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Student Division Symposium Sponsored by the Institute of the Bill of Rights Law: Policing Obscenity and Pornography in an Online World

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POLICING OBSCENITY AND PORNOGRAPHY IN AN ONLINE WORLD

The following is an edited transcript of the panel discussion portion of ACLU v. Reno II: Policing Obscenity and Pornography in an Online World, the 10th-Annual Student Division Symposium sponsored by the Institute of Bill of Rights Law, which was held on March 19, 1999, at the William and Mary School of Law.

Panelists: Ann Beeson, *National Staff Attorney*
American Civil Liberties Union (ACLU)

Deirdre Mulligan, *Staff Counsel*
Center for Democracy and Technology (CDT)

Bruce Taylor, *President and Chief Counsel*
National Law Center for Children and Families

Bruce Watson, *President*
Enough is Enough

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Harvard Law School

Moderator: Paul Marcus, *Haynes Professor of Law*
William and Mary School of Law

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INTRODUCTION

Responding to concerns over children's access to online pornography, Congress passed the Communications Decency Act of 1996 (CDA).¹ Two provisions of the CDA, however, drew a legal challenge from free-speech advocates led by the American Civil Liberties Union (ACLU). The ACLU charged that the controversial provisions—one seeking to protect children from “indecent” material,² the other from material deemed “patently offensive”³—were too broad and would therefore restrict free speech online. A special three-judge district court panel agreed, enjoining the

¹ See Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56.

² See 47 U.S.C.A. § 223(a) (Supp. 1997).

³ See 47 U.S.C.A. § 223(d) (Supp. 1997).

Government from enforcing the challenged provisions.⁴ Making use of the CDA's special review provision, the Government appealed directly to the United States Supreme Court, which, in *Reno v. ACLU*,⁵ upheld the district court's ruling by a 7-2 margin. Writing for the Court, Justice John Paul Stevens declared that "the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech."⁶

In wake of *Reno*, Congress sought to pass a new online child-protection law without running afoul of the First Amendment. The result was the Child Online Protection Act (COPA),⁷ which Congress designed to curb children's access to online material deemed "harmful to minors."⁸ Passed in 1998, COPA drew an immediate challenge from the original *Reno* plaintiffs (the case is known as *ACLU v. Reno II*), who maintained that the "harmful to minors" standard was at least as imprecise as the standards the Court had invalidated in *Reno* and should therefore be declared invalid. The ACLU won a permanent injunction against COPA in February 1998.⁹ A ruling in the Government's appeal of that decision is expected in early 2000.

Seeking to explore the ongoing debate over the limits of online speech, the Student Division of the Institute of Bill of Rights Law at the William and Mary School of Law sponsored *ACLU v. Reno II: Policing Obscenity and Pornography in an Online World*, its tenth annual symposium on March 19, 1999. The program included a student moot court and a panel discussion, the edited text of which follows. The entirely fictional moot court problem involved the appeal of Flynt Hefner, the owner of an adult entertainment site on the World Wide Web. Hefner was contesting his conviction for violating the Online Parental Assistance Act (OPAA), a law prohibiting owners of web sites from making available to minors for commercial purposes any communication deemed harmful to minors. Hefner had been prosecuted after the mother of an eight-year-old girl informed authorities that her daughter had inadvertently viewed an online strip show after her search for information about *Bambi* turned up a link to Hefner's web site.

MATTHEW FREY

⁴ See *American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).

⁵ 521 U.S. 844 (1997).

⁶ *Id.* at 874.

⁷ 47 U.S.C. § 231 (Supp. 2000).

⁸ See 47 U.S.C. § 231(a)(1).

⁹ For a hypertext link to the district court's opinion, see *ACLU v. Reno II, Appeals Court to Hear Arguments in Second Battle Over Federal Internet Censorship Law* (visited May 4, 2000) <<http://www.aclu.org/news/1999/n110299a.html>>.

TRANSCRIPT

MR. MARCUS: Good evening, everybody. My name is Paul Marcus. I am on the law faculty here at the College of William & Mary School of Law. It is my pleasure tonight to be MR. MARCUS for this panel discussion. I think all those in the audience have been introduced to our panelists, but I am not sure for purposes of posterity and our tape that everyone knows who everyone here is. Let me briefly mention who these folks are.

Ann Beeson is staff counsel with the ACLU National Legal Department in New York. Deirdre Mulligan, next to her, is Staff Counsel at the Center for Democracy and Technology in Washington. Jonathan Zittrain is the Executive Director of the Berkman Center at the Harvard Law School. Next to him is Bruce Taylor, who is President and Chief Counsel of the National Center for Children and Families. And finally, Bruce Watson, who is President of Enough is Enough.

The format tonight I think will be interesting and kind of fun for everyone. I have asked each of my colleagues to spend about ten minutes or so talking about some issues that they see in connection with Internet problems and protection of children and some of the statutory approaches that have been taken.

We will cover everyone, and that should take us 45 or 50 minutes. Then, at the end of that period, I am going to open it up to questions from the audience and members of the audience can certainly direct their questions to any one member of the panel, but then I will ask anyone else on that panel if they would like to respond as well.

In terms of some of the specific issues that I suspect we will be hearing about tonight, much of this begins with the Supreme Court's decision just a few years ago dealing with the Communications Decency Act (CDA). The Supreme Court struck that down, as I suspect most of you recall, as violative of the First Amendment.

Congress then went back to work and passed the Child Online Protection Act (COPA), passed very recently, trying to narrow the focus a bit, particularly with respect to commercial use of the Internet and minors, and litigation then was brought by, among others, by some of our panelists here, challenging that, too, under the First Amendment.

Well, the jury, so to speak, is still out on that, but the first blow has come upon the challengers, with Judge Reid in Philadelphia striking down the statute, and, as I understand, the matter is now on appeal.

So the stage is set for continued litigation, specifically with respect to the statute and also the broader issues that we deal with on a regular basis in this area. So without any further ado, I turn it over to Ann Beeson. Ann, if you would, share some thoughts with us.

STATEMENT OF ANN BEESON

MS. BEESON: Sure. It was a very fitting experience to participate in the earlier moot court and really sort of solidify the comments I was planning to make to the panel anyway. We have now, at the ACLU, challenged five different state attempts to make it a crime to communicate certain categories of material on the Internet, and we have succeeded so far in having all five struck down.

I am here to tell you something, in particular since the audience is primarily law students: I think it is a very important message that our wins have had nothing to do with First Amendment law or any of the theoretical issues that we have discussed or that were the focus of the presentations during the moot court, but rather have had everything to do with the facts.

A lot of times I know it's obviously very important for all of us to be very familiar with jurisprudence and all of the intricacies of all the case law. None of that would matter if there were not the speech that there is on the Internet or if we had not focused primarily on that speech in our arguments and focused primarily on the facts about the Internet as a speech-enhancing medium.

Related back to the problem, if we had *Flynt Hefner*, this hypothetical *Flynt Hefner*, as our only client in any of these cases, including the first, *ACLU v. Reno*, and the second, in my opinion it wouldn't matter how much law was on our side. Courts would find a way to uphold these statutes. They would do it. They would have used the broadcast analogies, they would have done whatever they had to do to uphold the statute.

Fortunately, *Flynt Hefner* and his friends are not the only speakers on the Internet. There are many, many millions of speakers on the Internet, who communicate an incredibly broader array of types of speech, some of which has to do with sexual topics, and much of which has much value for adults, even though many people would find it to be harmful to children.

I want to focus just a little bit on the actual evidence that we submitted in the most recent case in Philadelphia, just to give you a sense of how important that is in convincing judges in these cases to come to the right conclusion. There is a lot of talk, often from our adversaries in particular, about the hand-picked ACLU federal judiciary and why it is we keep winning these cases. There are maybe one or two that were appointed by a Democratic president. Judge Reid in Philadelphia was a Reagan-appointed judge. And again, it just goes to show that it isn't politics, it is speech that is winning these cases.

There are 36.7 million unique host computers on the Internet, or there were as of July 1998. There are 70 million people in the United States alone using the medium. There is no doubt that the medium has become a very easy and inexpensive way for speakers of all types to reach a large audience of potentially millions. The start-up and operating costs are so low that there are many, many people who have begun to

earn their living and begun to earn profits by communicating free information on the Internet.

Some of our clients in the case, some of the ones that testified, I want to tell you about. Mitch Tepper is about to receive his Ph.D. in Psychology from Carnegie-Mellon. He runs a site on the Internet that he set up called the Sexual Health Network. It is a site that provides very explicit sexual advice targeted to the disabled on how they can experience sexual pleasure. It is not a safer-sex site or how to protect yourself from AIDS or anything like that. It is a site on how to enjoy sex and it could actually have a lot of meaning for people who aren't disabled as well, so there is not a lot of argument that it has some other educational value that makes it different than other sexually explicit information for people who aren't disabled. It just happens to be targeted to a disabled audience.

