SEX, LIES, AND LIBRARY CARDS: THE FIRST AMENDMENT IMPLICATIONS OF THE USE OF SOFTWARE FILTERS TO CONTROL ACCESS TO INTERNET PORNOGRAPHY IN PUBLIC LIBRARIES

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I. INTRODUCTION

In the mid-1990s, the Internet suddenly became a household word. The Internet grew out of the military's desire for a resilient communication channel in time of war.[1] It had been limited to a relatively small body of users from its creation in the 1960s through the 1980s.[2] With the advent of the World Wide Web, the Internet suddenly became the hot "new" technology of the 1990s.[3] This presented the prospect of previously undreamt access to information for the public as literally millions of websites dealing with every imaginable area of human interest sprang up in a matter of months.[4] Naturally, as the public's information centers, libraries were anxious to offer their patrons access to this vast store of information.[5] Critics quickly objected to publicly funded libraries

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1. ED KROL, THE WHOLE INTERNET USER'S GUIDE & CATALOG 13 (2d ed. 1994).
2. *See id.* at 1.
3. Children's Internet Protection Act, S. REP. NO. 106-141, at 2 (1999) [hereinafter CIPA Senate Report] (reporting a "more than 13-fold increase in the Internet host computer count between 1994 and 1998," with "more than 29 million host computers," and a growth rate of "approximately 40 percent to 50 percent annually," with Internet traffic "doubling every four days"); Complaint for Declaratory and Injunctive Relief at 13, Am. Library Ass'n v. United States, 201 F. Supp. 2d 401 (E.D. Pa. 2002) (No. 01-1303) [hereinafter ALA Complaint] (alleging an estimated 400 million people were Internet users at the time of the filing of the complaint in April 2001); KROL, *supra* note 1, at 1 (stating that in the late 1980s the Internet had only a few thousand users, but by the time of publication the number of Internet users had increased a thousand fold).
4. Reno v. ACLU, 521 U.S. 844, 853, 870 (1997) (comparing the Web to "a vast library including millions of readily available and indexed publications" containing expression "'as diverse as human thought'") (quoting ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996)); *see also* ALA Compliant, *supra* note 3, at 13 (alleging that at the time of the complaint there were "well over one billion Web 'pages' or web sites, with several million new web sites created each day").
5. *See* JOHN CARLO BERTOT & CHARLES R. MCCLURE, PUBLIC LIBRARIES AND THE INTERNET 2000: SUMMARY FINDINGS AND DATA TABLES, REPORT TO THE NATIONAL COMMISSION ON LIBRARIES AND INFORMATION SCIENCE 3 (Sept. 7, 2000) (reporting that nearly ninety-five percent of all public libraries provide public Internet access); *see also* Complaint for Declaratory

providing unrestricted access to all that was available on the Internet. Specifically, these critics objected that providing unfiltered Internet services in libraries would permit access to child pornography[6] and obscenity,[7] risk exposing children to material harmful to minors,[8] and create sexually hostile environments for librarians.[9] Local library boards acted to require that their libraries restrict

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and Injunctive Relief at 18, Multnomah County Pub. Library v. United States, 201 F. Supp. 2d 401 (E.D. Pa. 2002) (No. 01-1322) [hereinafter Multnomah Complaint] ("[L]ibraries have been at the forefront of the digital revolution" and "among the first to . . . offer free public access to the Internet. . . . The Internet has provided unprecedented opportunities to expand the scope of information . . . available to users in public libraries."); CIPA Senate Report, at 2 ("At the conclusion of the first program year of the E-rate, the Schools and Libraries Corporation (SLC) . . . had processed 30,120 applications and funded 25,785.").

6. 18 U.S.C. § 2256 (2000), in which "child pornography" is defined as follows:

> [A]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where–
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is . . . of a minor engaging in sexually explicit conduct. . . .

Portions of the definition as it appears in the current code were excised in light of the opinion in *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002). The language remaining provides a workable definition of child pornography for purposes of this Article.

7. *See infra* text accompanying notes 187-88, for the current test of "obscenity" as set forth in *Miller v. California*, 413 U.S. 15, 24 (1973).

8. See 20 U.S.C. § 9134(f)(7)(B), in which "harmful to minors" is defined as follows:

> [A]ny picture, image, graphic image file, or other visual depiction that–
>
> (i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
>
> (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and
>
> (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

"Minor" is defined in 20 U.S.C § 9134(f)(7)(C) as "an individual who has not attained the age of 17."

9. *See, e.g.*, Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library, 24 F. Supp. 2d 552, 564 (E.D. Va. 1998) (where the library argued that "avoidance of creation of sexually hostile environment" was a compelling government interest). In May 2001, the Equal Employment Opportunity Commission (EEOC) ruled in favor of several Minnesota librarians who filed a complaint that their place of work, a public library, was a hostile work environment because of repeated displays of pornography. *See Chicago Public Library Staffer Files Discrimination Charges Over Cybersmut*, AM. LIBRARIES ONLINE (2000), *at* http://www.ala.org/alonline/news/2000/001218.html (reporting on a complaint filed by a Chicago librarian that "ongoing exposure to Internet pornography viewed on computers by patrons ha[d] subjected her to 'a sexually offensive/hostile work environment,' and that her repeated complaints to the library administration have gone unheeded"); *EEOC Rules in Minneapolis PL Complaint*, AM. LIBRARIES ONLINE (2001), *at* http://www.ala.org/alonline/news/2001/010528.html#eeocmpls (reporting EEOC

Internet access.[10] Decision makers at all levels of government have mandated filtering of Internet access in libraries or to tie funding to such filtering.[11] These actions have met with howls of protest from many librarians,[12] and ultimately led to litigation as to the legality of such measures.[13]

In 1998, in *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*,[14] a federal district court struck down one local library board's effort to restrict access through filtering.[15] In May 2002, in *American Library Association v. United States*,[16] another federal district court stuck down the Children's Internet Protection Act (CIPA).[17] CIPA was Congress's first attempt to restrict Internet access in public libraries as a means of controlling the availability of obscenity, child pornography, and material harmful to minors.[18]

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finding "that a sexually hostile work environment existed at the Minneapolis Public Library"); *Minneapolis Library Workers Go Public with Cybersmut Complaint*, AM. LIBRARIES ONLINE (2000), *at* http://www.ala.org/alonline/news/2000/000221.html (quoting from a February 12, 2000, *Minneapolis Star Tribune* letter to the editor signed by forty-nine employees of the city's Central Library, which read, in part, "We feel harassed and intimidated by having to work in a public environment where we might, at any moment, be exposed to degrading or pornographic pictures . . . .").

10. *See, e.g.*, Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library, 24 F. Supp. 2d at 552 (ruling on a First Amendment challenge to the Loudoun County Library's Internet policy).

11. *See, e.g.*, ARIZ. REV. STAT. § 34-502 (2000); COLO. REV. STAT. § 24-90-404 (2001); MINN. STAT. § 125B.15 (Supp. 2002); S.C. CODE ANN. § 10-1-206 (Law. Co-op. Supp. 2001); *see also infra* notes 13-18 and accompanying text.

12. *See, e.g.*, AM. LIBRARY ASS'N, AM. LIBRARY ASS'N RESOLUTION ON THE USE OF FILTERING SOFTWARE IN LIBRARIES, *available at* http://www.ala.org/alaorg/oif/filt_res.html (July 2, 1997) (asserting that "the use of filtering software by libraries to block access to constitutionally protected speech" is unconstitutional).

13. *See infra* notes 217-92 and accompanying text.

14. Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library, 2 F. Supp. 2d 783 (E.D. Va. 1998) [hereinafter Mainstream Loudoun I]; Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library, 24 F. Supp. 2d 552 (E.D. Va. 1998) [hereinafter Mainstream Loudoun II]. Reference to the case in general will be to *Mainstream Loudoun*. *Mainstream Loudoun I* addressed issues raised by pretrial motions to dismiss and for summary judgment. *Mainstream Loudoun II* records the court's opinion after a trial on the merits. Both opinions addressed First Amendment issues arising out the use of filters in a public library.

15. Mainstream Loudoun II, 24 F. Supp. 2d at 570.

16. *See* Am. Library Ass'n v. United States, 201 F. Supp. 2d 401 (E.D. Pa. 2002) (holding that the federal statute made it impossible for public librarians "to comply without overlooking substantial amounts" of protected speech).

17. *Id.* at 479; *see also* Children's Internet Protection Act, Pub. L. No. 106-554 [hereinafter CIPA], 114 Stat. 2763 (2000) (codified at 20 U.S.C. § 9134(f) (2000) and 47 U.S.C. § 254(h)(6) (2000)).

18. For convenience and brevity, these three categories of speech will sometimes be referred to collectively as "unprotected speech."

CIPA tied federal support to the mandatory use of filters.[19] Pursuant to the terms of CIPA, that case was appealable directly to the United States Supreme Court,[20] where the matter is currently pending.[21]

This Article explores the history of censorship and intellectual freedom in public libraries in the United States, the application of the First Amendment to public libraries, and the nature and scope of the problem that proponents of

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19. See Library Services and Technology Act, 20 U.S.C. § 9134(f)(1) (2000) [hereinafter LSTA], in which CIPA added, in part, the following language to the LSTA program:

> (1) In general
> No funds made available under this chapter for a library described in section 9122(2)(A) or (B) of this title that does not receive services at discount rates under section 254(h)(6) of Title 47, may be used to purchase computers used to access the Internet, or to pay for direct costs associated with accessing the Internet, for such library unless–
>
> (A) such library–
>
> (i) has in place a policy of Internet safety for minors that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are–
>
> (I) obscene;
>
> (II) child pornography; or
>
> (III) harmful to minors; and
>
> (ii) is enforcing the operation of such technology protection measure during any use of such computers by minors; and
>
> (B) such library–
>
> (i) has in place a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are–
>
> (I) obscene; or
>
> (II) child pornography; and
>
> (ii) is enforcing the operation of such technology protection measure during any use of such computers.
>
> (2) Access to other materials
> Nothing in this subsection shall be construed to prohibit a library from limiting Internet access to or otherwise protecting against materials other than those referred to in subclauses (I), (II), and (III) of paragraph (1)(A)(i).
>
> (3) Disabling during certain use
> An administrator, supervisor, or other authority may disable a technology protection measure under paragraph (1) to enable access for bona fide research or other lawful purposes.

For the provisions added to the E-rate discount program, see 47 U.S.C. § 254(h) (2000).

20. *See* CIPA, 20 U.S.C. § 9134(f)(4).

21. Am. Library Ass'n v. United States, 201 F. Supp. 401 (E.D. Pa. 2002), *petition for cert. filed*, 60 U.S.L.W. 3422 (U.S. Sept. 6, 2002) (No. 02-361).

restricted Internet access are attempting to regulate.[22] Proponents of filtering raise three concerns: (1) access to speech that is illegal for anyone to receive (e.g., child pornography); (2) access by minors to speech that is illegal to provide to them (e.g., material harmful to minors); and (3) use of speech to create a hostile environment.[23] Throughout, readers must recognize that any mandate that public libraries use filters has the effect of denying patrons access to constitutionally protected speech as a means of restricting access to unprotected speech.[24] This presents two fundamental issues: does the First Amendment proscribe such an approach, and, even if it does not, is it sound public policy to restrict everyone's access to constitutionally protected speech as a means of preventing some individuals from committing criminal, tortious, or otherwise disruptive acts?

I argue that individual responsibility and accountability are the most effective and proper means of dealing with the legitimate concerns created by Internet access in public libraries.[25] Filtering, when properly implemented, may serve as one tool to manage access under limited and appropriate circumstances. Libraries using filters, however, must implement safeguards designed to protect the First Amendment rights of their patrons.[26] In any event, libraries should have flexibility to implement a collection of measures to address the concerns raised in this Article. Librarians are in the best position to assess the degree to which unprotected speech is being accessed in their individual libraries and the extent to which this disrupts the use of their libraries and otherwise causes harm. This flexibility carries with it an obligation that librarians make reasonable efforts to address concerns raised from patrons' accessing and exposing minors and unwilling adults to unprotected speech and to mitigate against any harm that may occur when such efforts fail.[27]

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22. While portions of CIPA apply to school libraries as well, this Article will restrict its analysis to public libraries.

23. *See* discussion *infra* Part III.

24. *See infra* notes 276-82.

25. *See* discussion *infra* Part VI.B.

26. *See* discussion *infra* Part VI.C-D.

27. This obligation is not necessarily a legal duty. Indeed, in the only reported case that addresses the legal duties of a library to restrict the access of minors to obscenity on the Internet, the court held that libraries had no such duty and, even if they did, that librarians were immune from tort liability for failure to perform that duty. Kathleen R. v. City of Livermore, 104 Cal. Rptr. 2d 772, 783-84 (Cal. Ct. App. 2001). Rather, the argument here is that libraries that choose to provide Internet access have a moral or ethical obligation to take reasonable steps to prevent harm caused by others who use Internet access in libraries illegally or inappropriately, and to mitigate such harm when reasonable efforts to prevent it fail.

In *Kathleen R. v. City of Livermore*, the court cited as analogous *Carlton v. Cleburne County*, in which a court rejected plaintiffs' substantive due process claim against a county for failure to maintain a bridge that collapsed, reasoning that the county neither caused those injured to

II. HISTORY OF CENSORSHIP IN PUBLIC LIBRARIES IN THE UNITED STATES

A. *Origins*

Issues of what libraries should collect and to whom it should make certain materials available has a long history. An understanding of this history is crucial to understanding the positions adopted by various groups on the issues discussed in this Article. Some commentators have condemned the position taken by the American Library Association (ALA),[28] which opposes the use of filters as a solution to the problems discussed in this Article.[29] While some criticism of the ALA's positions is warranted, much of the criticism fails to recognize, or is indifferent to, both the degree of harm caused by the use of filters and the historical context in which the ALA's position has evolved.

Libraries in the United States are nearly as old as the colonization of North America.[30] The earliest collections were primarily developed to serve the religious needs of the early colonists.[31] For example, the Massachusetts Bay Company settlers in Salem had a small collection in 1629 which was meant to

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be on the bridge, nor "'create[d] the danger'" from which the plaintiffs were injured. Kathleen R. v. City of Livermore, 104 Cal. Rptr. 2d at 782-83 (quoting Carlton v. Cleburne County, 93 F.3d 505, 509 (8th Cir. 1996)). While the county in *Carlton* might have had no legal duty to maintain the bridge, it still had a moral or ethical obligation to do so. That is to say, while the county might not be liable for damages caused from its failure to maintain the bridge, it still should have done so to prevent loss of life and serious injuries. Libraries providing Internet access have a similar obligation. Saying that libraries have such an obligation in no way requires, however, the mandatory use of filters by all patrons.

For more complete analyses of potential civil and criminal liability for libraries related to patron and employee Internet use, see Memorandum from Jenner & Block, to the American Library Association, Civil Liability for an Alleged Hostile Work Environment Related to Patron or Employee Internet Use, *at* http://www.ftrf.org/work_jb.html (Aug. 1998), and Memorandum from Jenner & Block, to the American Library Association, Civil and Criminal Liabilities for Libraries Related to Using or Failing to Use Internet Filtering Software or Other Content Screening Mechanisms, *at* http://www.ala.org/alaorg/oif/civil_jb.html (Aug. 1998). For a general discussion of the danger to First Amendment values from the application of hostile workplace liability to cyberspace, including libraries, see Eugene Volokh, *Freedom of Speech, Cyberspace, and Harrassment Law*, 2001 STAN. TECH. L. REV. 3.

28. *See, e.g.*, DAVID BURT, DANGEROUS ACCESS, 2000 EDITION: UNCOVERING INTERNET PORNOGRAPHY IN AMERICA'S LIBRARIES 5, *available at* http://www.frc.org/get/61063.cfm (2000).

29. *See* AM. LIBRARY ASS'N, FILTERS AND FILTERING, *at* http://www.ala.org/alaorg/oif/filtersandfiltering.html (last visited Nov. 2, 2002).

30. For a detailed history of early libraries in the American colonies and the United States, see BUREAU OF EDUC., U.S. DEP'T OF THE INTERIOR, PUBLIC LIBRARIES IN THE UNITED STATES OF AMERICA: THEIR HISTORY, CONDITION, AND MANAGEMENT, SPECIAL REPORT 1-37 (1876) [hereinafter SPECIAL REPORT].

31. EVELYN GELLER, FORBIDDEN BOOKS IN AMERICAN PUBLIC LIBRARIES, 1876-1939: A STUDY IN CULTURAL CHANGE 3 (1984).

serve the goal of converting the natives to Christianity.[32] In 1653, Robert Keayne of Boston drafted his last will and testament.[33] By this will and upon his passing in 1656, the first "public" library in Boston was established.[34] From extant records, it appears that this library was supported by gifts and bequests, as there is no record of any town revenue being allocated for it.[35] The earliest record of public funds being used to benefit a library can be found in Dorchester in 1665.[36]

In 1731, Benjamin Franklin led the formation of a Library Company in Philadelphia.[37] This was the first of the social or subscription libraries.[38] In the mid-eighteenth century, the circulating or rental library became popular.[39] Later came the mercantile libraries, organized by clerks for their own use, and mechanic's libraries, organized by trade unions and factory owners, for the use of workers.[40] With the introduction of public schools, community libraries intended for adults were introduced and housed in the schools. These libraries were tax-supported and administered by school districts.[41] Beginning in 1839, a movement grew to establish a public library in Boston that would be funded by taxpayers and freely available for the use of all citizens.[42] In 1852, the City of Boston adopted an ordinance creating the Boston Public Library, which opened its doors to the public in the spring of 1854.[43] During this same period, public

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32. *Id.*

33. C. SEYMOUR THOMPSON, EVOLUTION OF THE AMERICAN PUBLIC LIBRARY 1653-1876, at 4 (1952). In that document, Keayne made bequests for a number of charitable purposes, among them being a town house. *Id.* at 6. His will noted that "in the same building [i.e., the town house] or the like, there may be a convenient roome for a Library & a gallery." *Id.* To establish this library, Keayne also bequeathed his books and "writings." *Id.* at 7. He hoped that his contribution would grow, noting: "'And though my bookes be not many, nor very fitt for such a worke being English & smale bookes, yet after this beginning the Lord may stirr up some others that will add more to them & helpe to carry the worke on by bookes of more valew, antiquity use and esteeme.'" *Id.* at 4.

34. *Id.* at 6. This is not the direct ancestor of the present Boston Public Library, which was founded in the mid-nineteenth century. *See* Boston Public Library Home Page, http://www.bpl.org (last visited Nov. 2, 2002).

35. *See id.* at 9-14 (describing the gifts and bequests made to the library from the time of its founding until a fire in 1747, which destroyed it).

36. THOMPSON, *supra* note 33, at 17-18. "[I]t was proposed, and put to a vote . . . whether the new impression of Mr. Mathers Catechismes should be payd for, out of a Towne Rate, and so the books to become the Towns." *Id.* As the proposition passed, one can assume that locally raised revenue was used to buy the work in question.

37. GELLER, *supra* note 31, at 4.

38. *Id.*

39. *Id.*

40. *Id.* at 6.

41. *Id.* at 8.

42. THOMPSON, *supra* note 33, at 158-86.

43. *Id.* at 186. The Boston Public Library dates its establishment as 1848. Boston Public Library Home Page, *supra* note 34.

libraries were established in Exeter, New Hampshire, and in Wayland and New Bedford, Massachusetts.[44] Thus were born the immediate ancestors of public libraries in the United States.

B. *Early History of Censorship and Intellectual Freedom in Libraries*

Censorship, as such, was not a problem with the earliest libraries in America. By their nature and mission, however, the earliest libraries had a very narrow scope of collection, one designed to assist in the salvation of non-believers and the edification of those who were already Christians.[45] While the subscription or social libraries had a different mission, their collections were narrow in scope as well, concentrating on secular and scientific interests.[46] Few, if any, women were permitted membership in subscription libraries.[47] These libraries seldom collected novels, which came into vogue during the eighteenth century.[48] Instead, circulating (also known as rental) libraries catered to the public's appetite for novels,[49] which were then considered by some to be poisonous to the mind, and even diabolical.[50] County and state school superintendents restricted the material that school-based community libraries could collect by discouraging novels and forbidding any works deemed inappropriate for children.[51] Likewise, "'all sectarian and controversial subjects'" were banned.[52] Failure to observe these restrictions could cost a library public funding.[53]

With the advent of the modern public library, disputes as to what should be collected soon arose between the trustees who oversaw the libraries and the professional librarians who managed them. Freedom to read, as it is now understood, however, was not the primary motivation of the founders of

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44. THOMPSON, *supra* note 33, at 186-87.

