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Pornography: Free Speech or Censorship in Cyberspace?

Fred Lawrence, Michael Godwin, Margaret Seif, and Lar Kaufman

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Fred Lawrence:[1]

1. When I was asked to chair this panel I had two reactions to the title, "Pornography: Free Speech or Censorship in Cyberspace?" First, it is difficult to imagine anything that combines a bedrock American value with such cutting-edge technology more than free speech issues in cyberspace.[2] Second, it is interesting to examine why we keep talking about pornography. I was discussing this with my wife, who noted that for someone who does not use pornography, I think about it often. Why is that?

2. Some 20 years ago, a group of Nazis sought to march in Skokie, Illinois.[3] The resulting trial raised very difficult First Amendment issues.[4] On a practical

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1 Fred Lawrence is an Associate Dean and Professor of Law at Boston University School of Law.

2 *See, e.g.*, ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) (finding the Communications Decency Act violated the First Amendment by regulating the content of speech presumptively); Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995) (finding an overbroad injunction for copyright infringement by online service might implicate the First Amendment as a prior restraint); United States v. Baker, 890 F. Supp. 1375 (E.D. Mich. 1995) (holding that defendant's statements in e-mail messages did not meet the First Amendment true threat requirement).

3 *See* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

4 *See id.* at 1206 (holding that the Nazis could peacefully march in a predominantly Jewish

level, it raised terrible fundraising issues for the American Civil Liberties Union ("ACLU") because the case tested many ACLU members' commitment to civil liberties. Many quit the ACLU or did not renew their memberships. Playwright and cartoonist Jules Feiffer addressed the group and essentially said that we have to find a better class of clients with civil liberties problems.[5] There was a time way back when people with civil liberty problems were wonderful people--the kind of people you would like to invite home to meet your kids. They were people like James Joyce,[6] Henry Miller,[7] Gene Debs[8]--wonderful, interesting, exotic people. Now we have pornographers. We have Nazis. We have all these disgusting people as our clients. Feiffer's statement signifies the strength of the American legal and political culture, yet identifies some problems--problems of disgusting people with First Amendment rights.

3. What if this session of the symposium was not entitled "Pornography: Free Speech or Censorship in Cyberspace?," but instead "Modern Philosophy: Free Speech or Censorship in Cyberspace?" or "Socialist Politics: Free Speech or Censorship in Cyberspace?" That would be terrifying. We are not facing questions such as whether or not one is allowed to put Marcuse[9] on the Internet. Before we discuss the problems associated with pornography on the Internet, we should remind ourselves of the problems we do not have at this point in First Amendment theory.

4. Our first speaker is Michael Godwin. As staff counsel for the Electronic Frontier Foundation,[10] Mr. Godwin advises users of electronic networks about their legal rights and responsibilities. He instructs criminal lawyers on computer civil liberty issues, and conducts seminars on civil liberties and electronic

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neighborhood because even unpopular or offensive views are protected by the First Amendment).

5 *See* Daniel Schorr, *The 1996 Matthew O. Tobiner Memorial Lecture*: *The First Amendment Under Pressure*, 18 HASTINGS COMM. & ENT. L.J. 433, 434 (1996) (discussing Feiffer's comments).

6 *See* United States v. One Book Entitled "Ulysses" by James Joyce, 72 F.2d 705, 707 (2d Cir. 1934) (holding Joyce's book not obscene).

7 *See* United States v. Two Obscene Books, 99 F. Supp. 760, 761-62 (N.D. Cal. 1951) (holding two of Miller's books obscene); Grove Press, Inc. v. Florida, 156 So.2d 537, 539 (Fla. Dist. Ct. App. 1963) (same); Attorney General v. Book Named "Tropic of Cancer," 184 N.E.2d 328, 335 (Mass. 1962) (holding Miller's book not obscene).

8 Debs led the Pullman Railroad strikes and advocated for labor unions. *See* In re Debs, 158 U.S. 564, 566-67 (1895).

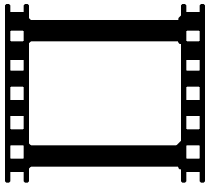
9 Herbert Marcuse was a German American philosopher and social theorist who founded the Frankfurt school of critical theory. *See* 18 ENCYCLOPEDIA AMERICANA INTERNATIONAL EDITION 308 (1994).

10 The Electronic Frontier Foundation ("EFF") is a non-profit civil liberties organization. The EFF works to protect privacy, free expression, and access to public resources and information online. *See Electronic Frontier Foundation* (visited Feb. 13, 1997) <http://www.eff.org>.

communications. Several years ago, Mr. Godwin chaired the Drafting Committee of the Massachusetts Computer Crime Commission,[11] supervising the drafting of recommendations to Governor Weld for the development of computer crime statutes.

Michael Godwin:[12]

5. When working on the Massachusetts Computer Crime Commission, we examined Massachusetts law and considered possible upcoming issues in computer communications. No one talked about pornography; it was . We talked about copyright infringement, the theft of trade secrets, the theft of services, computer intrusion, fraud, and searches and seizures. We talked about the evidentiary problems for computer crime, but not pornography. So, how do we account for the change in focus from hackers to sexual content?



Session #3 Video Clip (Michael Godwin)

6. From about 1989 to 1991, there was some general concern about computer crime. Such concerns come in waves and are typically associated with famous cases. If you examine the drafting of computer crime laws over the past 15 years, you see an increase in concern in certain periods. There was an increase in concern in 1983, and then again in 1987 after *The Cuckoo's Egg* situation involving Clifford Stoll.[13] Concern about computer crime increased in 1989 after the AT&T network crash--thought at the time to be caused by hackers.[14] The concern in 1983 was attributable to the movie *Wargames*.[15] Sometimes the social concern about computers and the

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11 The Massachusetts Computer Crime Commission was created in 1992 by Massachusetts Governor William Weld to provide recommendations for computer crime statutes. *See* Sally J. Greenberg, *The Massachusetts Computer Crimes Statute*, MASS. LAW. WKLY., Mar. 11, 1996, at 11; Ronald Rosenberg, *Software Firms See Boom Times Ahead*, BOSTON GLOBE, Jan. 28, 1992, at 42.

12 Michael Godwin is staff counsel for the Electronic Frontier Foundation. For a longer discussion of some the ideas presented here, see MICHAEL GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE (forthcoming 1997).

13 Clifford Stoll, an astrophysicist, wrote a book about computer hackers who had broken into his computer system. *See* CLIFFORD STOLL, THE CUCKOO'S EGG: TRACKING A SPY THROUGH THE MAZE OF COMPUTER ESPIONAGE (1989).

14 This hypothesis later turned out to be incorrect. *See* Lou Dolinar, *Phone Crash: The Day AT&T Broke Down*, NEWSDAY, Feb. 26, 1990, at 10. For an accurate account of the cause of the crash, see BRUCE STERLING, THE HACKER CRACKDOWN: LAW AND DISORDER ON THE ELECTRONIC FRONTIER (1992).

15 WARGAMES (Metro-Goldwyn-Mayer 1983) (a film in which computer hacking almost starts a

perceived threat posed by computer communication is not wholly rational. People geared up to fight computer crime and it turned out there was not that much computer crime.

7. It quickly became apparent, however, that there was significant traffic in adult materials online.[16] People were using the medium not just to trade images, but also to talk about sex. One of the great ironies of American culture is how uptight we are about sex. Nevertheless, if you give people private access to a medium, they start talking about sex almost immediately. It is no surprise that this occurred in the computer arena. Most of the adult materials were not on the networks. They were on individual bulletin board systems ("BBSs")[17] that were operated by hobbyists and commercial vendors.

8. In 1993, I had just started writing a column for *Internet World*[18] and I was asked to predict what problems system operators and system administrators would face. I said obscenity prosecutions would increase.[19] Even though the obscene material is not necessarily any different from the material available in adult bookstores, it is inherently newsworthy if you prosecute an adult BBS or a system carrying adult materials. I recognized that a potential wave of prosecutions could ensue as enterprising prosecutors and law enforcement personnel decided to attack adult BBSs, as they had previously attacked adult bookstores.

9. This trend has accelerated in the last two years. During the time I was writing the *Internet World* article, a couple in California was indicted and later prosecuted in Tennessee.[20] At the very same time, a then obscure undergraduate Carnegie Mellon student named Martin Rimm was putting together a pornography "study."[21] This so-called "study" was used as a tool by social conservatives to

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nuclear war).

16 *See* EDWARD CAVOZOS & GAVINO MORIN, CYBERSPACE AND THE LAW: YOUR RIGHTS AND DUTIES IN THE ONLINE WORLD 90-92 (1994).

17 A bulletin board system provides access to programs and files, electronic mail, and in some cases connections to the Internet. *See* THE INTERNET INITIATIVE: LIBRARIES PROVIDING INTERNET SERVICES AND HOW THEY PLAN, PAY, AND MANAGE 193 (Edward J. Valaukas & Nancy R. John eds., 1995).

18 Internet World legal columns published after 1995 are available at *iWORLD: Internet News and Resources* (visited May 12, 1997) <http://www.iworld.com>.