He testified about how important this information is for his audience on the Internet, many of whom would never ask their doctor for advice like this. This medium has basically given them an opportunity to find information they could find almost nowhere else and to do so anonymously. He testified if he were required to set up an age verification system onsite, he is certain he would lose ninety-nine percent of his audience.

Tom Riley is a CEO of Planet Out, which is a very large gay and lesbian contact provider on the Internet. Planet Out derives its revenue almost exclusively from advertising online. They have 350,000 unique visitors per month. These numbers again are very important; we are not talking about just a few speakers, for example like in the Dial-A-Porn case, calling in to phone-sex services. We are talking about 350,000 visitors looking at some of this stuff per month.

Those kinds of facts are just crucial when the judge is thinking how much protected speech is going to be impacted by this. There are 100,000 separate Web pages, just on Planet Out alone. There are forty-five different message boards, literally tens of thousands of people post and read messages on these boards every day. And that was the big focus of the testimony as well. There is much Web-based chat and discussion online, all of which would have to be censored entirely if there were a risk that a minor could access it.

In other words, it is not possible to place any kind of age verification screen within that kind of Web-based discussion forum—except for at the entrance to the forum—so that, even with the messages that are being posted that aren't harmful to minors, all of the adults—all of the users—would have to put in their credit cards first.

David Talbot is the CEO of Salon magazine, a very popular online magazine with diverse content, but some adult content. They have a regular column by Susie Bright called "Sexpert Opinion." It was very hard for the government to stand up and try to say the information in Susie Bright's "Sexpert Opinion" column had value for minors. It was clear that this was covered speech; the judge knew it.

When we presented the evidence in the courtroom, people were nervous; people were embarrassed. It is explicit information, but it is information that even a conservative judge is going to believe that adults have the right to access. And all of this information is being provided on the Internet for free, and all of this would be greatly inhibited if COPA were to go into effect.

The other category of facts that proved crucial to the holding were that the primary business model on the Web today is providing free content—not selling things—providing free content. People are making a profit two ways: first, by providing a whole bunch of free content so that, by the end of looking at all the free content, you might at some point or another—maybe not on the first visit—buy something on the site, for example the Amazon.com model, or second, by advertising.

The advertising model turns out to be, in fact, the primary model. Many businesses are attempting to make a profit—not a lot of them are making a profit yet, it turns out, including Amazon.com—by providing free content and getting revenue through advertisers. And their advertisers, the evidence showed, depend on the number of visitors in order to guarantee the contract. Just like with print or TV, Salon magazine says, “I guarantee that 100,000 visitors are going to see the ad on the page.” Unless you can guarantee—and say the advertiser is Microsoft—unless Microsoft can know for sure they are going to get 100,000 visitors, they won’t give them the money for the ad. The evidence showed that if you set up any kind of age verification screen, the numbers would plummet so much that the advertisers would go away. The whole business model might fail on the Web.

Third, the evidence showed that users would be deterred greatly by registration—any registration, not even a credit card. Donna Hoffman, Professor Hoffman from Vanderbilt University, has done quite a lot of study and she gave a lot of expert testimony relying on these studies that showed that up to seventy-five percent of users will not provide any kind of personal identification in order to obtain access to free content on the Web.

So again, I just want to continue to reiterate that we can have all the law in the world. You have got to know—to win these kinds of cases, you have got to know the facts; you have got to emphasize that speech is the issue, not economics. In fact, to close, I just want to—and I know some of you may have read Judge Reid’s recent opinion, but he said this quite eloquently, actually. It again comes down to why I think we are winning these cases, not losing them.

He wrote, “First Amendment jurisprudence indicates that the relevant inquiry is determining the burden imposed on the protected speech regulated by COPA, not the pressure placed on the pocketbooks or the bottom lines of the plaintiffs or of other web site operators and content providers not before the Court. Strict scrutiny is required not because of the risk of driving certain commercial web sites out of business, but the risk of driving this particular type of protected speech from the marketplace of ideas.” His focus in ruling in our favor was on speech, and this

speech: Mitch Tepper and Planet Out, and the Sexual Health Network and Salon magazine, not on the pornography sites that are already requiring the credit card verification online. Thanks.

MR. MARCUS: Thanks, very much, Ann. We turn now to Bruce Watson, please.

STATEMENT OF BRUCE WATSON

MR. WATSON: Thank you. I would like to start by taking a couple of minutes to illustrate the problem, since if there isn't actually a problem, there is no point in agonizing over the solution. The way I would like to illustrate the problem is by asking you to imagine what would it be like if the physical world worked the same way cyberspace does.

Imagine you take your ten-year-old daughter or ten-year-old sister to the shopping mall and in front of it on the sidewalk are full-sized hard core pictures advertising a live sex show that is right beside Toys-R-Us. Or you take your eleven-year-old son or brother to school. Let's say the school library stocks *Hustler* or *Deep Throat*, and the school says it is up to the parents to keep them from the kids. Or your 12-year-old daughter or sister gets an envelope in the mail claiming to obtain information about a free vacation, and inside she finds a dozen photographs of teen sex.

I don't give these examples to shock; I give them because the real world doesn't work this way, but unfortunately, at this point, the Internet does. COPA doesn't address all of these problems, but it does address the first one. Why in the world should commercial porn operators be allowed to put free samples of their materials where kids can trip over them?

Pornography, unfortunately, is blindingly easy to encounter on the Internet. Two separate studies are now estimating the total revenue of adult sites as approaching one billion dollars. It didn't get this big by being hard to find. It can be found intentionally or unintentionally. The unintentional ones are the ones that are particularly of concern when you are dealing with kids. Many people are familiar with the difference between the Whitehouse.gov site, which is the official White House site, and Whitehouse.com, which is a porn site.

An increasing problem is the misuse of brand names. Earlier—I was going to say this week; it was last week—a study by the online research company Cyveillance estimates that twenty-five percent of pornography sites use popular brand names to lure customers. They do this by putting the brand names in the search engine magnets, such as the invisible metatags, and the result is that seemingly innocuous search terms lead to porn sites.

Their study of 19,000 porn sites found that the top ten misused brand names included child-oriented brands like Disney, Barbie, and Nintendo. In the moot court

case earlier on this evening, the example given was a site called "Bambi.com." Well, until recently, Bambi.com was a porn site. You go to visit Mulan.com, you find the site for the Disney film. You apply the same logic and go to Bambi.com, and, until very recently, you were straight into a hard core site.

One of the more egregious examples to me is the misuse of Nintendo's Pokemon. Can I have a show of hands as to who knows what Pokemon is? Less than half. That is typical, because if I ask for a show of hands amongst people aged fifteen or less, you would have got a hundred percent. If you ask people age forty or above, nobody knows. It is the latest Nintendo craze.

We were told about this situation recently by a parent who contacted us. We tested it ourselves. When we put the phrase "Pokemon pictures" into one of the standard search engines, the first link was to a porn site. There was no evidence, no indication in the description it would be a porn site. When you went there, the first screen was hard core pornography, and when you were in, you couldn't get out. It was impossible to hit the "back" button; there was some java programming that took you to another part of the site, and you were taken through a loop through different parts of the site getting clear images of vaginal, oral, and anal sex. I apologize for being so explicit, but that is what our kids are finding. For most people to get out of that site, unless you have fairly advanced knowledge, basically you had to shut the computer off. It was the only way to get away. Who are these people targeting?

Let's also be realistic about intentional access. As I am sure everybody knows, if you are actually looking for pornography, you can't miss it on the Internet. Curiosity in children and teenagers is natural and healthy, which is exactly why, as a society, we have never made pornography available to them, because that is not where we want kids to learn sexual role models and relationships.

So to summarize, it is there, it is big time, and it is easy to encounter. This isn't what we let kids do in the physical world, or let people do to them. So where does that take us? I believe it takes us to the need to apply the standards of the physical world into the cyberworld. Not new standards; let's just maintain our existing standards in the cyberworld.

A good starting point that COPA has addressed is the free samples, because all the porn sites have free samples. COPA simply requires the same age verification to access commercial porn sites as is now part of the telephone Dial-A-Porn. COPA has learned from the Communications Decency Act, since the CDA covered all of commercial web sites, amateur news groups, chat rooms, e-mail, everything. COPA deals with web sites only. The CDA penalties would have been heavy if they ever would have been applied to amateurs. COPA applies to commercial sites only.

