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Issues in Internet Pornography

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Mr. PAUL McGEADY⁹

Thank you, Gary. Today we are going to talk about the Communications Decency Act of 1996,¹⁰ generally referred to as

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¹⁰ Communications Decency Act of 1996. (to be codified at 47 U.S.C. § 223(a)-(h)) (amending the Communications Act of 1934, § 223(a)(1)(B), (a)(2), (d)(1), (d)(1-2)). The Communications Decency Act of 1996 (CDA or "the Act"), which constitutes Title V of the Telecommunications Act of 1996, was signed into law by President Clinton on February 8, 1996. The Communications Act of 1934 provides in pertinent part:

(a)(1)(B) Whoever, by means of a telecommunications device knowingly makes, creates, or solicits, and initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication.

(a)(2) Whoever, knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity.

(d)(1) Whoever, in interstate or foreign communications knowingly uses an interactive computer service to send to a specific person or persons under 18 years of age, or uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1)

the "CDA." I think it is important to discuss what the act covers. I will give an abbreviation of the various things that it has to say.

First, it prohibits the transmittal by a telecommunications device, for instance, a modem, of an obscene¹¹ or indecent comment or image with the intent to annoy or harass.¹² Secondly, it prohibits the transmittal by a telecommunication device of an obscene or indecent comment or image, if it is known that the recipient is under eighteen years of age.¹³ Thirdly, it prohibits the knowing use of an interactive computer service¹⁴ to send any communications that, in context, depicts or describes in terms patently offensive, as measured by contemporary community standards, sexual or excretory activities or organs to a specific person under eighteen years of age.¹⁵ All three prohibitions will clearly be upheld, however, the third prohibition is in dispute.

The third prohibition is causing the Supreme Court difficulty. On March 19, 1997, the Supreme Court¹⁶ heard the appeal from the three-judge District Court in Philadelphia.¹⁷ The arguments were presented and the courtroom was overcrowded with lawyers. Various constitutional objections were articulated. One objection involved overbreadth and whether this type of law which prevented adults from communicating indecently was overbroad.¹⁸ The theory is that indecent communication between

with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.

Id.

¹¹ Obscene is defined "as objectionable or offensive to accepted standards of decency." BLACK'S LAW DICTIONARY 1076 (6th ed. 1990).

¹² 47 U.S.C. § 223 (a)(1)(A).

¹³ 47 U.S.C. § 223 (a)(1)(B).

¹⁴ Russell Shaw, *Technology; Cable Mulls Legal Issues for Internet*, ELECTRONIC MEDIA, Mar. 11, 1996, at 38 (stating that legal experts "'define interactive computer service to mean any information service system or software provider that provides or enables computer access.'").

¹⁵ 47 U.S.C. § 223 (d)(1).

¹⁶ *Reno v. ACLU*, 117 S. Ct. 2329 (1996).

¹⁷ *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd.*, 117 S. Ct. 2329 (1997).

¹⁸ *Id.* at 859. The overbreadth doctrine "serves to invalidate legislation so sweeping that along with its allowable proscriptions, it also restricts

adults is protected speech.¹⁹ However, that theory is not necessarily set in concrete. In *FCC v. Pacifica Foundation*,²⁰ the indecency law was upheld.²¹ One of the rationales for upholding the indecency law was that the audience consisted of unconsenting adults, as well as, children.²² As far as we are concerned the overbreadth is not a problem because we have two affirmative defenses that can be utilized. These defenses will enable adults to obtain this material.

A defense is available if the person who is posting the indecency, which is distinguished from obscenity, makes a good faith, reasonable effort under the circumstances to restrict access by minors.²³ Indecency is distinguished from obscenity because

constitutionally protected rights of free speech, press, or assembly. BLACK'S LAW DICTIONARY 1103 (6th ed. 1990).

¹⁹ *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989) (explaining indecent, but not obscene, sexual impression is protected by the First Amendment, however, the content of the constitutionally protected speech may be regulated in order to promote a compelling interest by utilizing the least restrictive means to further the interest).

²⁰ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The case involved an afternoon radio broadcast of comedy monologue by George Carlin, which contained profanity. *Id.* at 729-30. A father complained about the broadcast after he and his young son overheard it in the car. *Id.* The Federal Communications Commission ("FCC") found the broadcast indecent in violation of 18 U.S.C. § 1464 (1976 ed.). *Id.* at 732. Section 1464 (1976 ed.) provides:

Whoever utters any obscene, indecent, or profane language by means of radio communication which forbids the use of "any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

Id.

²¹ *Pacifica Foundation*, 438 U.S. at 748.

²² *Id.* at 748-49. The *Pacifica* opinion ruled on the "unique" attributes of broadcasting noting that broadcasting is "uniquely pervasive," it can intrude on the privacy of the home without warning as to the program context, and is "uniquely accessible too children, even those to young to read." *Id.*

²³ 47 U.S.C. 223 (e)(5). The Act affords a "safe harbor" defense which provides in pertinent part: "(A) Online providers have a defense if they have taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors . . . which may involve

obscenity is banned.²⁴ A second defense is available if the person who is posting the indecency has restricted access by requiring use of a verified credit card, debit account, adult access code or adult identification.²⁵ We believe that a combination of these aforementioned defenses will permit adults to freely talk indecently to each other.

An additional objection made involved anonymity. In order to utilize these defenses you must identify yourself in some way. Our answer to that is, so what? Identification is necessary when using dial-a-porn.²⁶ In order to obtain dial-a-porn, you have to use your credit card or a personal identification number. Under these circumstances, we do not think anonymity raises itself to a constitutional dimension. Dial-a-porn laws have been blessed by the courts.²⁷ In *Sable Communications of California v. FCC*,²⁸

any appropriate measures to restrict minors from such communications”
Id.

²⁴ *Roth v. United States*, 354 U.S. 476 (1957). In *Roth*, the Supreme Court sustained the validity of a federal obscenity statute that prohibited sending obscene material through the mail. For the first time, the Court held that obscenity is afforded no constitutional protection. *Id.* at 485.