19 *See* Michael Godwin, *Sex and the Single Sysadmin: The Risks of Carrying Graphic Sexual Materials*, INTERNET WORLD, Mar.-Apr. 1994.

20 *See* United States v. Thomas, 74 F.3d 701 (6th Cir. 1996). The California defendants operated a sexually explicit, members-only bulletin board for a fee. *See id.* at 705. A Tennessee resident applied and downloaded sexually explicit images from the BBS to his computer. *See id.* The BBS operators were then prosecuted under the obscenity laws in Tennessee, using Tennessee community standards. *See id.*

21 *See* Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of*

promote the Communications Decency Act ("CDA"),[22] shortly afterwards it was shown to be a hoax crafted by the author for his own reasons.[23] Rather than describe that hoax, which is a study in itself, I will discuss some basics of pornography, the law, and the legislation, focusing on some definitional problems.

10. What is "pornography"? This term is distinguished from "obscenity" in that there is no standard or legal jurisprudential definition. We know it when we see it,[24] but you cannot outlaw pornography because it is an undefined term. In fact, pornography, like all other expression protected by the First Amendment, is presumptively legal and protected by the First Amendment. To be illegal, the pornography must be found to be "obscene."[25] Obscenity is a subset of pornography.

11. The law of obscenity--despite longstanding criticism from commentators and civil libertarians--has been fairly stable in the United States for more than two decades.[26] Our courts use a three-part test to determine whether or not material is

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917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 200 Cities in 40 Countries, Provinces, and Territories, 83 GEO. L.J. 1849 (1995). The "study" upon which this law journal article was purported to be based is now recognized as a hoax. Rimm's deception was exposed by Godwin and other Internet activists. For a comprehensive account of the "study" and resulting criticism, see *Project 2000* (visited May 12, 1997) <http://www2000.ogsm.vanderbilt.edu/cyberporn.debate.html>.

22 *See* Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified at 47 U.S.C.A. § 223(a)-(h) (West Supp. I 1996)).

23 For a discussion of the Rimm saga, see Mike Godwin, *The Marty Method: How the Smart People Were Conned by The Cyberporn 'Study,'* MACWORLD, Dec. 1, 1995, at 324; *see also* CHARLES PLATT, ANARCHY ON LINE PART 2: NET SEX 11-42 (1996).

24 The ongoing difficulty of precisely defining obscenity or pornography is identified by Justice Stewart's comment: "I have reached the conclusion . . . that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand definition of obscenity; and perhaps I could never succeed in intelligently doing so. But I know it when I see it, and the motion picture involved in this case is not that." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (citations omitted). Nevertheless, the term "obscenity" has continued to be used. The term "obscenity" as promulgated in *Miller v. California*, 413 U.S. 14, 24 (1973), has been held as not unconstitutionally vague or overbroad. *See, e.g.,* DLS, Inc. v. Chattanooga, 107 F.3d 403, 415 (6th Cir. 1997) (upholding a city ordinance regulating adult establishments); Ripplinger v. Collins, 868 F.2d 1043, 1057 (9th Cir. 1988) (finding the "prurient appeals test" under the Washington obscenity statute survives constitutional challenge based on vagueness and overbreadth). Thus the term "obscenity" is a relatively defined term of art while "pornography" is not.

25 *See* Roth v. United States, 354 U.S. 476, 485 (1957).

26 *See* Jeffrey E. Faucette, Note, *The Freedom of Speech at Risk in Cyberspace: Obscenity Doctrine and a Frightened University's Censorship of Sex on the Internet*, 44 DUKE L.J. 1155, 1166-69 (1995) (providing an overview of modern obscenity cases).

obscene.[27] As I unpack the three-part test, the first prong of the *Miller v. California* test requires a state law, normally a statute.[28] There must be a state statute or defining state case that lays out with specificity the sexual content that cannot be depicted.[29] This prong marks a major change from previous obscenity law in this country because in the 1950s and 1960s, people like Lenny Bruce were prosecuted.[30] What troubled the government about Bruce was not that he was engaged in sex, but that he was using profane language.[31] Despite the frankness of Bruce's comments, nobody went to a Lenny Bruce performance and came away from it sexually aroused. Thanks to the Burger Court there has been a refocussing since *Miller* on material that has specific kinds of sexual content as distinct from material that is offensive for any other reason. The state law must be on the books, and if the state does not have an applicable state law, in theory you cannot have an obscenity prosecution in that jurisdiction.[32]

12. The second part of the obscenity test incorporates the notion of "community standards."[33] Specifically, the depiction or expression of the sexual act must be "patently offensive" and it must appeal to "prurient interests" as judged by an "average person, applying contemporary community standards."[34] As has long been established, the reasonable person standard is an objective, not subjective, standard.[35] "Appeals to the prurient interests" indicates that the depiction must be

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

28 *See id.* at 29.

29 *See id.* at 27.

30 *See* People v. Bruce, 202 N.E.2d 497 (Ill. 1964) (reversing conviction).

31 *See id.* at 497.

32 *See Miller*, 413 U.S. at 24. This led to some interesting consequences as state legislators were forced to say specifically in graphic language what kinds of expression they were banning. *See, e.g.,* N.Y. PENAL LAW § 235.20 (McKinney 1995) (defining nudity, sexual excitement, and sado-masochistic abuse).

33 *See Miller*, 413 U.S. at 24.

34 *Id.* (citations omitted).

35 *See* OLIVER WENDELL HOLMES, THE COMMON LAW 87 (Little Brown 1963) ("The law [normally] considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that.").

unwholesomely sexually arousing.[36] The "prurient interest" element is what saves Lenny Bruce[37] and George Carlin[38] recordings from obscenity prosecutions today.[39]

13. The third part of the test is what I jokingly call the "escape clause." According to this clause, obscene material must lack serious literary, artistic, scientific, social, political, or other social value.[40] Even if one has material that depicts an act that is forbidden by state statute, and even if that depiction is patently offensive and appeals to the prurient interests as judged by the reasonable person applying the standards of the local community, one is not liable if the work has serious literary, artistic, scientific, social, or political value.[41] Chief Justice Burger was attempting a balancing test when he wrote *Miller v. California* over 20 years ago.[42]

14. It is important to distinguish the kinds of material that often get conflated in this debate, because obscenity and indecency are often used interchangeably.[43] They are not the same and I will discuss the differences. First, I must talk briefly about child pornography which often gets confused in these discussions.

15. Child pornography is illegal whether or not it is obscene.[44] You do not even apply the three-part obscenity test.[45] You do not ask questions about community standards; you do not ask questions about redeeming or serious literary,

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36 *See* Brockett v. Spokane Arcade, Inc., 472 U.S. 491, 499 (1985) (finding inclusion of "lust" in definition of prurient interest unconstitutional because lust is "wholesome") (quoting J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482, 490 (9th Cir. 1984)); Ripplinger v. Collins, 868 F.2d 1043, 1054 (9th Cir. 1988) ("The term prurient interest in sex is not the same as a candid, wholesome, or healthy interest in sex.") (quoting Arizona v. Bartanen, 591 P.2d 546, 550 (Ariz. 1979)).

37 *See* People v. Bruce, 202 N.E.2d 497, 498 (Ill. 1964).

38 George Carlin is a comedian and actor. *See The Unofficial George Carlin Fan Page* (visited Nov. 21, 1996) <http://www.wam.umd.edu/~wrongway/bio.htm>.

39 *See* FCC v. Pacifica Found., 438 U.S. 726 (1978) (finding a George Carlin radio monologue broadcasted by Pacifica Foundation indecent and recognizing the FCC's power to regulate indecent radio broadcasts).

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

41 *See id.* at 26.

42 *Id.* at 34-35.

43 *See, e.g.,* Information Provider's Coalition v. FCC, 928 F.2d 866, 875 (9th Cir. 1991) ("Moreover, for purposes of the vagueness argument, we may analogize the Commission's definition of indecency to what the Court has described as obscenity.").

44 *See* New York v. Ferber, 458 U.S. 747, 761 (1982).

45 *See id.* at 760-61.

artistic, scientific, social, or political value.[46] Under federal law, child pornography is any visual material that depicts a child either engaging in explicit sexual acts when the manufacturer of such material uses an actual child.[47] These statutes have been upheld constitutionally because they are not primarily content-based restrictions.[48] They address conduct and are an attempt to destroy the market that makes such conduct occur.[49]

16. Senator Hatch has said that in this new day of computers, it is possible to generate material by computer that contains child pornography, but in which no child has actually been abused.[50] The Senator suggested Congress ban such material because its creators cannot be prosecuted under federal law.[51] Strangely, Senator Hatch seems to have forgotten about the obscenity laws. An explicit depiction of sexual content involving a child would surely violate the community standards in any community of which I am aware. His comments illustrate how policy makers' gut-level fears about new technology and communications media can cloud their thinking.

17. Child seduction is another issue that is raised in the context of regulating computer networks. Some argue that the CDA is necessary to reduce the risk that children will go online where child abusers will lure them into dangerous situations.[52] This is not wholly rational because it assumes that the only way pedophiles lure victims is through the Internet.[53] That does not seem to be the case in the majority of situations.[54] Americans are not yet used to this technology, so it

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46 *See id.* at 761.

47 *See* 18 U.S.C. § 2251(a) (1994).