45. GELLER, *supra* note 31, at 3-4. For a history of censorship throughout history, see Christopher D. Hunter, Filtering the Future?: Software Filters, Porn, PICS, and the Internet Content Conundrum (1999) (unpublished M.A. thesis, The Annenberg School for Communication, University of Pennsylvania), *at* http://www.ala.org/alaorg/oif/hunterthesis.pdf.

46. GELLER, *supra* note 31, at 4.

47. *Id.* at 5.

48. *Id.* at 4-5.

49. *Id.* at 4.

50. *Id.*

51. *Id.* at 8-9.

52. *Id.* at 8 (citations omitted in the original).

53. *Id.* The justification for the latter restriction might strike many as ironic today: restrictions were imposed to preserve the library as a "'neutral ground, on which those professing different, and antagonistic creeds, can meet together in peace . . . .'" *Id.* at 8-9 (citations omitted in the original).

American public libraries.[54] Indeed, trustees, and even many librarians, supported libraries whose collections were primarily, if not exclusively, devoted to materials that would elevate the tastes of the "uncultivated" masses.[55] Other librarians argued that the collections must cater to the "'real wants of all classes,'" noting that "[i]t was 'vain' to buy books that people ought to read then 'coax them to read them.'"[56] While library trustees and professional librarians might disagree as to where to draw the line, there was general agreement that there was a "'line of exclusion . . . beyond which readers must not indulge.'"[57] In addition to restrictions on materials collected, libraries also limited access to portions of the collection based on user characteristics, such as age and education.[58]

It is perhaps fitting that the Boston Public Library, the first true public library in a major city, was also the locus of the first major library censorship

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54. *Id.* at 11.

55. *Id.* at 18.

> There is a vast range of ephemeral literature, exciting and fascinating, apologetic of vice, confusing distinctions between plain right and wrong; fostering discontent with the peaceful, homely duties which constitute a large portion of average men's and women's lives; responsible for an immense amount of mental disease and moral irregularities which are so troublesome an element in modern society—and this is the kind of reading to which multitudes naturally take, which it is not the business of a town library to supply, although for a time it may be expedient to yield to its claims while awaiting the development of a more elevated taste.

Id. at 20 (quoting BOSTON PUB. LIBRARY, 1875 BD. OF EXAMINERS REPORT).

56. *Id.* at 19. Kate Gannett Wells, the first female member of the Boston Public Library's examining committee, argued in 1879 that "the librarian was a 'steward,' not an official compelling 'proper nutriment.' The latter notion was 'paternalistic' and 'socialistic.'" The public, she argued, should have the option "'to select the good or indifferent,'" and the librarian should only exclude the "'wholly bad.'" *Id.* at 20 (quoting Kate Gannett Wells, *Responsibility of Parents in Selection of Reading for the Young*, LIBR. J. 326 (Sept.-Oct. 1879)).

57. *Id.* at 21. William Frederick Poole, one of the founders of modern librarianship, declared, "'[T]he librarian who should allow an immoral novel in his library for circulation would be as culpable as the manager of a picture gallery who should hang an indecent picture on his walls.'" *Id.* at 21. America was at this time in the midst of seismic economic, social, and technological change. During this period, Congress enacted the "Comstock Law," Act of Mar. 3, 1873, ch. 258, § 2, 17 Stat. 598, 599 (codified as amended at 18 U.S.C. § 1461 (2000)), named for Anthony Comstock, the leader of the Society for the Suppression of Vice. *See* Christopher P. Keleher, *Double Standards: The Suppression of Abortion Protestors' Free Speech Rights*, 51 DEPAUL L. REV. 825, 835 n.97 (2002) (citing CATHERINE WHITNEY, WHOSE LIFE?: A BALANCED, COMPREHENSIVE VIEW OF ABORTION FROM ITS HISTORICAL CONTENT TO THE CURRENT DEBATE 44 (1991)). Enacted in 1873, the Comstock Law forbade the mailing of "every obscene, lewd, lascivious, or filthy book" as well as any material pertaining to abortion or birth control and "tending to incite arson, murder, or assassination." GELLER, *supra* note 31, at 21-22.

58. GELLER, *supra* note 31, at 27. Such restrictions were easily enforced, as books were not made available in open stacks, but instead were delivered by an attendant. *Id.*

controversy.[59] The controversy bears a striking resemblance to the debate that is the subject of this Article. In 1881, James M. Hubbard, a former minister and cataloger, accused the library of collecting "many directly immoral books," which were made available to children.[60] Hubbard proposed four steps designed to protect the youth: a board of censors to screen material;[61] labeling of books deemed harmless;[62] a special card that limited children to "harmless" books;[63] and a separate children's catalog that cataloged only "harmless" material.[64] Acting on Hubbard's accusations, the school superintendent proposed a more drastic solution: "purg[ing] the library at once of all objectionable matter."[65] Two Boston newspapers, the *Boston Advertiser* and the *Sunday Herald*, came to the defense of the library.[66] The *Advertiser* opposed censorship because any given book would affect different readers differently.[67] The *Sunday Herald* argued that the library was for the benefit of all citizens, not just for "the benefit of the Puritan New Englander" and noted, "nobody is forced to read what he does not wish to read."[68] As the battle raged, the trustees sought to support the reader's freedom, denying that they were "parents, or guardians,"[69] and noting

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59. *Id.* at 32.

60. *Id.* at 33. However, only those fourteen years old and older had any library access, so those that Hubbard called children, we would call teenagers. *Id.* The Boston Public Library still finds itself addressing the appropriate level of access for minors 120 years later. It is interesting to note that the library uses filters for Internet enabled computers available to children and young adults (thirteen to eighteen years old), but does not filter the Internet access of adults. BOSTON PUBLIC LIBRARY: INTERNET POLICY AND GUIDELINES, *available at* http://www.bpl.org/general/policies/internet_pol.htm (last visited Nov. 2, 2002).

61. This board of censors can be seen as the nineteenth century equivalent of today's filters. The analogy is not perfect, however, as the board of censors presumably actually reviewed the controverted works. In this respect, the board is more closely analogous to white-list filtering than it is to text-based filtering. *See* COMM'N ON CHILD ONLINE PROTECTION, REPORT TO CONGRESS [hereinafter COPA REPORT], 19-23, *available at* http://www.copacommission.org/report/COPAreport.pdf (Oct. 20, 2000).

62. GELLER, *supra* note 31, at 33. This labeling can be seen as analogous to rating systems used to facilitate Internet filtering. *See* COPA REPORT, *supra* note 61, at 24 (advising that third-party labeling may be an effective measure to protect children).

63. GELLER, *supra* note 31, at 33. This special card system can be compared to the current proposal to create a ".kid" or "green zone" domain that contains only material deemed appropriate for children. *See* COPA REPORT, *supra* note 61, at 31 (suggesting establishment of a "green zone" or "red light zone" by means of allocation of a new set of IP numbers).

64. GELLER, *supra* note 31, at 33.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* Compare this to the ALA's position that librarians should not act *in loco parentis*. *See infra* note 126 and accompanying text. The arguments have changed very little from the nineteenth century.

that "humanity was not placed in a world devoid of temptation."[70] Nonetheless, an examining committee was formed.[71] This committee alone could order foreign fiction, and domestic fiction was to be received on examination only.[72] Among the works expurgated were the Old Testament and Shakespeare.[73] Unsatisfied, Hubbard pushed for removal of objectionable material.[74] Bowing to pressure, the library at last removed the offending books from its shelves, created separate cards for younger users (along with separate fiction and juvenile collections), and provided the librarian and his staff more power to "'suppress[] all works discovered to be vicious.'"[75]

By the 1890s, libraries had relaxed many restrictions that had applied earlier in the nineteenth century.[76] For example, in that decade libraries instituted open library shelves where patrons could browse the collection, although restricted material was still relegated to closed stacks.[77] Nonetheless, the decade still witnessed its share of censorship.[78] Oscar Wilde, in his preface to *The Picture of Dorian Gray*, declared, "'There is no such thing as a moral or an immoral book. Books are well written or badly written. That is all.'"[79] Perhaps so, but Wilde's works were excluded from the ALA's first book guide for small popular libraries and branches, which contained five thousand titles that a librarian could "recommend to any trustees."[80] This exclusion occurred even before his arrest for homosexuality.[81] That incident led to the removal of Wilde's works by the librarians in St. Louis and Newark.[82] This in turn provoked the *Library Journal* to opine that works that were not themselves immoral should not be banned because of their author's reputation.[83] Following this editorial, the librarian in St. Louis, conceding the point, quietly returned Wilde's works to the library's shelves.[84] Still, progress was made in the battle against censorship. In

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70. GELLER, *supra* note 31, at 33.
71. *See id.* at 34 (noting that the "examining committee endorsed the trustees' policies").
72. *Id.*
73. *Id.*
74. *See id.* (describing how Hubbard published a pamphlet "appealing to the parents, clergymen, and teachers of Boston").
75. *Id.* at 34.
76. *Id.* at 51.
77. *Id.*
78. *See id.* (listing books that were restricted to closed shelves because of their content).
79. *Id.* (citation omitted in original).
80. *Id.* at 54-55.
81. *Id.*
82. *Id.* at 52.
83. *Id.* (citation omitted).
84. *Id.*

In re Worthington Co.,[85] the court applied the whole-book test to determine whether a work was obscene, noting that if a work was condemned "'because of a few episodes,'" most English-language authors would be banned.[86]

The early twentieth century ushered in a golden age for public libraries, as Andrew Carnegie's gifts encouraged the spread of libraries across the country.[87] With the increase in the number and collection sizes of libraries, issues of censorship naturally followed. When questioned by a reporter on his views of the policy of larger libraries not to exclude books as immoral, Carnegie answered "'I hesitate to differ with my good friends, the librarians . . . but I would err on the safe side. Certain books I would consign to the flames and think I was doing God's service thereby, books in the category of pornography.'"[88]

As with the debate raging today, advocates of censorship one hundred years ago rested their claims on the need to protect children. Among the works widely excluded from children's rooms was *The Adventures of Huckleberry Finn*.[89] When one librarian appealed to Mark Twain to aid his efforts to lift the ban, Twain replied, in his typical satirical style:

> It always distresses me when I find that boys and girls have been allowed access to . . . [*Tom Sawyer* and *Huckleberry Finn*]. The mind that became soiled in youth can never be washed clean. . . . To this day I cherish an unappeasable bitterness against the unfaithful guardians of my young life, who not only permitted but compelled me to read an unexpurgated Bible through before I was 15.[90]

Nonetheless, during this period, a growing number of voices could be heard criticizing library censorship. These critics, however, questioned the selection of works chosen for censoring, rather than censorship itself.[91] In reply to critics of library censorship, Henry Putnam, Librarian of Congress, stated, "The library is no censor. It does not dictate to the individual, he is still free to read what he fancies—at his own expense. Its responsibility is merely to see to the right expenditure of public funds."[92] This, undoubtedly, anticipates the views of many of today's filtering proponents.

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85. *In re* Worthington Co., 30 N.Y.S. 361 (N.Y. Special Term 1894).
86. GELLER, *supra* note 31, at 53 (quoting *In re* Worthington Co., 30 N.Y.S. at 362).
87. *Id.* at 80-81.
88. *Id.* at 86 (citation omitted).
89. *Id.*
90. *Id.* at 87 (citation omitted).
91. *See id.* at 87-101 (discussing critics of censorship such as Robert Herrick, who focused on the books being censored, rather than censorship itself).
92. *Id.* at 101 (citation omitted).

World War I brought about a new era of heightened censorship.[93] In response, librarians for the first time began to rely on First Amendment principles in seeking to protect their collections.[94] The librarian at Princeton University argued:

> The fundamental right and absolute need of democracy is the right to know all that can be said for or against any question. There is no right, and rightly no right, of which we are so sensitive as this right of knowing both sides and of the right to know the truth. . . . This was no matter of theory with the founders of America or the framers of the constitution. In America the people are sovereign. They have a right to know, and information cannot be withheld from them which would be kept of subjects [under a monarchy].[95]

By the 1920s, a broader-based shift in librarians' attitudes toward censorship became apparent.[96] In the intra-professional debate among librarians, those opposing censorship were in the ascendancy.[97] Representatives of the ALA testified against a bill under consideration in New York, which would have permitted a finding that a book was obscene based on a single passage.[98] The Massachusetts Literary Club worked to liberalize that state's censorship law.[99] A library trustee, criticizing another library for banning Upton Sinclair's work, remarked, "A sinister spirit of intolerance is stalking through our land. Various kinds of idiots are attempting to fashion all men and women after one pattern, pure and immaculate as the newborn babe. Prohibition, Blue Laws, antievolution, library censorship—for goodness sake what's coming next!"[100]

As state laws were enacted to suppress works on evolution and other subjects, the editor of the *Library Journal* argued, "Libraries should be 'free in a double sense. . . . And in this sense free libraries like a free press are essential to our continuing progress as a free people.'"[101] Even so, there was still a general

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93. *Id.* at 109.
94. *Id.*
95. *Id.* at 113-14.
96. *Id.* at 127.
97. *Id.* at 128-29.
98. *Id.* at 129-30.
99. *Id.* at 137. In defending such a stance, Hiller Wellman stated, "Organizations are sometimes criticized for interfering in legislative affairs with which, as a group, they have no immediate concern. But censorship directly affects librarians, and it appeared evident that their personal knowledge of the situation and their freedom from any selfish interest carried weight with the legislators." *Id.* (quoting Hiller C. Wellman, *Editorial*, LIBR. J. No. 54, at 219 (Mar. 1, 1929)).
100. GELLER, *supra* note 31, at 131 (citing J.J. Gummerscheimer, *Trustees and Library Extension*, ILL. LIBR., July 1926, at 63-64; IRVING HOWE & LEWIS COSER, THE AMERICAN COMMUNIST PARTY: A CRITICAL HISTORY, 1919-1957, at 2 (1957)).
101. *Id.* at 132 (quoting *Editorial*, LIBR. J. No. 52, at 200 (Feb. 15, 1927)).

understanding that in selecting materials, a librarian was to exercise "expertise in judging books and in assessing local community standards."[102] While celebrating a finding by a New York court that *The Well of Loneliness* was not obscene, the *Library Journal* noted that "'in this matter of censorship, such questions may fairly be left in most cases to the good senses of librarians.'"[103] This growing opposition to censorship did not necessarily reflect an agreement with the mores reflected in the literature of the time, but rather a belief that the state should not be the agent of control.[104]

C. Library Bill of Rights

In 1939, the ALA adopted *The Library's Bill of Rights* (later renamed and referred to hereafter as the *Library Bill of Rights*), reflecting a victory for those favoring unfettered access to information in public libraries.[105] The *Library Bill of Rights* set forth "basic policies" that "should guide services of free public libraries."[106] Among the events that led to the adoption of these principles was the banning of John Steinbeck's *The Grapes of Wrath* from libraries across the country.[107] This initial version of the *Library Bill of Rights* decried the "growing intolerance, suppression of free speech, and censorship affecting the right of minorities and individuals."[108] While motivated by specific instances of censorship, in reality, the *Library Bill of Rights* can be seen in historic context as reflecting a growing tolerance of divergent views, including those that would have in previous decades been deemed immoral.[109] This initial version was modest in the principles it espoused when compared to later revisions.[110]

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102. *Id.* at 136.
103. *Id.* at 137 (citations omitted).
104. *Id.* at 145-46.
105. LOUISE S. ROBBINS, CENSORSHIP AND THE AMERICAN LIBRARY, THE AMERICAN LIBRARY ASSOCIATION'S RESPONSE TO THREATS TO INTELLECTUAL FREEDOM, 1939-1969, at 11-14 (1996).
106. *Id.* at 13.
107. *Id.* at 12-13.
108. *Id.* at 13.
109. *See supra* notes 44-103 and accompanying text.
110. ROBBINS, *supra* note 105, at 13-14. This original *Library's Bill of Rights* provided as follows:

> Today indications in many parts of the world point to growing intolerance, suppression of free speech, and censorship affecting the rights of minorities and individuals. Mindful of this, the Council of the American Library Association publicly affirms its belief in the following basic policies which should govern services of free pubic libraries:
>
> 1. Books and other reading matter selected for purchase from the public funds should be chosen because of value and interest to people of the community, and in

The first major revision occurred in 1948.[111] This version declared it "a responsibility of library service" to select material "for values of interest, information, and enlightenment to all the people of the community."[112] It further admonished librarians to "challenge[]" censorship efforts by "volunteer arbiters of morals or political opinion or by organizations that would establish a coercive concept of Americanism."[113] Shortly following its adoption, the ALA cited its newly revised *Library Bill of Rights* at a hearing in which it protested the banning of *The Nation* from New York City schools.[114] This represented the first time that the organization had spoken against censorship in a public hearing.[115]

In 1967, the ALA added a provision to the *Library Bill of Rights* designed to defend the rights of youth: "The rights of an individual to use of a library should not be denied or abridged because of his *age*, race, religion, national origins or social or political views."[116] The revisions of the 1960s met with mixed reviews. The dean of the School of Library Science at Case Western Reserve University, Jesse Shera, pointed out a basic inconsistency with the promoters of intellectual freedom. Namely, he noted that if, as some librarians argued, reading "good" books promoted "good" behavior, then how could one logically assert that reading "bad" books did no harm.[117] Elaborating on this point, he concluded:

> [W]hen a librarian really believes that a book is harmful, that its content is contrary to the welfare of the community, or that it is destructive of good taste, even if those are his opinions only, he has not only the right, but the

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> no case should the selection be influenced by the race or nationality or the political or religious views of the writers.
>
> 2. As far as available material permits, all sides of questions on which differences of opinions exist should be represented fairly and adequately in the books and other reading matter purchased for public use.
>
> 3. The library as an institution to educate for democratic living should especially welcome the use of its meeting rooms for socially useful and cultural activities and the discussion of current public questions. Library meeting rooms should be available on equal terms to all groups in the community regardless of their beliefs or affiliations.

Id.; *cf. infra* note 121 (setting forth the current version of the *Library Bill of Rights*).

111. ROBBINS, *supra* note 105, at 35.

112. *Id.*

113. *Id.*

114. *Id.* at 38.

115. *Id.*

116. *Id.* at 137 (emphasis added).

117. *Id.* at 138. The ALA now addresses this charge by countering that the antidote for bad ideas is good ideas, not censorship. AM. LIBRARY ASS'N, THE FREEDOM TO READ, *available at* http://www.ala.org/alaorg/oif/freeread.html (last visited Nov. 2, 2002).

> obligation to do what he properly can to keep the book out of the hands of those whom he thinks might be injured by it.[118]

It appears that Shera and those who agreed with him were primarily concerned about librarians losing their autonomy to make professional judgments on what was and was not appropriate for the libraries that they managed.[119] Thus, critics saw the revised *Library Bill of Rights* as the other side of the coin of outside control. On one side, these librarians identified outside forces who sought to censor what they collected; on the other, they perceived other outside forces, namely, the ALA, seeking to subsume their professional autonomy. This concern over professional autonomy is still evident in the current debate on Internet access within libraries.[120]

The ALA adopted its last major revision of the *Library Bill of Rights* in 1980.[121] This revision added the following provision: "Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas."[122] The ALA Council reaffirmed the

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118. ROBBINS, *supra* note 105, at 138.

119. *Id.* at 137-40.

120. *See* NAT'L COALITION FOR THE PROTECTION OF CHILDREN AND FAMILIES, THE END OF LIBRARIANSHIP, A DISCUSSION PAPER (unpublished manuscript on file with author) (arguing that filtering is a type of selection policy and if librarians can no longer exercise judgment in selecting what is available the profession is obsolete); *cf.* Mark S. Nadel, *The First Amendment's Limitations on the Use of Internet Filtering in Public and School Libraries: What Content Can Librarians Exclude?*, 78 TEX. L. REV. 1117, 1119 (2000) (arguing that the use of filters is a constitutionally permissible tool for management of a scarce resource—time on Internet-accessible computers—and for performing the traditional librarian role of collection development).

121. AM. LIBRARY ASS'N, LIBRARY BILL OF RIGHTS, *available at* http://www.ala.org/work/ freedom/lbr.html (last visited Nov. 2, 2002).