²⁵ 47 U.S.C. 223 (e)(5)(B). The Act affords a “safe harbor” defense if the online provider has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number. *Id.*

²⁶ Elizabeth J. Mann, Comment, *Telephones, Sex and the First Amendment*, 33 UCLA L. REV. 1221 (1986). “Dial-a-porn is the colloquial name given to telephone services that offer sexually explicit recorded messages to anyone with access to a telephone.” *Id.*

²⁷ *Sable Communications of California v. FCC*, 492 U.S. 115 (1989). The Supreme Court struck down legislation outlawing dial-a-porn laws (telephone indecency). *Id.* at 131. The Court explained that the dial-a-porn service is a medium where callers have to take active and affirmative steps in order to access the phone sex services. *Id.*

²⁸ 492 U.S. 115 (1989). *Sable Communications* is a company in California that offers sexually oriented pre-recorded telephone messages, known as “dial-a-porn.” *Id.* at 117-18. In *Sable*, the Supreme Court considered the constitutionality of § 223 (b) of the Communications Act, as amended, which banned indecent and obscene interstate commercial telephone messages. *Id.* at 117. The Court held that although the ban on obscene interstate telephone messages was lawful, the ban on indecent speech was not. *Id.* at 124-25.

the Supreme Court suggested that Congress go back to the drawing board. The Court stressed that Congress should require credit cards, codes, and scrambling devices on dial-a-porn to separate children from adults.²⁹ Two Circuit Court opinions, one in the Second Circuit³⁰ and one in the Ninth Circuit³¹ have said that the dial-a-porn defense and the dial-a-porn law is valid. We find there is not much of a distinction between the two.

Vagueness³² was another objection that was raised. It is not a big deal. A justice in the Philadelphia court said, "I don't find any vagueness."³³ Vagueness is associated with the second prong of the Miller test which has been blessed by the Supreme Court.³⁴ In *Dial Information Services Corporation of New York v.*

²⁹ *Id.* at 128-30.

³⁰ *Information Services Corporation of New York v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991) (explaining that the "central blocking approach" involved placing a 3 digit prefix to the phone numbers of sexually explicit telephone services, telephone subscribers could request that the telephone company block access to sexually explicit telephone services).

³¹ *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir. 1991) (explaining that FCC regulations required an individual to notify the carrier in writing in order to receive "dial-a-porn" messages).

³² *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1976) (striking down a vagrancy statute on the grounds that it was vague and encouraged arbitrary enforcement).

³³ *Reno*, 929 F. Supp at 867. Judge Dalzell did "not believe the statute was unconstitutionally vague." *Id.*

³⁴ *Miller v. California*, 413 U.S. 15 (1973). In *Miller*, the Court vacated a conviction for mailing unsolicited advertisements containing sexually explicit material that was not obscene. *Id.* at 37. It articulated the standards by which obscene material could be identified. The Court set forth the basic guidelines:

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

Id. at 24.

Thornburgh³⁵ and Information Providers' Coalition v. F.C.C.,³⁶ the Circuit Courts stated that there is nothing vague about the patently offensive definition.³⁷

Mr. Godwin has indicated that the Supreme Court may or may not apply strict scrutiny to this type of speech.³⁸ Furthermore, Mr. Godwin says that it is possible that the Court will decide that every medium has its own law. The Supreme Court, theoretically, could say well, we've got to get a new answer to this, this is a problem that cries out for some type of solution. So we are not sure if strict scrutiny would apply. Instead, the Court may apply intermediate scrutiny.³⁹

We filed a brief in the Supreme Court and in the lower court.⁴⁰ We took the position that this is a form of nuisance speech.⁴¹ Nuisance speech is a concept that comes from the FCC v. Pacifica Foundation case.⁴² In Pacifica Foundation, broadcasting was held to be nuisance speech.⁴³ It had to be channeled in order

³⁵ 938 F.2d 1535 (2d Cir. 1991).

³⁶ 928 F.2d 866 (9th Cir. 1991).

³⁷ *Thornburgh*, 938 F.2d at 1540; *Information Provider's Coalition*, 928 F.2d at 874.

³⁸ *Sable Communications of California v. FCC*, 492 U.S. 115 (1989) Generally, the Supreme Court has applied a "strict scrutiny" standard to laws regulating the content of speech, requiring that such laws be "narrowly tailored" or that the "least restrictive means" be used to serve "compelling" governmental interests. *Id.* at 126.

³⁹ *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976) (adopting the "intermediate scrutiny" standard to determine if the law "serves important governmental objectives and if it is substantially related to achievement of those objectives.").

⁴⁰ Bob Peters & Paul McGeady, *Amicus Brief: Reno v. ACLU*, (visited Oct. 21, 1997) <<http://dorothy.as.arizona.edu/law/CDA/brief3.txt>>.

⁴¹ *Id.*

⁴² *Pacifica*, 438 U.S. at 750. The FCC's decision was based on a nuisance rationale where the "law speaks to channeling behavior rather than actually prohibiting it." The language of the comedy monologue was characterized as "patently offensive" not obscene. *Id.*

⁴³ *Id.* at 732. The Court reasoned that "we can regulate offensive speech to the extent it constitutes a public nuisance . . . [t]he governing idea is that 'indecenty' is not an inherent attribute of words themselves; it is rather a matter of context and conduct" *Id.* The Court noted that "of all forms

to protect children and adults that did not consent.⁴⁴ Our brief concentrates on speech constituting nuisance speech.⁴⁵ We start out with the premise that the speech is not protected. Whether or not the Supreme Court will pick up on that we do not know, but you have the same two concepts and principles involved.⁴⁶ You have the protection of children and you have invasion of privacy in the home, by dirty pictures and dirty messages that are readily available to children.⁴⁷

Incidentally, when Mr. James Exon, Senator of Nebraska, sponsored the Act, his office read the law to mean: whoever transmits the message is the guilty party. Well, when you think about it, who is doing the transmitting? You have a fifteen-year-old at home working on a computer. He wants to access something that he thinks would be interesting, so what does he do? He pushes a few keys on the board and he transmits it. He causes the information to come from the remote bulletin board into his home. We pointed that out to Mr. Exon. The word "available" was inserted into the revised bill.⁴⁸ In addition, we proposed defenses as a means of separating adults from children. Moreover, I mentioned that the *O'Brien* test⁴⁹ would apply.

of communication, it is broadcasting that has received the most limited First Amendment protection." *Id.* at 742.

