscenity standard.[189] Before we think about making more laws, there is a police department in Oklahoma that went out and seized copies of *The Tin Drum* from people's homes.[190] Fortunately for all of us, one of the people who had rented *The Tin Drum* from the

187. *See* ALA. CODE § 13A-12-197 (1997); ALASKA STAT. § 11.61.125 (Michie 1997); ARK. CODE ANN. § 5-27-304 (Michie 1997); CAL. PENAL CODE § 311.3 (Deering 1997); COLO. REV. STAT. § 18-6-403 (1997); CONN. GEN. STAT. § 3a-196 (1997); DEL. CODE ANN. tit. 11, § 1111 (1997); GA. CODE ANN. §16-6-100 (1997); ILL. COMP. STAT. 5/11-16 (West 1997); IOWA CODE § 725.3 (1997); MD. ANN. CODE art. 27, § 419A (1997); MASS ANN. LAWS ch. 272, § 29A-C (Law. Co-op. 1997); MICH. STAT. ANN. § 28.710 (Law. Co-op. 1997); MISS. CODE ANN. § 97-5-33 (1997); MO. REV. STAT. § 573.025 (1997); MONT. CODE ANN. § 45-5-625 (1997); NEB. REV. STAT. ANN. § 28-1463 (Michie 1997); NEV. REV. STAT. ANN. § 200.730 (1997); N.H. REV. STAT. ANN. § 649 (1996); N.J. STAT. ANN. § 2A-30-1 (West 1997); N.M. STAT. ANN. § 30-6A-1 (Michie 1997); N.Y. PENAL LAW § 263.00 (Consol. 1998); OHIO REV. CODE ANN. § 2907.323 (Anderson 1998); 18 PA. CONS. STAT. § 6312 (1997); R.I. GEN. LAWS § 11-9-1 (1997); S.C. CODE. ANN. § 16-15-335 (Law. Co-op. 1997); S.D. CODIFIED LAWS § 22-22-23.1 (Michie 1997); TENN. CODE ANN. § 39-17-902 (1997); TEX. PENAL CODE ANN. § 43-26 (West 1997); VA. CODE ANN. § 18-2-374.1 (Michie 1997); WASH. REV. CODE ANN. § 9.68A.40 (Michie 1997); WIS. STAT. § 948.12 (1996); WYO. STAT. ANN. § 6-4-302 (Michie 1997).

188. *See* ARIZ. REV. STAT. § 13-3209 (1997); ARK. CODE ANN. § 5-27-304 (Michie 1997); CAL. PENAL CODE § 266 (Deering 1997); COLO. REV. STAT. § 18-7-203 (1997); D.C. CODE ANN. § 22-2705 (1997); GA. CODE ANN. § 16-6-12 (1997); ILL. COMP. STAT. 5/11-16 (West 1997); IOWA CODE § 725.3 (1997); KY. REV. STAT. ANN. § 14.84 (Michie § 1997); MD. ANN. CODE art. 27, § 426 (1997); MICH. STAT. ANN. § 28.710 (Law. Co-op. 1997); NEB. REV. STAT. ANN. § 28-802 (Michie 1997); NEV. REV. STAT. ANN. § 201.300 (Michie 1997); OHIO REV. CODE ANN. § 2907.32 (Anderson 1997); R.I. GEN. LAWS § 11-34-1-3 (1997); VA. CODE ANN. § 1625-26 (Michie 1997); WIS. STAT. § 944.33 (1996).

189. *See* Roth v. United States, 354 U.S. 476 (1957) (delineating test to determine whether material is obscene).

190. *See Police Seizure of Film 'Tin Drum' Illegal, Judge Rules*, COM. APPEAL, Dec. 28, 1997, at A5.

local video store was the head of the ACLU.[191] But we have judges who do not understand that *Garrison v. Maryland*[192] says that police cannot just go and seize without some judicial determination first.[193]

Stratton Oakmont,[194] when we got involved, had already turned into a debacle because neither the judge nor the lawyers in the case were aware that you can not generally enjoin a libel. Thus the whole decision—which went awry until the Communications Decency Act—was based on trying to enforce an injunction against future libel, which should never have come down at all.

So I think as lawyers, we should think about whether or not we support a new Communications Decency Act or additional regulation when we hear that such legislation can not be perfect. It is going to be problematic. We come back to the question of whether or not our Congress is competent to regulate a technology that it does not understand when that technology will change before Congress can get a bill through the process.

I do not think that there is a hole that needs to be filled. I think that there is enough law. But, to the extent that there is a hole, if we tried to fill it, most likely the technology would get around it before the law could take effect or the law would be ineffective on its face. In this realm, any effort at imposing some new regulation will only lead to bigger problems.