48 *See* Osborn v. Ohio, 495 U.S. 103, 115 (1990) (finding Ohio statute prohibiting child pornography constitutional); *Ferber*, 458 U.S. at 766 n.18 (upholding New York statute regulating child pornography because child pornography is unprotected speech subject to content-based restrictions).

49 *See Osborn*, 495 U.S. at 108 (citing *Ferber*, 458 U.S. at 756-58).

50 *Child Pornography Protection: Hearing on S. 1237 Before the Senate Judiciary Comm.*, 104th Cong. 2 (1996) (statement of Sen. Hatch).

51 *Id.*

52 *See* Joseph N. Campolo, Note, *Childporn.GIF: Establishing Liability For On-Line Service Providers*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 721, 724 (1996); Barbara Kantrowitz, *Child Abuse in Cyberspace*, NEWSWEEK, Apr. 18, 1994, at 40.

53 *Cf.* Elmer-Dewitt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 38 ("[T]here is no evidence that [the threat of online pornography] is any greater than the thousand other threats children face every day.").

54 Nevertheless, the occasional case does arise. *See Seduction on the Internet*, HARTFORD COURANT, Nov. 22, 1996, at A16 (describing how a man met his young victim through an online chat room); Kelly Ryan, *On-line Chats led to Girl's Seduction, Officers Say*, ST. PETERSBURG TIMES,

plays on our fears, both as people who are growing accustomed to computers and as parents. Not everyone is a lawyer who will sit down and parse out the actual distinct categories that we are talking about. Nevertheless, fears about child pornography and child seduction were used to support the CDA.[55] Now the CDA raises some new definitional problems.

18. Let us come back to the definition of "indecency." What is indecency? Although the term has been used as if it has been defined, it has not been defined; thus only in specific cases do we know. We know that a George Carlin reading was indecent.[56] We know that Allen Ginsberg poetry may have been indecent,[57] but we do not have a definition. The Supreme Court has never construed the term, even in the case in which they legitimized it. In the 1978 case *FCC v. Pacifica Foundation*, the Supreme Court upheld the Federal Communications Commission's ("FCC") power to sanction a radio station for broadcasting so-called indecent, non-obscene material.[58] The material in question was a George Carlin comedy routine involving the seven words that you cannot say on television.[59] In the majority opinion, Justice Stevens wrote about the FCC's authority to regulate this new category of material.[60] When he attempted to define the term indecent, however, he did not write for a majority or even plurality of the Court. Support evaporated for the section of the opinion that defined "indecent."[61]

19. Amazingly, only two other Justices joined the definitional section of that

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Feb. 2, 1996, at 1 (describing how a man met teenage girls through bulletin boards and Internet chat groups); *Internet Seduction of Teen Leads to Jail*, CHICAGO TRIB., Oct. 26, 1995, at 20 (describing case of man convicted of having sex with a young girl he met by talking on the Internet).

55 *See* 41 CONG. REC. S9019 (daily ed. June 26, 1997) (reprinting Philip Elmer-Dewitt, *On a Screen Near You: Cyberporn*, TIME, June 1995, at 38).

56 *See* FCC v. Pacifica Found., 438 U.S. 726, 740 (1978) (Indecency "refers to nonconformance with accepted standards of morality.")

57 Although Ginsberg's material has not been held indecent, after the *Pacifica* ruling, Pacifica Foundation and other broadcasters refused to broadcast Ginsberg's poetry. *See* Telephone Interview with Harvey Silverglate, Silverglate & Good (May 12, 1997). Ginsberg was a party to a case seeking reinstatement of an after-hours safe harbor provision. *See* Action for Children's Television v. FCC, 852 F.2d 1332, 1340 (D.C. Cir. 1988).

58 438 U.S. at 738.

59 *Id.* at 729.

60 *Id.* at 737-38.

61 *See id.* at 742-47 (defining "indecent" in parts IV-A and IV-B). Justice Powell and Justice Blackmun concurred except in parts IV-A and IV-B. *See id.* at 755. Justice Brennan filed a dissenting opinion in which Justice Marshall joined. *See id.* at 762. Justice Stewart filed a dissenting opinion in which Justices Brennan, White, and Marshall joined. *See id.* at 777.

opinion.[62] Thus, in effect, the holding of *Pacifica* is that the FCC may regulate "indecency" in broadcasting, even though the term is not defined. For the most part, this has not generated much controversy for people who do not like Howard Stern[63] or do not say certain words. Nevertheless, it has generated some controversy among civil libertarians.[64] Americans as a whole have generated the notion that regulating broadcasting tightly is acceptable. This demonization of the broadcast media has kept the controversy off the front burner, even among most civil libertarians.

20. The CDA is an attempt to take this undefined term "indecency," which has primarily been applied to broadcasting, and expand it into a general governmental authority to regulate this broad class of material. Again, what do we know about "indecency?" We know the definition does not rely on any redeeming literary, social, or artistic value.[65] The FCC has explicitly stated that one cannot defend a purportedly indecent broadcast by arguing that it has serious literary, scientific, artistic, or social value.[66] Thus, there is no escape clause for indecency as there is in obscenity cases. Moreover, some of the working definitions of indecency promulgated by the FCC have included the term "patently offensive," thus seeming to rely on *Miller*.[67] But this term has not been used consistently.[68] In the obscenity cases, "patently offensive" was defined in terms of geographic communities.[69] In the indecency cases, the terms "patently offensive" and "community standards" do not necessarily mean the same thing. The "community standards" relevant to the

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62 *Id.* at 729 (Chief Justice Berger and Justice Rehnquist, joining parts IV-A and IV-B).

63 Stern has repeatedly been charged with indecency, and in 1995 he settled a case with the FCC for $1.7 million. *See* Catherine Hinman, *Anti-Stern Push is Far From Passionate*, ORLANDO SENTINEL, Sept. 13, 1996, at 20; *see also The Howard Stern Files*, L.A. TIMES, June 23, 1996, (Magazine), at 14 (reporting that Stern's broadcaster, Infinity Broadcasting, has spent more than $3 million defending him).

64 *See* Glen O. Robinson, *The "New" Communications Act: A Second Opinion*, 29 CONN. L. REV. 289, 311 (1996) (calling *Pacifica* the "bete noire of civil libertarians who consider its extremely broad and vague character an open-ended invitation to far reaching censorship.").

65 *See* Radio Broadcasting; New Indecency Enforcement Standards, 52 Fed. Reg. 16,386 (1987) (giving notice that the FCC will apply the *Pacifica* definition of indecency--"language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.").

66 *See* Action for Children's Television v. FCC, 852 F.2d 1332, 1340 (D.C. Cir. 1988).

67 *See* Radio Broadcasting; New Indecency Enforcement Standards, 52 Fed. Reg. at 16,386.

68 *Compare Pacifica*, 438 U.S. 726, 739-40 (1978) (indecency), *and Action for Children's Television*, 852 F.2d at 1343-44 (indecency), *with* Miller v. California, 413 U.S. 15, 30-34 (1973) (obscenity).

69 *See, e.g., Miller*, 413 U.S. at 30-34 ("It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City.").

indecency cases have always been understood to be the standards of a national community.[70]

21. Civil libertarians historically have been troubled by the obscenity cases because of potential infringement on individual liberties.[71] Among more socially conservative Americans, however, the obscenity test has been troubling because it has been perceived as too lenient.[72] Their concern is that there are some classes of pornographers who are avoiding obscenity prosecution because they can prove serious literary, artistic, or social value.[73] For example, they think it is terrible that Robert Mapplethorpe[74] works are protected under the First Amendment. The attempt to expand the indecency standard to other media, such as the Internet, stems from conservative concerns.

22. Professor Rodney Smolla, in his book *Jerry Falwell v. Larry Flynt: The First Amendment on Trial,*[75] points out that in *Pacifica*, the justification for special kinds of regulation on broadcasting was that the medium is pervasive.[76] "Pervasive" is a term of art. In practical terms it means that in the broadcast context one can turn on the radio or the television and be flooded with unchosen content.[77] That is, one can be a very passive recipient (or so it is argued); one can even be a child who is too young to read.[78] Justice Stevens characterizes broadcasting as "uniquely pervasive,"[79] but the carefully chosen word "uniquely" seems to be falling by the wayside. As the CDA illustrates, there are those who think the pervasiveness is not unique. But the scope and applicability of pervasiveness has not been adequately

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70 *See In re* Infinity Broad. Corp., 2 F.C.C.R. 2705, 2707 n.8 (Apr. 16, 1987) ("Contrary to Infinity's suggestion, this test does not require a local determination that programming is indecent before this Commission can take action.").

71 *See generally* HARRY M. CLOR, OBSCENITY AND PUBLIC MORALITY 88-135 (1969) (discussing libertarian views of the First Amendment).

72 *See* Michael Kent Curtis, *"Free Speech" and its Discontents: The Rebellion Against General Propositions and the Danger of Discretion*, 31 WAKE FOREST L. REV. 419, 440 (1996).

73 *See id.*

74 Robert Mapplethorpe is a controversial American photographer. For an example of some of his work, see *The Photography Network - Robert Mapplethorpe* (visited June 10, 1997) <http://www.photography-net.com/html/mapplethorpe.html>.