⁴⁴ *Id.*

⁴⁵ Bob Peters & Paul McGeady, *Amicus Brief: Reno v. ACLU*, (visited Oct. 21, 1997) <<http://dorothy.as.arizona.edu/law/CDA/brief3txt>>.

⁴⁶ *Pacifica*, 438 U.S. at 748-49.

⁴⁷ *Id.*

⁴⁸ Communications Decency Act of 1995 Legislative Analysis, (visited November 18, 1997) <http://www.ema.org/htm/at_work/s314.htm>. Senator Exon's amendments, in pertinent part, would result in a new version of 47 U.S.C. § 223 as follows: "Whoever . . . (1) by means of a telecommunications device: (A). . . makes, transmits, or otherwise makes available any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, filthy, or indecent . . ." *Id.*

⁴⁹ *United States v. O'Brien*, 391 U.S. 367 (1968). The *O'Brien* test is a three-prong test. The first prong asks whether the Act furthers important or substantial government interests. *Id.* at 377. The second prong asks whether the government's interests relate to suppressing free expression. *Id.* The third prong considers whether the incidental restriction on alleged First Amendment freedoms is no greater than required to meet the government's interests. *Id.*

An objection was made, in that, the government failed to identify the contemporary community standards⁵⁰ that would apply to Cyberspace, under the Act. In other words, it has to be "patently offensive" by contemporary community standards. What standard will be utilized in court? Of course, the cyber people suggest that the appropriate community for a community standard analysis is the cyber-community itself. It seems that could be the proper standard because it includes everybody in the world. However, I do not think the Supreme Court will have a problem in determining the standard.

In the situation we have today, a publisher may distribute a magazine nationwide and worldwide.⁵¹ If he is arrested for violating the Federal law pertaining to obscenity, the Federal District Court will apply the local standard.⁵² The Supreme Court has said we don't need a geographic standard.⁵³ If the broadcast law is violated, the standard for the broadcast medium will be applied. Now, we don't know what standard will be applied, but I predict the standard where the case is tried.

An additional objection raised was that some of these Internet programs have "serious value."⁵⁴ "Serious value" is not part of the test for indecency or for patently offensive speech. If it was, you end up with the obscenity test and that is not what we have. Therefore, "serious value" has no part in the determination, with one exception. If it has "serious value," it probably is not patently offensive;⁵⁵ but nevertheless, it is not a defense. It only goes into the mix to determine whether it is patently offensive.

⁵⁰ *Miller*, 413 U.S. at 30.

⁵¹ *See Shaw v. Reno*, 930 F. Supp 916 (S.D.N.Y. 1996).

⁵² *Id.* at 935. *See, e.g., U.S. v. Thomas*, 74 F.3d 701 (6th Cir. 1996). In *Thomas*, a California couple was criminally convicted for violating the "community standards" of Memphis. *Id.* at 705-06.

⁵³ *Miller*, 413 U.S. at 31.

⁵⁴ *Reno*, 929 F. Supp at 854-55. *See Miller v. California*, 413 U.S. 15 (1973). "Serious value" pertains to the third prong of the Miller test which states: (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.*

⁵⁵ *Miller*, 413 U.S. at 30 (noting that formulating a test for something that is patently offensive is virtually impossible).

One of the other problems raised at the Philadelphia court level, not commented on by the Supreme Court at the hearing, was the trans-border effect.⁵⁶ In other words, if you have someone that has a porn bulletin board in Detroit, and the law is passed and upheld, he or she will go across the border to Canada. Absolutely nothing can be done about it. The problem is that the same material will be coming into our home computers. I think that it is a loophole in the law. I do not think it is a constitutional loophole; it is just a practical loophole to accomplish the intended purpose. I think the easy way to do that is to make the online companies responsible, as facilitators of porn. To do that, we have to go back to Congress and ask whether Congress would adopt such a law. Certainly, that would plug up the loophole because the question of facilitation of a crime is not new; it is just that this law does not indicate it. Surely, that would be the way to cure it.

From a practical standpoint, put yourself in the seat of the Supreme Court. Say to yourself, I have heard these arguments, what are we going to do about this? For example, would a mother be held liable if she watches a child put this on and she sees it, but she does not do anything about it? Technically, the answer is yes but, practically the answer is no. How do you cure that? Well, that can be cured by applying the concept. The law is valid on its face but, invalid as applied to that situation. The Court can also construe the law to eliminate these examples.

Anyhow, my prediction is that the Court will not strike down this law in its entirety. When they get to the availability question, making it available to minors, they will have difficulty. If they have to come down with that rule, there is nothing that you can do about it. In other words, porn will have to be available to children. In my opinion, they are not going to do it. If they stumble on that block, they can give Congress direction as to how it can be cured.

⁵⁶ *ACLU v. Reno*, 929 F. Supp. at 844 (citing *U.S. v. Thomas*, 74 F.3d 701 (6th Cir. 1996) (affirming obscenity convictions stemming from the operation of a computer bulletin board)).

When I was at the Supreme Court hearing, I was asked to go to Senator Coates' office. I can tell you, if a loophole is found in this law, his office staff will eliminate it. Thank you.

Prof. SHAW:

Thank you, Paul. Now for the other side, Mike.

Mr. MICHAEL GODWIN:

I am going to get up to the podium because someone once told me I think better on my feet. I tend to agree, since I am always a little hazy about how I am thinking at any given moment. Therefore, I thought I would stand up just for insurance.

I do not really view this as a debate, however I do think differences exist between the philosophy toward the Constitution and the issues in this case. What I would like to do as a kind of temperamental debater is to just take this, instinctively of course, as a point-by-point issue with respect to Mr. McGeady's argument and have a point-by-point response. However, I do not think that it is very instructive because it does not really give you any philosophy. It is established that I can argue particular points and I would like to argue some of them during a question and answer session. More appropriately, I would like to talk about some of the constitutional law principles that are present here. In addition, I will discuss why I am personally interested in these issues, which is not about defending pornography, although I think some pornography is entirely defensible. Let me say at the outset that I am a parent, and my little girl, who turned four yesterday, is not yet a user of the Internet.⁵⁷ I feel certain she will be, given who her parents are, since we both met on the Internet. I am far more worried about how laws like the

⁵⁷ Originally developed by the U.S. government to provide a means of military communication in case of nuclear war, the Internet is a world wide collection of computer servers linked together through an elaborate system of computer hardware. Since the end of the Cold War, the Internet has become accessible to the public. ALFRED & EMILY GLOSSBRENNER, MAKING MORE MONEY ON THE INTERNET 5, 49-53 (1996).