MS. AFTAB: So we agree that there is a problem there now?

MR. KURNIT: Yes.

MS. AFTAB: Okay.

MR. SIMS: Ms. Fantino?

MS. FANTINO: I agree with Rick Kurnit. I think that there are already enough statutes on the books, including the Sexual Exploitation of Children Act,[195] which allows criminal penalties against

191. *See id.* Michael Cornfield, the development director for the Oklahoma ACLU, brought the action. *See id.*

192. Garrison v. State of Maryland, 303 Md. 385 (Md. Ct. Spec. App. 1985).

193. *See id.* at 391-392.

194. Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. Dec. 11, 1995).

195. 18 U.S.C.A. § 2251 (West 1998 & Supp. 1998).

those purveyors of child pornography.[196] As for Morality in Media worrying about adults, well, if you come upon a page you do not like, you turn the page.

I just want to point out what a hot issue this is as the lawmakers were very uncomfortable legislating in this area. I do not know if you are aware of the real power of the media, but as a reporter for CBS, it is easy for me to contact whomever I want. Every member of the Senate Judiciary Committee whom I called returned my call. Once they realized the subject on which I wanted a quote, they clammed up. They would not comment on cyber-legislation, period. They are ready to talk about everything else, but when it comes to articulating their opinion on this, they clam up.

MR. PETERS: One gap that I think Justice Stevens seemed to have recognized was the difference between obscene for adults and obscene for minors.[197] In the real world, which we can touch at least with our hands, there are laws that prohibit hard-core adult obscenity for everybody.[198] Courts and legislative bodies recognized decades ago that while we might want to protect certain types of sex material for adults, they are not good for kids. So there are two types of laws: one type prohibiting the sale of adult obscenity to you and me,[199] and another type prohibiting the sale to

196. *Id.* § 2251(d).

197. *See* Reno v. ACLU, 117 S. Ct. 2329, 2343 (1997).

198. *See* ALA. CODE § 13A-12-197 (1997); ALASKA STAT. § 11.61.125 (Michie 1997); ARK. CODE ANN. § 5-27-304 (Michie 1997); CAL. PENAL CODE § 311.3 (Deering 1997); COLO. REV. STAT. § 18-6-403 (1997); CONN. GEN. STAT. § 3a-196 (1997); DEL. CODE ANN. tit. 11, § 1111 (1997); GA. CODE ANN. §16-6-100 (1997); ILL. COMP. STAT. 5/11-16 (West 1997); IOWA CODE § 725.3 (1997); MD. ANN. CODE art. 27, § 419A (1997); MASS ANN. LAWS ch. 272, § 29A-C (Law. Co-op. 1997); MICH. STAT. ANN. § 28.710 (Law. Co-op. 1997); MISS. CODE ANN. § 97-5-33 (1997); MO. REV. STAT. § 573.025 (1997); MONT. CODE ANN. § 45-5-625 (1997); NEB. REV. STAT. ANN. § 28-1463 (Michie 1997); NEV. REV. STAT. ANN. § 200.730 (1997); N.H. REV. STAT. ANN. § 649 (1996); N.J. STAT. ANN. § 2A-30-1 (West 1997); N.M. STAT. ANN. § 30-6A-1 (Michie 1997); N.Y. PENAL LAW § 263.00 (Consol. 1998); OHIO REV. CODE ANN. § 2907.323 (Anderson 1998); 18 PA. CONS. STAT. § 6312 (1997); R.I. GEN. LAWS § 11-9-1 (1997); S.C. CODE. ANN. § 16-15-335 (Law. Co-op. 1997); S.D. CODIFIED LAWS § 22-22-23.1 (Michie 1997); TENN. CODE ANN. § 39-17-902 (1997); TEX. PENAL CODE ANN. § 43-26 (West 1997); VA. CODE ANN. § 18-2-374.1 (Michie 1997); WASH. REV. CODE ANN. § 9.68A.40 (Michie 1997); WIS. STAT. § 948.12 (1996); WYO. STAT. ANN. § 6-4-302 (Michie 1997).

199. See ALA. CODE § 13A-12-191 91997); GA. CODE ANN. § 16-20-80 (1997);

minors of material obscene for minors,[200] which is a broader standard intended to protect children.

No such law exists on the Internet at this point, certainly at the federal level. So basically what we say on the Internet is that whatever is protected speech for adults, in terms of pornographic materials on the Internet, at this moment in time is also legal for children. Now, perhaps none of you believe that is a gap. I think it is a gap.

If you read the *Reno* decision, the Court referred to the "harmful to minors" law as perhaps being the answer[201]—at least part of the answer.

MR. SIMS: Thank you. Any other comments?

MR. STEINHARDT: First, I am not so sure that Bob Peters and I read the same decision, we will have to spend some time later-on comparing notes.