75 RODNEY A. SMOLLA, JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL (1988).

76 *See id.* at 198-99.

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

78 *See id.* at 749.

79 *See id.* at 748.

defined. In terms of sheer volume of content today, what is more pervasive than books? Once a child learns to read, he could go into a bookstore, open *The Godfather*,[80] and be flooded with sexually explicit content before he realizes what he is reading. What is really at stake here? Professor Smolla has a theory:

> Pervasiveness and protection of children do not really tell the story. It is not the pervasiveness of broadcasting goading the FCC, but the pervasiveness of indecency. Much of American society--at least some members of the Supreme Court, most people in the recent Reagan administration, and a majority of the FCC--really do not believe in the side of our First Amendment tradition that holds that the indecent but nonobscene should be fully protected. To many, *FCC v. Pacifica* should not represent a special broadcasting exception to the usual First Amendment rule--it should *be* the usual First Amendment rule. That expansion of *Pacifica* was precisely what Jerry Falwell hoped to persuade the Supreme Court to undertake.[81]

Such an expansion is also what a subset of social conservatives hopes to utilize the CDA to accomplish. This became apparent in the conservative media prior to the introduction of the CDA.[82] Their goal is to expand the application of indecency and governmental authority to regulate non-obscene material having to do with sex, or material that is otherwise offensive.

23. The constitutional objections to the CDA have been well articulated now due to the lawsuits which have challenged the statute.[83] There are basically three objections, two of which are very traditional First Amendment challenges. The first challenge involves overbreadth. A prohibition of communication is overbroad in violation of the First Amendment if the definitions of the statute or the prohibition are so broad as to regulate legal conduct.[84] The second challenge, vagueness, raises a similar issue. If you do not know what the terms mean, if you do not know what the prohibition is, you are going to restrict legal conduct.[85] Civil libertarians call that a

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80 MARIO PUZO, THE GODFATHER (1969).

81 SMOLLA, *supra* note 75, at 199-200.

82 *See* John Zipperer, *The Naked City: 'Cyberporn' Invades the American Home*, CHRISTIANITY TODAY, Sept. 12, 1994, at 38 (discussing conservative concerns about pornography and the Internet).

83 *See* ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996); Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996).

84 The overbreadth doctrine "invalidate[s] legislation so sweeping that, along with its allowable proscriptions, it also restricts constitutionally protected rights of free speech, press, or assembly." BLACK'S LAW DICTIONARY 1103 (6th ed. 1990).

85 Under the vagueness doctrine, "a law . . . which does not fairly inform a person of what is

chilling effect.[86] Of course, on the other side of the issue, they call it deterrence.[87] Third, even if the terms of the CDA are neither overbroad nor vague, under the First Amendment prohibitions of otherwise protected speech, in the face of a compelling state or governmental interest, the government must use the least restrictive means to achieve that interest.[88] The question is whether or not the CDA, by criminalizing, on the public spaces of the Internet, what would be perfectly legal in Barnes & Noble[89] or the New York Public Library, is the least restrictive means to accomplish the goal of protecting children on the Net.[90]

24. The issue of federal authority, as philosophers would say, is ontologically precedent. The government's authority to regulate speech is generally limited.[91] The nicest thing to say, as a civil libertarian, about the restrictions on broadcasting is that at least they were limited to broadcasting.[92] Now there is an attempt to use the precedent of the *Pacifica* case to break through Justice Stevens's limiting language and to create a new social consensus about regulation of all media. The legislators know that they are leveraging the fact that people are nervous about this new technology.[93] Even people who are comfortable with computers are nervous about the potential for libel, copyright infringement, and the protection of privacy.[94]

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commanded or prohibited is unconstitutional as violative of due process." *Id.* at 1549.

86 *See* Lee Dembart, *Obscenity Law's Chill is Tepid*, L.A. TIMES, Apr. 29, 1986, at II5.

87 *See* Bruce A. Taylor, Symposium, *Will New Decency Standards on the Internet Protect America's Kids?*, INSIGHT, Mar. 4. 1996, at 22 (endorsing the CDA to "deter" what Taylor calls "porn pirates").

88 *See* Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989).

89 Barnes & Noble is the leading seller of books in the United States. *See* 1 HOOVER'S HANDBOOK OF AMERICAN BUSINESS 238-39 (Patrick J. Spain & James R. Talbot eds., 1996).

90 *See generally* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 81-84 (1996) (discussing least restrictive means).

91 *See, e.g.,* International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring) ("The First Amendment is a limitation on government, not a grant of power. Its design is to prevent the government from controlling speech.").

92 *See* FCC v. Pacifica Found., 438 U.S. 726, 750 (1978).

93 *See* Steven Levy, *No Place for Kids? A Parent's Guide to Sex on the Net*, NEWSWEEK, July 3, 1995, *reprinted in* 141 CONG. REC. S901-21 (daily ed. June 26, 1995) ("These reports have triggered a sort of parental panic about cyberspace. Parents are rightfully confused, faced with hard choices about whether to expose their children to the alleged benefits of cyberspace when carnal pitfalls lie ahead.").

94 *See generally* Byron F. Marchant, *On-Line on the Internet: First Amendment and Intellectual Property Uncertainties in the On-Line World*, 39 HOW. L.J. 477, 484-95 (1996) (discussing online legal issues involving copyright, privacy, and libel).

Also, many baby boomers had children late[95] and are especially panicky about being good parents because they have forgotten what it was like to be a child. Legislators play on the fact that we are fearful as parents.

25. In fact, there are three sources of nervousness underlying popular attitudes towards the CDA. First, we are nervous about computers. Second, we are nervous about children. Third, as Americans, we are nervous about sex. Combine all these sources of nervousness and there is a certain amount of anxiety which plays into the hands of people who believe that the *Pacifica* precedent can be used to leverage a fundamental change in American life. There will be a day when online communication is the primary communications technology for every American.[96] Thus, the conservative goal is to set the standards now, while they are malleable and while there is no general social consensus about the protection of the medium. If the standards are set high enough, it becomes difficult and riskier for people to engage in expression over the Net--even constitutionally protected expression--given the breadth of regulation.

26. What is often forgotten by law makers and social conservatives is that the First Amendment is designed to protect speech of which we do not approve.[97] That is how the protection of free speech works in an open society. You protect offensive speech because nobody tries to ban inoffensive speech. Justice Holmes commented on this when he said, "Every idea is an incitement."[98] But we should also remember what Justice Brandeis noted, "[T]he best answer for bad speech is more speech."[99] People who are concerned that our underlying social morality is being undercut by explicit, but constitutionally protected sexual speech, or by offensive language, are afraid that their opinions are wrong. They are afraid that in the free and open debate that Justice Holmes called the "free trade in ideas,"[100] they might lose. Apparently, it is important for these would-be censors to play on people's ignorance, fear, and anxiety to cast a certain part of their agenda for

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95 *See* PAUL C. LIGHT, BABY BOOMERS 149-50 (1988) (stating that baby boomers are likely to delay having children because of economic uncertainties).

96 *See* M. Ray Perryman, *The Nature of the U.S. Work Force is Undergoing Big Change*, SAN ANTONIO BUS. J., Mar. 22, 1996, *available in* 1996 WL 10037758 (discussing changes in the work world in the twenty-first century and recognizing that "our primary communication may be with a computer modem, the Internet, or voice mail"); *Online Households Could Reach 66.6 Million*, INTERNET WK., Nov. 25, 1996, *available in* 1996 WL 11369283 (reporting that there are 23.4 million online users, and predicting 66.6 million in the year 2000).

97 *See* Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir. 1978) (recognizing that the Constitution prohibits the abridgment of expression based on public intolerance or the unpopularity or offensiveness of the ideas expressed).

98 Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

99 Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

100 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

American society into law. But I do not think this effort will succeed. I think that the constitutional problems with the CDA are so deep that it cannot be rescued.

Fred Lawrence:

27. The problems that the CDA presents to service providers are a particular problem for our next panelist. Margaret Seif is Vice President of Legal Affairs for AT&T's Interchange Network Company, now called AT&T New Media Services Division. That division is the developer and proprietor of the AT&T Interchange OnLine Network, an online publishing platform, an AT&T Business Network, and an online service focused on the needs of business users. At New Media Services, Ms. Seif is responsible for all aspects of the legal work faced by online service providers: contract negotiations, policy coordination, member issues, and, presumably, some of the issues that we are wrestling with today.

Margaret Seif:[101]

28. I want to give a sense of what it is like to advise clients who are trying to create a product on the World Wide Web[102] as to what is permissible under the CDA. These clients want to copy what others are doing to bring a service to the market, and I must constantly stop them.

29. I was involved in the drafting of the CDA. I have been in the online business for over three years. Early on, I saw that pornography was going to be the next big issue. What I could not have anticipated was the speed at which the issue would become political. The presidential election may have provided the impetus for increased pace to the passage of the CDA.

30. At the time, we were trying to write a statute that we could live with. My clients were building a proprietary online service called the Interchange OnLine Network.[103] That service still exists and the *Washington Post* publishes on the network.[104] Within the last year, AT&T decided to move its business to the World Wide Web and we created the AT&T Business Network.[105] Every day we take a

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101 Margaret Seif is currently General Counsel for Firefly Network, Inc.