Communications Decency Act⁵⁸ will affect her than I am worried about her encountering pornography on the Internet.

I think we have all heard the apocryphal story that I will explain next. The story is about a mom who walked away from her kid at the terminal for just a couple of minutes and came back to see that pornography had flooded over the monitor, coming from some malfeasant person. Just two minutes away from the terminal is all it took. I always knew that story was fictitious because I never could find anything in two minutes on the

⁵⁸ Communications Decency Act of 1996. (to be codified at 47 U.S.C. § 223(a)-(h)) (amending the Communications Act of 1934, § 223(a)(1)(B), (a)(2), (d)(1), (d)(1-2)). The Communications Decency Act of 1996 (CDA or "the Act"), which constitutes Title V of the Telecommunications Act of 1996, was signed into law by President Clinton on February 8, 1996. The Communications Act of 1934 provides in pertinent part:

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Id.

Internet and I am pretty good at searching. Even if I tried to find something offensive on the Internet, I do not think I could find it in two minutes. For example, trying to find the Communications Decency Act would take longer than two minutes.

As you may remember, there was a case called *Cohen v. California*,⁵⁹ for which Justice Harlan wrote the majority opinion. In *Cohen*, a gentleman walked into a California courthouse during the Vietnam War with a jacket that had, "Fuck The Draft" written on it.⁶⁰ Do you remember what the holding was in that case? Well, it was considered to be political speech.⁶¹ Melville Nimmer,⁶² representing the appellant, argued the case before the court and pointed out that the phrase was also intended to annoy.⁶³ Intention to annoy is constitutionally protected.⁶⁴ I think it is recognized that part of the power of speech is to sometimes express irritation toward people, hoping to annoy them. In fact, when we address our speech to Congressmen, it is almost certain that it is intended to annoy them. It seems clear that intentionally annoying someone is part of freedom of speech because there is no effort from society to ban or punish people who say nice

⁵⁹ *Cohen v. California*, 403 U.S. 15 (1971) (holding that ". . . .absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense."). *Id.* at 27.

⁶⁰ *Id.* at 17.

⁶¹ *Id.* at 24. The court stated that:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id.

⁶² *Id.* at 16. Melville Nimmer represented the appellant in *Cohen*.

⁶³ *Id.* at 26.

⁶⁴ *Id.* at 22-23 (rejecting the lower court's conclusion that where a particular speech might invoke a violent response, the state has a right to censorship).

things. Mr. Rogers⁶⁵ is not a felon, right? We do not worry about Mr. Rogers getting scooped up in a dragnet for harassing speakers. I think we all accept that some kinds of verbal harassment, when raised to the level of threat or extortion, are not protected speech and that is okay. In addition to threat or extortion, I have no trouble with excluding blackmail, fraud or perjury from the protected list. All the standard protections of speech seem okay, and I do not take issue with those exceptions.

I believe what troubles me as well as Chief Circuit Judge Sloviter, was explained in his opinion in *ACLU v. Reno*.⁶⁶ The judge gave some examples of speech that were understood to be protected in the public square but would become illegal if said on-line on the Internet.⁶⁷

There is a real question as to why we should allow this type of inconsistency. What is the philosophical justification for making that distinction? For example, in the public square one does not need to worry about people overhearing quite so much. I think what is happening here has little to do with pornography despite what we have been told about the Internet and the problem with pornography. This is where I am going to part slightly from the CDA discussion and ask: How many people here have heard a story, seen news coverage or heard someone comment on the availability of bombing information on the Internet in the last year? One of the concerns about the Internet is that one can

⁶⁵ Mr. Rogers is a television host for a daytime children's show. *Mister Rogers Neighborhood* [PBS] (visited Nov. 19, 1997) <<http://www.pbs.org/rogers/>>.

⁶⁶ 929 F. Supp. 824 (E.D. Pa. 1996). The court held that the Communications Decency Act is facially unconstitutional. *Id.* at 884.

⁶⁷ *Id.* at 854. The court stated that:

Other illustrations abound of non-obscene material likely to be available on the Internet but subject to the CDA's criminal provisions. Photographs appearing in *National Geographic* or a travel magazine of the sculptures in India of couples copulating in numerous positions, a written description of a brutal prison rape, or Francesco Clemente's painting "Labyrinth," . . . all might be considered to 'depict or describe, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.'

Id.

apparently acquire information of all sorts that could be used for good or for ill. That is the advantage or risk of having access to information. One can use this information for bad purposes or purposes that are disapproved by other people. This is also true of public libraries, but we do not worry so much about regulating bomb-making information in public libraries. Every public library that I know contains information that could be used destructively. The reason we do not worry about it is we don't think people use libraries for the purposes of extracting socially unacceptable information. Libraries, we suppose, are depositories of unread information - - unlike the Internet. It is known that there have been many incidents of terrorism based on only the threat. We actually have the Federal Bureau of Investigation talking about accessible information on the Internet, but, at the same time there have been no terrorist incidents associated with bomb-making information on the Internet

What is really happening here, of course, is not really about terrorism on the Internet or even about pornography, although, for Mr. McGeady and his group, it is about pornography. For me, accessible information on the Internet means something else. It means that for the first time in the history of our republic, the full promise of the First Amendment⁶⁸ has suddenly come true. As a consequence, freedom of speech⁶⁹ or freedom of the press⁷⁰ suddenly is not a special interest constitutional amendment anymore. The First Amendment is everyone's special interest amendment.

A couple of weeks ago I appeared on a show that was taped by the Hoover Institute. The host asked: "Why not impose these restrictions on content providers?"⁷¹ I replied, "I don't think you understand, you're the provider. We're all the provider."