We have had a lot of discussion today, and there is going to be a lot of discussion in the future, about whether or not these statutes can be effective. In the ultimate, they cannot be effective. We are discussing a global medium, which perceives censorship as damage and routes around it.[202] In the end, it is going to be very difficult to have any law, whether it is a national law in this country or any other country, which will successfully control all the content of the Internet.

That, however, is going to be very cold comfort to those who become the victims of these laws in this country or any other country, as I was reminded, for example, today when panelist Lisa Fantino mentioned the Chinese government's attitude toward the

KAN. STAT. ANN. § 21-4301 (1997); MISS. CODE ANN. § 97-29-105 (1997); N.C. GEN. STAT. § 14-190.1 (1997); VA. CODE ANN. § 18.2-374.1 (Michie 1997).

200. *See* ALASKA STAT. § 11.51.130 (Michie 1997); CAL. PENAL CODE § 313.1 (Deering 1997); IND. CODE ANN. § 35-49-3-3 (Michie 1997); MASS. ANN. LAWS ch. 272, § 28 (Law. Co-op. 1998); MICH. STAT. ANN. § 45-8-2061 (Law. Co-op. 1997); OHIO REV. CODE ANN. § 2907.31 (Anderson 1997); S.C. CODE ANN. § 16-15-345 (Law. Co-op. 1997); S.D. CODIFIED LAWS § 22-24-28 (Michie 1997).

201. Reno v. ACLU, 117 S. Ct. 2329, 2351 (1997).

202. *See* S.E. Goodman & L.T. Greenberg, *Is Big Brother Hanging by His Bootstraps*, COMM. ASS'N COMPUTING MACH., July 1, 1996, at 11, *available in* WESTLAW, 1996 WL 9011859.

Internet. The Chinese government greatly restricts access to the Internet.[203] It is in the process of building the world's largest Intranet, where everything will be filtered through government proxies.[204] In the end, I do not believe the Chinese government will be successful. I think they have opened a Pandora's box. But that is going to be very cold comfort to a dissident sitting in a Chinese jail cell or in a labor camp who was imprisoned for accessing Western thought over the Internet. That is happening.

So it is important to remember as we debate whether these laws can be effective that, even if a war cannot be won, it does not mean there will not be innocent victims. The Communications Decency Act was an example of that. It was a war on indecency on the Internet that Congress could not win, but the clients represented by the ACLU, along with the First Amendment, avoided becoming innocent victims and prevailed.

MR. SIMS: Thank you. Any other questions or comments? Just to pick up, I have a couple of quick questions myself. Robert Peters, as I understand your point, you were talking about Congress, perhaps via the FCC, holding the Internet access providers liable for failing to do what they could realistically do, as a technological matter, to screen out obscenity and indecency. But as I understand Richard Kurnit's point, by the time Congress could define the obligations of the Internet providers, technological advances would likely have outstripped the legislation, enabling the users to circumvent the access provider's screening technology, rendering the latter obsolete and the providers legally vulnerable under antiquated legislation and regulations. How do you respond to that?

MR. PETERS: I guess one common-sense response would be that if the Internet access providers can provide parents with the option to add screening technology, the process could be reversed. I recognize the problem of the screening technology blocking too much, but let's just assume that screening technology could successfully block the sites that virtually everyone agrees are not suit-

203. *See* Donald Conant, et al., *Collection of Articles by Carl Middlehurst of Sun Microsystems, Inc.*, 471 PLI/PAT. 549, 564 (1997); Amy Knoll, *Any Which Way But Lose: Nations Regulate the Internet*, 4 TUL. J. INT'L & COMP. L. 275, 296 (1996).

204. *See* Mark LaPedus, *China Intranet To Connect 50 Cities*, ELECTRONIC BUYERS NEWS, Feb. 3, 1997.

able for access by children.

I think it would be technologically possible to simply reverse the process and instead require adults to provide identification before they can gain access to pornographic sites. Part of the Supreme Court's concern with the Communications Decency Act was the Internet content providers' difficulty in verifying identification, which is a legitimate concern.

But clearly, the Internet access providers can check identification. In some cases, they may be the only entity on the Internet that realistically could provide some meaningful protection for children by effectively screening for age.

Again, I do not see legislation as the whole answer to this. It requires a combination of technological limits and First Amendment limits. But screening technology is also not the whole answer. I sat with some students at lunch today and one of them said his mother taught pre-school and that she was teaching her students how to use the Internet. Now, to assume that every parent of each one of those children is going to become knowledgeable about the Internet and the use of the screening technology is impractical. I have read in the *New York Times*[205] and other places[206] that most people agree that screening technology is not the whole answer.