102 The World Wide Web, or the Web, is a hypertext collection of documents that furnishes "the technology needed to offer a navigable, attractive interface for the Internet's vast sea of resources." JOHN DECEMBER & NEIL RANDALL, THE WORLD WIDE WEB UNLEASHED 6 (2d ed. 1995).

103 Interchange OnLine Network uses custom-made software to deliver news and was purchased by AT&T in December of 1994. *See* Hiawatha Bray, *Workers at AT&T Unit Get Pink Slips - Layoffs Part of Plan to Gradually Shut Down Interchange Network*, BOSTON GLOBE, Apr. 4, 1996, at 66.

104 *See* Dorothy Giobbe, *AT&T Phases Out Interchange*, EDITOR & PUBLISHER, Jan. 20, 1996, at 27 (reporting that the *Washington Post* will continue to publish on AT&T's Interchange Network).

105 *See* Grant Buckler, *AT&T Launches Business Network*, NEWSBYTES, Sept. 19, 1995, *available in* 1995 WL 10196058 (reporting AT&T Business Network will provide business news

news story, collect relevant resources on the Web, and put them in one place so that one can "read all about it" in one web site.[106]

31. At the time, we were a proprietary online service, which gives one a different perspective than when one is part of the Web. Some defenses were drafted into the CDA that seemed helpful to us. For example, one would not be prosecuted if one were a mere access provider.[107] Another defense to the CDA that we relied on immunizes content providers from prosecution if they use registration screens that require the user to enter a credit or debit card number.[108] The rationale for this defense was that requiring a credit card number would prevent children from viewing the material. Very few content providers use registration screens, however, because of the technological issues.[109] It is difficult to build a good, effective registration screen.

32. Moreover, it is a marketing disaster to force people through a registration process. A provider will automatically lose a portion of users who might otherwise be interested in the content. It is difficult to make money doing business on the Internet, so most providers rely on advertisers as a source of revenue.[110] Advertisers only want to pay if many people see the ads.[111] When people are lost because of a registration screen, advertisers may not be interested in advertising on your site.

33. The CDA is troublesome for content providers. Imagine a large provider who wants to start a well-funded health and fitness service on the Internet. They already have contracts to upload content from a medical publisher. After they begin to build the site and are ready for beta-testing, it becomes clear that some of the medical content could be construed as indecent because the content includes sex and

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and information from numerous information providers, and will also provide access to Internet services such as the World Wide Web and Usenet news groups).

106 AT&T no longer operates this service. *See Leadstory* (visited June 10, 1997) <http://www.bnet.att.com/leadstory/>; *see also News Release* (modified Apr. 2, 1996) <http://www.att.com/press/0496/960402.bsa.html>. However, for a related service, see News (visited June 10, 1997) <http://www.industry.net/news/>.

107 *See* Communications Decency Act of 1996 § 502(2), 47 U.S.C.A. § 223(e)(1) (West Supp. I 1996).

108 *See* § 223(e)(5)(B); *see also* ACLU v. Reno, 929 F. Supp. 824, 845-46 (E.D. Pa. 1996).

109 *See ACLU,* 929 F. Supp. at 846 ("Verification of a credit card number over the Internet is not now technically possible.").

110 *See* Shea v. Reno, 930 F. Supp. 916, 929 n.10 (S.D.N.Y. 1996) (noting that most services do not charge users for search requests and are sustained primarily by advertising revenues); Janice Maloney, *Yahoo! Still Searching for Profits on the Internet*, FORTUNE, Dec. 9, 1996, at 174, 175 (noting advertisers pay between $10 and $100 for every hit on a web page with their banner).

111 *See* Maloney, *supra* note 110, at 174.

birth control information.[112] The lawyers advise the client to use a registration screen but the client does not have time to build a registration screen, and it was not part of the client's marketing plan. It is an unresolved issue as to what such a client should do. Innocuous medical information is suddenly problematic content.

34. Similarly, my own clients want to create a comprehensive view of one story of the day. Suppose they choose a topic like the CDA, and as part of the treatment of that story, they want to link to a museum site that displays Mapplethorpe photos. Suddenly, I must advise them how to present the material in a news context, and in a way that is not patently offensive. A link to Mapplethorpe photos does not appeal to prurient interests, therefore I must make editorial decisions regarding something that, in any other context, would be inoffensive and informational. We worry also about the whole culture of the Web. The Web relies on linking.[113] The CDA, as drafted, might inadvertently trap us. For example, a link to a link might be construed to be indecent material available to minors.[114] An online product edited by a lawyer is not going to be as good as an online product built by a journalist or someone who knows how to create interactive content online.

35. My clients appreciate my point of view, but after a while they do not want me involved. Unfortunately, the CDA forces me to be more involved than ever in the client's product. Internationalization is also a problem because many sites are hosted on servers outside the United States. People outside the United States do not worry about indecent content, because they are not subject to the CDA.[115] Again, we worry about linking.

36. Blocking technologies[116] should solve this problem. Approval of blocking

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112 *See* John C. Dvorak, *Decency Act -- Politics: 1, Internet: 0*, PC MAG., Apr. 23, 1996, at 89, 89 ("A Los Angeles-based World Wide Web page about birth control, for example, might be considered indecent in Arkansas, and the provider would be liable and possibly criminally prosecuted there.").

113 Links "are short sections of text or images which refer to another document. Typically, the linked text is blue or underlined when displayed, and when selected by the user, the referenced document is automatically displayed, wherever in the world it actually is stored." *ACLU*, 929 F. Supp. at 836.

114 The CDA provides fines or imprisonment for knowingly using "any interactive computer device" to display to anyone under 18, any communication that depicts or describes "in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." *See* Communications Decency Act of 1996 § 502(2), 47 U.S.C.A. § 223(d) (West Supp. I 1996).

115 *But cf.* Christopher Stern, *CompuServe Shuts Down Sex after German Protest*, BROADCASTING & CABLE, Jan. 8, 1996, at 69 ("CompuServe has shut down access to more than 200 sex-related Internet user groups since a German prosecutor declared they provided material that is harmful to children.").

116 Also called filters, blocking technologies allow the user to block objectionable content based on categories like violence, nudity, and profanity. *See ACLU*, 929 F. Supp. at 839-42.

technologies is evident in the CDA.[117] Unfortunately, the use of a blocking technology is like closing the barn door after the horse has run away. It is this year's problem. Next year, or in the coming months, we will focus on a different problem. Until legislators and judges understand how to use the Internet, we will have laws that do not work. The Internet changes fast. Online business models change at lightning speed, and the law is impeding the growth of the Internet.

Fred Lawrence:

37. Our next speaker, Lar Kaufman, has more than twelve years of experience consulting in computer and network technologies, and as a technical writer specializing in Unix[118] and C language programming.[119] He has extensive experience working on industry committees to develop standards for electronic documents to preserve document portability and ease of access by users with disabilities.

Lar Kaufman:[120]

38. I understand how computers and computer networks have developed over the years because I have been working in the industry since the dawn of personal computers. Today computers are transforming our lives. There is a dynamic that I view differently, perhaps, than Mr. Godwin. I see pornography, hate speech, and other nasty and distasteful uses of the Internet as driven by monetary interests. I will briefly examine the technology, where it is taking us, some unsolved problems, and some theories about why we may never solve them.

39. Original network technology involved serial communications: UUCP,[121]

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117 Communications Decency Act of 1996 § 502(2), 47 U.S.C.A. § 223(e)(5)(A) (West Supp. I 1996).

118 Unix is a "[f]lexible, portable, and powerful operating system dominant around the world." WIRED STYLE, PRINCIPLES OF ENGLISH USAGE IN THE DIGITAL AGE 57 (Constance Hale ed., 1996) [hereinafter WIRED STYLE].

119 Much of the software that runs on the Internet is written in C. *See id.* at 53.

120 Lar Kaufman was a first-year law student at Boston University School of Law at the time of these remarks.

121 UUCP stands for Unix-to-Unix Copy Protocol. UUCP is used to connect Usenet news servers and replicate the newsgroups across the network, as well as for e-mail. *See* Sean Gallagher, *At Long Last, a BBS You Can Set Up in Less Than 5 Minutes*, GOV'T COMPUTER NEWS, Mar. 6, 1995, at 1.

Usenet,[122] FidoNet,[123] and BBSs. When the Internet first became available to the public, people figured out how to make bulletin boards talk to each other so that they could exchange information. This led to private international networks. I was a FidoNet user back in 1983, and I enjoyed carrying on conversations with people from Holland and Australia. Sometimes it took two or three days for the messages to travel back and forth, but it was interesting for the time. That technology is overlooked today. When I first used that technology, modems were 300 baud.[124] Now I have a modem that is nearly 100 times faster. The FidoNet technology is still there and people may be using it. Recently, I have been using the Internet. But these other networks still exist and the barriers that limit their bandwidth are being lowered so that they are becoming more efficient. If we lived in another part of the country and were not limited by Nynex,[125] we might find it economically feasible to have an ISDN phone line.[126]

40. With increasing bandwidth afforded by technology, entrepreneurs realized money could be made with bulletin board services. The first people to make money were probably pornographers. They started running adult-only bulletin boards and they charged access fees. That has colored the perception of BBS operators unfairly and unfortunately. A vast majority of BBS operators are not driven by financial incentives, and many lose money. For example, when I was a BBS operator, I never charged people to use my system. I paid for the hard disks, the modems, and new computers when lightning hit the phone lines outside. Not everybody is out there to make money.