⁶⁸ U.S. CONST. amend. I. The Freedom of Speech Clause provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press" *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ A content provider refers to an Internet Service Provider or ISP. An ISP is an entity that allows home computer users access to the Internet. "Right now, what you need to know is that anyone with a personal computer, a

Despite what Mr. McGeady says with regard to what is banned and what can be banned and so on, I have a different opinion of the case law. I think the fact is that we tolerate a lot of offensive speech in both our public and our private lives. In fact, the United States is extremely solid in its tolerance of offensive language. I mean, sometimes we allow people enormous latitude. I have this viewpoint with respect to the *Pacifica*⁷² case. As we were reminded, that case involved “seven filthy words” of a George Carlin⁷³ monologue.⁷⁴ The Pacifica radio station broadcasted that monologue on the assumption that it underscored freedom of speech in America.⁷⁵ Little did they know. In fact, the regulation⁷⁶ in question is grounded on a history of treating broadcasting differently from other media.⁷⁷ The monologue that

telephone, and a . . . modem can connect [to] the Internet. . . . Millions of people . . . log on through independent Internet services providers (ISPs) based in their towns and local calling areas.” ALFRED & EMILY GLOSSBRENNER, *supra* note 1, at 5 (1996).

⁷² FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (holding that the Federal Communications Commission prohibition of indecent language did not constitute censorship under the Communications Act of 1934, that the broadcasted language in the monologue could be considered indecent but not be obscene, and that the Commission’s order banning obscene language was not a violation of the First Amendment.) “A radio station of respondent Pacifica Foundation . . . made an afternoon broadcast of a satiric monologue, entitled ‘Filthy Words,’ which listed and repeated a variety of colloquial uses of ‘words you couldn’t say on the public airwaves.’ A father who heard the broadcast while driving with his young son complained to the Federal Communications Commission (FCC). . . .” *Id.* at 727.

⁷³ “George Carlin rocked the 70’s with an unprecedented form of stand-up comedy involving skits, songs and cutting-edge material.” Mathew Schwarz, *George Carlin — A Classic!* (visited Oct. 17, 1997) <<http://www.rcknet.com/stuff/docs/stuff/edu/chsn/ramshorn/december/enter/carlin.html>>.

⁷⁴ 438 U.S. at 752. “The original seven words were[:] shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.” *Id.*

⁷⁵ *Id.*

⁷⁶ Communications Decency Act of 1996. (to be codified at 47 U.S.C. § 223(a)-(h)) (amending The Communications Act of 1934, § 223(a)(1)(B), (a)(2), (d)(1), (d)(1-2)).

⁷⁷ “Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are

was banned or at least restricted in the broadcasting arena surely could not be restricted in print. In fact, the Supreme Court knew this disparity. Do you want to know how the Court knew this? The Court did not say expressly, however, I feel Justice Stevens is responsible for appending the full text of the monologue to the text of the Court's opinion in the U.S. Reports. He was trying to make a point that I think Mr. McGeady would say underscores the "in context" language of the CDA. I think it says quite the opposite because now the Supreme Court opinions are retrievable on the Internet.

I have this vision that Justice Stevens's niece, if in fact he has a niece, is corresponding by e-mail. Let us say that he sends his niece the full text of the *Pacifica* case with the appended monologue from George Carlin which has the "seven filthy words". Now imagine he says, "Honey this was my best case, read it and grow wise." Here, we have material that is understood to be offensive because obviously, some people of the Court were offended.⁷⁸ It is also understood to have value. It is not obscene because it does not appeal to the prurient interest. In fact, no one, as far as I know, has ever listened to a George Carlin routine and became unwholesomely aroused, which is the prurient-interest prong of the obscenity test.⁷⁹ The monologue, including the seven filthy words routine, was designed to be offensive. In addition, it was designed to say how absurd it was, according to George Carlin, that people invested such power in these words, in this kind of profanity. I do not purport to say whether he is right or wrong, at least not in this discussion. But

unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference." *Pacifica*, 438 U.S. at 731 n2. (1978).

⁷⁸ *Id.* at 750-51 (holding that the commission's imposition of sanctions did not violate the constitution).

⁷⁹ *Id.* at 768. "Nevertheless, we have made it abundantly clear that under any test of obscenity as to minors . . . to be obscene 'such expression must be, in some significant way, erotic.' " 422 U.S. at 213 n.10 (quoting *Cohen v. California*, 403 U.S. at 20). Because the Carlin monologue is obviously not an erotic appeal to the prurient interests of children, the Court, for the first time, allowed the government to prevent minors from gaining access to materials that are not obscene, and are therefore protected, as to them." *Id.*

we do know, that was political speech and if not then what is? The monologue is political speech at the minimum; but even if one thinks it is nearly valueless, as Justice Stevens did when he wrote for the majority, one should ask whether it makes sense to build your whole society around the assumption that this stuff is so harmful that we have to keep it out of the public square. The worst profanity I have ever heard has been in face-to-face situations. I think that is true for many people. It is recognized that Americans like to speak frankly to each other. I think that the notion of nuisance speech is inherently destructive to the notion of freedom of speech. I do not dispute that speech could be a component of a particular nuisance. What binds us together as citizens and as communities is not how we set our standards of acceptable words or expressions or even a particular philosophy of what is acceptable. Rather, it is a commitment to a larger principle which is one of pluralism. We assume that we are working as an open society that is built on intolerance of a lot of different philosophies and that metaphilosophy is the overreaching philosophy to which we all subscribe.

Is there something about the medium that is inherently different that makes it more of a threat? I feel that most of the people who believe this are people who are not themselves comfortable with technology or the Internet. I have to say this puts us in a bad position in this generation because we ("we" meaning everybody in the room) are the only generation that will ever be the transitional generation between the world that never had this technology and the world that will have grown up with it. Almost every single argument that one can make for regulation of content on the Internet can be made for regulation of any mass medium. For example, Justice Stevens talks about broadcast content where the content can flood over one's radio or television.⁸⁰ One can be offended before one even has a chance to

⁸⁰ *Id.* at 749. "Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Id.*

turn it off.⁸¹ As Justice Stevens said in *Pacifica*, if one is a child, one can double his or her vocabulary in a certain realm of expression in an instant.⁸² That can be done at Walden Books. I have read pages there I wish I have not read and if one is a reasonably fast reader or even an average reader, one may be offended in an instant and that offense cannot be undone.