122. *Id.* The full text of the current version is as follows:

> The American Library Association affirms that all libraries are forums for information and ideas, and that the following basic policies should guide their services.
>
> I. Books and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves. Materials should not be excluded because of the origin, background, or views of those contributing to their creation.
>
> II. Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval.
>
> III. Libraries should challenge censorship in the fulfillment of their responsibility to provide information and enlightenment.
>
> IV. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas.

inclusion of "age" in 1996.[123] The ALA endorses a number of additional principles that further describe the Association's position on issues of intellectual freedom. Several of these principles are particularly relevant to the subject matter of this Article.[124] Among these are policy 53.1.16, which provides: "The

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> V. A person's right to use a library should not be denied or abridged because of origin, age, background, or views.
>
> VI. Libraries which make exhibit spaces and meeting rooms available to the public they serve should make such facilities available on an equitable basis, regardless of the beliefs or affiliations of individuals or groups requesting their use.
>
> Adopted June 18, 1948. Amended February 2, 1961, and January 23, 1980, inclusion of "age" reaffirmed January 23, 1996, by the ALA Council.

Id.

123. *Id.*

124. *See* AM. LIBRARY ASS'N, ALA POLICY MANUAL, *available at* http://www.ala.org/alaorg/policymanual/ (last visited Nov. 2, 2002) [hereinafter ALA POLICY MANUAL]. Other relevant policy provisions include:

> 53.1.1
>
> Challenged materials which meet the criteria for selection in the materials selection policy of the library should not be removed under any legal or extra-legal pressure. Adopted 1971, revised 1990.
>
> (*See* "Current Reference File": Challenged Materials: An Interpretation of the Library Bill of Rights: 1989-90 CD #61.2.)
>
> 53.1.2
>
> Expurgation of any parts of books or other library resources by the library, its agent, or its parent institution is a violation of the Library Bill of Rights because it denies access to the complete work, and, therefore, to the entire spectrum of ideas that the work was intended to express. Adopted 1973; amended 1981, 1990.
>
> (*See* "Current Reference File": Expurgation of Library Materials: An Interpretation of the Library Bill of Rights, revised 1990. 1989-90 CD #61.3.)
>
> 53.1.3
>
> Members of the school community involved in the collection development process employ educational criteria to select resources unfettered by their personal, political, social, or religious views. Students and educators served by the school library media program have access to resources and services free of constraints resulting from personal, partisan, or doctrinal disapproval and which reflect the linguistic pluralism of the community. School library media professionals resist efforts by individuals or groups to define what is appropriate for all students or teachers to read, view, hear or access via electronic means. Adopted 1986, revised 1990, 2000.
>
> (*See* "Current Reference File": Access to Resources and Services in the School Library Media Program: An Interpretation of the Library Bill of Rights: 1999-2000 CD #19.4)
>
> . . . .
>
> 53.1.5

Evaluation of library materials is not to be used as a convenient means to remove materials presumed to be controversial or disapproved of by segments of the community. Adopted 1973, amended 1981.

(*See* "Current Reference File": Evaluating Library Collections: An Interpretation of the Library Bill of Rights.)

53.1.6

Attempts to restrict library materials violate the basic tenets of the Library Bill of Rights. Policies to protect library materials for reasons of physical preservation, protection from theft, or mutilation must be carefully formulated and administered with extreme attention to the principles of intellectual freedom. Adopted 1973, amended 1981, 1991, and 2000.

(*See* "Current Reference File": Restricted Access to Library Materials: An Interpretation of the Library Bill of Rights: 1999-2000 CD #19.4.)

53.1.7

Describing or designating certain library materials by affixing a prejudicial label to them or segregating by a prejudicial system is an attempt to prejudice attitudes and, as such, is a censor's tool; such practices violate the Library Bill of Rights. A variety of private organizations promulgate rating systems and/or review materials as a means of advising either their members or the general public concerning their opinions of the contents and suitability or appropriate age for use of certain books, films, recordings, or other materials. For the library to adopt or enforce any of these private systems, to attach such ratings to library materials, to include them in bibliographic records, library catalogs, or other finding aids, or otherwise to endorse them would violate the Library Bill of Rights. Adopted 1951, amended 1971, 1981, 1990.

(*See* "Current Reference File": Statement on Labeling: An Interpretation of the Library Bill of Rights.)

. . . .

53.1.11

Librarians have a professional responsibility to be inclusive, not exclusive, in collection development and in the provision of interlibrary loan. Access to all materials legally obtainable should be assured to the user and policies should not unjustly exclude materials even if offensive to the librarian or the user. Collection development should reflect the philosophy inherent in Article 2 of the Library Bill of Rights. A balanced collection reflects diversity of materials, not equality of numbers. Collection development responsibilities include selecting materials in the languages in common use in the community which the library serves. Collection development and the selection of materials should be done according to professional standards and established selection and review procedures.

Librarians have an obligation to protect library collections from removal of materials based on personal bias or prejudice, and to select and support the acquisition of materials on all subjects that meet, as closely as possible, the needs and interest of all persons in the community which the library serves. This includes materials that reflect political, economic, religious, social, minority, and sexual issues. Adopted 1982, amended 1990.

ALA affirms that the use of filtering software by libraries to block access to constitutionally protected speech violates the Library Bill of Rights."[125] Policy 53.1.4 states: "Denying minors access to certain library materials and services available to adults is a violation of the Library Bill of Rights. Librarians and governing bodies should maintain that parents—and only parents—have the right and the responsibility to restrict the access of their children—to library resources."[126] Policy 53.1.13 provides:

> Recognizing that libraries cannot act *in loco parentis*, policies which set minimum age limits for access to videotapes and/or audiovisual material

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> (*See* "Current Reference File": Diversity in Collection Development: An Interpretation of the Library Bill of Rights: 1989-90 CD #61.3.)
>
> 53.1.12
>
> The American Library Association believes that freedom of expression is an inalienable human right, necessary to self-government, vital to the resistance of oppression, and crucial to the cause of justice, and further, that the principles of freedom of expression should be applied by libraries and librarians throughout the world. Adopted 1989.
>
> (*See* "Current Reference File": The Universal Right to Free Expression: An Interpretation of the Library Bill of Rights: 1990-91 CD #18.1.)
>
> . . . .
>
> 53.1.15
>
> The American Library Association stringently and unequivocally maintains that libraries and librarians have an obligation to resist efforts that systematically exclude materials dealing with any subject matter, including gender or sexual orientation. The Association also encourages librarians to proactively support the First Amendment rights of all library users regardless of gender or sexual orientation. Adopted 1993. Revised 2000.
>
> (*See* "Current Reference File": Access to Library Resources and Services Regardless of Gender or Sexual Orientation: An Interpretation of the Library Bill of Rights: 1999-2000 CD #19.4)

Id.

125. *Id.* at 53.1.16. If filters could effectively block access to unprotected speech and only unprotected speech, no First Amendment issue would arise from their use. Proponents of filters might counter that they are not seeking to have libraries block constitutionally protected speech but only unprotected speech. Thus, they could argue that they too oppose the use of filters to intentionally block constitutionally protected speech. The difference between advocates and opponents of filtering is the former's belief that the inadvertent blocking of constitutionally protected speech is less of an evil than unfiltered accessibility of unprotected speech. As will be developed below, the Supreme Court has found that restrictions on constitutionally protected speech are generally not permitted as a means of controlling unprotected speech. *See infra* note 393. *But cf.* Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1396 (2002) (finding that child pornography involving an actual minor is unprotected speech in order to prevent the crimes involved in its production; "virtual" child pornography produced without the use of an actual minor is protected).

126. *Id.* at 53.1.4.

> and equipment with or without parental permission abridge library use for minors. Nevertheless, ALA acknowledges and supports the exercise by parents of their responsibility to guide their own children's viewing, using published reviews of films and videotapes and/or reference works which provide information about the content, subject matter, and recommended audiences.[127]

Finally, Policy 53.8 provides, in part: "We defend the constitutional rights of all individuals, including children and teenagers, to use the library's resources and services."[128]

The current debate, while focused on new technology, involves many of the same issues and principles that have been the subject of controversy since the advent of public libraries. Fundamental questions of what is moral and immoral and who decides, are and have been debated for more than a century. Public perceptions of morality change. It is doubtful that a majority of Americans today would find *The Adventures of Huckleberry Finn* and *The Grapes of Wrath* inappropriate for teenagers, though some still do.[129] Fewer still, though perhaps some, would today seek to expurgate the Bible or Shakespeare. At the same time that some questioned the suitability of unexpurgated Bibles and novels for children, parents were taking their children to witness public hangings.[130] It is doubtful that many parents today would, if they could, take their children to witness a public hanging, while opposing their having access to an unexpurgated Bible or *The Adventures of Huckleberry Finn.*[131] This serves as a stark, but

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127. *Id.* at 53.1.13.

128. *Id.* at 53.8.

129. AM. LIBRARY ASS'N, THE MOST FREQUENTLY CHALLENGED BOOKS OF 1990-2000, *at* http://www.ala.org/bbooks/top100bannedbooks.html (last visited Nov. 2, 2002). *The Adventures of Huckleberry Finn* was fifth on the list. *Id.* Twain's *The Adventures of Tom Sawyer* was eighty-fourth on the list. *Id.* While *The Grapes of Wrath* did not make the list, Steinbeck's *Of Mice and Men* was the sixth most-challenged book. *Id.* In 2001, *Of Mice and Men* was the second most-challenged book. AM. LIBRARY ASS'N, BANNED BOOKS WEEK, CELEBRATE YOUR FREEDOM TO READ, *at* http://www.ala.org/bbooks/challeng.html (last visited Nov. 2, 2002).

130. V.A.C. GATRELL, THE HANGING TREE, EXECUTION AND THE ENGLISH PEOPLE, 1770-1868, at 246-50 (1994) (reporting on child witnesses to public executions, including a time when "middle-class parents' resort to scaffold and gibbet by way of example and punishment had been matter-of-course"). *Id.* at 246; *cf.* VICTOR L. STREIB, DEATH PENALTY FOR JUVENILES, 132-33 (1987). While not specifically reporting child witnesses, Streib details a circus that accompanied the triple hanging of teenage boys in the small town of Canton, Ohio in 1880. STREIB, *supra*, at 132-33. An estimated 10,000 people attended the hanging in the city square, which was followed by a four-hour-long viewing of the corpses. *Id.* It would be surprising if children were not present.

131. There is no evidence that the same parents who opposed their children reading an unexpurgated Bible took them to witness public executions. The point is that nineteenth century perceptions of what was appropriate for children differ significantly from those of the early twenty-first century. Our great-grandchildren may well live in a world that views our standards as odd as

historic example of how the public's view of what is appropriate for minors changes. This history cautions against a quick resort to censorship as a means of addressing the problems created by unfiltered access to the Internet in publicly funded libraries. Nonetheless, the problems noted by proponents are real. With these cautions in mind, I will turn to a description of the problems that proponents of filtering seek to address.

III. THE NATURE AND SCOPE OF THE PROBLEM

How serious is the problem of pornography being accessed on computers in public libraries? It depends on whom you ask.[132] Then president of ALA,

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we view nineteenth century standards. Whether they will view our standards as too loose or too restrictive, or as indicative of misplaced emphasis, is impossible for us to accurately predict.

132. There appears to be no dispute that there are a large number of pornographic sites on the Internet. The *National Journal* reported in January 1999 that there were "at least 30,000 pornographic Web sites," not including Usenet news groups and spam. CIPA Senate Report, at 2 (quoting Neil Munro, *The Web's Pornucopia*, NAT'L J., Jan. 9, 1999, at 38). The software filtering industry estimates that about 2500 to 7500 new adult sites are found each week. *Id.* at 5 (citing Richard Raysman & Peter Brown, *Extreme Speech on the Internet*, N.Y. L.J., June 8, 1999, at 3). The dispute as to the scope and nature of the problem is over the extent to which such material is accessed in school and public libraries and what portion of such material is constitutionally unprotected speech as to either minors or adults.

This Article does not attempt to analyze whether access to such material is harmful to children. The Supreme Court has repeatedly held that the state has a compelling interest in protecting children from exposure to obscene and other sexually explicit material. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 757 (1982); FCC v. Pacifica Found., 438 U.S. 726, 748-50 (1978); Ginsberg v. New York, 390 U.S. 629, 636-43 (1968). The Senate Committee that heard testimony related to CIPA found the following:

> Natural sexual development occurs gradually, throughout childhood. Exposure of children to pornography distorts this natural development by shaping sexual perspective through premature exposure to sexual information and imagery. "The result is a set of distorted beliefs about human sexuality. These shared distorted beliefs include: pathological behavior is normal, is common, hurts no one, and is socially acceptable, the female body is for male entertainment, sex is not about intimacy and sex is the basis of self-esteem."

CIPA Senate Report, at 3 (quoting testimony of Mary Anne Layden, Ph.D., Director of Education, Center for Cognitive Therapy, University of Pennsylvania). "'Many people including children and adolescents learn about sex through pornography; it shapes their beliefs, attitudes, and expectations . . . . The prevalence of violent, abusive, and degrading pornography can indue beliefs that practices are not only common, but acceptable.'" *Id.* at 3 (quoting NEIL POSTMAN, THE DISAPPEARANCE OF CHILDHOOD (Marty Asher ed., 1994)).

> The Internet presents a unique threat to normal sexual development in children by playing upon common elements that contribute generally to antisocial behavior in children. "Research indicates that there are three factors that produce the best environment to stimulate antisocial behavior in children; it is the combination of

Ann K. Symons wrote, "The whole issue of protecting children has been blown way out of proportion by the media and those who seek to promote their own agendas."[133] Another called filtering "'an unconstitutional solution in search of a problem.'"[134] Indeed, in *Mainstream Loudoun*, the court found very little evidence to support the need for filtering.[135] At that time, there was only one reported incident of "a boy viewing what [a patron] believed were pornographic pictures on the Internet" at any public library located in the state of Virginia.[136]

> anonymity, role models of behavior and arousal. Internet web sites possess exactly those three factors."

Id. at 3 (quoting testimony of Mary Anne Layden, Ph.D., Director of Education, Center for Cognitive Therapy, University of Pennsylvania). The Committee report goes on to detail the risks posed to minors from the use of the Internet to exchange child pornography and to participate in the sexual abuse and exploitation of children. *Id.* at 3-4.

In addition, the Committee considered evidence of the use of the Internet to spread "racism, anti-Semitism, extremism, and how-to manuals on everything from drugs to bombs." CIPA Senate Report, at 4. Much, if not all, of this material is constitutionally protected speech, at least as to adults. Some of it, however, may fall into the category of material harmful to minors as defined by federal and state law, and thus, be unprotected as to them.

There is not a great deal of empirical research on the impact of sexually explicit material on minors. *See* YOUTH, PORNOGRAPHY, AND THE INTERNET 143 (Dick Thornburgh & Herbert S. Lin eds., 2002). In part this is because of the legal and ethical issues that arise from conducting such studies. *Id.* at 144. For a more detailed discussion of what research has to offer on this issue, see *id.* at 143-60. For a more general discussion of societal views on the impact of such exposure, see *id.* at 161-80.

133. Ann K. Symons, Open letter from the ALA President, AM. LIBRARIES, Jan. 1999, at 44. Ms. Symons added:

> Our children are growing up in a global information society. They need to learn the critical viewing and information skills that will lead them to make good judgments about the material they encounter on the Internet. They need to be able to assess as well as access information, to distinguish between that which is useful and that which is not. We do not help children when we simply wall them off from information and ideas that are controversial or disturbing.

Id. Of course, unprotected speech is not merely "controversial or disturbing," its distribution in general (in the case of obscenity) or to minors (in the case of material harmful to minors) or even possession (in the case of child pornography) is illegal. *See* Part V.B (criticizing the ALA's stance that they should not be required to determine what is obscene and therefore should not be held criminally responsible). The Supreme Court has long approved statutes and regulations criminalizing such conduct. *See* New York v. Ferber, 458 U.S. 747, 773-74 (1982) (reversing the New York Court of Appeals and upholding a conviction for possession of child pornography); Miller v. California, 413 U.S. 15, 36-37 (1973) (sustaining statute criminalizing distribution of obscenity); Ginsberg v. New York, 390 U.S. 629, 644-45 (1968) (sustaining regulation criminalizing distribution to minors of material harmful to them).

134. David Hudson, *Civil Libertarians Blast Internet Pornography Proposals*, *at* http://www.freedomforum.org/templates/document.asp?documentID=9392 (Mar. 13, 1998) (quoting Larry Ottinger, a senior staff attorney with the People for the American Way).

135. Mainstream Loudoun II, 24 F. Supp. 2d 552, 565-66 (E.D. Va. 1988).

136. *Id.* at 565.

Further, an expert testifying on behalf of the Board of Trustees could offer evidence of only three other such incidents nationwide.[137]

In a study prepared for the ALA and released in June 2000, less than twenty percent of all libraries had received any formal complaints about Internet content in the preceding twelve months.[138] In larger libraries, defined as those serving more than 100,000 persons,[139] more than half reported receiving such complaints.[140] Most formal complaints (87.5%) concerned sexually explicit material.[141] One-third of libraries with a formal complaint procedure, however, opined that such complaints came "from people who do not use [the] library, but heard about [our] Internet service."[142] How the survey respondents came to this conclusion is not indicated.

On the other hand, the expert who testified in *Mainstream Loudoun* has since found the problem to be widespread and pervasive.[143] In *Dangerous Access, 2000 Edition, Uncovering Internet Pornography in America's Library*, librarian David Burt found 2062 incidents involving library patrons viewing pornographic material.[144] Of these incidents, 668 were classified as either "Child

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137. *Id.* at 565-66. These incidents were in libraries located in Los Angeles County, California, Orange County, Florida, and Austin, Texas. The expert quoted a newspaper article that reported the library computers in Los Angeles County "'are regularly steered to online photos of naked women, digitized videos of sex acts and ribald chat-room discussions,' causing legitimate researchers to have to wait in line while others read 'personal ads or X-rated chat rooms.'" *Id.* at 566 n.17 (quoting *Public Libraries Debating How to Handle Net Porn*, AUG. CHRON., July 3, 1997). He testified that Orange County, Florida libraries installed filters because some "patrons were accessing hard-core porn sites 'for hours on end.'" *Id.* at 566 n.18 (quoting Pamela Mendels, *A Library That Would Rather Block Than Offend*, N.Y. TIMES, Jan. 18, 1997). Two incidents led to the installation of filters in the Austin, Texas library: a patron printing child pornography on the library printer and an adult teaching children how to access pornography on library computers. *Id.* at 566 n.19.

138. LIBRARY RESEARCH CTR., GSLIS, UNIV. OF ILL., SURVEY OF INTERNET ACCESS MGMT. IN PUB. LIBRARIES 5, *available at* http://www.lis.uiuc.edu/gslis/research/internet.pdf (June 2000).

139. *See id.* at 1-2 (providing that the largest population of a legal service area was over 100,000 terminals).

140. *Id.* at 5.

141. *Id.*

142. *Id.* at 6.

143. *See* Mainstream Loudoun II, 24 F. Supp. 2d 552, 565-66 (E.D. Va. 1988) (providing that David Burt, an expert for the defendant, discovered problems in Los Angeles County, California, Orange County, Florida, and Austin, Texas).

144. BURT, *supra* note 28, at 5. Burt relied both on a survey he conducted and "a few news stories published independently of this study." *Id.* According to the study, "incidents involved library patrons viewing pornographic material as defined by the incident reports using the term 'pornographic,' 'porn,' 'pictures of naked women,' 'obscene material,' 'sex picture,' 'sexually explicit material,' 'adult web sites,' and 'smut sites.'" *Id.* The author also included in that number "incidents that featured the names of sites being viewed by patrons that were obviously

Accessing Pornography" (472), "Adult Exposing Children to Pornography" (106), "Child Accidentally Viewing Pornography" (26), "Child Accessing Inappropriate Material" (41), or "Pornography Left for Children" (23).[145] An additional forty-one incidents involved "Child Porn Being Accessed."[146] "Harassing Staff with Pornography" was reported twenty-five times,[147] and 113[148] incidents of "Pornography Left on Printer or Screen" were identified.[149] Burt's study also included the text of several of the incident reports.[150] Ages of "Children Accessing Pornography" ranged from as old as thirteen or fourteen to as young as seven.[151]

One difficulty in ascertaining the true extent of the problem is that groups and individuals studying the issue may have preconceived notions of the results for which they are looking. The *Dangerous Access* survey was published by the Family Research Council,[152] an organization that believes filtering is the solution to the problems addressed in this Article.[153] Even a cursory reading of *Dangerous Access* reveals an animus against the ALA related to the issue of whether filters should be installed on computers with Internet access located in public libraries.[154] On the other hand, the *Survey of Internet Access* was prepared for the ALA, an organization that has adamantly opposed filtering.[155] In *Dangerous Access*, the author alleges that an ALA councilor stated the following in an e-mail posted to the ALA Council Discussion List: "We don't have a body of research (though I know the data is out there, if we look) to underscore what any librarian will tell you—that the 'problem' has been manufactured by folks

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pornographic in nature." *Id.* Finally, the reported incidents also included patrons viewing "'inappropriate' material" as the survey specifically requested incidents of "patrons accessing pornographic or sexually explicit material." *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *See id.* at 6-11.