CDA implied, but didn't actually state in the language of the statute, a redeeming value test. COPA specifically excludes material with serious literary, artistic, political, or scientific value for minors. The main difference between the two is that the CDA treated the Internet like TV. It applied the broadcast standard of

“indecent” to define the restriction. COPA treats the Internet like books and magazines by applying the print standard of “harmful to minors.”

Lo and behold, what we now find is that the opponents of COPA and people who opposed CDA are now raising the hurdle. If we read the ACLU publication, *Fahrenheit 451.2*, which came out immediately after the CDA decision, they said repeatedly that the Supreme Court declared that the Internet deserves “the same” high level of speech protection afforded to books and other printed matter.

By the time of the ACLU publication *Censorship in a Box* one year later, however it says the Court declared the Internet to be a free speech zone, deserving “at least” as much protection as books, newspapers, and magazines. In fact, what we are seeing now in the wording of COPA, is that it does apply the print standard, which two years ago we were told was what they wanted. But suddenly they tell us, the print standard has become too vague because, in effect, “Just about anything might be considered harmful to minors by someone, somewhere.”

All of the arguments about the difficulty of applying it—and what about this site and this site and this site—are based on the same basic premise that nobody really knows what “harmful to minors” means. Well, harmful to minors is a defined legal term. The Congressional Record for COPA noted that “cases such as *Eroznick* in 1975 and *Pico* in 1982 prevent the traditional harmful to minors test being extended due to the materials that merely contain nudity or sexual information, regardless of how controversial they may be for these political or sexual viewpoints.”

There is minimal evidence that the borderline cases we are being presented with are ever successfully prosecuted under the print harmful to minors standard anywhere in the country. Is this because the print harmful to minors standard is in fact so variable by different communities?

Well, actually, already, people are applying it nationally. Magazines like *Penthouse* deal with this question every month. Those magazines are available right across the counter in most communities, and every month they have to decide—they have a meeting to decide—whether the material stacks up against the contemporary standards in most of the communities across the country. Judging from their financial success, they don’t find it an impossible task.

Meanwhile, magazines like *Cosmopolitan* obviously know they are not harmful to minors, even though the cover stories on sex techniques are not that dissimilar from the co-plaintiffs’ material that has been described in the COPA case.

So the issue is how to make our existing standards work in cyberspace. Well, is it that, or are some groups trying to change the standard? I think I have to mention this; we have to understand what the ACLU policy is on obscenity, pornography, and indecency.

I have great respect for Ann’s earnestness in what she is doing, but the policy of her organization is that “all limitations of expression with regard to obscenity, pornography, or indecency are unconstitutional.” Just in case that wasn’t sufficiently

clear, it goes on, policy 4B, to explain that they believe that “laws which punish the distribution of exposure of such material to minors violate the First Amendment.”

Similarly, if you look at the record of the Electronic Freedom Foundation—who opposed both the CDA and COPA—their founder, John Perry Barlow, is on record in various contexts saying that he believes there should be no rule applied to cyberspace.

So we have to recognize, as we keep hearing about these practical difficulties, that there is no law to keep pornography from minors on the Internet which will ever be blessed by various of its opponents, because by formal policy they disagree with the basic objective.

So in conclusion, I would suggest that much of the opposition is the counsel of despair, basically saying the problem is too complicated to be solved. Well, please, if we can create the problem, we can create the solution. I happen to believe we can protect both the First Amendment and kids. I believe that COPA does this by taking a focused approach to a specific problem and addressing it with the very well-established concept of material harmful to minors. The First Amendment will not fall into ruins if we continue the time-honored practice of putting the burden on pornographers to keep their wares away from kids.

MR. MARCUS: Thank you. We turn now turn to Deirdre Mulligan.

STATEMENT OF DEIRDRE MULLIGAN

MS. MULLIGAN: Thank you. It is a pleasure to be here. I am going to start from a different place and tell you a little bit about the Center for Democracy and Technology (CDT). I am sure many of you are familiar with the ACLU and probably very few of you have heard of CDT. We are a small nonprofit in Washington, D.C., and we focus much more on the legislative process and policy process rather than on litigation, although we were one of the organizers, along with the ACLU—there were actually two suits that were joined—in the original Communications Decency Act litigation.

As Ann said, the facts have been incredibly important, but I think the other point that she raised is possibly even more important—certainly even more important in the legislative process—that is the breadth of people who are concerned about this issue. It is not just the ACLU or the Electronic Frontier Foundation. If you look at the plaintiffs in the original Communications Decency Act or if you look at some of the amicus briefs that were submitted and the pending COPA litigation—I just want to give you a sense of the folks who don’t believe that the statute is narrowly tailored—I think you will see many people who, really, I don’t think would fit into the commercial pornographers or the hardcore pornographers box. They range from the Association of American Publishers, the American Society of Newspaper Editors, the

Comic Book Legal Defense Fund, the Commercial Internet Exchange—people who don't have any contact at all, but they merely move information—the Freedom to Read Foundation, the American Library Association, the Magazine Publishers of America, the National Association of Recording Merchandisers, the Society of Professional Journalists.

These are folks who are very, very concerned about how we deal with speech in this medium. They are probably not folks who would necessarily be in court if this was only about commercial pornographers' ability to speak on the Net in an unimpeded way. Rather than talk about the pending litigation, which I think you probably have gotten from both sides of that issue, I am going to talk a little bit about what is happening to bring us where we are.

After the CDA was struck down, Congress didn't like to be told by the Court that they got something wrong. And as those of you who read the CDA decision certainly know, there was a road map that was set out that gave Congress some sense of where they might tread a little bit more successfully and so they certainly did try to do that. The bill that passed in October, like the CDA, has a very thin legislative history and a very thin record of hearings.

So, as Ann said, the facts have become very, very important in this type of litigation, and one of the things that Congress has repeatedly failed to do is actually create a factual record. They haven't actually gone and looked at what are the different ways in which information is made available, what is the scope of information that is out there, what does speech look like, how do you look at information in this medium? What is the whole? We asked some questions: is it a single page, or is it the entire web site, is it a link? What does it mean to consider a work? In the traditional medium we are pretty clear what that entails.

The bill that finally passed in October, in addition to the sections that were struck down, has two other sections, one of which requires all Internet service providers to make available the user empowerment technology, these filtering and blocking tools. It doesn't say the parents have to use them, but it says the industry has to take the step of making them available, because as Bruce said, there are many people who think there is a problem and parents do have an interest in this society. I think we have an interest in ensuring that parents are able to protect their children from information they don't find appropriate for their children. And I think most of us acknowledge that what we find appropriate for our seventeen-year old, we probably don't want our six or eight-year-old to have access to.

The information we are concerned about may be commercial pornography, but it also may be hate speech. It may be racist information. It may be information we don't think they are quite ready to handle. There are a number of filtering and blocking tools and other approaches to giving parents the ability to deal with content. These include green spaces that are put together by cooperative efforts—the educational community, libraries, schools, PTAs in conjunction with the kind of big

players in the content community, ranging from an AOL or Disney or Time-Warner—to try to help figure out how can we create safe spaces, how can we create a kind of a tool box so that when parents are concerned, they can readily put protections in front of their kids to make sure they are not coming into contact with information they find objectionable.

The other section of the statute that I think is important is that Congress also required under the law that a commission be established, and it is called the COPA Commission, the Child Online Protection Act Commission, and it is a commission of sixteen private sector individuals and three members of government. The task of the commission is actually, between now and the end of October, to look at the viability and effectiveness of a variety of techniques for protecting children from information that is harmful to minors—filtering and blocking tools, the notion of zoning cyberspace, some “XXX” domain, among other things.

I think that, while reasonable people can probably disagree about whether or not the statute that is currently before the Court will be upheld, I, like Ann, don’t believe it stands a chance. I do think that there is a large segment of folks who want to figure out how to protect the First Amendment and protect children. I think the hope is that this Commission will do some of the fact-finding that Congress to date has avoided doing. I think when there are reasonable people in the room and you actually look at the facts, the fact that a lot of the information we are concerned about comes from overseas, a lot of it is noncommercial. As we know, it does move about very quickly. Parents have an interest in deciding between what their children see and when they can do it. As a parent, your ability to determine what is appropriate for your kid may be very different than the standard that the government may set.

I think there is a real interest in trying to figure out the factual record. My hope is that Congress will do a better job on the fact-finding, because this process of statute followed by litigation doesn’t actually get us to the problem at hand, which is how do we make sure the children have appropriate protections, and what it does do is cost you a lot of money in the process.