How can we possibly assume that every child in the United States has a parent that will provide the necessary oversight? So I think the law must plug some of the holes; that is how I see the law. It can plug some of the holes. If I were in Congress, I would try to do that, win or lose.

MR. KURNIT: One comment on that. There are ISPs that do provide that kind of service. One told me about their structure back when it was much more proprietary and less on the Internet. They made it clear to their subscribers that the *A* subscriber could have as many as six sub-subscribers, and the *A* subscriber could

205. Peter H. Lewis, *An On-Line Service Halts Restriction on Sex Material*, N.Y. TIMES, Feb. 14, 1996, at A1.

206. *See* John W. Kennedy, *Profamily Groups Demand More Cyberporn Prosecutions; Protecting Children From Pornography on the Internet*, CHRISTIANITY TODAY, Feb. 9, 1998; Michael A. Banks, *Filtering the Net in Libraries: The Case*, COMPUTERS IN LIBRARIES, Mar. 1, 1998, at 50.

provide that some of those sub-subscribers would not have Internet access, but only the proprietary software. This was pretty much ineffective, however, because they found that, in most households, the *A* subscriber was a twelve-year-old child who helped his or her mother and father gain access to the Internet.

MR. PETERS: Part of my answer to that is, if you have a parent in the home that really understands the Internet, that parent is the best protection that child has. In many homes, where children don't have that Internet-savvy parent, those children are going to need some help from some other sources.

Let's assume that the law required all ISPs to block access to known pornographic sites unless the subscriber provided adequate identification. To me, that would be adequate protection for a lot of children. It would protect them in many schools. Not all the schools use screening technology. There is a belief that they do, but they do not. But even in New York City, I assume teachers would not sign up to give their six-year-olds access to hard-core porn sites. So if that block automatically existed, a lot of children would receive a form of protection that they do not get under the current state of affairs.

MS. AFTAB: Even in New York. I think, however, that if there is the kind of interest that you are talking about, it would be very easy for somebody to set up an ISP that says: "You cannot get access. We are going to apply filtering across-the-board and you cannot have access to any of these other things." And then, if there is enough of a market need for that, a lot of people will sign up for that. But that is choice, not law.

CyberPatrol[207] is a technology used by all of the on-line service providers. AOL uses this technology, and CompuServe and Prodigy use the product.[208] There are different ways of setting it. AOL is also one that will allow you to ban access to chat rooms, and other on-line places, for your kids.[209] Most of the other on-line

207. CyberPatrol 4.0 is manufactured by Microsystems Software. Information about this technology is available at www.cyberpatrol.com. *See* Richard J. Dalton Jr., *A Safer Web for Kids*, NEWSDAY, Sept. 14, 1997, at F10.

208. *See id.*

209. *See* Carol Ellison, *How to Use AOL's Parental Controls*, HOME PC, Oct. 1,

service providers do that as well.[210]

There are a lot of relatively simple ways to get there. I, as an adult, as a person who lives in the United States, and as a person who has access to anything I want to see that is legal in this country, do not want to have to sign up with my name and my identification number to see what is perfectly legal for me to see. Knowing how data is collected on the Internet and knowing the problems we have with privacy on the Internet, I have major concerns with that.

I have a real problem with the fact that I might get better protection renting a videotape under the current law[211] than I might have under those circumstances. As an adult, I should not have to sign up, qualify, and prove a lot of things to people who may be able to take information from me on-line.

It is much easier to restrict the children. As an adult, I do not want my children pre-selected to have certain information. I want my children to be able to measure things knowledgeably, and I want to be able to educate my children so they know that certain things are unacceptable. Whether it is in a movie or in a book or on the Internet, I want to teach my children that there are certain things that they should turn off when they see, as opposed to my pre-screening a lot of things for them. But that is my choice as a parent. I just do not want anyone else making those choices for me.

MR. PETERS: If I could respond to that, to my knowledge, Internet access is not free. If you are paying for Internet access, the ISP already has personal information about you. So in terms of finding out how old you are, it is a minor thing if they already have your credit card numbers and other information.

MS. AFTAB: But not at that site.

1997, at 175.

210. For example, America Online, Prodigy, and CompuServe all provide control features that allow users to block access to chat rooms. *See* Nancy Tamosaitis, *Parental Discretion Advised; Steer Clear of Cyberspace's Steamier Side*, COMPUTER LIFE, Nov. 1, 1994, at 163.

211. In New York, for example, personal privacy and personal information are protected by statute. N.Y. GEN. BUS. LAW § 671 (McKinney 1997).

MR. PETERS: No, no, no. I am talking about the age screening process taking place when you sign up for access to the Internet. It does not always have to occur at a chat room or newsgroup or Web site. There could be privacy protections in the law to ensure that ISPs will not give out this information.