151. *Id.*

152. *Id.* at 5.

153. *See, e.g.*, FAMILY RESEARCH COUNCIL, PRESS RELEASE, FRC TO DEFEND INTERNET PORN FILTERING BILL AGAINST ATTACK BY ACLU, ALA, *at* http://www.frc.org/get/p01c05.cfm (May 20, 2001); FAMILY RESEARCH COUNCIL, PRESS RELEASE, ONCE AGAIN, COURTS NEGLIGENT IN PROTECTING KIDS ONLINE, FRC SAYS, *at* http://www.frc.org/get/p02e05.cfm (May 31, 2002).

154. *See* BURT, *supra* note 28, at 25-32 (taking issue with official statements of the ALA).

155. *See, e.g.*, Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 420-22 (E.D. Pa. 2002) (discussing the ALA's support of free access). For more information regarding the ALA's opposition to the use of filters in libraries, see AM. LIBRARY ASS'N, FILTERS AND FILTERING, *at* http://www.ala.org/alaorg/oif/filtersandfiltering.html (last visited Nov. 2, 2002).

who are dead set on censorship."[156] She then suggests "that ALA should sponsor a report (or, even better, reports) . . . demonstrating the importance of the Internet in public libraries and refuting the concept that there is a 'problem.'"[157]

Whatever may have been the motive for conducting its study, the *Survey of Internet Access* prepared for the ALA reveals that obscenity, child pornography, and material harmful to minors is accessible and is in fact being accessed in public libraries.[158] Its response to this indicates that, despite the protest of some, the ALA recognizes this as a problem. For example, the ALA has disseminated suggestions to public libraries and to parents regarding safe use of the Internet, indicating recognition that accessibility of such material creates a problem that must be addressed.[159] Further, the ALA has acknowledged that some material on the Internet is obscene or child pornography, and not protected by the First Amendment.[160]

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156. BURT, *supra* note 28, at 29.

157. *Id.*

158. *See supra* notes 137-41 and accompanying text.

159. *See, e.g.*, AM. LIBRARY ASS'N, ESPECIALLY FOR CHILDREN AND THEIR PARENTS, *at* http://www.ala.org/alaorg/oif/children.html (last visited Nov. 2, 2002).

160. AM. LIBRARY ASS'N, GUIDELINES AND CONSIDERATIONS FOR DEVELOPING A PUB. LIBRARY INTERNET USE POLICY, *available at* http://www.ala.org/alaorg/oif/internet.html (issued June 1998, revised Nov. 2000) [hereinafter GUIDELINES AND CONSIDERATIONS]. These guidelines provide, in part, the following:

> In the millions of Web sites available on the Internet, there are some—often loosely called "pornography"—that parents, or adults generally, do not want children to see. A very small fraction of those sexually explicit materials is actual obscenity or child pornography, which are not constitutionally protected. The rest, like the overwhelming majority of materials on the Internet, is protected by the First Amendment.
>
> Obscenity and child pornography are illegal. Federal and state statutes, the latter varying slightly depending on the jurisdiction, proscribe such materials. The U.S. Supreme Court has settled most questions about what obscenity and child pornography statutes are constitutionally sound.
>
> According to the Court:
>
> *Obscenity* must be determined using a three-part test. To be obscene, (1) the average person, applying contemporary community standards, must find that the work, taken as a whole, appeals to prurient interests; (2) the work must depict or describe, in a patently offensive way, sexual conduct as specified in the applicable statutes; and (3) the work, taken as a whole, must lack serious literary, artistic, political, or scientific value.
>
> *Child pornography* may be determined using a slightly less rigorous test. To be child pornography, the work must involve depictions of sexual conduct specified in the applicable statutes and use images of children below a specified age.
>
> Many states and some localities have "harmful to minors" laws. These laws regulate free speech with respect to minors, typically forbidding the display or

In *American Library Association*, the court, while striking down the statutes in question, likewise acknowledged that a problem exists.[161] The court found that there were "more than 100,000 pornographic Web sites" accessible for free and "tens of thousands of Web sites containing child pornography."[162] The court further found that many such sites contained domain names that would not warn someone browsing the Web as to the nature of the content which they contained.[163] Examples cited by the court were http://www.whitehouse.com, http://www.boys.com, http://www.girls.com, http://www.coffeebeansupply.com, and http://www.BookstoreUSA.com.[164] The court also noted that once such a site was accessed, attempts to exit such content was made difficult by the use of pop-up windows, which open new instances of the browser to advertise other sexually explicit sites.[165] Further, the court found that the existence of such sites had created problems for library patrons and librarians alike.[166] The Greenville (South Carolina) Public Library, for example, reportedly experienced a high turnover rate among reference librarians who worked within view of Internet terminals.[167] Given these undisputed facts, the issue is not whether there is a problem, but rather how libraries and governments can best respond to the problems created by Internet access in publicly funded libraries. The next section explores the constitutional limitations on what may be done.

One of the primary justifications offered for the need for filters in public libraries is to protect minors from accessing obscenity, child pornography, and

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dissemination of certain sexually explicit materials to children, as further specified in the laws.

According to the U.S. Supreme Court:

Materials "harmful to minors" include descriptions or representations of nudity, sexual conduct, or sexual excitement that appeal to the prurient, shameful, or morbid interest of minors; are patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and lack serious literary, artistic, political, or scientific value for minors.

Id.

161. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 410-11 (E.D. Pa. 2002).

162. *Id.* at 405; *see also* YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 132, at 72-73 (noting that websites with adult content in the United States exceed 100,000—with each site containing multiple pages containing such content—and about 400,000 for-pay sites worldwide, viewed by an estimated 70 million persons per week, 20 million of whom view such sites hosted in the United States and Canada; the industry in the United States generates an estimated $1 billion in revenue, which is expected to grow to between $5 billion and $7 billion in the next five years).

163. Am. Library Ass'n v. United States, 201 F. Supp. 2d at 419.

164. *Id.*

165. *Id.*

166. *Id.* at 424.

167. *Id.*

material harmful to them.[168] This raises the question of the extent to which minors are accessing or otherwise viewing such content. One study found that nearly sixteen percent of visitors to adult-oriented websites in February 2002 were seventeen years and younger.[169] Another source placed the rate at between twenty and thirty percent.[170] Sites using Adult Verification Services (AVSs) have rates of minor access somewhat lower—approximately five percent.[171] *Dangerous Access* reported access by minors, but did not quantify rates of such access compared to the total access of such material.[172]

IV. LEGAL ANALYSIS

A. *The First Amendment and Obscenity, Child Pornography, and Material Harmful to Minors*

The rights protected under the First Amendment are perhaps our most cherished.[173] Commentators and courts alike recognize freedom of speech as essential to the function and preservation of democracy and a free society.[174] Indeed, some commentators and judges have asserted that those rights should be considered absolute.[175] The Supreme Court has rejected such an absolutist position.[176] Rather than permitting outright speech restrictions, commonly referred to as "prior restraints," however, in most cases parties harmed by speech must rely on damages as the only available remedy. For example, those defamed

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168. *See, e.g.*, CIPA Senate Report, at 3 (citing harm to minors as a primary need justifying CIPA).

169. *See* YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 132, at 78 (citing Nielsen/NetRatings during February 2002).

170. *Id.* (citing Bill Johnson, FCI, 2001).

171. *See id.* (noting that advances in AVSs may enable the industry to reduce the rate of access by minors to approximately two percent).

172. *See supra* note 150 and accompanying text.

173. *See* Andrew Beckerman-Rodau, *Prior Restraints and Intellectual Property Law: The Clash Between Intellectual Property and the First Amendment from an Economic Perspective*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 6 (2001) (citing RONALD D. ROTUNDA & JOHN E. NOWAK, 4 TREATISE ON CONSTITUTIONAL LAW § 20.2, at 243 (5th ed. 1995) ("'Freedom of speech has been recognized as one of the preeminent rights of Western democratic theory, the touchstone of individual liberty.'")).

174. *Id.* (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 n.24 (1974)) (noting that government control of press jeopardizes liberty); Palko v. Connecticut, 302 U.S. 319, 326-27 (1937) (noting that "freedom of thought and speech indispensable to nearly every other form of freedom"); Jones v. Battles, 315 F. Supp. 601, 607 (D. Conn. 1970) (stating that the right to criticize is important to the functioning of democracy).

175. *Id.* at 22 (citing Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867, 874 (1960)).

176. *See id.* at 22-23 (citing Konigsberg v. State Bar of Cal., 366 U.S. 49 (1961)) (holding that the First Amendment does not provide absolute freedom of speech).

are generally limited to suing after the falsehoods have been spoken or published.[177] Obscenity is one of the few exceptions in which prior restraint may be exercised.[178] Child pornography is another.[179]

Defining obscenity and, as a result, prescribing the limits of what expressions Congress and the states may prohibit as obscene, has proved difficult for the courts. The seminal case in this area, *Miller v. California*,[180] recites the troubled history of obscenity jurisprudence up to that time.[181] In *Miller*, the Court considered a case involving the mass mailing of unsolicited sexually explicit material in violation of California law.[182] Adult recipients, who had not requested the material, complained to the police.[183] The defendant was convicted under a California statute that made it a misdemeanor to knowingly distribute or cause to be distributed "obscene matter," as defined in the statute, within that state.[184] The Court recognized that states "have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."[185] The Court summarized the tortured history of First Amendment jurisprudence as it applied to obscenity.[186] The *Miller* majority then set forth a new three-part test that still applies today:

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177. *See id.* at 23 (citing Lothschuetz v. Carpenter, 898 F.2d 1200, 1206 (6th Cir. 1990)) (adhering to the general rule "'that equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages'").

178. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973) (holding the state has a legitimate interest in prohibiting dissemination or exhibition of obscene material).

179. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982) (upholding New York statute prohibiting distribution of child pornography).

180. Miller v. California, 413 U.S. 15 (1973). For a short history of obscenity law prior to *Miller*, see RODNEY SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §§ 14:1-14:18 (2002).

181. Miller v. California, 413 U.S. at 21-23.

182. *See id.* at 16.

183. *Id.* at 18.

184. *Id.* at 16-18.

185. *Id.* at 18-19 (citation omitted).

186. *Miller* was "one of a group of 'obscenity-pornography' cases . . . reviewed by the Court [during that term] in a re-examination of standards enunciated in earlier cases involving what Mr. Justice Harlan called 'the intractable obscenity problem.'" *Id.* at 16 (citation omitted). Sixteen years before the *Miller* decision, five justices joined in the majority opinion in *Roth v. United States*, which stated that obscenity was "utterly without redeeming social importance" and thus, "not within the area of constitutionally protected speech or press." Roth v. United States, 354 U.S. 476, 484-85 (1957). Nine years later, a plurality opinion in *Memoirs v. Massachusetts* rejected this proposition and, in its place, set forth a three-part test of obscenity:

> [I]t must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[187]

Whether this test can survive the decentralized and ubiquitously distributed Internet is open for debate. Can a test that requires resort to widely divergent local community standards have any meaning when Internet technology does not provide online publishers the ability to limit distribution of certain files based on geography?[188] While a variety of challenges exist for the *Miller* test, the problems addressed in this Article do not require abandonment of this standard. Indeed, unlike the issues surrounding the publication of such material,[189] managing access to obscenity, child pornography, and material harmful to minors in public libraries lends itself to a variety of approaches that recognize and can be tailored to local community standards.[190]

> representation of sexual matters; and (c) the material is utterly without redeeming social value.

Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966). Thus, the presumption that "obscenity" was "utterly without social importance" was replaced with a requirement of proof that the material in question was "utterly without redeeming social value." *Id.*

187. Miller v. California, 413 U.S. at 24 (citation omitted).

188. *Cf.* Sable Communications of Cal. v. FCC, 492 U.S. 115, 125 (1989) (stating "that 'distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional,'" and noting that a dial-a-porn provider was "free to tailor its message, on a selective basis . . . to the communities it chooses to serve"). The tailoring suggested by the Court in *Sable* is not possible for online publishers utilizing current Internet technology.

189. The Supreme Court is struggling with this very issue. *See* Ashcroft v. ACLU, 122 S. Ct. 1700 (2002) (plurality opinion finding that the reliance on community standards in the Child Online Protection Act (COPA) did not render it facially unconstitutional). *But see id.* at 1714 (O'Connor, J., concurring) (expressing her views on the constitutionality and desirability of adopting a national standard for obscenity for regulation of the Internet); *id.* at 1715-16 (Breyer, J., concurring) (interpreting the word "community" as used in COPA "to refer to the Nation's adult community as a whole, not to geographically separate local areas," which "significantly alleviates any special need for First Amendment protection"); *id.* at 1719 (Kennedy, J., concurring) (expressing concerns that "economics and technology of Internet communications" make it "expensive if not impossible to [limit access] to a geographic subset"); *id.* at 1726-27 (Stevens, J., dissenting) (asserting "[w]eb speakers cannot limit access to those specific communities" which would "not find [specific content] harmful to minors").

190. *See, e.g.*, Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 410 (E.D. Pa. 2002).

B. *The Right to Receive Information*

It is now well established that the First Amendment does not merely protect the right to speak and publish, but also the right to receive information spoken or published by others.[191] The leading Supreme Court case addressing this issue as it relates to libraries is *Board of Education, Island Trees Union Free School District No. 26 v. Pico*.[192] In *Pico*, a local board of education ordered the removal of certain books from school libraries that it found to be "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."[193] In affirming the Court of Appeals' reversal of a district court's summary judgment order in favor of the school board, a plurality of justices reinforced the principle that "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom."[194] In doing so, the Court quoted James Madison:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.[195]

The plurality specifically held that this right to receive information applied to students.[196] The plurality was careful to note, however, that a school board has "significant discretion to determine the content of their school libraries."[197] That discretion could not be used to suppress ideas with which the board disagreed.[198] The opinion did intimate that it could be used to remove books which were "pervasively vulgar" or "educational[ly] [un]suitab[le]."[199] The opinion was carefully and explicitly limited to the issue of removal of material and not its

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191. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972) (holding the First Amendment protects the right of the public to receive information); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas."); Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them."); Martin v. Struthers, 319 U.S. 141, 143 (1943) ("The right of freedom of speech and press . . . necessarily protects the right to receive it.").

192. Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

193. *Id.* at 857.

194. *Id.* at 867 (emphasis omitted).

195. *Id.* (quoting 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed., 1910)).

196. *Id.* at 868.

197. *Id.* at 870.

198. *Id.* at 870-71.

199. *Id.* at 871.

initial acquisition.[200] In a concurring opinion, Justice Blackmun, while recognizing that schools might not remove material "'to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,'"[201] asserted that the First Amendment did permit "a school board to refuse to make a book available to students because it contains offensive language . . . or because it is psychologically or intellectually inappropriate for the age group."[202]

Noting that "[t]he First Amendment . . . must deal with new problems in a changing world," Chief Justice Burger, in his dissent, rejected the plurality's views as bringing the Court "perilously close to becoming a 'super censor' of school board library decisions."[203] He argued that the first of two essential issues involved was "whether local schools are to be administered by elected school boards, or by federal judges and teenage pupils."[204] While recognizing that "'students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'" Burger asserted that these rights were not impinged where the books in question were available in public libraries.[205] In these circumstances, Burger found the plurality opinion would create "a new First Amendment 'entitlement' to have access to particular books in a school library."[206]

Likewise, in a separate dissenting opinion, Justice Rehnquist noted that proscribing receipt of certain information in a school library did not act to bar all access to this information.[207] He specifically noted that such works were still available to students in bookstores, university libraries, friends, and public libraries.[208] Going further than Chief Justice Burger, Justice Rehnquist specifically distinguished university and public libraries from school libraries, noting that the former were "designed for freewheeling inquiry."[209]

Nonetheless, the dissenters rejected the propositions that "the government has an *obligation* to aid a speaker or author in reaching an audience" or that the right to receive information "carr[ied] with it the concomitant right to have those ideas affirmatively provided at a particular place by the government."[210] In his

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200. *See id.* at 871-72.
201. *Id.* at 880 (Blackmun, J., concurring) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).
202. *Id.*
203. *Id.* at 885 (Burger, J., dissenting).
204. *Id.*
205. *Id.* at 886 (citation omitted).
206. *Id.*
207. *See id.* at 913, 915 (Rehnquist, J., dissenting).
208. *Id.*
209. *Id.* at 915.
210. *Id.* at 888.

separate dissent, Justice Rehnquist argued that a state has an interest as an employer, property owner, and educator that would permit it to restrict speech that it would not be constitutionally permitted to restrict as sovereign.[211] The dissenters also rejected any constitutional significance between the decision not to acquire a certain book and the decision to remove that book.[212] The evil which the plurality sought to prevent, the "official suppression of ideas," was equally present whether the decision was non-acquisition or removal and unaffected by "the coincidence of timing."[213]

Justice Powell chose to include an appendix providing excerpts from the books in question, presumably to demonstrate the justification for the board's decision to remove them from the school library.[214] What makes this inclusion so illuminating on the issues raised in this Article is that Justice Powell apparently saw value in printing excerpts that contained words that undoubtedly would be targeted by filtering software to identify material that might be obscene or harmful to minors.[215] It is conceivable that a webpage containing the full text of all opinions in *Pico* would be blocked by a text-based filter because of the inclusion of Justice Powell's appendix.[216] It is ironic that a library employing such a filter would conceivably deny users access to an online copy of the seminal Supreme Court case addressing the right of library patrons to receive information.[217]

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211. *Id.* at 920.

212. *Id.* at 892.

213. *Id.*

214. *Id.* at 896-903 (Powell, J., dissenting).

215. *Id.* Justice Powell included excerpts from Eldridge Cleaver's *Soul on Ice*, Alice Childress's *A Hero Ain't Nothing but a Sandwich*, Bernard Malamud's *The Fixer*, *Go Ask Alice*, Kurt Vonnegut, Jr.'s *Slaughterhouse Five*, Richard Wright's *Black Boy*, Oliver LaFarge's *Laughing Boy*, Desmond Morris's *The Naked Ape*, and *The Best Short Stories by Negro Writers*, edited by Langston Hughes. *Id.* at 897-903. These excerpts highlighted the words and descriptions on which the board had based their removal decisions. *See id.* at 897 (noting that the excerpts set out led the board "to look into the educational suitability of the books").

216. *Id.* at 896-903. A recitation of those terms is not included here. Suffice it to say the words and descriptions referenced were quite graphic.

217. The author downloaded a trial version of CYBERsitter, an Internet filtering product, from the company's website at http://www.cybersitter.com. After configuring the filtering option to "adult/sexually oriented," the program scanned the hard drive containing a draft of this Article, and digital copies of sources reviewed in its preparation. The scan reported 364 "suspect files." Among the files reported as suspect was one titled "102 S. Ct. 2799," which was a copy of the case report in *Pico* accessed via Westlaw and stored in the Temporary Internet Files directory. By right-clicking on a title within the scan report and selecting "Properties," one can learn more about why a particular file was identified as suspect. Several of the words identified by the scan of the *Pico* opinion were indeed from Justice Powell's appendix. With CYBERsitter's filter activated, the author was denied access to the *Pico* opinion when he attempted to access it through Westlaw. When the author deactivated the filter, access was available. The scan identified as suspect

C. *The Right to Receive Information and Filtering in Public Libraries*

While *Pico* lacked a majority, it has nonetheless been influential in later cases addressing First Amendment issues, including cases arising out the efforts to curb access to pornography on the Internet, and the utilization of filters in public libraries. Specifically, the case was cited by the courts in *Mainstream Loudoun I*,[218] *Mainstream Loudoun II*,[219] and *American Library Association*.[220] Indeed, if First Amendment protection applied only to the speaker and not to the recipient, it is doubtful that filtering would face any constitutional problems. Filtering does not prevent Web publishers from speaking, but only blocks the access of potential recipients.