What the debate underlying the Communications Decency Act is really about is a lack of faith in our constitutional principles. We have these guarantees like freedom of speech and freedom of the press. However, our leaders don't worry about ordinary citizens using freedom of speech because people usually talk in small groups or one-on-one. In addition, there is no need to worry about the New York Times because there is only one New York Times. Moreover, there are not that many daily newspapers to worry about either, because there is usually only one in each city. Therefore, regulation is easier because identity is easy. Similarly, they do not have to worry about broadcasting either, because it is a scarce resource and it can be licensed, thus, keeping people under control. Suddenly, there is this medium -- the Internet -- in which all the scarcity that was used in the past, either practically or legally to justify regulation is nonexistent. Every time one adds a node to the Internet, the size is increased.

It is not really the case that one can justify *Pacifica*-style regulation on the Internet. What is really at issue here, I think, is whether we trust each other as citizens with the kind of liberty the Constitution seems on its face to give us. That liberty, thanks to the Internet, is an immense amount of power and once given, anyone has the power to reach millions, at least potentially. I think the framers of the Constitution and the founders of the Republic actually thought that citizens could be trusted with this power. They did not think that there had to be a special class of printers and publishers who alone had this license from the king.

⁸¹ *Id.* "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow." *Id.*

⁸² *Id.* at 750. "*Pacifica*'s broadcast could have enlarged a child's vocabulary in an instant." *Id.*

They thought that everybody potentially had the power to speak, either to a small audience or to a large one, and they could be trusted to use that liberty wisely. That is one reason why I think the Internet should not be regulated in this way.

I think that we at least have the potential to refuse to hear what we do not want to hear. If we are offended by speech, and I am often deeply offended by speech that I will not share here, I think our argument is largely that we should not refuse to hear offensive speech but instead respond with moral suasion. We should set the better example. I think that every government in the history of the world has opted for shutting people up because it is easier to do rather than to try and teach by moral example.

Prof. SHAW:

I want to thank both Paul and Mike for certainly what I found enlightening statements. I cannot believe that their comments got anyone to the point where they do not have questions they want to ask at the microphone. While I am waiting for you to come up to the microphones I will ask one question to both of them. Mike, with respect to George Carlin's monologue,⁸³ you made a comment earlier, that there are far fewer restrictions on print media or far fewer permissible restrictions on print media than on broadcasting media. Clearly, one of the issues that will be arising is how we should treat the Internet. Should we treat it as primarily a print medium, in which case there will be far fewer permissible restrictions, or should we treat it as an electronic medium, rather than a broadcast medium, in which case greater restrictions would be permissible? I would appreciate comments from both of you on that issue.

Mr. McGEADY:

Well, it seems to me that we are going to end up with either a new approach, media specific, that being the Internet, or we will end up with the broadcasting rationale that this is pervasive. It

⁸³ See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

comes into the home, frequently the parents are not available. You have latchkey kids, and they can get it in somebody else's home. It cries out for regulation. It is pervasive. It is all over and you have the same governmental interest in the protection of children. The Federal Solicitor's office also argued that there is an additional interest in the education of parents.⁸⁴ Many parents are afraid to go out and buy a computer because they do not want their kids exposed to this type of material and parents have a constitutional right to control their children's education. All these concepts are involved and I do not think we are going to end up with the print media that would permit indecency. I did not quite understand whether Mr. Godwin's argument was that obscenity should also be permitted. If we can prohibit obscenity not only in print media, but also in broadcasting, what is the problem with prohibiting indecency on the internet when the Supreme Court hopefully says that is a proper approach?

Mr. GODWIN:

For the record, I am co-counsel on *ACLU v. Reno*,⁸⁵ and the staff counsel for the Electronic Frontier Foundation has not challenged the obscenity provisions of the Communications Decency Act⁸⁶ which are merely duplicative of existing law.

Individual philosophies of obscenity are not at issue in *ACLU v. Reno*⁸⁷ or, to my knowledge, in any challenge of the Communications Decency Act, or any clone of that Act that we see in the state legislature. If it is not about obscenity, what is it about? Is it always about George Carlin routines? The Supreme Court gives us very little guidance about what the contours of indecency are.

⁸⁴ *Id.* at 758.

⁸⁵ *ACLU v. Reno*, 929 F. Supp. 824 (E.D.Pa. 1996).

⁸⁶ U.S. CONST. amend. I; Communications Decency Act of 1996, (CDA or "the Act"), which constitutes Title V of the Telecommunications Act of 1996, signed into law by the President on February 8, 1996. The CDA will be codified at 47 U.S.C. § 223(a)(1)(B), (a)(2), (d)(1),(2), as amended, 47 U.S.C.A. section 223(a)(1)(B), (a)(2),(d)(1),(2).

⁸⁷ *ACLU v. Reno*, 929 F. Supp. 824 (E.D.Pa. 1996).

It is an unfortunate term of art because it seems to suggest something about its meaning from the very word; but, in fact, when Justice Stevens, in one small subsection of his opinion for the Court, attempted to define "indecenty" in a constitutional category, only two other justices joined him.⁸³ There was no majority of the Court. The Court said that in the context of broadcasting, the FCC could penalize somebody for not broadcasting in the public good.⁸⁹ That is how the Court meant to be understood; but the Court has not addressed whether so-called. The Court has expressly avoided that issue. Even in *Sable Communications v. FCC*,⁹⁰ which is often cited to justify the notion that you can regulate indecenty in some kind of general way, Justice White, who wrote for the majority, clearly avoids making that statement.⁹¹

For those of you who are lawyers, law professors, or law students, reread that passage in which Justice White spoke about the *Ferber*⁹² and *Ginzburg*⁹³ case as leading precedents on the principle of protecting children from some kinds of contact.⁹⁴ Those cases are not indecenty cases. One is an obscenity-as-to-minors case, and the other is a child pornography case. They stand for the general proposition that the state has a compelling interest in the protection of children, which is undisputed in *ACLU v. Reno*.⁹⁵ In a First Amendment⁹⁶ case where freedom of speech is involved, it must not merely be the case that for the government to prevail there must be a compelling interest.⁹⁷ It is

⁸³ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

⁸⁹ *Id.*

⁹⁰ *Sable Communications of California v. Federal Communication Commission*, 492 U.S. 115 (1989).

