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Children's Rights vs. Adult Free Speech: Can They Be Reconciled?

LOFTUS E. BECKER, JR.*

One of the nice things about going last is that you can steal from the other two and, as I talk along, I think you may find that I sound often like Professor Strossen and sometimes like Professor Fish—he won't think so, but some of you may think so.

I want to try to make three points, the first of which I will make very briefly and the other two of which I will expand on a bit.

The first is that if you really think about it, the First Amendment is an enormous protection for children. If you wonder why I say that, I ask you simply to look at the news reports from Romania or from China or from other countries that have nothing like the First Amendment, and think about the likelihood that the treatment of children that we hear about in their orphanages could go on long in the United States. I mean, there is much wrong in this country, but I think that the First Amendment, far from being a danger to children's welfare, is one of the best things we could possibly do for our kids and our grandkids.

The second point that I want to urge, and talk a little about, is this weird thing called the Internet. And, let me ask you, how many of you are connected to the Internet? How many of you think of yourselves as having actually "surfed" the Internet? Okay, not a huge proportion. Less than half are connected. The point that I would like to make is that the Internet is really something very new and it's very unlike in

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some significant ways any of the institutions that we have had before and that unlikeness makes it sometimes a very difficult thing to think about.

Third, and here is where I am going to sound very much like Professor Strossen, I think that even if you take the ultimate Professor Fish pragmatist position, that I don't care about the First Amendment, I just care about what works, I think you're still going to conclude that, in fact, the only method of controlling children's access that is going to work is some kind of parental controls like the ones that Professor Strossen was urging. The others simply won't work for some reasons that I will discuss later.

Let me talk first about the Internet. You all remember, I'm sure, the old story about the blind men and the elephant. The seven blind men were taken to see an elephant and one of them felt the elephant's trunk and said "Gee, the elephant is very like a snake." Another felt the elephant's side and said the elephant was very like a wall. Another one felt the elephant's legs and said the elephant was very like a tree, and so on and so forth. Well, the Internet is very like that. Many of us get experience with a little bit of it and say, "Gee, it's very much like . . ." and then pick our favorite analogy. What is strange about the Internet is that if you get to talking to people who know what they're talking about, it isn't really a thing at all. The Internet people will say it is really, in one sense, nothing more than a set of agreements for methods by which different computers can talk to each other and that's what the Internet is. Another way of looking at it, the practical way, is to say well, we can also think of the Internet as all of the computers throughout the world that are capable of using these various agreed upon protocols to talk to each other.

In either case, notice that it's in no sense a single entity, even in a legal fictive sense that we are used to thinking of General Motors as a person.

The Internet is a constantly changing thing. Computers are coming on and off constantly and it's international, a matter of some importance. By and large, from the user's perspective, the Internet is a method for either distributing or receiving virtually any kind of information that can be stored on a computer. That means text, obviously; it means graphic images; it means sounds; it means movies. It means even conversations. You can actually, in many cities, make a long distance call cheaper by using the Internet than you can by using your local long distance provider.

For the user, by and large, what the Internet consists of, is things

called news groups, which, if you're familiar with computer bulletin boards, you can think of them as computer bulletin boards. If you aren't familiar with computer bulletin boards, you can think of them as bulletin boards just like the ones in the Safeway or whatever grocery store you go to—a bulletin board on which people who like can post messages and anyone who feels like coming up to the bulletin board can read the messages. It consists of sites for distributing any kind of file that can be distributed by computer. It consists of electronic mail. And finally there are also areas where people can go and, the jargon is, "chat on-line." That means they type something into their computer and one, five, ten, a dozen or a hundred people see it the very instant they are typing it and may join in.

Now the Internet is similar to a lot of things we're used to. It's like the post office in one sense. It delivers information to you. Information of any kind, letters, books, videotapes, audiotapes, anything you like. It's like the telephone in a sense—both because you can carry on phone calls over the Internet but maybe more important because you can contact and be contacted by virtually total strangers. The only nicer thing about it is that it won't wake you up when the call comes in. You can pick up the message when you feel like it. But it's in that sense like your telephone. It's a conduit on which you can get in touch with others and others can get in touch with you. It's like a library in that it contains an enormous store of information of all kinds.

But, it's also very different from all of these existing institutions. In particular, in terms of the way that relatively young children interact with it. We are talking, by and large, of literate children, if we are thinking of children using these devices. There's enormous anonymity, both for your children and who may also pretend to be almost anything in this strange electronic world and for those who are talking to your children who may pretend to be almost anything. From a parent's point of view, I think that electronic communications probably have a lot more privacy than other methods of communication. When I was seven years old and I went to the library, it had a children's section and I was steered into the children's section because it was self-evident when I walked up to the desk that I was not an adult. This isn't true in electronic communications. I suspect, though it's been a long time, that most parents even have some sort of sense of what mail their children are getting, if for no other reason than that they often pick it up and distribute it. So, if your children start getting strange bits of mail or packages marked Eric's Adult Book Store, you know what they're getting, whereas, I suspect that parents tend not to read their children's

electronic mail, not to filter it through them.