Mainstream Loudoun was the first case to directly address the installation of Internet filters in a public library.[221] In *Mainstream Loudoun*, the Board of Trustees of the Loudoun County Library passed a "Policy on Internet Sexual Harassment," (Policy) which contained the following provisions:

> (1) [T]he library would not provide e-mail, chat rooms, or pornography; (2) all library computers would be equipped with site-blocking software to block all sites displaying: (a) child pornography and obscene material; and (b) material deemed harmful to juveniles; (3) all library computers would be installed near and in full view of library staff; and (4) patrons would not

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numerous other webpages containing case reports, including thirteen United States Supreme Court opinions. In addition to the *Pico* opinion, the following Supreme Court opinions, cited elsewhere in this Article, were blocked by the filter: *Ashcroft v. ACLU*, 122 S. Ct. 1700 (2002); *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000); *Reno v. ACLU*, 521 U.S. 844 (1997); *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996); *South Dakota v. Dole*, 483 U.S. 203 (1987); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); and *Ginsberg v. New York*, 390 U.S. 629 (1968). In addition, CYBERsitter's scan identified as suspect both opinions in *Mainstream Loudoun*, and the district court's opinion in *American Library Association, Inc. v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002). When activated, the filter blocked access to all three of these opinions when the author attempted to access them through Westlaw. When the filter was deactivated, access was restored. The following are samples of other material on the author's hard drive identified as "suspect files," all of which were reviewed for this Article: the Jurisdictional Statement and Petition Appendix filed by the Department of Justice in its appeal to the United States Supreme Court in *American Library Association*, pages from the ACLU's website, pages from the ALA website (including its *Freedom to Read Statement*), Current Index to Legal Periodical Journal and Subject Indices, pages from the Family Research Council's website, and pages from Multnomah County (Oregon) Public Library's website.

218. Mainstream Loudoun I, 2 F. Supp. 2d 783, 792 (E.D. Va. 1998).

219. Mainstream Loudoun II, 24 F. Supp. 2d 552, 561 (E.D. Va. 1998).

220. Am. Library Ass'n v. United States, 201 F. Supp. 2d at 451.

221. *See* Mainstream Loudoun I, 2 F. Supp. 2d at 787.

> be permitted to access pornography and, if they do so and refuse to stop, the police may be called to intervene.[222]

The plaintiffs challenged the Policy on the grounds that it amounted to a constitutionally prohibited prior restraint of protected speech based on content.[223]

After addressing preliminary issues of standing and immunity,[224] the court in *Mainstream Loudoun I* analyzed the principle issue: "whether a public library may, without violating the First Amendment, enforce content-based restrictions on access to Internet speech."[225] Applying the plurality decision in *Pico*, the court held that by purchasing Internet access, the Loudoun County libraries had made everything published on the Internet available to its patrons.[226] Any action to restrict or deny access to a portion of these materials was in effect, therefore, a removal decision.[227] The court concluded that *Pico* stood for the proposition that the First Amendment applied to decisions to place content-based restrictions on access to constitutionally protected material within a public library's collection.[228] Applying this to the facts before them, the court found that a public library has less justification than a school library in applying such restrictions, as adults have a constitutionally protected right to receive speech "which may be inappropriate for children."[229] Further, the court, borrowing from Justice Rehnquist's dissent in *Pico*, noted that "public libraries are places of freewheeling and independent inquiry."[230] The court contrasted this with school libraries which share an inculcating mission with the schools of which they are a part.[231] Finally, the court noted that unlike hard copy resources, restricting access to Internet publication neither saved money nor space.[232] In fact, filtering increased library costs.[233] With these considerations in mind, the *Mainstream Loudoun I* court concluded that content-based restrictions on access to the Internet could only be justified by a compelling governmental interest, and must

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222. Mainstream Loudoun II, 24 F. Supp. 2d at 556.
223. Mainstream Loudoun I, 2 F. Supp. 2d at 787.
224. *See id.* at 788-92.
225. *Id.* at 792.
226. *Id.*
227. *See id.* at 793-94.
228. *Id.* at 794.
229. *Id.* at 795.
230. *Id.* (citing Bd. of Educ. v. Pico, 457 U.S. 853, 909 (1982) (Rehnquist, J., dissenting)).
231. *Id.*
232. *Id.*
233. *Id.* *But see* Nadel, *supra* note 120, at 119 (arguing that the *Mainstream Loudoun* court too narrowly viewed the issue of cost, and that filters were a means by which libraries could manage a scarce resource—computer time available for patrons—where, in fact, the demand for Internet access by patrons often exceeds the supply).

be narrowly tailored to meet that interest.[234] The court then analyzed the interests offered as justification for the Policy adopted by the Board. It recognized that obscenity and child pornography are not protected by the First Amendment, and that transmission of such content via the Internet was illegal.[235] The issue, therefore, turned on whether the means chosen to restrict access to such material was narrowly tailored.[236] Deciding this issue required a trial.[237]

In *Mainstream Loudoun II*, the court analyzed the use of the filters in question to determine whether they violated the First Amendment rights of patrons.[238] To determine the appropriate standard to apply in answering this question, the court was required to determine the nature of the forum represented by the public library.[239] The Supreme Court has recognized three types of fora for purposes of First Amendment analysis: public fora, limited public fora, and non-public fora.[240] The first includes such venues as parks and streets; the second includes meetings open to the public and theaters; the third includes government office buildings.[241] There is little question that public libraries are not public fora, as libraries are not available for all types of expressive activities, but only those consistent with their mission.[242] In fact, many expressive activities would be detrimental to fulfilling the mission of public libraries. For example, having a dance, a play, or a political speech in a library reading room would interfere with intended patron use.

The issue, then, was whether the library was a limited public forum or a private forum.[243] In deciding this issue, the court turned to the case of *Kreimer v. Bureau of Police*.[244] In *Kreimer*, the issue was not restrictions placed on what a library collected or made available to its patrons, but whether content-neutral rules based on patron conduct violated the First Amendment.[245] Nonetheless, the *Mainstream Loudoun II* court relied on three factors utilized in *Kreimer* to decide that the Loudoun County Public Library was a limited public forum:

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234. Mainstream Loudoun I, 2 F. Supp. 2d at 795.
235. *Id.* at 796.
236. *Id.* at 796-97.
237. *See id.* at 797 (denying defendant's motion for summary judgment because the court found that plaintiffs "have adequately alleged a lack of such reasonable means").
238. *See* Mainstream Loudoun II, 24 F. Supp. 2d 552, 563-70 (E.D. Va. 2002).
239. *Id.* at 561-63.
240. *Id.* at 562 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983)).
241. *Id.*
242. *See id.*
243. *Id.* at 561.
244. *Id.* at 562 (citing Kreimer v. Bureau of Police, 958 F.2d 1242 (3d Cir. 1992)) (holding that a public library is a limited public forum).
245. Kreimer v. Bureau of Police, 958 F.2d at 1262-64.

"government intent; extent of use; and nature of the forum."[246] Intent to make the library a limited public forum was in part based on a resolution by the Board, which stated the Loudoun Public Library's "'primary objective . . . [is] that the people have access to all avenues of ideas.'"[247] While the language of this resolution may be unique, it expresses a principle that underlies most, if not all, public libraries. Likewise, extent of use favored such a finding as the library was opened to the public at large.[248] Again, this principle applies to most public libraries. Finally, the court noted that the library was the nexus for the receipt of information communicated in the general manner utilized by the Internet.[249] With these findings, the court held that the Loudoun Public Library was a limited public forum, and thus, any restrictions of First Amendment rights were subject to strict scrutiny and needed to be narrowly tailored to serve a compelling state interest.[250] This finding should have applicability to any public library opened to the public in general.

Applying this standard, the court found that the filters chosen were not narrowly tailored to serve an admitted compelling state interest.[251] The filters chosen by the Board of Trustees not only blocked constitutionally protected speech in addition to obscenity and child pornography (i.e., overblocked),[252] but also, because of the broad applicability of the policy, denied adults access to material that was protected as to them even though "harmful to minors" as defined by Virginia law.[253] Further, the court found that material that was arguably pornographic was not blocked by the filters (i.e., underblocked).[254] While the Policy included a provision that permitted adults to request that a site or sites be unblocked, the court found that this provision lacked any standards, leaving the unblocking decision entirely within the discretion of the librarian.[255] Despite the decision by the court in *Mainstream Loudoun*, a number of libraries continue to restrict Internet access through the use of filters.[256]

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246. Mainstream Loudoun II, 24 F. Supp. 2d at 562 (citing Kreimer v. Bureau of Police, 958 F.2d at 1259).

247. *Id.* at 562-63 (citation omitted).

248. *Id.* at 563.

249. *Id.*

250. *Id. But see* Bernard Bell, *Filth, Filtering, and the First Amendment: Ruminations on Public Libraries' Use of Internet Filtering Software*, 53 FED. COMM. L.J. 191, 217-28 (2001) (arguing that public libraries should be declared a "[n]ew [t]ype of [f]orum").

251. Mainstream Loudoun II, 24 F. Supp. 2d at 566-68.

252. *Id.*

253. *Id.* at 566.

254. *Id.*

255. *Id.* at 569-70.

256. The court in *American Library Association* found that seven percent of libraries used filters. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 406 (E.D. Pa. 2002). An

D. *Children's Internet Protection Act*

In 2000, Congress enacted the Children's Internet Protection Act (CIPA).[257] CIPA was Congress's attempt to address the issue of minors being exposed to pornographic images on computers in school and public libraries.[258] Instead of an outright mandate, CIPA ties funding and discounts for Internet service to certification by libraries that they have adopted and are enforcing "a policy of Internet safety for minors that includes monitoring the online activities of minors and the operation of filters."[259] As applied to minors, the policies are specifically required to protect "against access[ing] . . . visual depictions that are . . . obscene; . . . child pornography; or . . . [material that is] harmful to minors."[260] The same restrictions apply to access for adults except for access to

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example of a policy that closely mirrors the one struck down in *Mainstream Loudoun* can be found at the Memphis-Shelby County Public Library, which provides, in part, the following:

> The Library provides access to Internet World Wide Web content in accordance with our mission of satisfying our customer's need to know.
>
> The Library's official web site the Library Web provides customers with links to basic information on the World Wide Web that has been indexed, reviewed, and recommended by staff. In addition the Library allows customers to connect to other network resources outside the Library.
>
> The Library assumes no responsibility or liability for any such content. Customers are encouraged to exercise discretion while using the World Wide Web content. Parents and children are encouraged to learn more about child safety on the Internet from the Kid's Web page on the Library Web. As with all library materials, restriction of a child's access to the Internet is the responsibility of the parent/legal guardian.
>
> The Library employs filtering technology to reduce the possibility that customers may encounter objectionable content in the form of depictions of full nudity and sexual acts.
>
> Customers who encounter objectionable content may request a block for that content using the online Customer Request for Reconsideration of Library Materials or World Wide Web Resources Form or the printed version available in each library.
>
> Customers who are prevented by the filtering technology from access to content which they believe is not objectionable may request that the block be removed using the online Customer Request for Purchase of Library Materials or Access to World Wide Web resources Form or the printed version available in each library.

MEMPHIS-SHELBY COUNTY PUB. LIBRARY AND INFO. CTR., LIBRARY INTERNET USE POLICY, *available at* http://www.memphislibrary.org/about/internetpol.htm (last visited Nov. 2, 2002).

257. CIPA, 114 Stat. 2763 (2001) (codified at 20 U.S.C. § 9134 (2000); 47 U.S.C. § 254(h) (2000)).

258. *See id.*

259. 20 U.S.C. § 9134(f)(1); 47 U.S.C § 254(h)(6).

260. 20 U.S.C. § 9134(f)(1)(A).

material harmful to minors.[261] In addition, the Act permits "[a]n administrator, supervisor, or other authority [to] disable" the filter "to enable access for bona fide research or other lawful purposes."[262]

The Federal Communications Commission (FCC) adopted regulations implementing CIPA in late March 2001.[263] Prior to implementation of these regulations, two complaints were filed in federal court challenging the constitutionality of CIPA.[264] In *American Library Association*, the plaintiffs alleged that "Congress has used its spending power to conscript public libraries into its censorship program."[265] Because of the imprecise nature of Internet filters (i.e., their over and under restriction of targeted material), the ALA suit alleged that public libraries are left "with an impossible choice: either install mechanical, imprecise, and incredibly broad speech restrictions on Internet resources, or forgo vital federal funds to which libraries are otherwise entitled."[266] The suit also attacked CIPA's disabling provisions, which permitted a library employee to disable the filters to permit adults to conduct "bona fide research or other lawful" uses.[267] Plaintiffs charged that this provision is "hopelessly vague," gave libraries unconstrained discretion, and created a "dangerous chilling effect on the exercise of patrons' right to receive information anonymously by attaching a threat of stigma to the receipt of fully protected expressive materials."[268]

After a trial in the spring of 2002, a three-judge court, convened pursuant to CIPA,[269] struck down the Act as unconstitutional.[270] In a lengthy opinion, the court gave a detailed description of how text-based filtering works, demonstrating the "inherent trade off between any filter's rate of overblocking . . . and its rate of underblocking . . . ."[271] Overblocking is the denial of access to websites that were not the intended targets of the filters.[272] Underblocking is the

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261. *Id.* § 9134(f)(1)(B).
262. *Id.* § 9134(f)(3).
263. Federal State Joint Board on Universal Service: Children's Internet Protection Act, 66 Fed. Reg. 19394-01 (Apr. 16, 2001) (to be codified at 47 C.F.R. pt. 54). For further information regarding the FCC's treatment of CIPA, including treatment following the decision in *American Library Association v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002), see http://www.fcc.gov/wcb/universal_service/schoolsandlibs.html (last visited Nov. 2, 2002).
264. *See* ALA Complaint, *supra* note 3; Multnomah Complaint, *supra* note 5.
265. ALA Complaint, *supra* note 3, at 3, ¶ 4.
266. *Id.* at 4, ¶ 5.
267. *Id.* at 5, ¶ 7.
268. *Id.*
269. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 407 (E.D. Pa. 2002) (citing CIPA, 114 Stat. 2763 (2001)).
270. *Id.* at 495.
271. *Id.* at 436.
272. *Id.*

granting of access to websites that were the intended targets of the filter.[273] As filters decrease their rate of overblocking, they increase their rate of underblocking.[274] Conversely, as filters decrease their rate of underblocking, they increase their rate of overblocking.[275]

While the court in *American Library Association* devoted most of its analysis to text-based filtering, the same is true of the effectiveness of black-list filters and white-list filters.[276] Black-list filters work by allowing access to all websites except for those specifically selected by a human for blockage.[277] White-list filters, on the other hand, work by denying access to all websites except for those specifically selected by a human for accessibility.[278] The court reviewed studies that attempted to quantify the rates of overblocking and underblocking.[279] While the court found each of these studies seriously flawed, it concluded that a fair characterization of the minimum overblocking rate is between six percent and fifteen percent.[280] That is, for every 1000 sites blocked, between 60 and 150 of those sites were not the intended targets of the filter. Other studies reviewed by the court place the rate of overblockage much higher.[281] Furthermore, the court found that none of the filters tested successfully blocked all intended sites, though the rates of underblocking were lower.[282]

Given these extreme rates of overblocking, the court concluded that filters were not narrowly tailored to achieve the compelling state interest of denying access to obscenity, child pornography, and material harmful to minors.[283] It found that those provisions that allowed for unblocking upon patron request imposed undue burdens on those who desired unfiltered access, and did not cure the law's constitutional defects.[284] "To prevent patrons from being unwillingly exposed to offensive, sexually explicit content, libraries can offer patrons the option of using blocking software, can place unfiltered terminals outside of patrons' sight lines, and can use privacy screens and recessed monitors."[285]

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273. *Id.*
274. *Id.* at 436-37.
275. *Id.*
276. *See id.* at 437 (discussing the effectiveness of text-based filters); *see also* YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 132, at 52-54 (noting the effectiveness of black and white-list filtering techniques).
277. YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 132, at 52-54.
278. *Id.*
279. *See* Am. Library Ass'n v. United States, 201 F. Supp. 2d at 436-49.
280. *Id.* at 442.
281. *See id.* at 445.
282. *Id.* at 440.
283. *Id.* at 476.
284. *Id.* at 411.
285. *Id.* at 490.

While the court acknowledged that none of these solutions were perfect, it found the government had failed to carry its burden of showing they were less effective than use of mandatory filtering of all patron access.[286]

The court similarly found that the restrictions were not narrowly tailored as to minors.[287] Specifically, the court noted alternatives that might be less restrictive, including a "tap-on-the-shoulder" when minors access material that is unprotected as to them, restricting their use to terminals in a segregated area that is viewable by librarians, and limiting access to unfiltered terminals unless accompanied by a parent or if a parent consents to unfiltered use.[288] In doing so, the court noted: "'A court should not assume that a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.'"[289] The court contrasted CIPA to the statute upheld in *Ginsberg v. New York*,[290] which gave parents the option to provide their minor children access to material that vendors were forbidden to sell to them.[291] CIPA, on the other hand, provides no means for parents to permit their minor children unfiltered access to the Internet in public libraries.[292] While the voluntary use of filters at the election of parents might fail to entirely prevent minors' access to unprotected material, mandatory filters would likewise fail to entirely prevent such access.[293]

E. *The First Amendment and Minors*

Discussion of how libraries may and should respond to the accessibility of obscenity, child pornography, and material harmful to minors cannot avoid a

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286. *Id.*

287. *Id.* at 482.

288. *Id.* In discussing these alternatives, the court noted: "We need not decide whether these less restrictive alternatives would themselves be constitutional." *Id.* at 482 n.32 ("'We intimate no opinion on the constitutionality of [a less restrictive alternative to the challenged law] . . . inasmuch as we consider merely [its] comparative restrictiveness . . . .'") (quoting Fabulous Assocs., Inc. v. Pa. Pub. Util. Comm'n, 896 F.2d 780, 787 n.6 (3d Cir. 1990)).

289. *Id.* at 482 (quoting United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 824 (2000)).

290. Ginsberg v. New York, 390 U.S. 629 (1968).

291. Am. Library Ass'n v. United States, 201 F. Supp. 2d at 482 (citing Ginsberg v. New York, 390 U.S. at 639).

292. *Id.*

293. *Id.* In the final section of the opinion, the court considered the severability of CIPA. *See id.* at 494-95. It concluded that those sections of CIPA that provided LSTA grants and E-rate discounts were severable and, therefore, were not affected by striking down CIPA's filtering provisions. *Id.* The court concluded that the "separability" clauses of the statute were intended by Congress to save the requirement of filtering as to minors, should those provisions applying to adults be found unconstitutional. *Id.* The court did not apply those clauses because it found CIPA to be facially unconstitutional in its entirety. *Id.* at 489-95.

discussion of what rights minors have under the First Amendment. Such discussions were largely absent from the *Mainstream Loudoun* and *American Library Association* cases, which focused on the restrictions placed on adult access.[294] This was appropriate as both cases centered on restrictions that applied to adults as well as to minors.[295] The fashioning of effective measures to address the concerns created from the accessibility of such material, however, requires a determination as to what restrictions, if any, may be imposed on minors' right to receive information that are not constitutionally permissible as to adults.

The Supreme Court has held that minors do not enjoy the same First Amendment right to receive information as adults.[296] At the same time, the Court has recognized that minors have some First Amendment rights.[297] The plurality opinion in *Pico* makes clear that this includes the right of minors to receive information.[298] Indeed, "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to" minors.[299] The Court has failed to provide much guidance, however, as to the age and circumstances that decision makers and providers of information should consider when determining whether a minor may or may not be permitted to receive various types of information.[300] This lack of guidance has prompted speculation from scholars as to what rights minors have to receive information.[301]

Parents may restrict their children's access to information.[302] Constitutional issues arise, however, when parents seek or expect state assistance

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294. *See* discussion *supra* Part IV.C.

295. *See supra* note 252 and accompanying text.

296. *See, e.g.*, Ginsberg v. New York, 390 U.S. at 639 (upholding a New York criminal obscenity statute prohibiting the sale of obscene material to minors under seventeen years of age).

297. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (declaring that minors do not "shed their Constitutional rights . . . at the schoolhouse gate").

298. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) (stating that "the right to receive ideas follows inevitably from the *sender's* First Amendment right to send them"). *But cf.* Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 31-32 (2001) (asserting that "[s]tudents' right to hear rests on a relatively uncertain judicial foundation," and that the plurality opinion in *Pico* has "muddied" the "clear recognition of the right embodied in *Tinker*").

299. Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975).

300. *See* H.B. v. Wilkinson, 639 F. Supp. 952, 952-54 (D. Utah 1986); *In re* Doe, 866 P.2d 1069, 1073-74 (Kan. Ct. App. 1994); *In re* Anonymous 1, 558 N.W.2d 784, 787-88 (Neb. 1997); *In re* Jane Doe I, 566 N.E.2d 1181, 1185 (Ohio 1990); Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 246 (1999) [hereinafter Ross, *An Emerging Right*] (citing Bellotti v. Baird, 443 U.S. 622, 640-43 (1979) (plurality opinion)).

301. *See, e.g.*, Ross, *An Emerging Right*, *supra* note 30, at 246.

302. *See id.* at 243-44 (concluding that parents may restrict rights inside the home because they are not state actors).

in supporting their decision to restrict information their children receive.[303] Deference to parents has generally been shown in the public school setting by permitting parents to opt their children out when they object to their participation in specific lessons.[304] As will be developed below, a deference to parental control appears to be a major factor in the Supreme Court's analysis of restrictions on the distribution of obscenity and material harmful to minors.[305]

While the First Amendment rights of minors is a broad topic, this Article does not address the issue of whether and under what circumstances libraries may restrict the access of minors to constitutionally protected speech for other purposes, including parental objection to such speech. Of course, there is no constitutional problem with libraries restricting access to material that is not constitutionally protected.[306] The analysis here is limited to the narrow issue of the extent to which the Constitution permits public libraries to restrict minors' access to constitutionally protected speech in order to deny them access to unprotected speech.

Case law offers no clear answer to this question. The Supreme Court has, however, recognized a compelling state interest in protecting minors from obscenity and other material harmful to them.[307] This protection of the viewer is not the justification for denying access to such material for adults. Indeed, adults may possess obscene material even though it is not protected constitutionally.[308] The Supreme Court has denied constitutional protection for the distribution of

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303. *See id.* at 246-50.

304. *See id.* at 246-47. "[N]early every school district in the country allows parents 'to opt their own children out of sexuality and AIDS education, as well as out of specific activities or assignments that conflict with their religious beliefs.'" *Id.* at 247 n.120 (quoting PEOPLE FOR THE AM. WAY, A RIGHT WING AND A PRAYER: THE RELIGIOUS RIGHT AND YOUR PUB. SCHOOLS 60 (1977) [hereinafter A RIGHT WING AND A PRAYER]). Ross further asserts that People for the American Way recognizes that "'preventing one's own child from using materials or participating in a program, an appropriate exercise of parental rights, is not censorship.'" *Id.* (quoting A RIGHT WING AND A PRAYER, *supra*, at 30). Governmental deference to parental control has long been recognized and enforced by the Court. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) (holding that a compulsory public school attendance policy infringed parental right to choose private education for their children); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (striking down a statute prohibiting the teaching of German in public schools as interfering with parental rights to raise children as parents choose).

305. *See infra* text accompanying notes 308-12.

306. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) (stating that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate").

307. *See* Ginsberg v. New York, 390 U.S. 629, 640 (1968) ("The State also has an independent interest in the well-being of its youth.").

308. *See* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that the states' power to regulate obscenity "simply does not extend to mere possession by the individual in the privacy of his own home").

obscenity as a means to reduce the risk that such material will reach minors or adults who do not desire it.[309] The Court has justified criminalizing distribution and possession of child pornography as a means of protecting children from being harmed in its production.[310] The Supreme Court struck down a statute criminalizing the possession of virtual child pornography, because the need to protect minors was not present when an actual minor was not used in the production.[311] Thus, protecting minors provides one justification, if not the primary justification, for all three categories of unprotected speech which are the avowed targets of filters: obscenity, child pornography, and material harmful to minors.

While the state has a compelling interest in protecting minors from obscenity and other material harmful to them, it may not deny minors access "solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[312] In *Erznoznik v. City of Jacksonville*,[313] the Supreme Court struck down a city ordinance that prohibited the showing of movies containing nudity by drive-in theaters when the screen was visible from a public street.[314] The city justified the ordinance, in part, on the need to protect children.[315] The Court rejected this justification, holding that the state may not forbid dissemination to minors of all images of nudity, but only those images which are obscene.[316] In *Erznoznik*, however, the ordinance *intentionally* targeted all movies that displayed images of human nudity, not only those that were, "in some significant way, erotic."[317] The ordinance at issue in *Erznoznik* could have been drafted in such a way as to have applied to obscenity only, but it was not.[318]

As a general rule, then, "[g]overnment may not suppress lawful speech as the means to suppress unlawful speech."[319] This does not, however, end the analysis of what government may do to prevent minors from accessing obscenity

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309. *See id.* at 567 (citations omitted).
310. *See* Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1396 (2002) (citing New York v. Ferber, 458 U.S. 747, 758 (1982) (holding that "the state's interest in protecting the children exploited by the production process" justifies proscribing child pornography regardless of whether the material is obscene under *Miller*)).
311. *Id.* at 1401-02, 1405.
312. Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-14 (1975).
313. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).
314. *Id.* at 206, 217-18.
315. *Id.* at 212.
316. *Id.* at 213.
317. *Id.* at 213 n.10.
318. *Id.* at 216-17 n.15.
319. Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1404 (2002).

and other material harmful to them. As noted above, parents may restrict the information available to their children in their own home.[320]

Parents may also restrict the information that the state makes available to their children, at least in some circumstances. For example, nearly all public schools permit parents to restrict their children's access to at least some information normally provided to the pupils.[321] Further, governments may restrict minors' access to certain speech so as to enable parents to decide whether it will be made available to their minor children.[322] In *Ginsberg*, the Court upheld a state regulation that barred the sale of "girlie magazines" to minors.[323] In doing so, the Court noted that parents were still able to provide their minor children access to such magazines if they chose to do so.[324] In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,[325] the Court overturned a ban on indecent broadcasts.[326] Justice Kennedy in a separate opinion noted: "So long as society gives proper respect to parental choices, it may, under an appropriate standard, intervene to spare children exposure to material not suitable for minors."[327] Justice Thomas, also in a separate opinion, went further, declaring: "Our precedents establish that government may support parental authority to direct the moral upbringing of their children by imposing a blocking requirement as a default position."[328] In striking down CIPA, the court in *American Library Association* specifically noted the lack of any provision for a parent to request that their child be given unfiltered access to the Internet.[329] Thus any restrictions of minors' access to speech must permit and enable parents to provide adult levels of access at their discretion.[330] Restrictions that do so, whether on an opt-in or opt-out basis, should be upheld.

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320. *See supra* note 301 and accompanying text.

321. *See* Ross, *An Emerging Right*, *supra* note 300, at 246-50 (discussing and citing examples of parents having the choice to opt their minor children out of specific school programs and assignments).

322. Ginsberg v. New York, 390 U.S. 629, 639 (1968).

323. *Id.* at 634, 644.

324. *Id.* at 639.

325. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).

326. *Id.* at 733.

327. *Id.* at 806 (Kennedy, J., concurring in part and dissenting in part).

328. *Id.* at 832 (Thomas, J., concurring in part and dissenting in part).

329. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 482 (2001) (citing Ginsberg v. New York, 390 U.S. at 639).

330. Whether parental restrictions on the information available to older minor children is efficacious or wise is open to debate. *See* Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 436-46 (2000) [hereinafter Ross, *Anything Goes*]. Ross quotes G.K. Chesterton, who found logical flaws in the proposition that bad books lead to bad behavior: "'It is firmly fixed in the minds of most people that gutter-boys, unlike everybody else in the community, find their principle motives for conduct in printed books.'" *Id.* at 442-43 (footnote omitted). This Article does not attempt to analyze the

On its face, the *Library Bill of Rights* opposes restrictions on access based on age.[331] The ALA has justified this position, in part, on the proposition that libraries should not act *in loco parentis* as to minors.[332] Use of restrictions that enable parents to choose the access available for their minor children does not place libraries in the position of acting *in loco parentis* any more than forbidding the sale of "girlie magazines" to minors places vendors in that position.[333] Rather, such restrictions empower parents to make the decision as to what level of access their children receive and merely requires librarians to honor that parental determination. It is not for librarians or other actors of the state to override parental discretion in this area. To the extent that the ALA's official position on age-based restrictions results in parents not having the option of restricting their minor children's ability to access obscenity, child pornography, and material harmful to minors,[334] that result is in conflict with the Supreme Court's application of the First Amendment to minors.[335]

V. CRITICISMS

A. *Criticism of the* Mainstream Loudoun *and* American Library Association *Cases*

The *Mainstream Loudoun* and *American Library Association* opinions have not escaped criticism. Commentators have noted that providing unrestricted, as opposed to filtered, Internet access is not without cost.[336] They

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wisdom or public policy implications of parental restraints intentionally directed at minor childrens' access to speech that is constitutionally protected. Rather, the discussion here is limited to state action designed to assist parents in restricting their minor children's access to speech that is not protected by the Constitution: obscenity, child pornography, and material harmful to minors.

331. *See supra* notes 116 and 122 and accompanying text.

332. *See, e.g.*, *supra* text accompanying note 127.

333. *See* Ginsberg v. New York, 390 U.S. 629, 639 (1968).

334. *See* ALA POLICY MANUAL, *supra* note 124, at 53.1.4.

335. Indeed, it is not entirely clear what the ALA's position might be on librarians providing parents with the option of having minor children's Internet access filtered. The organization has generally opposed any use of filters. *See id.* at 53.1.16 ("The ALA affirms that the use of filtering software by libraries to block access to constitutionally protected speech violates the Library Bill of Rights."). The proposals presented in Part VI are consistent with Policy 53.1.4, which states: "Denying minors access to certain library materials and services available to adults is a violation of the Library Bill of Rights. Librarians and governing bodies should maintain that *parents–and only parents–have the right and the responsibility to restrict the access of their children–to library resources*." *Id.* at 53.1.4 (emphasis added).

336. *See* Nadel, *supra* note 120, at 1128-29 (listing as unconsidered in *Mainstream Loudoun I* the cost of display terminals, Internet access links, internal wires, modems and servers, the opportunity cost of using terminals for disfavored uses, as well as "[t]he same budget concerns constraining the number of books that libraries can offer," which "limits the number of terminals,

argue that filtering can serve as a tool to manage access to a scarce resource—time on a computer with Internet access.[337] Just as the libraries must make collection decisions based on scarce funds and shelf space, so too must libraries allocate computer time.[338] Libraries make decisions to acquire multiple copies of some works, while not acquiring even a single copy of others.[339] These decisions are based on patron demands and a librarian's judgment as to the relative value of given works.[340] Value may be placed upon a work because of its authoritativeness, quality of writing, or fit into the library's existing or prospective collection.[341] By filtering out some websites, librarians could be said to be engaging in a similar activity.[342] The same argument has been raised in response to the *American Library Association* decision.[343]

The analogy between traditional collection development and text-based Internet filtering is flawed. While the analogy has a certain facial appeal, it fails when applied to text-based filtering because librarians are not making judgments about the sites blocked by the filter, but rather, are using filters as a blunt instrument to avoid making judgments. In doing so, they undoubtedly deprive library patrons of many valuable information sources that are authoritative and fit well into their library's collection and collection goals. At the same time, many sites that escape the filter may have little or no value to the community being served, may be of questionable authoritativeness, and in other ways may be outside the scope of the collection development objectives of the library.

Application to other types of filtering is likewise not analogous. If applied to black-list filtering,[344] which permits access to all websites except for those

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Internet accounts, and speed access links that can be purchased"); *see also* Bell, *supra* note 250, at 225-26 (stating that one cost of allowing unrestricted Internet access would be librarians losing their traditional role of deciding that the scarce resources of the library should be committed to intellectual inquiry, rather than personal e-mails, games, shopping, etc.).

337. *See* Nadel, *supra* note 120, at 1128-29 (stating the Court in *Mainstream Loudoun I* neglected to consider the cost of display terminals, Internet access links, and internal wires, modems, and servers); *see also* Bell, *supra* note 250, at 225-26 (stating that one cost of allowing unrestricted Internet access would be librarians losing their traditional role of deciding that the scarce resources of the library should be committed to intellectual inquiry, rather than personal e-mails, games, shopping, etc.).

338. Nadel, *supra* note 120, at 1127-28.

339. *Id.*

340. *Id.* at 1127.

341. *Id.*

342. *Id.* at 1130.

343. Jason Collum, *Court Strikes Law Requiring Filters on Library Computers*, AFA J., Aug. 2002, *available at* http://www.afa.net/journal/august/2002/pornography4.asp.

344. Black-list filtering permits access to all websites except for those specifically blocked by human discretion. Black-list filters operate with a presumption that a user is entitled full access to the Internet, but denies access to a user when that content sought matches the filter's

specifically blocked by a human, the analogy fails because the decision to accept all, then block some, is more analogous to removal than to acquisition. To the extent that speech blocked by black-list filtering is obscene or contains child pornography, however, it presents no constitutional problem because such speech is not protected.[345] Further, to the extent black-list filters are used to deny minors access to speech harmful to them, no constitutional issues are raised, provided that adults are not denied access to such material.[346]

If applied to white-list filters, which deny access to all Internet sites unless specifically allowed,[347] the analogy is closer. With white-list filtering, a librarian is actually making a decision as to which websites are made available,[348] much in the same way a librarian decides which books to acquire. Even as to white-list filters, however, the analogy is flawed. The scarce resources being managed with traditional acquisition decisions, funds, and space, are not affected by a decision to filter or not to filter. Indeed, the only way to manage these two resources is to select only a portion of all information resources available. The scarce resource that filtering helps manage, available time on Internet-accessible computers, on the other hand, can be managed effectively by measures that do not require denying access to constitutionally protected speech. Of course, during periods when sufficient access is available to all users, this ceases to be a justification at all. However, even during periods when demand for Internet access exceeds supply, content-neutral restrictions are available. For example, time limits can be used during periods of peak demand. Further, libraries may block access to Internet services that do not fit well into the mission of public libraries: providing access to information. Many libraries, for instance, prohibit e-mail, chat, instant messaging, and the playing of games as activities falling outside the scope of traditional library services.[349] Such bans cannot in any way be said to discriminate based on viewpoint, as these services are blocked without regard to the content of any communications that might take place. Finally,

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blocking criteria. Richard J. Peltz, *'Use the Filter You Were Born With': The Unconstitutionality of Mandatory Internet Filtering for the Adult Patrons of Public Libraries*, 77 WASH. L. REV. 397, 402 (2002).

345. *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (child pornography, like obscenity, is not protected by the First Amendment); Roth v. United States, 354 U.S. 476, 485 (1957) (holding that obscenity is not constitutionally protected speech or press).

346. *See* Reno v. ACLU, 521 U.S. 844, 886-87 (1997) (O'Connor, J., concurring) (discussing "adult zones" and stating that a zoning law is valid "if (i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material").

347. Peltz, *supra* note 344, at 402.

348. *Id.*

349. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 422 (E.D. Pa. 2002).

librarians can "tap-on-the-shoulder" patrons who violate acceptable use policies which forbid accessing unprotected speech.

Advocates of this argument have noted that librarians have traditionally served a vital role in locating reliable, authoritative material for patrons, while steering them away from low-quality works.[350] Given that the Internet has only exacerbated an already existing state of information overload, it is reasoned that white-list filtering could be used to limit library patrons to web sites that have been previously screened for their authoritativeness and other attributes of quality.[351] This, it is argued, greatly benefits patrons by separating the wheat from the chaff.[352] That this is a vital role for librarians is beyond dispute. That it is more important than ever, given the vastness of the Internet, is likewise indisputable. This does not, however, support the use of mandatory filtering. Librarians can and should act as "filters" for patrons who want their assistance in separating the "wheat" from the "chaff." Other patrons, however, may believe they need no such help, may disagree with librarians' definition of "chaff," or, even if they agree, may want access to the "chaff." Thus, such filtering can and should be available to those patrons who want it, but not foisted upon those who do not. This, in fact, is essentially the position of the ALA, which endorses the use of library recommended sites as one measure that librarians may use to manage the problems created by unfiltered Internet access.[353]

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350. *See* Nadel, *supra* note 120, at 1119-20 (stating that librarians' duty of choosing content is no different than librarians choosing content available on the Internet at library terminals).

351. *See id.* at 1136 ("[A] library can use a 'white list' filter to provide patrons with access to a specific category of favored content consistent with the library's goals.").

352. *See id.* at 1137 (stating that most patrons want librarians to aid in selecting and mediating materials).

353. *See, e.g.*, AM. LIBRARY ASS'N, 700+ GREAT SITES, *at* http://www.ala.org/parentspage/greatsites/amazing.html (last visited Nov. 2, 2002). A related concept to white-list filtering, and one that may address many of the practical limitations of this method, is for libraries to subscribe to online services that aggregate collections of related Internet sites in various subject areas. An example is *Kid's Catalog Web* which offers children access to both a subscribing library's own collection and more than twenty thousand other websites selected by the aggregator. *See* THE LIBRARY CORP., *at* http://www.carl.org/tlccarl/products/pacs/kcweb.asp (last visited Nov. 2, 2002). Already, some libraries use this method to provide access for children. *See, e.g.*, BROWARD COUNTY (FLORIDA) LIBRARY, KID'S CATALOG WEB, *at* http://www.browardlibrary.org:2000/kcweb/kcHome (last visited Nov. 2, 2002). Were sufficient demand to exist, one can imagine publishers in other areas, such as the sciences and humanities, offering access to sites they have reviewed for authoritativeness and other quality-related uses. The use of filtering as to minors is discussed elsewhere in this Article. *See* discussion *infra* Part VI.D. As to adults, the use of such sites, while perhaps providing great benefit to patrons who use them, does not require blocking of all other sites. Users who wish to benefit from librarians or others sorting the "wheat" from the "chaff" for them, may do so without requiring that all users limit themselves to what others have defined as "wheat."

One criticism of *Mainstream Loudoun* that does have merit is its analogy of the acquisition of Internet access to the acquisition of an encyclopedia set.[354] In acquiring Internet access, libraries are not so much acquiring content as they are a means of accessing content, that is, a conduit. To say that libraries must accept all that may be accessed via the unfiltered Internet is somewhat, though not perfectly, analogous to saying that a library must retain in its collection all unsolicited submissions of free books, recordings, and other media which it receives via the mail.[355] Just as libraries may make decisions to retain or discard such unsolicited material based on professional judgment as to value to the collection, they should be able to reject some Internet content as unsuited to its mission.[356] This is in fact what libraries do when they prohibit use of e-mail, chat, and online games.[357] This criticism of the court's analysis, however, does not help the proponents of text-based filters, the type of filter primarily analyzed in *American Library Association*.[358] As noted above, text-based filters are not a tool for aiding librarians in making professional judgments, but rather are a blunt instrument used to avoid the work of collection development. The latter requires at least some degree of intellectual effort by a human to judge value to the collection. The former is simply a means of denying access to large quantities of information without regard to its demand by patrons, its authoritativeness, the quality of writing or any other legitimate measures of value. It is true that a large amount of obscenity, child pornography, and material harmful to minors may be blocked, but so too will vast quantities of valuable information.

To plainly perceive this point, apply text-based filtering to the mail analogy presented in the preceding paragraph. Suppose that a library instituted a rule that unsolicited books containing such words as sex, sexual, vagina, breast, women, and girls in the title or the text would be rejected without further review. Such a rule would undoubtedly prevent some obscene material from entering the collection, but it would also exclude books on women's health. Just as such an approach would be unacceptable when applied to books, it must likewise be deemed unacceptable when applied to online content. In fact, it is just this aspect

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354. *See* Mainstream Loudoun I, 2 F. Supp. 2d 783, 792-93 (concluding libraries that block inappropriate websites are acting like censors who extract portions of encyclopedias deemed unfit for patrons).

355. *See* Nadel, *supra* note 120, at 1127 (stating that libraries compile collections based upon their community role with some preferring one type of literature, others preferring to maximize variety, and still others preferring to purchase multiple copies of popular literature).

356. *See id.* at 1128 (noting that libraries may seek to utilize filters to help them allocate limited Internet access they can afford in a way most compatible with their role in a community).

357. *See* Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 422 (E.D. Pa. 2002) (noting some libraries prohibit e-mail and chat functions on public terminals).