I am just saying that, relatively speaking, that intrusion for you, the customer, is a very small one because you already signed your life over to them when you signed up for the service.

MS. AFTAB: I think it is a big intrusion. But, then again, I understand Internet technology.

MR. STEINHARDT: I think you really have to spend more time on-line. You need to get a sense of the breadth of the Internet. You have this notion of the Internet as television, where maybe there are 120 channels. There are millions of web sites,[212] and that does not even begin to deal with news groups, chat rooms, e-mail, and all the other forms of communication on the Internet. And I can tell you from representing people who have been thrown out of America Online that America Online is pretty aggressive in monitoring chat rooms.[213]

MS. AFTAB: I was thrown off.

MR. STEINHARDT: If you could be thrown off, anybody could be thrown off. I have never actually been thrown off. I guess I'm embarrassed by that.

MS. AFTAB: You have to know what you need to do.

MR. STEINHARDT: That's right. I do know.

The notion that an Internet service provider is going to be in a position to effectively pick and choose those sites which are appropriate for children is really fanciful. When America Online, for example, tried to filter on the basis of certain key words, one of the words they filtered out was the word "breast."[214] What happened?

212. The number of World Wide Web sites is estimated between two and four million, with the number continuously growing. *See* Greg Mazurkiewicz, *Nothing But Net: Useful Internet Sites, Air Conditioning*, HEATING & REFRIGERATION NEWS, Sept. 29, 1997, at 6; *The Web of Information Inequality*, LANCET, June 21, 1997, at 1781.

213. *See* Michael Beebe, *AOL Draws Line on Fighting Child Pornography*, BUFF. NEWS, Oct. 1, 1997, at A15.

214. *See*, Ari Staiman, Note, *Shielding Internet Users from Undesirable Content:*

They blocked out breast cancer awareness sites. There was a great uproar among their subscribers and the content providers about that.

It is very, very difficult to do this. The notion that you can hold the Internet service provider liable for all the billions of words and images that are on the Internet is just not realistic. It is certainly not fair or consistent with basic notions of the law, and certainly constitutional law, in this country.

MR. PETERS: From my side, I recognize that nobody can block out all of this stuff. But if they can block out most of it, that is better than nothing. I do not want to impose a legal burden on America Online or anybody else that they realistically cannot comply with. But if there are some simple things that they can do that are within their means, then I think the law ought to require those things. Unfortunately, I think the law must require them because many would not do so otherwise. The idea that every child has a lovely, perfect parent is a myth. If things continue to go the way they are now, it is not going to get better in our lifetime.

MS. AFTAB: At the Internet summit,[215] the ISPs and the on-line service providers received some substantial criticism. There are hotlines that have been set up with both the United States Customs Service and the National Center for Missing and Exploited Children, which maintains a web site as well.[216] You can report what you think is already illegal. If you find obscenity that you think violates the law, you can report it. The ISPs or the on-line service providers have agreed to try to limit access to sites that are clearly illegal, such as child pornography sites and a lot of other sites.[217] So if it is pointed out to them, they will limit access; they

The Advantages of a PICS Based Rating System, 20 FORDHAM INT'L L.J. 866, 908 (1997); Ann Beeson, *Top Ten Threats to Civil Liberties in Cyberspace*, 23 HUM. RTS. Q. 10, 12 (1996).

215. The "Internet Online Summit: Focus on Children" was held in Washington, D.C., from December 1 to 3, 1997. *See* Bob Dart, *Summit Takes on Net Safety; Internet Summit Focuses on Kids*, AUSTIN AM.-STATESMAN, Nov. 28, 1997, at B1.

216. The National Center for Missing and Exploited Children can be accessed at www.missingkids.org. *See* Carolyn Jabs, *Parents' Online Survival Guide—Our Tips Will Show You How to Keep Kids Safe Every Time They Go Online*, HOME PC, Mar. 1, 1998, at 89.

217. In 1996, the Internet Service Providers Association ("ISPA") and London

have agreed to do that.

I do not know that I want AOL or Steve Case[218] deciding what I should be seeing either, or judging what is or is not obscene. I think that is what our courts are supposed to do. In any case, once we point out something that is legally impermissible, they will respond. They have agreed that they will.

MR. SIMS: Just picking up on a couple of themes mentioned earlier, I think that Ms. Aftab just emphasized a rather interesting proposition, namely, that as a parent she should have the right to make her own decisions about how her children react to indecency in the world and on the Internet. And, by the way, I want to point out that her point very much picks up the theme of the liberal dissent in the *Pacifica* case:[219] that some parents might want their children to hear the "seven dirty words" monologue[220] and similar talk.