MR. MARCUS: Thank you. We move now to Bruce Taylor.

STATEMENT OF BRUCE TAYLOR

MR. TAYLOR: As you can imagine, I probably disagree with Ann Beeson on most things that involve law. She said that this case depends on the facts, and in one sense she is right. She can only win if she makes the facts to appear to the Court to be what they aren’t. I think that we should have the statute upheld if we can get the courts to apply the law.

Congress looked at the opinion that came out of the Supreme Court in 1997 in the CDA case and said, if the Court says we can’t deal with a lot of the other parts

of the Internet—Usenets, list services, e-mails, and whatever—but they said maybe you can take web sites as commercial activity on the Web, that might be an area that is at least ripe at this stage in technology for regulation in some way. Congress looked at that and said, what about just the commercial sites and not the nonprofit sites, because the commercial sites take credit card?. What if we limit it to pornography? How are we going to do that? We can do it by using the legal terms that apply to pornography, so they made a definition of “harmful to minors” that said materials harmful to minors are either “obscene,” triggering the obscenity test of *Miller*, which usually means hard core pornography, or it uses that three-prong test that we call “harmful to minors” or “obscenity for minors,” that stems from the New York statute upheld in the *Ginsberg* case in 1968.

Both of those terms, “obscenity” and “harmful to minors,” apply to pornography. They don’t apply to sexual discussions that aren’t prurient, meaning intended to appeal to a lustful, lascivious kind of interest in sex. They aren’t and can’t be applied to materials that don’t depict sexual activity in a patently offensive way. Mere nudity can’t be obscene, much less harmful to minors. The Court has said so.

You look at a test like “obscenity” or “child pornography” or “harmful to minors” and say, I don’t know what that means. You say that’s because you haven’t read the court cases. The statute doesn’t define obscene under federal codes. The Supreme Court has defined obscenity.

Maybe that is a tough job, but that’s why they have lawyers, so we can go back and look through all the court cases and say, this is what obscenity means, because the Supreme Court said in *Miller* there is a three-prong test, and then, in 1977, they said, when you get to Prong Two you also use the average person applying community standards to determine whether it depicts sex in a patently offensive way. Then, in 1987, the Court said, but when you get to Prong Three, on serious value, you don’t use the average person, you use the reasonable man test. Therefore, it takes some time for a lawyer to tell you what the law means.

But the Court has always operated under the assumption that the law is something that can be understood by people, even if you don’t know all the legal terms. You don’t need a lawyer to know in every instance. Just like, what is a reasonable speed? What does a reasonable man do at a corner? What does a reasonable doctor do during an operation? You don’t ask juries to be doctors to sit on medical malpractice cases or even have a driver’s license to sit on a traffic accident case.

The question in a traffic accident litigation isn’t, what would I have done as a juror at that intersection—could I have made it, would I have stopped, could I have kept my car under control—it is what would a reasonable person have done. You get eleven other people, men and women, sitting on a jury to say what would a reasonable man or person do in this situation. That is a tough judgment and it is not one you can look up in a book and say, there has got to be some way to objectively figure this out.

If there was, we wouldn't have standards in this country that have the basis for the Bill of Rights, which is written in words that cannot be defined because they are based on human judgment and a human being's ability to put themselves last instead of first.

We have a presumption of innocence in American law; we have a burden of proof beyond a reasonable doubt. I am a prosecutor and I have been a prosecutor all of my legal life of twenty-five years. I can't define "reasonable doubt" to a jury, and neither can a court. We can give the jury guidelines: "Beyond a reasonable doubt means this" and they combine kinds of doubt that prevent you from acting out in the most important of your own personal affairs. What the heck does that mean? Everybody knows what that means. Each person may have a different idea of how it applies to themselves, but when you get twelve people in the jury box, the assumption of the American judicial system is that the best way we have ever been able to define "reasonable doubt" will emerge because juries are a way to have human beings sit in judgment of other human beings, judging human conduct that nobody in the courtroom saw happen, except maybe a couple of witnesses we bring in one at a time and shove out of here, but they are not the people who decide the case.

The CDA defined the type of material for which commercial sites had to ask for a credit card before they show it to the public in a way that is available to minors: to be harmful to minors under the same three-pronged test that defines pornography like you find when you go to a convenience store. One thing about harmful to minors is that it is a standard that everybody in this courtroom is familiar with, whether you ever heard of the term before or not.

I would imagine that everyone here has been to a convenience store someplace in America or has been to a gas station or someplace where they sell—video store, maybe—or even a movie theater where they might have some racier movies or R-rated or X-rated movies, or a magazine rack where they have men's magazines like *Playboy*, *Penthouse*, *Hustler*. And they might have some other materials like *Cosmopolitan* or one of the gay rights magazines or a sexual information magazine, or AIDS pamphlets.

If you notice, in every place in America, nobody makes a mistake about what goes behind the counter. All of the *Hustlers* and *Penthouses* and *Playboys* go behind the counter. None of the gay magazines and AIDS information go behind the counter; it is all out front. You can go into a library anyplace in this country, you can go into a supermarket, and you can find sexual information that is not prurient, that is not pornographic, but includes sexual information, and it is out there where kids can see it because it is not harmful to minors. It is the harmful to minors laws under state codes that provide the mandate that if you are selling magazines in the print medium and it is available to the public, including minors, then you have to display or sell the harmful matter to adults, make them ask for it, make them reach for it, or get it from behind the counter. That's what COPA intended to do.

Now, if that is all COPA did, like the opinion in the hypothetical that was used for the moot court, you would get like Ann Beeson said, if it was against Larry Flynt, in a site like Flynt Hefner, she would lose. It is my job to state, therefore, and my opinion, that COPA is constitutional because that is what it does. It doesn't apply to the clients in the *ACLU vs. Reno* case pending in Philadelphia. COPA does not and cannot be applied and should not be.

I agree with Ann that it doesn't. If it did, it would be unconstitutional. I think it doesn't, not because you ask the prosecutor—trust me, I wouldn't prosecute the gay site—it is because if I am the prosecutor and the biggest redneck and I hate everybody—I don't like gay people, I don't like people in wheelchairs, especially people who are handicapped, I can't stand anybody who even has sex because I don't do it and therefore nobody else should—if I was that kind of a prosecutor, I would look at the statute and say give me a law that I can lock up all those people that are having all this fun.

I would look at COPA and say, damn, I can't do it. Why? Because I couldn't convince a judge, much less than twelve average people, to say under this law and under the guidelines that have come from the Supreme Court for thirty years, that a law in America would prevent and prohibit a prosecutor from applying COPA's definition of "harmful to minors" to a sex information or even sex entertainment sites for handicapped people. If you show that to a child and they watch people in a wheel chair having sexual activity in a way that only they can do—I mean kids might say, "You want to see the wheelchair people have sex?"—that may be a titillation of types, but it is not a patently offensive representation of sex. I don't think you could get twelve people to say that is what the law is intended to do.

There have been cases where courts have discussed on the hypothetical arguments that have been raised, like in the *ACLU* case, could a "harmful to minors" standard or obscenity test be applied to that kind of material. The courts have said no. The reason they have to use hypotheticals is because there haven't been any prosecutions. There are very few "harmful to minors" actual arrests in this country because the stores all comply with it. Theaters comply with it. Video stores comply with it. Nobody does that. They don't sell adult materials to kids in the real world. Therefore, the sites on the Internet that know who COPA is aimed at, all the ones who violate, all the porn sites that give their free teasers—the front page of their site will have like eight pictures: they have got one bestiality, one group sex, one gay sex for men, one gay sex for women, they have got a group sex, they have got a urination sex, they have a torture sex, they have got a whatever—all COPA says is if you are regularly engaged in the business of selling porn, you are taking a credit card to sell somebody 2000 pictures on the Internet, on the World Wide Web site, you can take the credit card before you show them the ten free teaser things. That is all COPA does. How do we make sure that is all COPA does? How do we make sure it only

applies to the pornography? One of the ways you do that is you look at what Congress intended.

The second way you do it is you ask the court to make sure that's all that happens. Ann Beeson goes into court and she says, "I have got all these people who are afraid, Your Honor." What the court should say isn't, "As long as it is constitutional it will make all those people scared." What it should say, if it applies to the law in Philadelphia, is "I am going to narrow the scope of the statute consistent with the First Amendment principles and the Supreme Court's and other cases that have relied on the First Amendment to make these decisions in the past, and I am going to announce today a decision that says this statute is limited to this kind of pornography, can't be applied to the kind of speech that is merely controversial, and therefore all her clients get to go home in peace." Just like Congress intended. That solves both problems.