41. E. B. White made probably the first drive to clean up television because

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122 Usenet accommodates nearly 10,000 newsgroups organized according to topic and allows subscribers, with a proper newsreader, to post messages to specific groups. *See The Sound and the Fury: Usenet*, MACWORLD, Nov. 1, 1995, at 47.

123 FidoNet is a garage-band version of the Internet linking BBSs through dial up connections. *See* WIRED STYLE, *supra* note 118, at 111.

124 The baud rate is the number of bits per second that can be transmitted between computer systems. *See* WEBSTER'S NEW WORLD DICTIONARY 95 (1974).

125 Nynex provides local phone service throughout New York and most of New England. *See* HOOVER'S HANDBOOK OF AMERICAN BUSINESS 1082 (1996).

126 ISDN lines carry voice and data simultaneously over a single copper wire pair. ISDN lines link directly into the switched telephone network and can thus make connections anywhere in the world. *See* Mel Breckman, *ISDN Survival Kit*, INFOWORLD, Apr. 1, 1996, at 1.

he was afraid that television content was degrading the quality of his texts.[127] Perhaps the regulation of television should guide the constraints to be placed on the Internet. There is a direct correlation between the idea of making money on the Internet and the drive to clean up the Internet. The original technologies for data transfer, such as Gopher[128] and FTP,[129] were largely non-interactive. Even the early World Wide Web was strictly text-based.[130] I have friends who are dependent on electronic documentation to communicate. Commercial interests, such as Netscape[131] and Microsoft Blackbird,[132] are now involved. Now one can view a web site that once could not be accessed using a character-based browser. That, however, denies open communication to people who need it most. These issues have to be addressed at an international level, but it is unlikely that they will be addressed in the near future.

42. CUSeeMe software[133] offers real-time interactive video. With a video camera and direct Internet access one has bandwidth capacity for real-time, low resolution video.[134] Predictably, this could lead to a new form of phone-sex on the Internet. I do not know if that will make money.

43. The problem is that, as the desire to clean up the Internet becomes stronger, the urge to control it is stifling the technology. The next session of this Internet Law Symposium will focus on data encryption.[135] The United States

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127 *See* LETTERS OF E. B. WHITE 540 (Dorothy Lobrano Guth ed., 1976) ("It is the fixed purpose of television and motion pictures to scrap the author, sink him without a trace, on the theory that he is incompetent, has never read his own stuff, is not responsible for anything he ever wrote and wouldn't know what to do about it even if he were."). White viewed television as "the test of the modern world." *See* James M. Wall, *Kid's Stuff*, CHRISTIAN CENTURY, Aug. 2, 1995, at 731, 731 (quoting White and arguing that we have "failed the test that White described").

128 Gopher is a server software capable of making available the resources of a host computer using a set of menus. *See* Shea v. Reno, 930 F. Supp. 916, 928 (S.D.N.Y. 1996).

129 FTP, or file transfer protocol, is software that implements a set of conventions for copying files from a host computer. *See id.*

130 *See* Playboy Enters., Inc. v. Chuckleberry Pub'g, Inc., 939 F. Supp. 1032, 1037 (S.D.N.Y. 1996) (describing the early Internet as strictly text-based).

131 Netscape is a premier "web browser" that allows one access to the World Wide Web as well as other parts of the Internet. *See* Carl P. Deluca, *Legal Bytes,* R.I.B.J., Nov. 1996, at 23.

132 Microsoft Blackbird is a complete authoring and publishing environment. *See* Andrew Singleton, *Wired on the Web*, BYTE, Jan. 1, 1996, at 80.

133 CUSeeMe offers real-time video by using a video board and a video camera connected to the computer, and bouncing audio-visual messages off Internet "reflectors"--machines running enabling software--to others with a CUSeeMe setup. *See* Lynn Paul, *What will Cyberspace be Like in the Future?*, THE FIN. POST, Mar. 23, 1996, at N5.

134 *See id.*

135 *See generally* Symposium, *Financial Services: Security, Privacy, Encryption,* 3 B.U. J. SCI. &

government, in particular, has been trying to control access to data encryption.[136] It is ammunition. It is military technology.[137] There is good data encryption software. In fact, it is not difficult to have private communications by using encryption. Most people do not know that it is easy, or they would probably do it. There is a concern about terrorist networks, so the government wants to control data encryption.[138] But the same data encryption software makes commercial transactions possible. If one does not have this security, one could not exchange money, or conduct other transactions, over the Net.[139] If one cannot conduct business, our "brave new world"[140] is not going to get bigger. We need it to get bigger; we need people to be able to telecommute in a practical way. A vision is developing out of computer telephony integration.[141] A little laptop multimedia computer can have a built-in fax machine and telephone. When one leaves the office, the Internet can be used through a radio link in your personal computer card slot. One can use satellite communications and still be linked to the office. One can go visit any customer, anywhere in the world, and still be linked to the office. But, where is the privacy?

44. I do not know what the solutions are, but I believe that there is an interest in stifling certain behavior. If we could get rid of these troublemakers, we could have a nice commercial Internet. I do not think it is well rationalized all the time. I still think that for the next few years, for example, the real money will come from people who do not do much business on the Internet. They are exchanging ideas. I see the Internet as a "commons." It is like going to the beach. One might want to get a tan; one might want to check out the new bathing suits. One does not necessarily want to get involved. One just wants to look. It is a very safe way to get around. But, what if I say something in this commons and a three-year-old child wanders by? Would I be in trouble if he or she overheard what I was saying? Not

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TECH. L. 4 (1997) (discussing technology needed for successful online banking).

136 *See Hearing Before the Foreign Operations Subcomm. of the Senate Appropriations Comm.*, 104th Cong. (1996) (testimony of Louis Freeh, Director, Federal Bureau of Investigation), *available in* LEXIS, News Library, Curnws File.

137 *See id.*; *see also* Dorothy Denning, *The Case for "Clipper": Clipper Chip Offers Escrowed Encryption,* TECH. REV., July 1995, at 48.

138 *See* Denise Caruso, *Technology: Digital Commerce; The Key Issue for the Net is Not the Smut, It Is the Use of Encryption*, N.Y. TIMES, Mar. 25, 1996, at B5.

139 *See* Denning, *supra* note 137, at 48.

140 *See generally* ALDOUS HUXLEY, BRAVE NEW WORLD (1963) (presenting an ironic reference, for Huxley's Brave New World was a severely controlled socialist state).

141 *See generally* Christopher Libertelli, *Internet Telephony Architecture and Federal Access Reform,* 2 B.U. J. SCI. & TECH. L. 13 (1996) (providing an overview of the technology and regulation).

under the traditional model.[142] But we are getting close to that concept with some of the proposals to regulate the Internet.[143] I think that it is very useful to keep a model of the Internet and other communications techniques as commons communication. It is a different sort of community that transcends physical boundaries. Thus, it is difficult to know what the community standards would be under the traditional model.

45. I see a viable blocking technology developing. One gets a list of words that are prohibited or a list of sites that you are not allowed to access. There are many difficult ways to circumvent these prohibitions. But there is another concept that is going to develop rapidly. It is often overlooked because it is almost too obvious: intranets.[144] People will erect barricaded villages, and they will have privacy within their villages. They will have their community within their villages. They will be able to go through the gates, but they will also be able to keep out certain people.

46. We will move toward this model, not on a geo-physical basis, but on a medium basis. People will have private serial and satellite networks. Cisco Systems[145] recently introduced a new product that accesses the Internet, but does data encryption and decryption on the fly.[146] Virtual villages will develop out of this one big amorphous Internet. The intranets will be anything from a small group of people in a community--a village, a neighborhood, a bunch of classmates--to a corporation. Further developments in the corporate model are going to occur first and fastest, because it is going to be market driven. But I think this division of the Internet into a series of semi-private networks will tend to be the model that will

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142 *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986). *But cf.* RESTATEMENT (SECOND) OF TORTS § 48, illus. 5 (1965) (child who overheard railroad worker using profane language, when the worker knew the child was waiting for a train and would overhear him, could recover damages for emotional distress).

143 *See, e.g., Australian Internet Regulations Ridiculed*, TELECOMWORLDWIRE, Apr. 2, 1996, *available in* 1996 WL 7889828 (noting the Australian government's plan to introduce a $10,000 fine or one year in jail for those transmitting, accessing, or promoting Internet pornography and other "distasteful services"); Reginald Chua, *Hanoi Unveils Strict Rules to Control Internet Access*, ASIAN WALL ST. J., June 3, 1996, at 3 (describing Vietnam's strict telecommunications rules allowing the Ministry of the Interior to regulate Internet traffic and banning information that is "deemed damaging to the country's interests"); *see also* Communications Decency Act of 1996 § 502(2), 47 U.S.C.A. § 223(a)(1)(B) (West Supp. I 1996) (making it illegal to use a telecommunications device to make an obscene comment to recipient under 18 years old).