⁹¹ *Id.*

⁹² *New York v. Ferber*, 458 U.S. 747 (1982).

⁹³ *Ginzburg v. United States*, 383 U.S. 463 (1966).

⁹⁴ *Sable Communications of California*, 492 U.S. 115, 126 (1989).

⁹⁵ *ACLU v. Reno*, 929 F. Supp. 824 (E.D.Pa. 1996).

⁹⁶ U.S. CONST. amend. I. The Freedom of Speech Clause provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech." *Id.*

⁹⁷ *United States v. O'Brien*, 391 U.S. 367 (1968). The O'Brien test was established in this case. The test provided that a state regulation of conduct

also true that the measures taken must be narrowly tailored.⁹⁸ That is the central constitutional doctrine at issue here.

The “community standard” is a national standard in this context.⁹⁹ It seems contradictory to say that; but the FCC “community standards”, which are applied to indecency, have always been understood to be the community of the broadcasting audience, which is everybody within range. The Court has never really taken it any further than that. Probably one of the reasons the majority of the justices did not join Justice Stevens in his definition of indecency in *Pacifica*¹⁰⁰ was that they had just bailed on the whole issue of national standards of acceptable content in *Miller v. California*¹⁰¹ They wanted to get out of national standard setting and, in effect the CDA is retrofitting another national standard for an even broader class, more problematic content. I do not think the Supreme Court will uphold that.

Mr. McGEADY:

I think we should make a distinction when we quote *Pacifica*.¹⁰² If you read the cases, you will find that a plurality opinion at the Supreme Court level is precedential and there is no question in my mind that this three-justice opinion is a plurality opinion and is the law of the land.

which itself embodied both speech and nonspeech elements to be sufficiently justified if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.*

⁹⁸ *Id.*

⁹⁹ *Miller v. California*, 413 U.S. 15 (1973). The Miller test is a three prong test that inquires (a) whether ‘the average person applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Id.* at 39.

¹⁰⁰ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

¹⁰¹ *Miller v. California*, 413 U.S. 15 (1973).

¹⁰² *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Mr. GODWIN:

A six-justice plurality is better than the three-justice plurality because six justices voted the other way.

Mr. McGEADY:

No, they did not vote the other way.

Mr. GODWIN:

They did not concur.

Mr. McGEADY:

They did not join together and that is the test for a true plurality opinion, which is precedential.

Mr. GODWIN:

That is a reasonable argument, but not a compelling one.

Mr. SHAW:

We have a question.

AUDIENCE MEMBER:

My question relates to Mr. McGeady's argument about creating liability on the Internet service providers. Please address what dangers are involved if the Supreme Court finds that there is no problem involved with creating a liability in the Internet service. For instance, Sprint or AT&T, which is providing access across the Atlantic Ocean, would they then either become liable or eliminate a site in, let us say Sweden or Finland which is making indecent material available for display? Is there anything comparable in the existing medium with respect to that?

Mr. McGEADY:

There are comparable provisions that exist in State and Federal law relative to drugs for instance. If you facilitate the sale or transportation of drugs, you can go to jail for that. The online companies have the ability to eliminate this material. The ISPs have the same ability and they are not exercising it. Sprint has an awful lot of subsidiaries whose output many people would question right here in the United States. I do not think we have to go overseas. The answer to the question is that if they facilitate it, then they should be responsible.

Of course, you have to properly draft the law to afford the opportunity to eliminate it before they would be held liable. It would solve a lot of our transborder problems.

Mr. GODWIN:

I think we can take it a step further. In fact, most of the roads and highways in this country are used as interstate and national highways by distribution trucks that carry indecent content like Playboy and Penthouse to different venues where minors can retrieve and use them.

Some of them are subscription copies that go to parents' homes and latchkey kids can pick up copies before their parents get home and read them. We can stop that. We can actually do it a little easier because the government already has some ownership or control over most of the highways and can inspect every truck that goes by. If we impose that on the states, for example, which we arguably could do and justify under the commerce laws, then we would reduce, to some great degree, the amount of indecent material on paper that found its way into children's hands. Obviously, I am making a joke. You can tell by the laughter.

You can monitor your kids on the computer. You know when they are on the computer because there is the blue or red glow in the kid's bedroom. On the other hand, they can take the paper just about anywhere. They can even read it with a flashlight under the covers.

Any medium can be characterized as a terror. Media that carry ideas and communications can carry frightening ones, ones that you do not approve of. I can make a philosophical decision not to review everything; I am not telling you to approve of all content. I am saying you should treat the content as if it were the same regardless of the material.

Mr. McGEADY:

I think it is absolutely clear that there is no idea so vile that it cannot be enunciated in any medium. Ideas are absolutely protected. It is a question of how you enunciate them. Do you enunciate them in an obscene manner or with broadcasting in an indecent manner? Would the commerce law accommodate this type of regulation?

Mr. GODWIN:

I was speaking generally.

Mr. McGEADY:

Well, do not be so sure that an obscenity law is not on the books already. There is a section of Title 18¹⁰³ which provides that if the obscene material has traveled in interstate commerce and is found and sold in a retail store, then there is a responsibility there. So that law is already in place.

¹⁰³ 18 U.S.C. Section 1466 states in pertinent part:

- (a) Whoever knowingly utters any obscene language or distributes any obscene matter by means of cable television or subscription services on television, shall be punished by imprisonment for not more than two years or by a fine in accordance with this title, or both.
- (b) As used in this section, the term "distribute" means to send, transmit, retransmit, telecast, broadcast, or cablecast, including by wire, microwave, or satellite, or to produce or provide material for such distribution.

Id.

Mr. GODWIN:

For the budding constitutional lawyers, this is actually quite an interesting interplay of State and Federal laws. The Federal statute uses the term “obscene” and yet obscenity, as we know, is defined in terms of community standards. As a result, you see an interaction to the application by the federal system standards.

Mr. SHAW:

We have a couple of questions from the e-mails and we are almost out of time so I'll ask you to comment on each of the questions briefly. Let me ask them one at a time. The question is: “Should there be a rating system for material on the Net; if so, what would be the best method of implementation?”