COPA then is still on the books to be used against the pornographers, who Congress passed it for, so that they would have to take their credit card before they showed the kids the teasers, and then they can sell all the harmful matter to adults they want to. But the kids aren't going to be able to put "White House" or "Bambi" into that little line at the top of AOL where it says give me a search term and go to a site where they will see explicit pictures. Browsers assume that nothing in front of the term means www, and it assumes that nothing behind the term means .com, because those are the most prevalent. So unless you tell it to go to .gov, it is going to bring you to the .com, and the pornographers know this and that is why kids can inadvertently get it. If they went to the hotsex .com, they would see a picture maybe of girls scantily clad or black marks over it to give you an idea what you are going to see when you pay your money and go behind the curtain, but they wouldn't see the hardcore pictures. They wouldn't see the penetration on the front page.

If that is all COPA does, that is what it should do, and that's not unconstitutional. That's why it is important to dispel the facts being overblown. The fear of the people may be reasonable if the ACLU or whoever tells the guy in the wheelchair, "You could get your site shut down and go to jail because you have sexual information," or, to the gay site, says "You are talking about gay sex and that's offensive to a lot of people and you could go to jail." Whatever reason those people have a fear, it is not because of the law, and that has to be made clear to them, either because they go to a lawyer and he says, "Nobody is ever going to prosecute you and if they did, we will get you off, because the courts are going to say this and no problem." Or, you can go to court, like Ann did, and I hope what happens is not that the judge strikes down the law because he doesn't understand it or he thinks it could be overapplied to protected speech, but that he protects all of our rights by preventing it from being applied to protected speech.

If he has a duty to narrow it, he'd better narrow it. I think the Supreme Court will narrow it. If it doesn't, I think this is a different battle than the CDA, because

this is an easier one to say, "Congress intended this to apply to pornography. They said so in their committee report. The test for 'harmful to minors' has always been applied to pornography. There is no evidence that it has been applied to anything but pornography. Therefore, we are going to narrow it to pornography, and everybody who is not in the porn business go home and do what you are doing." This would leave just the pornographers standing with COPA right in the middle of their nose. That is the way it should be, and I think that is the fair fight I hope we see come out of this.

MR. MARCUS: Thanks, Bruce. And lastly, Jonathan Zittrain.

STATEMENT OF JONATHAN ZITTRAIN

MR. ZITTRAIN: I will do what I can to pull things together from the very disparate viewpoints we have heard. It has been fascinating to listen to so far.

So, three major points. Point number one, which has to do with the problem we have been discussing. I, at least, hear it when the Bruces say, "Look, we have a problem, and the problem is that there is a lot more porn available in the world today than there used to be." They add a footnote to that: "It's available to kids." Actually, I notice already that that represents some concession in the boundaries of the arguments presented here.

You don't have people saying here—at least not explicitly—that there is a lot more porn out there and that's bad, so we can't let people see that; we have to cut it back. There is an appreciation here for the line drawn by the Supreme Court and the federal courts that says, for better or for worse, you can't do that unless it is obscene, and you can debate whether the small amount of material in dispute actually qualifies. As for the material we are talking about here, it's okay for adults to see it. We are not saying—even though there is a lot more porn and therefore a lot more adults will see it—we need to stop that in some way.

You hear from this side of the table that the argument is about protecting kids. There is a *New Yorker*-esque cartoon, which I had with me and wish I could show now on the screen, that shows a kid in frame one getting kicked out of the porn shop because he is way too young; he has a propeller beanie. Then, in frame two, you see him going up to a computer and logging onto "alt.sex.stories" and happily getting all the porn he wants.

In a fact-specific realm, I think it's a pretty hard fact to dispute, that more kids can see more porn at less cost transactionally—in terms of embarrassment and even in terms of money—than they possibly could have before the Internet. Now I think Ann—I don't want to put words in her mouth—describes it like this: the Internet equals more speech, more everything; so yes, there is more porn.

The point, what I think Ann highlighted as spurring the thinking in the Communications Decency Act case, is that the Internet is a source of a lot more speech in general. People are talking to each other, and there are different kinds of authors of speech now, or additional kinds of authors: people with enough gumption to put up a web site or offer e-mail as well as those who actually produce manuscripts and find a publisher—or who pay Dan Rather to recite the work.

It turns out that there is a lot more speech in general, and there is some appreciation here on that that is a great thing, that it may actually be some way of improving politicking in our society, thanks to technology that just wasn't there before.

So if you agree with that, the next question is how do you sever the pornographic components from material appropriate for kids? How do you sever that part from the rest of the speech that you think is so good? I see the discussion on this side of the table conceding that, in terms of controlling speech, we're just talking about protecting kids and so forth, and at the same time, a sort of parallel concession on the other side of the table, that we're talking mostly about protecting the people at the margins whose voices we don't want to have squelched.

We're talking about people like the plaintiffs that Ann is eager to represent, for instrumental reasons and because this is the kind of fight that might get you up in the morning: protecting people that have the artistic sites, educational sites, sites that might wrongly fall into the purview of poorly drafted law—or arguably any law drafted in this area. That is part of what Bruce was talking about: how easy it could be to draft a law that properly separates the two.

You don't hear much eagerness here to actually go out, for example, and defend Larry Flynt for what he wants to do. You don't see, even at the ACLU, people looking for the reasons why *Ginsberg* should be overturned. Again—at least in this environment—you don't hear people saying, "Come on, Supreme Court, this is your chance to wake up and rule that *Playboy* magazine should be on the bottom rack, right next to comic books sold to kids, who can then maybe buy or get one free."

Instead, I see here a closeness in the two positions that might otherwise not be apparent.

My second point has to do with the solutions that have been offered if we define the problem as there being too much porn available to kids. I am not saying we agree that this is the problem, but I am speaking from the premise that we do.

In this case, I give a sort of caution. We have a range of solutions that are suggested, and again at least for the purposes of argument, when you are before the Supreme Court saying no, no, strike down this law, you might concede—indeed under prevailing doctrine, you have to—that the government has a legitimate state interest in protecting kids from the material in question.

Given that this is the case, it has been argued that there are other ways to protect kids that are less restrictive, which is why you hear Deirdre talking about filtering

methods, the user-based filtering programs available to help solve the problem. My caution here is actually an empirical matter. If what you are worried about is the camel's nose getting into the tent, and you start trying to sever pornography from material appropriate for kids, you inevitably end up filtering out a lot more than you mean to.

In my opinion, there is a credible argument to be made that the so-called less restrictive alternatives, the leading example of which is this user-based filtering, are actually more dangerous along those lines. User-based filtering—Deirdre explained one feature of it—has “horizontal portability.” What do I mean by that? Horizontal portability means that the software doesn't necessarily have to apply just to porn. You can filter out hate with it, you can filter out Christian speech with it, you can filter out whatever category of speech somebody might go to the trouble of defining, and then the trouble of visiting sites to see whether they fall under the category or not.

Once you have the architecture—the engine for filtering out the unpleasant content generally—then you worry that far more speech will be squelched with this “lesser” alternative than with the original law.

And sure enough, you can download Cyber Patrol or one of the other filtering software programs, and see a check box offered to the administrator of the program—mom, dad, or the librarian—who can check an amazing array of boxes identifying what kinds of speech they want to filter.

Another problem with filtering is its so-called “vertical portability.” The intention with these programs is for the parent to act in “loco parentis” in place of herself, for the child; but once the engine is written, it is actually quite easy to vertically move up in the chain. By that I mean that ISPs could just subscribe to the filter in “loco parentis” for all of their customers. Compuserve customers, for example, might be treated only to those sites the company chooses to allow through its filter, with Compuserve checking boxes to decide what they will include and what they will exclude, with perhaps one category being “sites critical of Compuserve.” All right, check that box.

When a customer searches the Web, the software won't necessarily say there is an error: “Sorry, Compuserve is trying to govern what you see.” It could read as, “Error, 404 not found,” or “Try again later;” or even, if Compuserve was really being crafty, the error might be a really slow connection. And then you are left with the question, “Is it slow because it is slow, or is it slow because I am not supposed to be looking at it?”

So, these are some problems that occur when you get into a filtered world and start producing a solution so effective that it becomes a Swiss Army knife with uses far beyond what you imagined, beyond the classic Frankenstein story about this.

So, if you reject that scenario, you might—and hold your nose if you are on this side of the table—go with the legislative solution and run into the problem whereby you'll keep trimming it back and the Supreme Court will strike it down, then you'll

trim it back again. And the frustration is: "Come on, how narrow can we get it to make it work?"