On the other hand, Robert Peters emphasized the imperfection of many parents. I want to specifically ask you, Mr. Peters, given that situation, and assuming that you can identify what indecency is, does society have a greater interest than the parents in protecting children from indecency on the Internet?

MR. PETERS: Well, in *Ginsberg v. State of New York*[221] and in *Pacifica*,[222] the Supreme Court recognized two valid interests regarding children; one was assisting parents,[223] and the other was protecting children.[224] This second issue recognizes that, in some

Internet Exchange ("LINX") formed the Safety-Net Foundation (later renamed the Internet Watch Foundation) to monitor illegal material on the Internet. The ISPA stated that members would remove illegal material when they are aware of it. *See* Guy Clapperton, *Net Working on Porn Laws; Guy Clapperton Looks at the Methods Being Used to Screen Out Online Obscenity*, OBSERVER (London), Mar. 9, 1997, at 13.

218. Chief Executive Officer, America Online, Inc. *See Case: Summit, Politics Do Not Mix*, MULTIMEDIA DAILY, Dec. 2, 1997.

219. FCC v. Pacifica Found., 438 U.S. 726 (1978) (Brennan, J., dissenting).

220. *Id.* at 770.

221. 390 U.S. 629 (1968).

222. 438 U.S. 726 (1978).

223. *See Ginsberg*, 390 U.S. at 639; *Pacifica*, 438 U.S. at 758 (Powell, J., concurring).

224. *See Ginsberg*, 390 U.S. at 640; *Pacifica*, 438 U.S. at 757-58 (Powell, J., concurring).

cases, the parent may be the enemy of the child. For example, where there is sexual abuse and other problems in the home. The government's concern cannot be limited to assisting parents, given the fact that many parents have bigger problems than their children do.

So I agree that the answer to the parents who do not want to restrict their children's access to the Internet is to open the door to them. It is a tough problem, and certainly it is another thing that came up in *Reno*.[225] The judges were very concerned that the prosecutors were going to go after good, liberal parents who did not believe in screening.[226] Now, you cannot get prosecutors to go after organized crime controlled adult obscenity businesses, but admittedly, in theory, going after good parents could happen. It is hard for me to believe that any prosecutor in this country, certainly at this point, would go after an honest, sincere, and loving parent. But the Court was very concerned about that.

So I suppose the compromise requires some defense for parents who allow their children access to sites on the Internet which most parents would not approve of. Hopefully, that defense would not allow bad parents who use pornography to sexually abuse their children, but presumably there are other laws that would apply in those instances.

As part of the compromise we would need this parental defense. Personally, I am very liberal when it comes to parental authority, except in the worst cases. So if you did not want to limit your child's access to the Internet, I would not bat an eyelash. I think that is the answer to the parental conservatives.

MR. STEINHARDT: Let me talk as a parent. Actually, Parry Aftab and I are about the same age, but my children are younger. I have a fifteen-year-old and a nine-year-old. My fifteen-year-old is a sophomore in high school, and gets remarkably difficult home-

225. *Reno*, 117 S. Ct. at 2336-37 (noting that, even if it were technically feasible to block minors' access to newsgroups or chat rooms that contain indecent or offensive material, it would be impossible to allow them access to the remaining, non-indecent content).

226. *See id.* at 2348 ("Under the [Communications Decency Act], a parent allowing her 17 year old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term.").

work assignments that scare the heck out of me.

My wife and I have made very different choices for our children because of their age differences in terms of their Internet access. Basically, for our fifteen-year-old we get complete Internet access. I have no doubt this fifteen-year-old is interested in sexual issues, and I have no doubt that he is clever enough and smart enough to access sexual material. I encourage him to access material, for example, about safe sex practices. He is probably more likely to absorb information accurately on-line than he is going to absorb it from his parents, given his age.

For our nine-year-old, we do subscribe to America Online and we do use some of the parental controls. But I must tell you that I do it reluctantly, not so much because I think that parental controls are a problem as they relate to a nine-year-old, but because the truth is that I do not think there is a great chance that my nine-year-old is going to be harmed on-line. First of all, she is exposed to very, very little on-line that she does not go after or that she does not have some adult help her get to. Second, as I see this parade of other nine-year-olds come through my home with sprained ankles, broken arms, and broken wrists, all caused by ice skating or roller blading, I actually think she is a lot safer on-line. I think that our medical premiums are reduced by encouraging her to stay on-line, rather than go out roller blading. I am afraid we are just not that worried about it when it comes to my still-very-young daughter.

On the other hand, I am worried about my fifteen-year-old. He is interested in sex; I know that. But I am concerned about the possibility that he is not going to be able to do his homework if we employ parental controls. I do not want him blocked from the Quaker web site or the American Association of University Women web site. I certainly do not want him blocked from the biology department of Yale University when he is struggling with his biology homework. The Internet is his primary source of research now, as it likely is for most of his fellow students.