Mr. GODWIN:

I think there should be thousands of rating systems. I am very much for rating systems. I think it is quite handy in a world where you have so much information, whether you find it useful or offensive to be able to do some free processing to filter it.

I think we have rating systems in place. Not all of them have the force of law; but certainly we know that if we are worried about empowering parents or individuals to make choices or not to be annoyed or offended, now you can actually choose to only watch the Disney Channel. This is an example of the rating systems. When I was a kid, my mom said I could read anything that had the Newberry Award¹⁰⁴ sticker on it because that was the rating system then, or you could apply Good Housekeeping¹⁰⁵ or the Morality in Media ¹⁰⁶ standard.

¹⁰⁴ The Newberry Award is an independent rating system. *Yahoo Alta Vista Web Pages* (visited Nov. 3, 1997) <<http://av.yahoo.com/bin/query?p=Newberry+Award+Sticker&hc=0&hs=0>> .

¹⁰⁵ The Good Housekeeping Seal has been a highly recognized statement of the magazine's renowned Consumer Policy. The policy states that if a product bearing the seal proves to be defective within two years of purchase, Good

Mr. McGEADY:

We do not have any standard. The standard is the law.

Mr. GODWIN:

Yes, I know; but not all of us want standards in the law. Some of us are a little more tolerant. I would like to see your standard be in the marketplace of ideas. I would like to see how well everybody really wants to sign up for the standards of Morality in Media. I think that, in a democratic society we normally allow moral suasion. We reason with people, we talk with, and prevail upon people to agree with us. We do not always have to try to nuke them by having the police come after them.

Mr. McGEADY:

A rating system could be of some help. Of course, that is the big debate in Congress today and at the FCC level as to what type of rating system will be on TV videos. Some would like to go back to the MPA¹⁰⁷ rating system. Most people, when polled, say they do not like that because they do not think that is suitable for broadcasting. I think that we will end up on broadcasting with a

Housekeeping will replace the product or refund the purchase price. Hearst Corporation, *What's Behind the Good Housekeeping Seal* (visited Nov. 03, 1997) <<http://goodhousekeeping.com/gh/ghi/ghinstr1.htm>>.

¹⁰⁶ The organization known as Morality in Media, an advocate of freedom of speech and of the press, as guaranteed by the First Amendment, recognizes that obscenity is not covered by the constitutional guarantees of freedom of speech and freedom of the press. *About MIM - Missions, Goals, and Accomplishments* (visited Nov. 03, 1997) <<http://pw2.netcom.com/~mimnyc/ABOUTMIM.HTM>>.

¹⁰⁷ The Motion Picture Association of America (MPAA) and its international counterpart, the Motion Picture Association (MPA) serve as the voice and advocate of the American motion picture, home video and television industries, domestically through the MPAA and internationally through the MPA. *About MPAA* (visited Nov. 06, 1997) <<http://www.mpaa.org/mpaa.html>>.

rating system that has an audio component and says to parents that this particular video is unsuitable for children because it has sexual intercourse, for instance. I think that is where we are going to end up. That type of rating system on the Internet would also be helpful to parents.

Mr. GODWIN:

Rating systems, even in the broadcasting arena, are interesting. You may remember that in the debate over the V chip. President Clinton mentioned it briefly when he was talking about rating TV content for violence.

One of the reasons that there was a lot of threatening and no legislation that opposed the rating system is that it is by no means clear constitutionally that Congress could impose a content rating system even in broadcasting in other media. What they did is threaten, and the hint is that you will have a huge court battle, or you can put the V chip in. Well, the manufacturers knew what direction to take.

Mr. McGEADY:

The rating system is going to be mandated by the FCC if the industry does not come up with it. That, of course, would be subjected to constitutional challenge. But there are ways of amending the law before that challenge occurs to protect the system by requiring that, for instance, the FCC go into court and establish the indecency or the lack of, following the rating system in a particular instance. There are other ways of doing it as well.

Mr. GODWIN:

Let me ask one question of the audience. How many of you know of someone who has postponed their purchase of a television until they get that V chip? Raise you hands!

Prof. SHAW:

They did not raise their hands.

Mr. McGEADY:

The ultimate answer is to enforce the law against obscenity and indecency.

Prof. SHAW:

We have one last question off the e-mail. The question is, could you comment on the CDA, the potential role it may or may not play in "the protection of society" while balancing constitutional freedoms.

Mr. GODWIN:

There is often a balancing test in dealing with constitutional law issues. If there is a balancing test, the government usually wins because a compelling interest is always scary and freedom of speech is pretty abstract. In general, I do not like the balancing test approach. I think that there should be some areas that are more or less fenced off from the government.

At the same time there is a premise underlying this question, which I do not think is correct. The premise is that freedom of speech and social needs stand in opposition to each other. I do not think that is true. In fact, I think our social goods are built on freedom of speech. Society cannot progress without freedom of speech and it cannot be strong without freedom of speech.

Mr. McGEADY:

Well, one of our principles of Morality in Media is that the First Amendment is one of the greatest things that ever happened. The question is, is this material within the First Amendment? If

you remember the *Roth*¹⁰⁸ case, the Supreme Court in *Miller*¹⁰⁹ said that freedom of speech, and freedom of the press, did not encompass obscene material. So, it is outside the First Amendment. That is how we approach this problem.

Prof. SHAW:

I would like to make some very brief remarks although we have run thirty minutes late. I would want to thank all the panelists who attended. This was tremendously exciting for me personally to see so much talent assembled here and discussing critical issues of the day. I would like to thank both Paul and Mike for the fireworks. They were both restrained, but you could tell the passion in both their voices and I hope you learned as much from it as I did. So I thank you both.

I want to also thank the people of the administration and other faculty at Touro who helped to make this possible. I want to thank the people at GRIT, the President, Rob Gould who came up with the idea. Jodi, and the others at GRIT who made this a reality. Last of all, I would like to thank you, the audience, for being here. I know it turned out to be longer than you expected but I hope you feel that you found it worthwhile. I thank you all. Rob, you're the one who said you wanted to do it annually, hopefully we'll see you in another year. Thank you very much.

¹⁰⁸ 354 U.S. 476 (1957).

¹⁰⁹ *Miller v. California*, 413 U.S. 15 (1973).