I have some sympathy for the viewpoint that if in fact the law does just hit commercial pornographers, and in fact does simply prevent kids from getting access to pornography in the way they are now prevented from getting it at the supermarket, that we can deal with that. Maybe.

There may even be a way to do this technically, as age verification systems improve. You can imagine adults getting adult IDs that do not identify them. Systems could actually take the vector of your age and separate it from your identity. By that I mean you could tell a site "I am over 18," and the site could believe it. It could properly certify that you are over 18; but still have no idea who you are. This is more efficient than when you hand a driver's license to a clerk, because the driver's license doesn't merely certify your age—it has your name and your address, as well, and the classes of vehicle you are licensed to operate.

The only other problem you might see with Bruce's approach is that he says, "Look, it's easy. We have cases on this." And maybe you haven't read them or maybe the public watch hasn't read them, but whatever—they can call a lawyer and read them. This argument has limitations. One reason is that people speaking on the Net cut a much broader swath; they aren't just professional publishers. To the extent the law might be construed to reach them, these people are going to worry, and they are not going to know the niceties of the three-prong test versus the two-prong test.

In the words of *Broderick v. Oklahoma*, the danger of the sword of Damocles is that it hangs, not that it drops. It is the possibility of prosecution—the phone call from the top investigator at the Attorney General's office to your house, asking if you run a web site, the words, "Thank you, that is all we wanted to know," that might make you take the site down, not the actual filing of a case.

In the last fifteen seconds I presume I have, I will just touch on or briefly discuss my third point, about which I welcome questions later. Let's say you look at the problem, not from the supply side—which I have actually just been saying may be the better alternative—but on the demand side. Access to the computer itself is access to an incredibly powerful, enriching, and—yes, to some extent, precisely because we know it is powerful—dangerous instrumentality. Perhaps the proper thing to watch—at least if they are eight-year-olds—is whether kids even get access to the computer. Or, if they get access, to see that they get a "computer junior," a completely different computer with its own so-called kiddie corral limiting where kids can go, much the way that we now license those who can get behind the wheel of a car. That is one way that would allow kids some access without having to burden adults too much.

QUESTION AND ANSWER

MR. MARCUS: Thanks, all panel members. We do have some time reserved for questions. If anyone does have questions or comments, this is the moment.

QUESTIONER: Let me ask a question of Jonathan Zittrain, if I can. Jonathan, you did a very nice job, it seems to me, of laying out the common ground between the two wings of the panel tonight. As I listened to you and saw you forge this common ground, the one thing I was anticipating that you might say is that the way to deal with the problem that Bruce is worried about is through private market solutions, such as search engines that can screen out this sort of activity.

You are attacking that type of solution in which CompuServe sets up a system in which only certain sites can be accessed. If CompuServe doesn't have a monopoly, but simply goes into the market and says look, families and parents and whoever, we are going to sell this product. If you don't like the screening we do, go to AOL, because this is what we do. I was curious about your critique of a kind of nongovernmental solution to the concerns on this side of the panel.

MR. ZITTRAIN: If you imagine full information, you know what CompuServe is filtering and why; okay, then you can go take your business elsewhere. If you don't know, and we as yet have no reason to assume that full information—indeed, even if you ask for filtering, the point is to have CompuServe make all the decisions for you—you could see CompuServe just producing those errors that are borderline deceptive.

You can see governments as well doing this; for example China or Singapore. Pick your government of choice, and imagine them with access to the architecture that lets them do it. The software may not even let you know what you don't know. And that's why I have the kind of a skepticism about it that I do.

As for an adult ID—I agree, there would be some stigma attached to getting one today, because the only reason you'd want one is for porn. But you can imagine in the future getting a new computer out of the box and the first question it asks of you as a matter of course is whether you are over or under 18, and there was a way of certifying that information. Then there wouldn't be a stigma attached anymore. It would automatically have your identity as either child or adult and convey it in the appropriate situations.

MR. MARCUS: Let me ask Deirdre Mulligan, then perhaps Bruce Watson will comment as well.

MS. MULLIGAN: Yes. If you listen carefully—I think I probably should have emphasized this a little bit more strongly—that when I talk about technical tools, I

talk about user-empowerment tools. There is a huge difference between government-imposed solutions, whether it is through a legislative approach or the enforced use of a technical tool.

So right now, for example, there is legislation up on the Hill—and I just had a hearing on the Senate side—to require libraries and educational institutions to employ blocking and filtering tools. We are very opposed to that type of approach because, as Jonathan said, the ability to use these tools in a variety of places does pose a risk of them being used in lieu of a statute if somebody were to require you to use them.

I think that when parents use them, in the words of Vice President Gore, we call that parenting. I think the fact that they might have some more flexibility may allow parents to actually provide protections. It may not be just about information that is deemed harmful to minors. It is okay, because parents do that in the real world, and this is an environment where there are a variety of other types of information, and you don't want parents to keep their kids off the Net.

So I think that in order for these tools to be real tools of user empowerment, there are a bunch of hurdles that they have to get over. One is disclosure. Right now, if you purchase a lot of the filtering products, you have no idea whose values you are purchasing, and that is very, very important. Most of us, when we buy the *New York Times* or we buy the *Washington Post* or the *Christian Science Monitor*, or whatever newspaper it is, we have some sense of whose lens of the world we are looking through.

When you are buying a filtering product, right now the disclosure is about what the criteria are, how they block things. You don't know. So that's at least one piece. The second piece is that even though they are private tools, I think there are some due process concerns. What happens if you get blocked by a technical tool and the filtering company says we are only blocking out things that are harmful to minors if you check off this box. They don't actually use that word, but things that are lewd or indecent or whatever they might say. And, you happen to be one of Ann's clients or one of the current plaintiffs. You are the disability sex site and you don't want to be in that box. Right now there is not now a process to get yourself unblocked.

So there are a bunch of questions I think have to be answered before these can really be tools of user empowerment. Equating them with a government law that censors speech, I think, though, is a far stretch unless the government opposes them, which they haven't done. I do want to address a second point: when we talk about user-empowering tools, we talk about filtering. There is also this: people then want to talk about why don't we use ideas, and I think you can think about labeling content or you can think about labeling people. I think both of them pose risks.

COPA says that although you collect this information to restrict people from entering your site, you can't disclose it for other purposes, et cetera. However, we do know that law enforcement will get access to that information. We know that information is vulnerable. And, we are dealing with a global medium, so who is

operating the site? Whose laws will apply to access and to information that is collected by a site? There are a lot of “ifs” out there. I think that when we are talking about First Amendment protected activity, I don’t think we want to go down the road of monitoring what everybody reads. I think that all we have to do is look at the recent Lewinsky-Starr episode—where Kenneth Starr wanted to find out what Monica had been purchasing in the bookstore—and know that that might be the direction in which we are heading, because it does create a rather attractive fishing pool of data about people’s activities.

MR. MARCUS: Bruce Watson, any thoughts?

MR. WATSON: Yes. I guess I would offer two or three thoughts. One is when we compare a law like COPA with filtering, I don’t think we should presume that this is an “either/or.” Our theory at Enough Is Enough is that there is an “and” involved here. We think the parents do have a responsibility, very important responsibilities, and we have educational programs for parents. We also think the technology industry has responsibilities. There are things they have started to do and more things they could do in codes of conduct.

But we also think the pornographers have responsibility as well. They must work within certain boundaries, keeping out material that is clearly illegal and not making it available to kids. So, to us it is a false choice to say, “Should a pornographer have the responsibility or should the parent have the responsibility? The reality to us is they both have responsibility.

Secondly, sometimes you can reach the situation where the cure is worse than the problem. Professor Zittrain was saying that this sort of scenario could happen with filters. I think there is an important distinction between filters on the one hand and rating systems on the other hand.

At the time of the CDA litigation, many of the CDA opponents were arguing strongly to—I have a clipping file of newspaper editorials—how we don’t need CDA because we have PICS, a protocol which will allow all sites to rate themselves and problems will go away. And it was the opponents of CDA who were pushing that argument forward.

Ultimately, even before the CDA was overturned, they were actually backtracking fairly rapidly as they realized, “Hey, if we create a system where every single site has to rate themselves, my goodness, are we setting up the mechanism for all kinds of censorship? And they themselves realized that the solution they were offering could in fact be a real problem. In the case of that sort of rating system across all sites, I think there is a legitimate concern that the solution could be worse than the problem.

Filtering I would suggest is somewhat different, though, and the vertical process that was referred to, that already is happening. There are different ISPs who do offer

different degrees of filtered services. And there are consumer choices available. You can go to some and their standard package is "check the boxes," and they can or will exclude pornography plus three or four other boxes. There are some who say, "We will exclude only pornography. That is the only issue we are concerned about; if you are concerned about others, go to those companies over there."