I am willing to take whatever slight risk there is on the Internet as a trade for the access that he has to a wealth of information, which would be otherwise inaccessible to him: information that certainly was inaccessible to me when I was his age.

MR. SIMS: Thank you. Were there any questions from the audience?

QUESTION: A question for Mr. Peters. Is the child safety issue a self-curing problem? In time, when the children of this generation become parents, because they will be far more expert than their parents in regard to the Internet, won't they have the wherewithal and the knowledge to control their children's access?

MR. PETERS: Well, I'll tell you, as the years go by, children will be able to access the Internet outside of the home more and more easily. I do not know how any system can depend totally, utterly, solely on parental use of home screening technology. I do not see how that is going to solve the problem.

Also, in the meantime, until this generation grows up, we will just throw the children who do not have all-wise parents to the wolves.

QUESTION: If in fact there are sufficient laws, Mr. Peters, to already control obscenity and the obscenity standard seems usable, if not perfectly defined, why bother legislating specifically for cyberspace? The law is there already. If it is obscene, you go after it. If it is child pornography being sent to children, you go after it.

MR. PETERS: Well, I will tell you one practical problem. We have not had an obscenity prosecution in Manhattan[227] for almost two decades.[228] So if the idea is protecting children by enforcing the adult obscenity standard, we'll be abandoning many children who do not have perfect parents.

I shouldn't use the phrase "even in New York," but I think it is true that, even in New York City, if it were proved that some adult book store were selling hard-core porn to children, the prosecutor would enforce the harmful-to-minors law. But that does not apply to the Internet.

227. One of New York City's five boroughs, Manhattan comprises the whole of New York County.

228. The last successful obscenity prosecution in Manhattan occurred in 1973. *See* People v. Heller, 33 N.Y.2d 314 (1973). The New York Court of Appeals affirmed an obscenity conviction from the Supreme Court in Bronx County, New York, and the Appellate Division for the First Department in 1980. *See* People v. Hearne, 415 N.Y.S.2d 625 (App. Div. 1979), *aff'd*, 50 N.Y.2d 919 (1980).

QUESTIONER: Why not?

MR. PETERS: When you are dealing with a harmful-to-minors law in a medium where you might limit adult access, you have a First Amendment issue. You do not have that in an adult bookstore because clerks can easily check for identification.

MS. FANTINO: How many do? I bet there is a fifteen-year-old child in Iowa somewhere that is buying *Screw* magazine or *Hustler* magazine. And you are telling me his parents know about it? Really, if children want to access pornography, they are going to do it whether they live in some Mormon town or whether they live in New York City, and they are going to do it whether they can hold it in their hands or whether they can scan it with a mouse.

MR. PETERS: Well, I tell you, that rationale would say that we should repeal all laws that protect children against pornography, and I do not think that is going to happen. I grew up in an area where there were laws against selling alcohol to minors. Admittedly, those who wanted to get a drink got a drink. But from my experience, it was pretty much limited to the rebels.

MS. FANTINO: Bob, you never looked at a copy of *Penthouse* when you were a child?

MR. PETERS: *Penthouse* may have been after my time, believe it or not.

MS. FANTINO: No. It is over twenty-five years old.

MR. PETERS: I am forty-nine, so when I was a child it was not there. *Playboy* was around. I saw pornography when I was a child, and in my opinion it did not help me.

MR. KURNIT: It doesn't seem to have hurt you.

MR. PETERS: I don't want to get into my personal life, but my observation on the effects of pornography is that the average person looks at it and pretty much goes on to other things and that is the end of it. But I think real-world experience will show you that many people will become addicted to pornography. It usually begins when they are children. That is the reason why we like to limit children's access.

To some extent, many laws that would help kids are not rigorously enforced. But this does not mean that we should remove

those laws from the books. I do not see law as the whole answer, but I am glad it is there to punish the person who knowingly does what is wrong.

QUESTION: When I was a child, my father absolutely forbid me from dialing any of those 976 dial-a-porn numbers, and that is why I did it. How come that analogy does not transcend into the Internet? If you are a parent and you tell your child not to look at those type of web sites, isn't that the parent's responsibility?

MR. PETERS: Again going back to the real world before the Internet, every loving, perfect parent would say to her child, "Now, Johnny or Janine, you are not to go and buy those pornography publications." That would have been the end of it. We wouldn't have needed any laws that made it unlawful for shop owners to sell pornography to children. But for some reason our forefathers concluded that perfect parents, instructing their children in an effective way, would not always provide the protection. So we made it a little harder for children to get pornography; we made it harder for them to drink under age; we made it harder for them to smoke under age. It's a tough battle.