358. *Id.* at 430-36. Black-list and white-list filters present other problems, which are described elsewhere in this Article. *See infra* text accompanying notes 398-408.

of the filtering controversy that causes some opponents of filtering to question the motives of proponents.[359]

There is another way in which the *Mainstream Loudoun* court's misplaced analogy of the Internet to an encyclopedia set creates problems: the conceptualization of the issues involved. The acquisition of an encyclopedia set is, presumably, a decision based on the content of the encyclopedia set. That is to say, from a librarian's point of view, it is primarily the acquisition of the content of the encyclopedia. Were a librarian to deliberately purchase an encyclopedia set that contained displays of child pornography and obscenity, criticism would be warranted. By making its misplaced analogy, the *Mainstream Loudoun* court gives some undue credence to critics who attack librarians for opposing filters. As noted above, subscribing to the Internet is not acquisition of content, but is, instead, providing to patrons a conduit through which they may make their own acquisition decisions. More accurate analogies would be to the provision of alternative information retrieval and communication tools, for example, phone service and audio-visual equipment. No one would seriously argue that a public institution, say a college, that provided phone services to students, was endorsing student access to dial-a-porn services, or that a library that provided audio-visual equipment was endorsing its use by patrons to view child pornography that a patron might bring with him or her to the library. While such uses are possible, that is not the purpose for which these tools were acquired. The same is the case when some patrons use computers in public libraries to access obscenity and child pornography.

B. *Criticism of the American Library Association's Position on Filters*

On the other hand, the ALA, while opposing filtering, has been less than consistent in advocating an approach it believes is permissible to control access to obscenity, child pornography, and material harmful to minors. Specifically, while the ALA supports acceptable use policies,[360] along with patron and parental education and guidance,[361] other statements by the ALA must certainly cause those concerned about this issue to question its commitment to making such approaches actually work. For example, in the same document in which the ALA advocates the adoption of Internet use policies which should, among other things, "expressly prohibit any use of library equipment to access material that is obscene, child pornography, or 'harmful to minors' (consistent with any

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359. *See, e.g., supra* notes 132 and 155.

360. *See* GUIDELINES AND CONSIDERATIONS, *supra* note 160 (identifying guidelines that libraries can use when developing Internet use policies).

361. *See id.* (stating that an Internet use policy should communicate the relevant policies regarding Internet use to patrons and parents).

applicable state or local law),"[362] it asserts that "[l]ibraries and librarians are not in a position to [decide] for library users or citizens generally" whether specific content is obscene, child pornography or harmful to minors.[363] At best, this demonstrates that the ALA itself has not developed a coherent approach to this issue. At worst, proponents of filtering may point to this as evidence that librarians who follow the ALA's lead cannot be trusted to enforce any acceptable use policies adopted.

The ALA's position that librarians cannot judge what is obscene, child pornography or harmful to minors, while having a certain facial appeal, is untenable. Laws that proscribe distribution or possession of obscenity, child pornography, and material harmful to minors carry criminal penalties.[364] Librarians, who are information professionals, cannot plausibly assert that they lack the ability to determine what material falls within this category when everyone, no matter their level of education or experience with information, is subject to prosecution for violation of these statutes.[365] While admittedly, such determinations may be difficult in relation to some content, the Supreme Court has upheld convictions under statutes criminalizing distribution of obscenity,[366] distribution and possession of child pornography,[367] and distribution to minors of material defined as harmful to them.[368] In order for policies to be used in a meaningful and acceptable manner, policies must not only be adopted, but must also be enforced. Enforcement will require that librarians determine when violations of such policies have occurred. This, in turn, will require librarians to

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362. *Id.* Specific guidelines proposed include the following:

> [S]et[ting] forth reasonable time, place, and manner restrictions;
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> expressly prohibit[ing] any use of library equipment to access material that is obscene, child pornography, or "harmful to minors" (consistent with any applicable state or local law);
>
> provid[ing] for the privacy of users with respect to public terminals; and
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> protect[ing] the confidentiality of records, electronic or otherwise, that identify individual users and link them to search strategies, sites accessed, or other specific data about the information they retrieved or sought to retrieve.

Id.

363. *Id.*

364. *See generally* 18 U.S.C. ch. 71 (2000) (federal obscenity statutes); 18 U.S.C. ch. 110 (2000) (federal child pornography statutes).

365. *See generally* 18 U.S.C. ch. 71 (2000) (federal obscenity statutes); 18 U.S.C. ch. 110 (2000) (federal child pornography statutes).

366. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973).

367. *See, e.g.*, Ferber v. New York, 458 U.S. 747 (1982).

368. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1968).

decide whether specific content is obscene, child pornography, or harmful to minors.[369]

Another reason to question the ALA's commitment to effectively addressing the problems created by public libraries providing Internet access is its policy that minors should enjoy the same informational access as adults.[370] The historical efforts to censor the material libraries collect, and to dictate that some material not be made available to minors[371] undoubtedly led to the adoption of the ALA's *Library Bill of Rights* and its suspicion of any effort that in any way restricts anyone's access to any information.[372] New circumstances, however, dictate a more careful examination of the other interests that are competing with the rights guaranteed by the First Amendment and of how policy makers should balance these competing interests. In the past, libraries could avoid providing access to obscenity, child pornography, and material harmful to minors by not collecting such material.[373] Making the Internet accessible without filtering within libraries, however, fundamentally changes the situation. Unrestricted Internet access makes available material that is clearly illegal under federal and state laws regulating unprotected speech.[374] By providing access to such

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369. Library schools might assist this effort by offering lessons on the First Amendment that include a study of how courts have determined whether specific content fell within one or more of these categories. In addition, librarians could pursue continuing education which would keep them up-to-date on developments in this area of the law and would provide an understanding of the community standards applied in their localities. Naturally, patrons who believe a librarian's decision was in error may seek judicial redress.

370. *See supra* notes 115, 122 and accompanying text.

371. *See, e.g.*, *supra* text accompanying notes 44-103.

372. *See, e.g.*, *supra* text accompanying note 110.

373. To the extent they did so, this would indicate that librarians have some ability to identify material that is legally obscene, child pornographic, or harmful to minors. Undoubtedly, in many cases, librarians have decided to err on the side of caution in making such determinations, electing not to collect some material that is constitutionally protected. In view of *Mainstream Loudoun II*, this may lead some to argue that while they were free not to collect such material, once they have done so by obtaining Internet access, they may not remove such borderline content. This is an area in which courts, while applying strict scrutiny analysis, must recognize that perfection is not possible, and provide some leeway, as long as there is proof of good faith. If a librarian is overzealous in determining which material is unprotected, courts may overturn their decisions. Main Stream Loudon II, 24 F. Supp. 2d 552, 571 (E.D. Va. 1998). The risk of overzealousness, however, should not bar their making such determinations initially.

374. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 405-06 (E.D. Pa. 2002); *see also* YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 132, at 96-112. While neither the court in *American Library Association* nor the authors of YOUTH, PORNOGRAPHY, AND THE INTERNET analyzed the content of the more than 100,000 sites identified as having adult content under any federal or state definitions of obscenity or material harmful to minors, one can safely assume that a great many such sites contained content that would fit such definitions. Further, the court in *American Library Association* found that "tens of thousands of Web sites contain[ed] child pornography." Am. Library Ass'n v. United States, 201 F. Supp. 2d at 406.

material, libraries have placed upon themselves the duty to make reasonable efforts to restrict access to such content, and, where such efforts fail, to mitigate against any harm caused.[375] The ALA's position that minors should enjoy access equal to that of adults simply has no support in First Amendment jurisprudence.[376]

VI. PROPOSALS FOR A BALANCED APPROACH

A. *Need for a Balanced Approach*

In the two most prominent cases addressing filtering, the methods selected have failed to pass constitutional scrutiny.[377] In large measure, this is because the entities involved mandated the use of filtering in a way that assured that patrons, both adults and minors, would be denied access to a large quantity of constitutionally protected speech,[378] provided no means by which the filters could be readily and anonymously bypassed,[379] and left parents no ability to determine for themselves whether their minor children should be provided adult-level access.[380] Thus, by insisting on such implementations of filtering, proponents have sidetracked uses of filters which are constitutionally permissible and which would aid in controlling the problems described in this Article. Text-based filters have been found to block access to a wide range of speech that could in no way be described as pornographic.[381] Denying law-abiding individuals access to such speech that they need in order to prevent less responsible individuals from committing crimes or torts is bad public policy aside from the First Amendment

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375. *See supra* note 22 and accompanying text.

376. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 875 (1997) (recognizing that the government has a greater interest in protecting minors from harmful material); Ginsberg v. New York, 390 U.S. 629, 639 n.6 (1968) ("regulations of communication addressed to [minors] need not conform to the requirements of the [F]irst [A]mendment in the same way as those applicable to adults") (quoting Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 938-39 (1963)).

377. Am. Library Ass'n v. United States, 201 F. Supp. 2d at 496; Mainstream Loudoun II, 24 F. Supp. 2d 552, 570 (E.D. Va. 1988).

378. Am. Library Ass'n v. United States, 201 F. Supp. 2d at 489; Mainstream Loudoun II, 24 F. Supp. 2d at 570.

379. Am. Library Ass'n v. United States, 201 F. Supp. 2d at 484-89; Mainstream Loudoun II, 24 F. Supp. 2d at 570.

380. Am. Library Ass'n v. United States, 201 F. Supp. 2d at 482; *cf.* Mainstream Loudoun II, 24 F. Supp. 2d at 570 (while not directly addressed, as all patrons' access was filtered—including adults—and as the disabling provision as applied to all users were deemed unconstitutional, it follows that parents could not opt-out for their minor children).

381. *See, e.g.*, Am. Library Ass'n v. United States, 201 F. Supp. 2d at 446-47 (listing erroneously blocked sites in such categories as religion, government, politics, health, education, careers, and sports).

objections. In essence, it allows society's least responsible members to control the rights of everyone else. This flips America's tradition of individual responsibility and accountability on its head by punishing everyone for the crimes of a few.[382]

The ALA's opposition to any use of filters and the mixed message conveyed by its policy statements calls into question the organization's commitment to any meaningful solution to the problem. Indeed, some of its members refuse to even acknowledge there is a problem.[383] If the very real problems discussed in this Article are to be effectively dealt with, a balanced approach must be taken. Filtering, properly implemented, can serve as one of several tools that public libraries may use to address this problem.[384] It is not, as Lawrence Lessig has argued, "the devil."[385] It is a tool, which, like most tools, can be used for good or for ill, properly or improperly. In this case, filters are tools to "prevent certain materials or content from arriving in places where they are not wanted."[386] In the case of filters, proper use is for individuals to utilize them as a means of controlling the content they receive[387] and, as I will argue

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382. *See infra* note 393 and accompanying text.

383. *See supra* text accompanying note 132.

384. The Waltham (Massachusetts) Public Library apparently utilizes an approach similar to that advocated in this Article. *See* Tom Mashberg, *Net Pushes Library Limits: Computers Become Peep Shows, Forcing Librarians to Look at Issue*, BOSTON SUNDAY HERALD, Aug. 12, 2001, at 3 (noting the use of filters in children's areas, and the setting aside of two filtered terminals for adults who fear they may stumble across "smutty or hate-filled sites while online"). Thomas Jewell, chief of the Waltham Public Library, noted: "It's a tricky issue. It's impossible to satisfy everyone. We're compromising as best we can in a complex arena." *Id.*

385. Lawrence Lessig, *Tyranny in the Infrastructure*, WIRED 5.07, July 1997, at 96.

386. R. Polk Wagner, *Filters and the First Amendment*, 83 MINN. L. REV. 755, 760 (1998).

387. Lawrence Lessig believes that this is, or at least may be, an improper use of filters, as it allows individuals to avoid information which they may find disturbing or with which they disagree. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 179-80 (1999). While he acknowledges that we all (himself included) already use personal filters, he argues that the imperfections of filters in real space mitigate against our living sheltered from disturbing information. *Id.* Tim Berners-Lee, the inventor of the World Wide Web, has stated, "An individual clearly has the personal right to filter anything that comes at him . . . . Without this right, each day would be chaos." TIM BERNERS-LEE, WEAVING THE WEB 134 (1999). Here, at least as to the proposals presented in this Article, the goal is not to enable the blocking of any content that individuals might find offensive for themselves or their minor children, but only content that is obscene, child pornography, or otherwise harmful to minors. Lessig's fears, however, are overstated. The Internet is not our sole, or even—at least for most people—primary source of information. We still live in the real space in which Lessig finds imperfect filters, and are confronted everyday with realities that are disturbing and hopefully thought provoking. To date, the author has observed no real threat that Internet use, even if filtered, will shield us from the stark and harsh realities of life. Indeed, a national survey found that three-quarters of Internet news consumers still rely primarily on traditional outlets for their news. THE PEW RESEARCH CTR. FOR

below,[388] for parents to restrict their minor children's access to material that may be obscene, child pornography, or otherwise harmful to minors. Improper use is for government, at any level, or for other outside entities to control what information individuals receive. Even when properly used, however, filters, by themselves, are not a viable solution to limiting the accessibility of obscenity, child pornography, and material harmful to minors.[389]

THE PEOPLE AND THE PRESS, THE INTERNET NEWS AUDIENCE GOES ORDINARY, *at* http://people-press.org/reports/display.php3?PageID=337 (last visited Nov. 2, 2002). Indeed, the Pew survey found that "the online population is more likely to read a newspaper daily than the offline public." *Id.* In addition, with the Internet, properly implemented filtering places more control with end users and parents, rather than with broadcast executives, film producers, and print publishers who have long served as filters for all of us, enabling them to convey the messages that they believe we want or should have. Lessig's fear appears to be that end users will not use Internet filters wisely. He may well be correct. Many question the wisdom of those who now act as filters on our behalf. *See, e.g.*, Bell, *supra* note 250, at 229-30 (discussing pressure from elected officials to remove books, use filters, or prohibit art exhibitions). What is wise, however, is largely a matter of opinion. Since information filtering is, and long has been, a part of our everyday life, the key is to implement Internet filtering in a way that empowers information users and parents, not government or other outsiders who wish to control the flow of information. Indeed, Lessig's own proposal to manage access to pornography on the Internet involves a type of filtering, even if he does not so denominate it. *See* LESSIG, *supra*, at 177-78.

388. *See infra* text accompanying notes 409-27.

389. *See* YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 132, at 374. In this respect, the author is in agreement with the conclusion of the Committee to Study Tools and Strategies for Protecting Kids from Pornography and Their Applicability to Other Inappropriate Internet Content, (Computer Science and Telecommunications Board, a committee within the National Research Council), which concluded: "If one installs tools and/or passes legislation in the hope that they will 'take care of the problem,' and that in doing so one's responsibilities will thus be adequately discharged, children are highly likely—eventually—to encounter inappropriate material or experiences on the Internet." *Id.*; *see also* MULTNOMAN COUNTY PUB. LIBRARY ASS'N, PRESS INFO. CTR., CHILDREN'S INTERNET PROTECTION ACT, *at* http://www.multcolib.org/news/cipa.html (last visited Nov. 2, 2002). The Multnomah County (Oregon) Public Library describes how it protects minors from unprotected speech on the Internet as follows:

> No one wants children to be exposed to pornography on the Internet, on television, in print, or anyplace else. What's important is finding effective solutions to this serious problem. As a recent report by the National Academy of Sciences' National Resource Council indicates, no single approach will succeed in protecting children. Internet filters are only one of several tools that will contribute to a balanced solution including education, law enforcement and public policy. And the involvement of local communities to determine which strategies make sense in their particular situation is also critical. The recent decision by the U.S. District court on CIPA also affirmed that public libraries can protect children using many alternatives to mandatory filtering.
>
> Multnomah County Library does all it can to create a safe and welcoming environment for children. In addition to providing optional filters, we work very hard to ensure that every child's library experience is a positive one. Children are encouraged to use computers in the children's area of the library. These computers

B. *Primary Reliance on Individual Responsibility and Accountability*

The debate between advocates of text-based filtering in public libraries and those opposing filtering may be seen in broader terms as a debate between advocates of governmentally imposed restraints that restrict lawful, as well as unlawful and tortious uses of a subject matter as a means to control the latter, versus advocates of holding those who engage in unlawful or tortious uses individually responsible and accountable for their actions.[390] This debate is not confined to speech; these competing approaches are advocated in a variety of contexts. For example, the debate over gun control can be seen in this context.[391]

> open directly to the library KidsPage, which features quality children's Web sites chosen by library staff and other age-appropriate information.
>
> The library encourages parents to play an active role in guiding their child's use of the library in the following ways:
>
> Discuss family rules regarding Internet use at the library with their children.
>
> Monitor their children's Internet use at the library.
>
> Ask library staff members for help in selecting library materials to suit their family's interests and values.
>
> Show an interest in what their children borrow from the library, taking the opportunity to provide guidance if a particular choice seems inappropriate.

Id.

390. From this broader perspective, the sides taken in this debate reveal what seems to be a paradox: advocates of filtering are often identified as politically conservative, while opponents are often identified as politically liberal. Yet in other public policy debates, those who are often identified as politically conservative are seen supporting individual responsibility and accountability, while those who are identified as politically liberal favor governmentally imposed restraints that equally impact lawful and unlawful use of the subject matter over which control is sought. While a cynic might attribute this shift in approaches by each side as indicative of hypocrisy, a more generous and likely more accurate interpretation would be to attribute it to the value placed on various constitutionally guaranteed rights and competing interests.

391. A comparison of the filtering debate to the debate over gun control reveals a great many parallels. In both cases, constitutional protections are at issue. In both cases, real harm is caused by those who use the constitutionally protected subject matter in illegal and tortious ways. In both cases, heated disputes have developed between those who would limit harm from illegal and tortious use of the constitutionally protected subject matter through individual and parental responsibility, and those who would impose burdens and restrictions on those who are lawfully and responsibly exercising their constitutional rights as a means of preventing the harmful conduct. In both cases, the law has come to rely heavily on individual responsibility and accountability for misuse of the freedom this gives them. Thus, with a few exceptions, law-abiding citizens may own firearms, but if they use a firearm in a crime, they are subject to enhanced penalties (18 U.S.C. § 924(c) (2000)), and if they use them recklessly or negligently, they are subject to civil liability. *E.g.*, 63 CAL. JUR. 3D *Weapons* § 4 (2002). Likewise, with few exceptions, government may not restrict speech, but individuals who use speech to commit criminal acts (e.g., securities fraud) are subject to punishment (18 U.S.C. § 1961), and those who are reckless or negligent in their use of speech (e.g., defamation), are subject to civil liability. *E.g.*, N.D. CENT. CODE § 32-44-02 (2001).

In the case of Internet access in public libraries, this becomes a debate between those who would deny responsible users access to constitutionally protected speech inadvertently blocked by the filters as a means to prevent access to unprotected speech versus those who advocate allowing responsible individuals to use the Internet to access the constitutionally protected speech they need and want while holding responsible those who use it to access child pornography, or display obscenity and material harmful to minors in public places.[392] In general, our society has relied on individual responsibility and accountability as the primary means of controlling criminal and tortious conduct rather than restricting lawful use by responsible people.[393]

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392. Multnomah County (Oregon) Public Library, a plaintiff in the *American Library Association* case, relies on accountability. MULTNOMAN COUNTY PUB. LIBRARY ASS'N PRESS INFO. CTR., CHILDREN'S INTERNET PROTECTION ACT, *at* http://www.multcolib.org/news/cipa.html (last visited Nov. 2, 2002) ("[T]he library may revoke computer privileges, library privileges and/or alert law enforcement officials if its computers are used for illegal or other improper activities. If customers see a potential problem, they should alert staff, who will assess the situation and take appropriate action.").