So the list is sort of developing. And there are some things called clean ISPs who are doing that prefiltered service. That worries me less from a paranoid point of view, because I think that the market forces do work. When Cyber Patrol, for example, created a bit of a stir by filtering out the American Family Association, which is one of the organizations that advocate filtering, the word got around fairly quickly.

And that tends to be what happens. When anomalies take place in the filtering, word does tend to get around. Is there a consumer place where you can go to get information? No, there is not. It is an infant industry. But as it develops, I have a lot of confidence in the market forces providing exactly the sort of comparative information the consumers are looking for: "These people block all these things; these people give you a choice; these people only block this material."

MR. MARCUS: Thanks, Bruce. Let me shift gears just a moment and direct this to Ann Beeson and Bruce Taylor. You both talked about the litigation perhaps more than the other panelists, and to those who are not expert in the area it seemed to us—to me at least—that you were really talking about two very different things. Ann, you are saying this isn't just about the Larry Flynts in the world, we really are talking about whole other category of folks who could be, and are, seriously affected and that is why the courts are striking these down. Bruce, on the other hand, you seem to be saying no, no, that is not what this statute is about. This statute is really about pornography and obscene materials for minors. Who is right between you two? Can we hear a little bit more about that?

MS. BEESON: Yes. We haven't said enough throughout this debate tonight that what we are talking about here is a criminal statute. We are not talking about speakers on the Web who might lose a little bit of their audience because this law happens to be there. We are talking about a law that says if they make the wrong decision concerning the content of their site, they are going to go to jail. Okay? To jail. They are going to go to jail and they are going to pay up to \$150,000 a day in criminal and civil penalties, per day, per violation.

Now pretend that you are Tom Riley and you are the CEO of Planet Out and you got a hundred thousand Web pages on your site, and you have also got tens of thousands of messages. You have no idea what these people are saying in their messages. They could be talking about all sorts of stuff, and there is all sorts of explicit information about homosexuality on your site.

What are you going to do? You are going to self-censor. You are going to be very worried that you might go to jail. And therefore you are going to err on the side of caution and you are going to take anything that could remotely come close to lying off the site. You are going to read the very words of the law and look at your speech and think about it.

I am sure Tom doesn't find his speech to be harmful to minors, right? But he is thinking. And here is a man, a gay man who has himself experienced much censorship in his life and has himself experienced much harassment simply about speech because he is a gay man. Not even sexually explicit speech, just any speech that discusses gay issues and has been targeted as offensive to many, many people. And he is going to say, you know what, I am going to shut my site down or else I might go to jail.

And it is real people like that that have to make the decisions, and you can't wait until you are prosecuted. You have to decide from one day to the next whether you might go to jail and make a decision based on that and based on the words in the statute. And again, that is why it is that kind of evidence and those kinds of facts that make judge after judge say, "Wow, these are real people that are here in front of me, they are telling the truth, they are going to self-censor, and therefore adults will be inhibited from accessing speech that they are entitled to access."

MR. MARCUS: Bruce, response?

MR. TAYLOR: I do think that the law applies only to pornographers and not to the gay site when the gay site is talking about gay rights, gay issues, gay politics, and even gay sex. You can talk about sex all you want, whether you are gay or heterosexual or you are asexual or a monk or a Catholic nun—that doesn't do it. I think that what Ann is saying in a sense sounds really good, but I think it is nonsense in two ways to buy into it too much.

It is a good lawyer trick to talk to the media—although judges should know better—about how you are going to jail for two years and paying \$150,000 a day. Under state laws, if you get prosecuted under the "harmful to minors" law, which fines up to \$10,000 or \$50,000, a state judge can give it all to you: "First offense, I never saw you before, maybe you know you broke the law an inch, but I am going to give you the whole maximum fine."

And then under the federal system there are federal sentencing guidelines that prohibit the judge from giving the maximum penalty. You look at their ability to pay—there is a scale—you find out if it is first offense, is it second offense, how many other characteristics of the crime were involved in the conviction, and, even though you convicted all ten people of the same crime, you will get ten different penalties depending upon the individual conduct.

So the first offense fines under COPA probably can't exceed for a site like PlanetOut.com—I don't know—how much money the gay site makes off a particular page that could be held to have been made available to minors and that is harmful to minors, but it is not going to be enough to trigger a fine of more than \$5000 or \$10,000 under the existing guidelines. A first offense in jail is probably going to be more like six months or home detention for three months, so there isn't this ability to punish people up to the maximum the law allows.

However, the other half of it is that it is no better for a gay site to say, "Well, I am a gay site. I should be able to have porn on my site." If the guy in the wheelchair puts up the centerfold from *Hustler*, he should take a credit card for that too, just like Larry Flynt does. But when the gay guy or the handicap guy puts materials that are germane to their issue out there—and they are not putting it out there to be pornographic—then they don't have to do anything to it.

As for all the gay rooms that discuss sex, if they want to have a gay chat room that is going to get racy and that kids shouldn't be in, there is not going to be a stigma attached for adult gay men any more than there is for adult heterosexual men or adult handicapped men to say, "I will show you my adult ID so I can go into this room and I know there aren't going to be any kids listening to me." It's just like an adult man going to an adult movie or an NC-17 or an R-rated movie. So what if they ask how old you are? That doesn't bother me. If I am a porn customer, then I will give them my money to buy the porn, I will give them my credit card.

So, it is not so much that the gay site should have the right to do whatever they want. The gay site doesn't have the right to distribute harmful matter to minors. What they are doing wrong is distributing material that is harmful to minors. The First Amendment principles that says you can't suppress material because of its idea or its message applies. Therefore, if you are talking about sex and you are not doing it in a way that offends the three prongs of the obscenity test for adults or the obscenity test for minors, then if it is not harmful to minors, it doesn't affect what you do under COPA. You don't have to do anything.

However, that doesn't mean that a gay site or a handicapped site can go into the porn business. They can't. They can have a gay site that has all kinds of sex information for gays and they don't have to do anything to any of their pages. If they want to have a gay centerfold of the month, they take the credit card to see that one page, just like porn people have to do for their pages.

I think that if the law gets upheld, it will be because the Court recognizes the scope of COPA only to be what Congress said when they said that the "harmful to minors" test applies to materials that are clearly pornographic and inappropriate for minor children of the age groups to which it is directed and prevents the traditional "harmful to minors" test from being extended to entertainment, library, or news materials that merely contain nudity or sexual information, regardless of how

controversial they may be for their sexual and political viewpoints. That is the intent of Congress as expressed the committee report. If that is what the Court says about COPA, then we do both what I am trying to do and what I hope Ann is trying to do, which is to make it so that those legitimate speakers about sex who are afraid, but not pornographic, and shouldn't be subject to the law aren't, and don't have to be afraid any more.

Kids should be able to use the Web as much as you or I do. This isn't for adults. To heck with adults. We can fend for ourselves. My kid has just as much right to use the Web as your kid, and if I can't read or if I am a working mother or if I am an immigrant that just got here last week and I don't speak English and my kid goes to school or if I am stupid, lazy, drunk, and I don't like computers, my kid has a right to use it just as much as some upper or middle-class, educated, I went to college and my kids and I have got a Pentium and all this junk.

The only way to equalize kids is to make it so that both sets of kids get to go on the Web. And there shouldn't be any picking what they see. I think we ought to make these pornographers do something about it and not everybody else try to filter the whole library and segregate and pick and rate themselves. I think that is why COPA is going the right direction. We have to make sure the rifle shot hits the bad guys and make sure it doesn't become a shotgun that kills all the good people.

So I think in some sense we are after the same objective, and it is just going to be an argument that if I win it over COPA—meaning the people on my side and our argument—it is going to be because it does exactly what Ann Beeson says it should only do, or that it doesn't do what she says it couldn't do—that it only does what I say it does, which is to control pornographers' conduct, and it doesn't do what she says, which is to spill out on to other kinds of contents. I think there is that common ground. It is going to be an interesting fight to watch.

MS. MULLIGAN: Can I make a comment? One of the things that was interesting during the hearing on the House side on COPA, there was a representative from the adult entertainment industry—commercial pornographers—who in effect said a lot of us are using credit cards or some other adult verification; you don't need to put this law in place to catch us.

I know there are those that aren't, but it is kind of interesting. If you look at least at the one hearing that there was, folks are saying that if you are talking about us, we are trying to do this already, so you must be talking about someone other than us. I think there was a lot of concern that this is not just aimed at commercial pornographers.