The same thing is true of drugs. I think we might need to refine our approach a little bit, but making drugs legal to sell is not the answer to it.

MR. SIMS: I see that we have a question from one of the *Journal* editors.

MR. GARNER: I'm Robert Garner, managing editor of the *Fordham Intellectual Property, Media & Entertainment Law Journal*. I would like to revisit a much narrower topic mentioned earlier: the Virginia libraries that restrict the content that they accepted from the Internet for their public.[229] Why is that viewed as a problem? Libraries do not have to buy every book that is published, so why is an Internet content restriction not analogous to the library not buying every book that is sold?

MR. STEINHARDT: It is a very different issue. Librarians now in the world of books do make content decisions, but they

229. *See* David Nakamura & Justin Blum, *Va. House Takes Page From Black's Book, Passes Internet Controls*, WASH. POST, Mar. 5, 1998, at V2.

make content decisions because they are limited both by physical space in their library and also by their financial resources. For the most part, publishers do not give away their materials to libraries.

The Internet is very different, of course. Once libraries pay for access, they essentially have access to the entire world of information that is on the Internet. The Loudoun County, Virginia case[230] involves access limitations not only for minors but also for adults, and it has been limited by the use of the X-Stop software,[231] which filters to an extraordinary degree and cannot be overridden: even by adults. That is a case in which I think my side is going to be victorious. It is a case in which the library is engaging in the worst kind of content discrimination. The library is prohibiting adults from accessing material to which they have a constitutional right in the name of protecting children from material. But the library is using methodologies that have nothing to do with children, and which are aimed at adults as well.[232]

MR. GARNER: Why is the library case not representative of the distinction between *Rust v. Sullivan*[233] and *Rosenberger v. Rector & Visitors of the University of Virginia*?[234] Isn't the action of the Virginia public libraries analogous the federal government's abortion counseling restriction in *Rust*? Isn't the government buying a service, and doesn't it then have the right to choose what service it is buying or the parameters of the service?

MR. STEINHARDT: I do not think that the government has the right to engage in content-based discrimination. That is what

230. Mainstream Loudoun v. Board of Trustees of the Loudon County Library, No. Civ. A. 97-2049-A, 1998 U.S. Dist. LEXIS 4725 (E.D. Va. Apr. 7, 1998).

231. *See id.* at *36-37; *see also* Sewall Chan, *Web Debate at Library on Shelf for Now; Decision on Limits Pushed to December*, WASH. POST, Aug. 30, 1997, at V3 (defining X-Stop as "a software program that blocks specific Web addresses based on [personal] preferences).

232. *See Mainstream Loudoun*, 1998 U.S. Dist. LEXIS 4725, at *38 (noting that the governmental interest in protecting children does not justify an unnecessarily broad suppression of speech).

233. 500 U.S. 173 (1991) (holding that government may make content-based choices when the government is the speaker or when the government enlists private entities to convey its own message).

234. 515 U.S. 819, 833 (1995) (distinguishing *Rust v. Sullivan* by drawing a line between conditions imposed on government-funded private speech and conditions imposed on the government's own speech or that of its surrogates).

the government is doing here in an extremely crude way. The odd thing here is that much of the material blocked by the X-Stop software is available on the library shelves. You can get it in its printed form. The library cases, which have always turned on the question of scarce resources in both space and dollars, just do not apply here because there are no scarce resources.[235]

And in this case there certainly are less-restrictive alternatives that the libraries could have taken. For example, they apply this practice only to minors. Instead, what they have done in the name of protecting minors applies to adults as well. If they were concerned about passers-by seeing what was on the screens, they could have put in privacy screens. They could have done any number of things without engaging in this sort of crude form of filtering.

Another interesting sideline to this is even in Loudoun County, Virginia, which is in the midst of the Moral Majority country, the vote on the library board was very close: 5-4 to install the Internet filtering software.[236] So even in that fairly conservative jurisdiction, they saw the peril.

MR. SIMS: I am enjoying this. I would love to continue, but we are out of time. I want to personally thank our very fine panelists for a stimulating, interesting, and informative panel. I would also like to thank the editors and staff of the *Fordham Intellectual Property, Media & Entertainment Law Journal* for this setting up this fine program. On behalf of the *Journal*, I also want to thank all of you for attending.

235. *See Mainstream Loudoun*, 1998 U.S. Dist. LEXIS 4725, at *33-35 (noting that by purchasing Internet access, the library has made all Internet publications accessible to patrons); *cf.* Board of Educ. v. Pico, 457 U.S. 853, 909 (1982) (Rehnquist J., dissenting) (noting that budgetary concerns force school libraries to choose some books over others).

236. *See Mainstream Loudoun*, 1998 U.S. Dist. LEXIS 4725, at *2 (naming five of the library board members as defendants).