144 An intranet is a private network designed strictly for internal use. *See* WIRED STYLE, *supra* note 118, at 50.

145 Cisco Systems, Inc. is the "leading global supplier of enterprise networks, including routers, LAN and ATM switched, dial-up access servers, and network management software." *See Cisco Announces New High Performance, Mid-Range Router*, M2 PRESSWIRE, Sept. 19, 1995, *available in* 1995 WL 10484196.

146 *See id.*

alleviate some of this pressure. As long as there are people out there trying to make money on the Net, there are going to be people out there trying to control the kinds of activities that take place on it. The Internet used to be a very wild, interesting, wonderful place, but how wild can it get when there are only five or six thousand people out there? Things are very different now. The same kinds of dynamics that create the desire for a protected network, things like Prodigy[147] and America Online[148] which are well known as service providers that cater to the young, are also the places that the child porn people are hanging out. That is the attraction for some of these problem people and why they are getting into this medium. So that is my perspective on it. I think we should keep an eye on the money and maybe some of these things will sort out.

Question and Answer Session

Audience Member:

47. First, could a provider be liable under the CDA for pornographic sites? Second, Ms. Seif, in your professional experience, is there anything a business might be able to do to protect themselves from liability?

Michael Godwin:

48. In *Smith v. California*,[149] the Supreme Court held that a seller of material cannot be liable for content without a showing of fault.[150] *Smith* is an obscenity case,[151] but it was harmonized on the issue of scienter[152] in the libel arena in *New York Times v. Sullivan.*[153] Here is where the CDA raises an interesting issue. Technically, it was always possible to create obscenity liability for a bookstore by reading the books, finding something obscene, notifying the bookstore owner, telling the district attorney, and essentially eliminating any claim that the bookseller was

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147 Prodigy is an online service provider. *See Prodigy Homepage* (visited Feb. 26, 1997) <http://www.prodigy.com>.

148 America Online is an online information service offering bulletin boards, financial data, and news. *See* HOOVER'S HANDBOOK OF EMERGING COMPANIES 90 (Patrick J. Spain & James R. Talbot eds., 1996); *see also AOL Homepage* (visited Feb. 26, 1997) <http://www.aol.com>.

149 361 U.S. 147 (1959).

150 *Id.* at 153.

151 *Id.* at 148.

152 Scienter is used to signify the defendant's guilty knowledge. *See* BLACK'S LAW DICTIONARY 1345 (6th ed. 1990).

153 376 U.S. 254, 266 (1964).

not responsible.[154] But, the significance of *Smith* was that it more or less took prosecutors out of the business of prosecuting mainstream bookstores, because requiring proof of a mental state or fault made it easier for prosecutors and law enforcement officers instead to go after the originators of purportedly illegal material. The logic in *Smith* was that we do not want to put booksellers in the position of having to know the content of everything before they sold it.[155]

49. Now I think there is a consensus in America that policing obscenity might be all right. The CDA was modified so that it is easy for someone to target a provider by simply writing a letter to the provider that obscene or indecent material was seen online, and then notifying the Unites States Attorney if it was not removed.[156] This enforcement mechanism allows individual citizens to police indecency. If one knew that something was probably legally obscene in your community, one could notify a law enforcement officer. Or one could notify the pornography bookseller, who then could not claim that he was not knowingly communicating the material that was obscene. What happens if one is a provider who does not police the content? The beauty of the Net is that one does not have to screen everything through a publisher and editor before reaching the audience. But the CDA creates the possibility that people who want to police for offensive material can notify the provider and then simply erase the supposed protections for providers that are built into the CDA.[157] This is exactly what the drafters intended.

Margaret Seif:

50. With a build-your-own-web-page business one has to worry about indecency problems with what people put on their web pages. One also has issues regarding copyright, privacy, fraud, libel, and other illegal activities. Yet, when one builds those web pages, or one lets other people build them, are they incorporating your URL[158] into their URL? If so, it looks like the provider sponsors those web pages. If it says www.JohnSmith.tripod.com the provider starts to worry that it looks like the provider is endorsing the behavior.[159] Generally, the business should

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154 *See Smith,* 361 U.S. at 154 (finding that an inference can be drawn that a bookseller is aware of a book's contents).

155 *See id.* at 153 ("If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed.").

156 Communications Decency Act of 1996 § 502(2), 47 U.S.C.A. § 223(e)(2) (West Supp. I 1996) (making safe harbor unavailable to those with knowledge).

157 § 223(e)(1).

158 A URL, or uniform resource locator, acts as an address on the Internet. *See* WIRED STYLE, *supra* note 118, at 144.

159 *See* Marie D'Amico, *The Law Abiding Netizen -- Courting Content Liability*, NETGUIDE, July 1, 1996, at 36 ("If you're a Web content or service provider, does this mean you have to scan every statement sent to your site or service to assure you won't be liable for anything? Unless you have a

try to get an agreement indemnifying it for any behavior or activity on those web pages.

51. Indemnifications would only help in civil liability, however, and an accused can go to jail when prosecuted under the CDA.[160] One should also get an agreement that the business can take down the web page for any reason or no reason at all. If one gets into a long dispute about the value of the material or why it may be a problem, the provider's liability could quickly mount.

Michael Godwin:

52. One of the ironies of the CDA is that it takes the medium that has been the most free and empowering in terms of allowing individuals to reach their audiences, and makes it the least free. First, there are criminal penalties here that do not exist in any other medium. Second, it creates vast disincentives to be providers. At the Electronic Frontier Foundation, we had aimed to create the possibility of what we privately think of as garage-band providers. To start an Internet service, as opposed to any other mass media service that requires a great amount of capital, one can just do it in the garage. One cannot do it if the overhead becomes a barrier to entry, however, and one of the barriers is hiring a lawyer to police all of the content.

Audience Member:

53. Could somebody on the panel explain what the expectation is for review of the CDA?

Michael Godwin:

54. I think we will have Supreme Court review this year. Not in this term, but I think we will have it in the next term, or at the very latest at the end of the 1997 term.[161]

Audience Member:

55. Could you explain a little bit about the Exon amendment?[162]

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legion of lawyers or no personal life, you don't have the time.").

160 47 U.S.C.A. § 223(d)(2) (stating that violators "shall be fined under title 18, United States Code, or imprisoned not more than two years, or both").

161 *See* ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa 1996), *cert. granted*, 65 U.S.L.W. 3609 (Nos. 96-963, 96-1458). The case was argued before the Supreme Court on March 19, 1997. *See Supreme Court Hears Oral Arguments in CDA Case*, COMM. TODAY, Mar. 20, 1997, *available in* 1997 WL 7465795.

162 S. 314, 104th Cong. (1995).

Michael Godwin:

56. Nobody actually knew, the day the Exon Amendment passed in the Senate, what the specific provisions were, and they had changed substantially. One of the things I remember is spending 12 hours writing an analysis when we realized it had been fundamentally altered and distributing those changes so that people could make the correct criticisms. But, a year ago it was thought that the Exon Amendment, as the CDA was then called, would not pass.[163] Then Senator Exon held up the bluebook filled with obscene images and content on the floor of the Senate.[164] Deen Kaplan of the National Coalition for the Protection of Children and Families, formerly the National Coalition Against Pornography, provided him with the bluebook.[165] Most Senators do not know the difference between obscenity and indecency. They were driven by ignorance, fear, and silence into voting for the amendment because nobody wants to appear to be pro-obscenity, pro-pornography, or "pro-indecency"--whatever that last term might mean.

57. In the final version that was passed the term "indecency"[166] appears as does language that reads "patently offensive . . . sexual or excretory activities."[167] Why is it different there? The answer is that in response to criticism, the FCC administrative definition of indecency[168] was codified and added to the CDA.[169] The harassment offense was always a smokescreen. CDA proponents never really cared about harassment. This is apparent because under pre-CDA existing law, sending harassing or threatening comments through a telecommunications device was already prosecutable.[170] All the supporters cared about when they were selling the amendment on the floor of the Senate, was the "display offense" on the second page of the bill.[171] They wanted the "display offense"--which expanded the scope of

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163 *See* Ronald Shafer, *Business Lobbies for GOP Tax Cuts, But Some Prefer Deficit Reduction*, WALL ST. J., Mar. 31, 1995, at A1.

164 The "bluebook" is a scrap-book of pornography collected off the Internet. *See* 141 CONG. REC. S9017 (daily ed. June 26, 1995) (comments of Senator Exon).

165 *See* B. G. Gregg, *On-Line Porn Put on Spot*, CINCINNATI ENQUIRER, Sept. 23, 1995, at B1.

166 *See* Communications Decency Act of 1996 § 502(2), 47 U.S.C.A. § 223(a)(1)(A) (West Supp. I 1996).

167 § 223(d)(1)(B).

168 *See* 47 C.F.R. § 76.701(a) (1995) (defining indecency as material describing or depicting sexual or excretory activities in a patently offensive manner).