I just want to go back; Bruce said this was about the standard. I think the harmful to minors standard is narrower than indecency, but I think that what the Court said in CDA and what I think is the real issue is not the standard, but the means. And there is a less restrictive means to deal with "harmful to minors"

material. I think we can say no, it is not the least restrictive and it is also not going to be the most effective.

I'm sure that folks are just as concerned about their kids getting access to information that they consider harmful to minors. It is not at a dot com web site; it is at an international web site. It is not going to be captured by the scope of the law, and I think there is a broad array of information that is out there that parents could find is offensive.

MR. MARCUS: Let's hear what Bruce Taylor has to say.

MR. TAYLOR: There was a pornographer who said, "Yes, some of us are using credit cards, you know, we don't sell free teasers." What I heard him saying is, "Yeah, this law doesn't really bother me because I don't show free teasers. I take a credit card." I think what bothered him was that if you pass this law, you will place competitors at the high bid teasers, and that would be good; that would level the playing field. I don't think what he was saying was, "You don't mean us pornographers, you must be after the gay site." What he really said was, "Yeah, you are after some of us pornographers and some of us are not really doing the bad stuff." But he didn't say there weren't 50,000 porno web sites that don't have age verification checks. That's what this law is directed at; if you read the committee report, that is what they said and that's what Congress said. This law is aimed at the free teasers on the porn web sites. There are 50,000 of them that don't take a credit card. And they found a witness that went to Congress and said, "Well, some of us do, so you don't need the law to get to us."

MR. MARCUS: Questions?

QUESTIONER: If there was some kind of law restricting along the lines that COPA introduced, would there be some way for someone who was frivolously sued to, once the suit was found without merit, then to counter-sue the person to cover hopefully not only court costs, but also enough for damages?

MS. BEESON: You have no recourse whatsoever, which is again why the chilling effect of the law is going to be so strong. In fact, just the opposite is true. The notion that you might get acquitted ultimately and that makes everything okay—well, excuse me, it doesn't make it okay. You just had to defend yourself in a criminal prosecution and you may have had your name smeared all over the headlines. Your whole business could be ruined. You could have spent a fortune trying to defend yourself because you couldn't afford a criminal defense lawyer. So even if you are ultimately acquitted, there can be severe damages, and no, you have

absolutely no recourse if you are acquitted. Nothing, period. You just get to go home.

MR. MARCUS: Jonathan, and then Bruce Watson.

MR. ZITTRAIN: Just a brief comment that some forms of challenge—since it is a criminal statute, not civil action which Rule 11 or some equivalent—could be easily gotten; the closest equivalent is the Equal Access to Justice Act, which for certain kinds of acts, for certain kinds of people allows at least their attorneys to get reimbursed for all their fees when they haven't been paid in the course of a lawsuit for time and expense. Again, in its exact application, I am not sure.

MR. MARCUS: It is pretty limited, at least for the moment.

MR. ZITTRAIN: Yes. I would be interested if Bruce would be willing to have it be a civil penalty rather than criminal.

MS. BEESON: They are actually all civil penalties, but nobody knows what they mean, in COPA. That is actually another issue: Who could bring an action for civil penalties?

MR. MARCUS: Bruce Watson.

MR. WATSON: Not much I can add to it.

MR. MARCUS: Other questions?

QUESTIONER: Up until six months ago, I was one of those schmucks who was twenty-five years old and didn't have a credit card. And just a couple days ago I read an article in the *New York Times* about fourteen-year-olds who have credit cards now. Concerning the credit card, is there any mechanism in place where you could tell just by the credit card that the person is over eighteen?

MR. MARCUS: My son today, eleven years old, got an application in the mail—preapproved because of his allowance, I am sure. Deirdre, you want to respond?

MS. MULLIGAN: Credit card companies are not interested in becoming the adult ID. That is not their role. There are other folks who put themselves out there as folks who issue adult IDs. Whether or not you could rely upon them, who figures

out whether or not they are reputable, there are a lot of questions. But the credit card companies aren't interested in that being a major role.

MR. MARCUS: Anyone else?

MS. BEESON: I was going to make the point that it is clear that it is not, it is definitely not a proxy for age in the real world, and that just goes again to the statute's ineffectiveness in protecting children. It is just another factor.

I am sure Congress understood that there were some minors that could get credit cards and made a decision. They knew it was one of the few things that would work on the Web at all, so they accepted that inadequacy.

MR. TAYLOR: My response to that is that none of that is true. The reason that Congress picked credit cards is because the Supreme Court already discussed the presumption that most people who have credit cards are going to be adults. Not all. We know that some parents give their kids cards and some kids could steal a card. It was an intended method of saying to the vendor, "If you take a credit card, we are going to protect you even if the person is a kid and got a card from his parents or stole a card." That is not something that makes the site care whether or not the kid is a kid or the adult is an adult.

COPA doesn't ask you and it doesn't care and doesn't put any requirement on you to care whether the person that comes to your site is a child or adult. It has nothing to do with that. What it says is, "Don't make your porn available to minors. But if you do, we will give you complete immunity if you take a credit card," not because it will have a kid or an adult behind the credit card, but either because the presumption was that most credit cards are held by adults."

The other thing is that, if a parent gives a kid a card, the parent runs the risk that their kid is going to be treated like a adult. When you give the kid a credit card, he is going to go out and act like an adult with it and people are going to be protected for selling adult things—booze, cigarettes, porn on the Web, or whatever. So, an adult at least has a choice of allowing a kid to get a card, and that is why it is there and the reason why Congress picked it—because it was one of the methods that the FCC authorized for Dial-A-Porn companies to be protected.

When the Dial-A-Porn law was before the Supreme Court, the Supreme Court made the statement that the use of these technical methods by the FCC, including credit cards and pin numbers, would deter all but the most enterprising and disobedient juveniles and therefore it would protect most kids. That is why they picked credit cards. That is the legal history behind it. But it is just one of those things where Congress says, "Maybe you can't identify for age, but we will protect the site that at least takes a credit card." Then it is up to the parents not to let their kids have cards, but it protects the site if a kid steals a card.

MR. MARCUS: We have time for one quick question.

QUESTIONER: I would like to give Jonathan an opportunity to talk a little bit more about the third point he wanted to speak about.

MR. MARCUS: That was a plant if I ever heard one. Jonathan, are you related to him?

QUESTIONER: Only because it seems to me that somewhere in the technology—since the Internet is such a technology-based medium—it seems to me that therein lies the least restrictive and most effective means. We haven't come to the point yet where we can really say that we have achieved that—and maybe we won't for decades, or maybe it is just around the corner, or maybe digital certificates are the answer—and I think that is what you were alluding to.

MR. MARCUS: Jonathan, make this a final word, if you would.

MR. ZITTRAIN: The technology is going to be offering lots of different answers. Certainly, a part of my point was the ultimate answer may lie within it. Also, an answer that goes in a direction that no one expected may also lie within it. It is not sufficiently indeterminate that we can just throw up our hands and say let's do the best we can. We can actually map out some ways in which these answers can go awry—or not.

One answer that I haven't talked about was what I think may emerge as the primary means of parental control, and that is that there will simply be a log. You will come home and see where Joey went on the computer that day. It will be hard for Joey to figure out where the log is, or for all we know maybe the log can be sent real time over the Net so the parents can see it at work where Joey can't get rid of it. You will just take a scan and see if there are any bad sites there.

Even better, technologies are being developed today to keep people from playing too much Solitaire. You can actually push a button and see whatever your home computer screen is showing now, on the computer screen wherever you may be.

The idea—that you could actually catch Joey red-handed with his hands in the cookie jar—could make this a very popular technology, and again one whose other uses are manifold and somewhat frightening.

My way of wrapping up would be to say I like the idea that Congress shall make no law abridging freedom of speech. All the slippery characteristics that make it dangerous to legislate in this area we accept from the Supreme Court, although it might be fair to question whether this one area—obscenity, and to some extent, material harmful to minors—falls under the First Amendment. But, again, in drawing doctrinal lines, I am much more comfortable saying commercial, non-commercial, or

are you as an ISP merely conveying the information. If so, you are off the hook and don't even worry about what it says. That puts the Planet Out person a little more at ease.

Those are the distinctions that maybe you can make; but as soon as you have to start judging content, it is really dicey. That's why it may be that we get used to having kids that are a little bit more savvy in a world where they will have to develop their critical skills sooner. Because they are going to find web sites that tell them there is no Santa. And they will find web sites that tell them all sorts of other things, too, that they will have to learn to develop new kinds of faculties a little sooner.

MR. MARCUS: To all those folks out there, there is no site that will tell you that Santa does not exist. I think that is not true. On that happy note, I thank all our panel members.