There are very few filters in the Internet and Professor Fish has given some indications of the kinds of things I'm talking about. If you go to your local public library and try to look for books on the natural superiority of the Aryan race or the inevitable triumph of communism or on why libraries are a bad idea or free speech is a bad idea, you'll find there aren't very many, in many libraries there are none, and almost all of the information sources we are used to using have filtered the information that is on them very extensively. Libraries do, Lord knows, television and radio do, whereas any nut can put information up on the Internet—and, as far as one can see from a quick look, most of them have. Most of us could probably go to a library, go to a section of a library in which there are some books of interest, and pretty much just by looking at the spines get a good idea of which are the books that are going to help us and which are the books that are at the wrong level or are not what we're looking for. There are no tags to indicate the quality of information on the Internet which indeed often isn't permanent. That is, the book that you found in the library today is probably going to be there again tomorrow and, almost certainly, if it is going to be there tomorrow, it's going to say the same thing. The information you see on the Internet today may not even be there tomorrow and, if it is there tomorrow, it may be in a very different form, it may look very different.

What do all these differences have to do with regulation and children?

Well, I would like to start out suggesting that the real dangers to children from the Internet have very little to do with what we most often talk about, which is the vision of child molesters somehow coming through the computer and grabbing our children or our children spending all their time getting dirty pictures and being ruined by them.

I don't deny that both of those, if they happen, can be problems, but I don't think they're anywhere near the most serious problems.

One of the biggest problems I think people will find with children on the Internet and one that is wholly unregulable by government, by any means that anyone would tolerate, is simply addiction. That is, remember that your child can be anyone, anything he or she likes, on the Internet. For some shy, socially inept, unhappy children, the ability to masquerade can be great fun, something of enormous power, and there are already psychologists and psychiatrists treating both children and adults. It's not only children who can get addicted to it, but people whose entire lives are virtually sucked into their on-line representations.

Some years ago, you may remember the Dungeons and Dragons craze and the way some people—some children—got so deeply into the role playing that they had trouble dealing with real life. Well, the same thing can happen with the on-line lives of computers.

The second problem is simply getting bum information. That is, letting your kid wander through the library is in many ways pretty safe. They're not going to be running across books, talking about how and why the earth is flat. They're not going to be dealing with the nut cases, but believe me, if they wander through the Internet, they're going to come across these and I don't know, has anyone here ever argued with a "flat earther"? I have, and I lost. These people may be crazy, but they're not dumb. They've been making the case for years. They've tested it against some of the smartest people they could see and they can be terribly persuasive.

Now, notice that this kind of problem is not very susceptible to the kind of censorship that even the people in the house who are happy to vote for no indecent materials would be willing to tolerate. Moreover, the very nature of the Internet makes it a very hard medium to censor even if you want to. It's easy enough to write a statute, for example, which says "The original provider of particular information that we think is harmful is responsible, criminally or civilly, for getting it disseminated." Trouble is, as Professor Strossen pointed out, already about 40 percent of the stuff on the Internet is originated by people who have nothing to do with American laws and anonymity on the Internet is a very easy thing to get.¹ There are all sorts of ways that you can post material on the Internet with complete anonymity and so any form of censorship that aims at going at the original provider, which might be a sensible way to do it if you wanted to do it, isn't going to do a whole lot of good. Going after the sort of intermediate channels of the Internet is rather like going after the phone company for transmitting ransom messages from kidnappers. These people have relatively little responsibility for the content and, once again, even if you do, you're likely to discover that the only big change is simply to take Internet service providing business away from American firms and give it to firms in the Barbados or other countries that think it's just fine to get a few billion dollars of additional revenue.

So, the conclusion that I reach is that if you really believe there

1. Nadine Strossen, *Children's Rights v. Adult Free Speech: Can They Be Reconciled?* 29 CONN. L. REV. 873 (1997).

are some things that kids shouldn't get to and you want to make that good, you've got to go in the parental controls direction. That's the only one that will work. Professor Strossen has talked about a variety of ways that are springing up.² There are, as she said, software that purports to block various kinds of material. There are also services growing up that purport to not even let the material get close to their machines. There is also, I know at least under development, what I think is in many ways the most effective method of all, and that is software that doesn't block access to everything but keeps a record of what the kid has been doing. It seems to me that growing up with a kid, there is a time in every kid's life where he has to be allowed considerable freedom, but somebody ought to be watching him. Really knowing what your kids are doing is, I think, not only the best way to raise kids but also the best and about the only way, if you really want to be sure that they don't get things that are bad for them.

2. *See id.* at 877.