169 Communications Decency Act of 1996 § 502(2), 47 U.S.C.A. § 223(d)(1)(B) (West Supp. I 1996).

170 *See* 47 U.S.C.A. § 223(a) (1994) (prohibiting interstate use of a telecommunications device to threaten or harass).

171 *See* S. 314, 104th Cong. § 2(a)(1)(B) (1995).

potentially prosecutable defendants--to survive a constitutional challenge.

Audience Member:

58. What will the effect of *Turner Broadcasting Sys., Inc. v. FCC*[172] and its progeny[173] be on cable, since cable has no scarcity?

Michael Godwin:

59. Cable is in an interesting position because of the *Turner Broadcasting* case.[174] The justification for almost all broadcasting regulations has been the scarcity of the broadcasting spectrum.[175] But, there is no scarcity on the Internet because every time a site is added, the size is increased. This is also true of cable. In *Turner Broadcasting*, the Supreme Court held that there was no scarcity in cable.[176]

60. What business does the FCC have saying that cablecasters have an obligation to carry the broadcast station content? The rationale was antitrust.[177] There is a dysfunctional market and in order to save the broadcasting market, the law provides must-carry rules.[178] That is a different decision from what you are going to see with regard to cable indecency regulation. You cannot require must-carry rules because there is no scarcity to support the antitrust rationale. There are two outcomes that I see with any attempt to regulate indecency in cable. The rational outcome is that because there is no scarcity predicate for federal control of non-obscene content there is no rationale for regulating. The more likely outcome, however, is that pervasiveness--the secondary rationale in *Pacifica*[179]--will be used as the rationale for regulating indecent cable content, but that the Supreme Court will narrowly define it as content control. Justice Stevens, in discussing pervasiveness, spoke specifically of a unique medium[180] where children not even capable of reading can access the medium, but cannot even read or understand a

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172 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

173 *See* Denver Area Educational Telecommunications Consortium, Inc. v FCC, 116 S. Ct. 2374 (1996) (holding that cable operators can refuse to carry indecent programming and provide blocking).

174 512 U.S. 622 (upholding must-carry rules as serving a legitimated governmental interest).

175 *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 377 (1969).

176 512 U.S. at 630.

177 *See* Gary S. Lutzker, *The 1992 Cable Act and the First Amendment: What Must, Must Not, and May Be Carried*, 12 CARDOZO ARTS & ENT. L.J. 467, 493 n.168 (1994).

178 47 U.S.C. § 534 (1994) (requiring carriage of local television stations).

179 FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

180 *See id.*

warning.[181] That is emphatically *not* true with computer communications.

Margaret Seif:

61. Even though it is hard to describe what obscenity is, I could at least tell my clients to stay away from linking to sites with naked children or sexual materials with animals. With indecency law, however, nobody exactly knows what it is, and I definitely do not know what it means in Tuscaloosa, Alabama. Now, I am at a complete loss as to how to advise them, particularly with content that seems to have redeeming social value. For example, children might not be the proper audience for a Mapplethorpe exhibit, but it would have found protection from obscenity prosecution as an artistic work. So, the standard for indecency is unclear in many areas.

Michael Godwin:

62. I can make three basic arguments for regulating broadcasting. First, the federal government has special scope to regulate content in broadcasting to ensure that the scarce broadcasting medium is used properly.[182] Although the opinion in *Pacifica* does not cite the scarcity rationale, the FCC argued the scarcity rationale to justify its sanctions against a radio station that broadcast the George Carlin routine.[183] By current standards that routine would be regarded as innocuous. I do not know of any child above the age of eight who has not heard every single word mentioned in the George Carlin routine.

63. Second, even if one considers pervasiveness an adequate justification for federal content control in broadcasting,[184] pervasiveness is a term of art. It refers to specific unique characteristics of the broadcast medium.[185] Arguably, nothing is less user-driven than broadcasting when one is sitting in front of the television and material simply floods over the user. Yet few things are more user-driven than choosing to see content on the Internet. For all the stories we hear about people who accidentally encounter material on the Net that offended them, it just does not happen that much. It certainly happens no more frequently than in a Harvard Square bookstore.[186] Why should the rules be different for a bookstore?

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181 *See id.* at 749-50.

182 *See* National Broad. Co., Inc. v. United States, 319 U.S. 190, 213 (1943) (using scarcity argument to justify regulation beyond mere technical and engineering details).

183 *See* 56 F.C.C.2d 94, 97 (1975); *see also* FCC v. Pacifica Found., 438 U.S. 726, 731 (1978).

184 *See id.* at 748 (finding pervasiveness and accessibility to children to be adequate regulatory justification).

185 *See id.*

186 *See No to On-Line Nannyism*, THE SACRAMENTO BEE, June 16, 1996, at F4 (explaining Congress made it a crime to transmit indecent material over the electronic networks where it might

64. It is certainly possible for a 10-year-old to walk into a bookstore and find books by Norman Mailer--such as *An American Dream*[187] or *Ancient Evenings*[188]-- that depict explicit sexual conduct in a way that might offend. I take the controversial position that these books have serious literary value. Do we send the bookstore owner to prison for two years because it is possible that a child might access that material? In our open society, we have allowed for the possibility that a child may walk into Boston Common and hear a person say offensive and profane things. That speaker, however, cannot be prosecuted.[189]

Margaret Seif:

65. Realistically, if you are on the Web reading stories in a bestiality news group, and you leave it running, and your five-year-old comes along and reads it, that is a problem with how you use your own computer.

66. It is really hard, however, to get dirty pictures off the Internet. I have tried. I have a loaded computer and I cannot unpack those images. With Netscape's new browser,[190] it automatically unpacks the image.[191] It puts together binary files so one can get the pictures right away.[192] All one has to do is access Yahoo[193] and then search for "sex." It will be easier with new technology. It does not mean, though, that blocking technologies[194] are not the right approach. They work much better to protect children.

Michael Godwin:

67. For example, many parents have adult videos in their home. If the parent leaves the home, it is possible for a child to have access to those videos. There is no

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be available to children, whereas the Supreme Court has required a more stringent obscenity standard be met in order to ban printed materials from bookstores and libraries).

187 NORMAN MAILER, AN AMERICAN DREAM (1965).

188 NORMAN MAILER, ANCIENT EVENINGS (1983).

189 *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (explaining the First Amendment guarantees wide freedom in matters of adult public discourse).

190 *See Introducing Navigator 3.0* (visited Jan. 23, 1997) <http://www.netscape.com/comprod/products/navigator/version_3.0/index.html> (describing Netscape's new web browser, Navigator 3.0).

191 *See id.*

192 *See id.*

193 *See Yahoo!* (visited Feb. 20, 1997) <http://www.yahoo.com>.

194 *See, e.g., Rated-PG* (visited Feb. 24, 1997) <http://www.ratedpg.com/> (blocking software); *Solid Oak Software* (visited Feb. 24, 1997) <http://www.solidoak.com/index.htm> (blocking software called CYBERsitter).

parental exemption under the Communications Decency Act. Under the CDA, it is a crime, to leave your computer on a copy of the text of *Pacifica* if your seventeen year-old college freshman, home for the holidays, walks past the screen and sees the word "fuck."[195]

Audience Member:

68. Several cable cases have made a distinction between cable and broadcasting on the grounds that, in essence, one invites cable into the home, as opposed to broadcasting. Justice Stevens said in *Pacifica* that exposure to indecency should be a nuisance cause of action because something is not where it should be.[196] The point being, there is an affirmative action with the Internet. The CDA is worried about kids walking by a screen and seeing indecency, but who subscribed to the computer service in the first place?

Margaret Seif:

69. There is a significant quantity of pornography online because it drives new technologies. VCRs and CD-ROMs spread because of pornography.[197] Relative to the amount of other data online, however, it is minuscule. There are zillions of news groups and a tiny percentage are for the particular purpose of creating indecent content. The political football got blown up to gigantic proportions.

Michael Godwin:

70. One of the joke experiences that I have is that people ask me how many hours a day I spend online. Well, sometimes I say "eight hours a day." They say, "Boy, I bet you see a lot of pornography." I say, "Actually I never see any." And they say, "How can that be?" People have demonized the media.

Margaret Seif:

71. I was involved early on in the beginning when CDA was so much smaller. The general counsels of America Online and the News Corps Service got involved. We tried to guide the lawmakers as to what would and would not work, and how the CDA should be legislated. Our real goal was to kill it. We were told it was not possible to kill this thing and we were neophytes. We believed it could not be killed, so we went along trying to fix it. It eventually got bigger than all of us and eventually had ranks and ranks of people involved. Ultimately, Mr. Godwin would

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195 Communications Decency Act of 1996 § 502(2), 47 U.S.C.A. § 223(d)(2) (West Supp. I 1996) (subjecting any person who "knowingly permits any telecommunications facility under such person's control to be used for a prohibited activity" to potential criminal enforcement).

196 *See* FCC v. Pacifica Found., 438 U.S. 726, 750 (1978).

197 *See* Janice Maloney & Eryn Brown, *Married . . . With Internet?*, FORTUNE, Sept. 30, 1996, at 218 (VCRs); David Colman, *Porn Again*, ARTFORUM, Feb. 1, 1996, at 9 (CD-ROMs).

agree, it could have been killed early on. We made a misstep.