393. *See, e.g.*, Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1399 (2002) ("The prospect of crime, . . . by itself[,] does not justify laws suppressing protected speech.") (citing Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 689 (1959)); Stanley v. Georgia, 394 U.S. 557, 566-67 (1969) ("'Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . . .'") (quoting Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring)). As to the gun control analogy discussed above, advocates for filtering and other restrictions on protected speech may argue that public funds are not used to provide guns, but public funds are used to provide Internet access in public libraries. This argument would hold that where government funds the access, it may restrict what speech is received, even if that speech is otherwise protected by the Constitution. In the case of public libraries providing Internet access, this distinction, while real, does not call for a different approach. Another analogy might be useful to illustrate why this is the case. Public funds are used for highway construction and maintenance. As with the Internet, most people use highways in a responsible manner to meet their legitimate needs, but some use the publicly funded roads to commit torts and crimes. Few, if any, would advocate that in order to prevent such harmful use, perfectly legal uses should be so technologically restricted that irresponsible use becomes nearly impossible. Speeding could be prevented (or at least greatly reduced) by mandating that all automobiles sold have governors installed that limited their top speed to the highest speed limit permitted in the country. Such a solution to speeding, however, has obvious flaws. Emergency situations may justify speeding, for example, just as researching breast cancer justifies access to websites that filters may block. And, of course, drivers could still speed in zones where the limits were lower than the governor's limit, just as filters still permit access to obscenity, child pornography, and material harmful to minors. Likewise, the federal government or states could mandate that all new cars sold have ignition interlocks installed so that no one could start the engine without first proving they were sober. While forty states have laws that require such devices in some circumstances for cars driven by those previously convicted of driving while intoxicated, see *Ontario's New Attack on Drunk-Driving; A Breath Sample Will Determine If Driver Can Start Car*, THE HAMILTON SPECTATOR, Oct. 24, 2002, *available at* 2002 WL 101892871, no state mandates their installation on all cars. *See, e.g.*, JERRY L. MASHOW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 131-40 (1990) (discussing the public outcry caused

There is no reason to believe that approaches which emphasize individual responsibility and accountability will not work to manage the problems arising from the accessibility of unprotected speech on the Internet.[394] This conclusion does not mean that there is no place for measures other than individual responsibility to manage the problem, but the use of such measures should be used to enhance the ability of responsible adults and parents to avoid their and their children's access to such material.[395] The *American Library Association* court discussed some measures libraries might utilize to aid and augment individual responsibility and accountability, including acceptable use policies and placing computer monitors where librarians can detect misuse and "tap-on-the-shoulder" violators of such policies.[396] Alternatively, privacy screens and

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by a proposed rule of the National Traffic Safety Administration, requiring ignition interlock devices that would have prevented drivers from starting an automobile if they did not fasten their seatbelt). Instead, when individuals are negligent or reckless in the use of highways, they are subjected to civil liability, and when they use them illegally, they are subjected to criminal prosecution and penalties. *Compare* RESTATEMENT (SECOND) OF TORTS §§ 500-501 (1965), *with* MODEL PENAL CODE § 2.02(c)-(d) (2001). Further, adults are not restricted in their use of publicly funded roads as a means to control how minors use the roads. Again, the analogy is not perfect. The public's use of highways is subject to more invasive governmental controls than is speech. Nonetheless, personal responsibility and accountability are the primary means by which highway use is controlled.

394. Underlying the arguments offered by advocates of filtering appears to be a general mistrust that librarians will actually enforce acceptable use policies. It may well be that some librarians will not enforce these policies. The solution there, however, is not to mandate filters for all users, but rather it is to discipline and, if necessary, to terminate the employment of librarians who refuse to enforce the policies adopted by their employers. Punishing responsible users by denying access to constitutionally protected speech is neither constitutional nor sound public policy. Reno v. ACLU, 521 U.S. 844, 885 (1997).

395. Such enhancement measures are also used to control illegal and tortious use of firearms by imposing waiting periods and background checks. *See generally* James B. Jacobs & Kimberly A. Potter, *Keeping Guns Out of the "Wrong" Hands: The Brady Law and the Limits of Regulation*, 86 J. CRIM. L. & CRIMINOLOGY 93 (1995). Such measures apply to the use of highways by mandating, for example, automobile safety inspections.

396. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 406 (E.D. Pa. 2002). The "tap-on-the-shoulder" approach is not without its detractors. The American Civil Liberties Union (ACLU) has attacked it as "in many ways, more intrusive and unconstitutional than a computer program." ACLU, CENSORSHIP IN A BOX, WHY BLOCKING SOFTWARE IS WRONG FOR PUB. LIBRARIES, *at* http://www.aclu.org/Cyber-Liberties/Cyber-Liberties.cfm?ID= 5001&c=16*teaching (last visited Nov. 2, 2002). The position of the ACLU demonstrates the difficulties in fashioning any meaningful means of controlling access and displays of obscenity, child pornography, and material harmful to minors in public libraries. Certainly, librarians are properly reluctant to snoop into what patrons read. Display of obscenity to minors and adults who do not want to view it, however, is something that librarians should be concerned about. Privacy screens and recessed monitors are arguably a means to prevent unwanted displays while avoiding snooping of what patrons are viewing. Indeed, the ACLU recommends the use of privacy screens for this purpose. *See* ACLU, *supra*. These approaches, as noted, have their own problems. For example, they help

recessed monitors might be used to prevent minors from viewing content illegal as to them, but not for adults. All of these approaches have their strengths and weaknesses. Privacy screens or recessed monitors, for example, could be used to conceal access to child pornography, while placing monitors in positions readily viewable by librarians increases the likelihood that minors might view material harmful to them. The availability of these measures, however, does not foreclose the use of filters as a means to augment these approaches, provided that appropriate limitations on their use are followed to avoid the problems identified in *Mainstream Loudoun* and *American Library Association*.

C. *Constitutional Use of Filters*

1. *Text-Based Filters*

There are a number of ways in which text-based filters may be used without violating the constitutional rights of patrons. First, some computers could be filtered, while others are left unfiltered. This would allow patrons who wish to avoid inadvertently accessing obscenity and other offensive material an option, while leaving others access to all constitutionally protected speech available through the Internet. Alternatively, all computers could be filtered, but configured to permit patrons to turn the filters on and off without librarian intervention. In either case, the filters could be configured to permit individual patrons to customize the filtering criteria they desired. In this way, patrons could limit their own access to speech that is constitutionally protected but which they nonetheless find offensive, such as sites devoted to hate and violence.[397] Filters could be configured to provide a warning that a site which a patron is attempting to access might contain material that is obscene, child pornographic, or harmful to minors, but not actually block access. This would aid patrons who want to

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conceal patrons who may be accessing child pornography and may make collaborative work more difficult. To the extent that they are more concerned about protecting minors than adults from viewing unprotected speech, libraries may choose to place computers available to minors where their screens are readily viewable by librarians, while limiting the use of privacy screens and recessed monitors to unfiltered computers made available to adults. One way to address the potential use of computers with privacy screens to access unprotected speech would be to have software that logs access to sites that a text-based filter would have blocked. Librarians could then review those sites listed in such a log to determine if they contain obscenity or child pornography. Any sites judged obscene or child pornographic could then be blocked by black-list filtering. *See infra* notes 402-03 and accompanying text.

397. Multnomah County (Oregon) Public Library, one of the plaintiffs in *American Library Association*, uses an approach similar to this suggestion. MULTNOMAH COUNTY PUB. LIBRARY PRESS INFO. CTR., CHILDREN'S INTERNET PROTECTION ACT, *at* http://www.multcolib.org/news/cipa.html (last visited Nov. 2, 2002). Parents could use this option to configure the filtering of their children's access, as discussed more fully below.

avoid such content from inadvertently accessing it while permitting patrons to make intelligent judgments as to the risk that such sites might contain unprotected speech. Someone attempting to access one of the many sites identified as being inappropriately blocked in *Mainstream Loudoun* or *American Library Association*, for instance, could simply ignore such a warning and proceed to access the site.

2. *Black-List Filters*

By itself, black-list filtering is not a practical means to deal with the accessibility of unprotected speech. While black-list filtering might lessen the degree to which constitutionally protected speech would be inadvertently blocked, the Internet contains so much content that librarians could not possibly review enough of it to block a meaningful portion of websites containing content that is obscene, child pornographic or harmful to minors. It might be argued that librarians could use text-based filters to identify potentially illegal content and then exercise their own professional judgment and understanding of community standards to determine what material is unprotected. Even with the use of such filters to narrow the range of sites to review, the task would be herculean and, as a practical matter, impossible.

The *American Library Association* court estimated the number of pornographic sites was in excess of 100,000.[398] A still larger number, however, were misidentified as pornographic by the text-based filters.[399] All such sites would require review by individual librarians who would be required to apply the current standards that apply in the jurisdiction in which the library is located for obscenity, child pornography, and material that would be harmful to minors. Even if it were humanly possible to review one site per minute all day, every day, for a full working year (certainly a mind-numbing task), an individual librarian would only be able to review 120,000 sites out of the more than two billion on the Internet.[400] Further, because the average site changes every ninety days,[401] the sites reviewed in the first three months of the year would have changed their content, on average, three times by the end of the year. As the whole point of black-list filtering is that all sites are allowed through the filter until reviewed, it can be plainly seen that this method holds no promise by itself to deal with the problems described in this Article.

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398. Am. Library Ass'n v. United States, 201 F. Supp. 2d at 406.
399. *Id.* at 437-50.
400. This assumes a 2000 hour work year, reviewing sixty sites per hour.
401. Am. Library Ass'n v. United States, 201 F. Supp. 2d at 419.

Nevertheless, there is no reason why black-list filters could not be used by librarians to block access to sites on a case-by-case basis as one tool to be used in combination with the other measures to minimize access to content that is illegal. For example, if a librarian observes a patron accessing a site that contains obscenity or child pornography, he or she could block that specific URL. That a blocked site's content might change later is no reason to prohibit this use of black-list filtering. Certainly, precision is required of content-based restrictions of speech.[402] So long as a library initially blocks a site only after a review of the site's content to determine whether it is publishing unprotected speech and implements procedures for unblocking it if the publisher ceases to publish unprotected speech at the blocked URL, it should be deemed to have acted with sufficient precision. Libraries, for instance, could periodically review blocked sites to determine if the content continues to be an appropriate subject for blocking. Alternatively, libraries could, provided such software were available, set expiration periods which would automatically turn off blocking of a site after the designated period unless specifically renewed after reexamination.

Further, libraries might be required to post lists of blocked sites so that concerned patrons or web publishers could challenge any decisions that they deem inappropriate either initially or because of changes in the site's content. While this places libraries in the uncomfortable position of providing lists of sites which may contain all manner of unprotected speech, in balance, it seems an appropriate requirement to prevent purposeful viewpoint censorship of constitutionally protected speech and overbroad application of the criteria used to identify unprotected speech. As a practical matter, the posting of such a list does not contribute significantly to the accessibility of nonprotected speech, as such material is easily found using any number of Internet search engines.[403]

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402. *See* NAACP v. Button, 371 U.S. 415, 438 (1963) (holding that only a compelling state interest can justify limiting First Amendment freedoms). That a librarian might block virtual child pornography because of the mistaken belief that it depicted an actual child should likewise be no basis for objection. If a librarian cannot determine whether images depict real children, he or she should be permitted to err on the side of caution. In any event, much of what meets the statutory definition of child pornography, be it real or virtual, may well be obscene under local community standards. Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1396 (2002). Black-list filtering could also be used to block access to URLs that contain tools that do not fit into the mission of public libraries such as e-mail, chat, and games. *See* Am. Library Ass'n v. United States, 201 F. Supp. 2d at 422 (giving an example of a county library's policy of not allowing "patrons to use the library's Internet terminals for personal email, for online chat, or for playing games").

403. *Cf.* Am. Library Ass'n v. United States, 201 F. Supp. 2d at 430-36 (describing how filtering companies use methods similar to search engines to determine which sites to evaluate using the filtering criteria).

3. *White-List Filters*

Some have argued that white-list filters are constitutionally permissible on the theory that their use closely mirrors the method by which a library decides to acquire information resources available in other media (e.g., books, audio tapes, etc.).[404] For reasons discussed earlier, white-list filtering is constitutionally suspect, at least when applied to adults and, possibly, mature minors.[405] Scarcity of Internet-accessible computers does not give rise to a compelling state interest which requires libraries to block access to large portions of the Internet. Further, unlike management of finite funds and space, which make limited acquisition of physical media unavoidable,[406] there are other, less restrictive means to manage scarce Internet time.[407] In addition, librarians can assist interested patrons in narrowing the material they search without denying all patrons access to other constitutionally protected speech.[408] As the vast majority of the content on the Internet is not obscene, child pornography, or harmful to minors, white-list filtering offers no practical assistance in combating the problems raised in this Article, except as to immature minors. Indeed, because of the vastness of the information available on the Internet, the same time constraints discussed as to the use of black-list filters would make the use of white-list filters even more restrictive of constitutionally protected speech than text-based filters.

D. *Filtering of Minors' Internet Access*

Another permissible purpose of filters is to control the access of minors to the Internet. As noted above, minors do not enjoy First Amendment rights equivalent to adults.[409] While court decisions indicate that older minors may have greater rights than younger ones,[410] they have failed to provide clear guidelines with which to assess what greater rights older minors have, and how to

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404. *See* Nadel, *supra* note 120, at 1119.

405. *See supra* text accompanying notes 343-52.

406. Indeed, a library might decide because of scarcity of funds or space not to make Internet access available at all. *See* Mainstream Loudoun I, 2 F. Supp. 2d 783, 795 (E.D. Va. 1998).

407. *See supra* text accompanying notes 343-59.

408. *See supra* text accompanying notes 343-59.

409. *See supra* notes 293-333 and accompanying text.

410. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 878 (1997) (stating that "the strength of the Government's interest in protecting minors is not equally strong throughout" all age groups); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) (holding "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.").

determine when they apply.[411] The Supreme Court has repeatedly upheld statutes that deny minors below the age of seventeen access to material that adults have a constitutional right to receive and possess.[412] As argued above, protection of minors appears to be one value, if not the primary value, justifying not only laws restricting minors' access to material determined to be harmful, but also restricting the distribution of obscenity in general, as well as the possession of child pornography.[413] This use of filtering merely extends parental control from their homes, where it is clearly permissible, to public libraries.[414]

Systems that minimize the risk of access by minors to such materials are constitutional so long as they do not impinge on the rights of adults to access constitutionally protected material and provide parents the ability to permit adult-levels of access for their minor children if they desire.[415] It can be argued from *Erznoznik* that denial of access to constitutionally protected speech is not permissible, even as to minors, where more narrowly tailored restrictions are available.[416] This reading of *Erznoznik*, while accurate, is incomplete. In *Erznoznik*, the City of Jacksonville was not acting to enable parental

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411. *See, e.g.*, Ross, *An Emerging Right*, *supra* note 300, at 223 n.3 and accompanying text.

412. Stanley v. Georgia, 394 U.S. 557, 560-61, 568 (1969) (holding that adults may possess obscene material even though its distribution is not protected as a means of preventing access by minors); Ginsberg v. New York, 390 U.S. 629, 634 (1968) (upholding a New York statute that restricted the sale of sexually explicit material to minors).

413. *See supra* notes 307-10 and accompanying text.

414. Lawrence Lessig offers what may be a better alternative if in fact implemented. Users could have profiles which indicate whether a given user is an adult or a minor. If the user is a minor, websites would receive this information and be required to block access to content harmful to minors. *See* LESSIG, *supra* note 387, at 761. One can imagine libraries providing access only by login which would then load the user's profile. For such a system to work, however, the cooperation of web publishers is needed. "Cooperation" could be mandated, but would likely be difficult to enforce, particularly for sites outside the United States. One way to deal with this problem might be to fall back to the use of filters for sites that fail to implement such a scheme on their end. This in turn, might require the cooperation of vendors of filters, who would need to implement a system to detect if a site is in fact authenticating users by profile and blocking access to material harmful to minors when the profile indicates the user is a minor. This would, then, permit sites that might be inadvertently blocked by filters to avoid them by implementing such a profile authentication scheme. Even sites with no objectionable content would need to implement such schemes in order to avoid being the victim of overblocking. Several legal issues rise from such a scheme. First, if governments mandate this approach, it could well be deemed an undue burden on web publishers. Further, problems of varying community standards as to what is in fact harmful to minors will still exist, unless the Supreme Court decides to implement a national standard. *See supra* note 188 and accompanying text. At this time, no such scheme exists. Until it does, filtering is the only viable technology tool available to parents.

415. *See supra* notes 323-27 and accompanying text.

416. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 n.10, 217 n.15 (1975).

discretion.[417] The ordinance in question *intentionally* restricted access to a broad range of speech, much of which could not be defined as obscene, even as to minors.[418] The Court found this unacceptable.[419] *Erznoznik* did not, however, involve a state actor providing parents an option of denying their children access to unprotected speech through a mechanism that might also *inadvertently* deny access to some constitutionally protected speech as well. *Erznoznik* has little to offer in addressing that issue. Thus, libraries may limit minors' Internet access through text-based filters or white-list filters by either an opt-in or opt-out method. That is, they may elect to permit adult-levels of access unless parents request filtered-only access or, alternatively, may elect to provide filtered-only access unless parents request unfiltered access. Libraries may not, however, deny parents the option of choosing unfiltered access for their minor children.[420] This places the decision of the degree to which minors have access to unfiltered Internet services, and hence the risk they will access obscenity, child pornography, and material harmful to them, where it belongs—with their parents.

White-list filters, either administered by local librarians or by subscription to services that aggregate links to kid-friendly sites, would seem most appropriate for younger children.[421] Text-based filters would seem more appropriate for

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417. *Id.* at 206-15.

418. *Id.* at 213, 214 n.10.

419. *Id.* at 212.

420. *See* Reno v. ACLU, 521 U.S. 844, 865 n.31 (1997) (citing Ginsberg v. New York, 390 U.S. 629, 639 (1968)) (noting the Court's "consistent recognition of the principle that 'the parent's claim to authority in their household to direct the rearing of their children is basic in the structure of our society'"). One might argue that parents who wished to provide their children unfiltered access to the Internet could do so from home. This ignores the reality that many parents do not have the ability to provide their children access at home and that libraries are the only Internet access these minors may have. *See, e.g.*, AM. LIBRARY ASS'N, ALA RESPONDS TO DIGITAL DIVIDE SUMMIT, *at* http://www.ala.org/news/announcements/digitaldivide.html (Dec. 9, 1999).

421. *See* Reno v. ACLU, 521 U.S. at 878 (stating that "the strength of the Government's interest in protecting minors is not equally strong throughout" all age groups). As we lack any cases that provide a definitive standard as to the rate at which minors' constitutional rights "mature," it is impossible to provide a bright-line rule as to when minors' First Amendment rights might forbid restricting their access through the use of white-list filters. Because of this, it is perhaps advisable that parents select which type of filtering is applied to their minor children's Internet access. Obviously, there may be limits to the degree of discretion public libraries may give parents. As mature minors have greater First Amendment rights than immature minors, public libraries may face constitutional challenges to imposing white-list filters on mature minors even in response to parental requests. This too is unclear. *See* Erznoznik v. City of Jacksonville, 422 U.S. at 214 n.11 (noting that the age of a minor is relevant to the extensiveness of a minor's First Amendment rights). Because text-based filters do not perfectly block access to all sites containing unprotected speech, and because the state has a greater interest in protecting less mature minors from accessing such speech, permitting parents to chose the use of white-list filters for at least their prepubescent minor children is appropriate. *See* Am. Library Ass'n v. United States, 201 F. Supp.

mature minors, whose information needs are often greater. In the latter case, librarians may and should make reasonable efforts to limit overblocking of mature minors' access.[422] In doing so, librarians should respond to all requests to review specific websites that might be erroneously blocked and unblock any sites found to not contain unprotected speech.[423] Libraries should also be required to provide complete lists of all blocked sites. Filtering companies that want to market their products to libraries should, therefore, be required to relinquish any

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2d 401, 436-37 (E.D. Pa. 2002) (noting that filters both overblock and underblock categories of information).

422. *See* Ross, *An Emerging Right*, *supra* note 300, at 234 (stating that blocking access to the Internet violates constitutional rights). While arguing that minors have or should have the right to access certain information, even against their parents' will, Professor Ross would limit that right to instances "where state action is implicated, where the minor can establish legal 'maturity,' and in order to enhance the exercise of another right, such as the right to abortion, contraception or free exercise of religion." *Id.* at 250-52. One concern regarding the use of filters may be that speech needed "to exercise another right" would be blocked even though it is not obscenity, child pornography, or other harmful material to minors. *See* Am. Library Ass'n v. United States, 201 F. Supp. 2d at 436-37 (noting tendency of filters to overblock access to speech). This Article does not address what rights parents might have to expect assistance from the state in denying their mature minor children access to the speech identified by Ross. As opt-out programs often are available for parents who object to a school's sex education program, however, one could argue that parents have such a right. *See* Ross, *An Emerging Right*, *supra* note 300, at 246 n.120 (noting some states and courts have recognized this right). On the other hand, the Court has held that in some cases, deference to parental control must give way to the constitutional rights of minors. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 899 (1992) (ruling that minors may bypass parental consent requirement to have an abortion by judicial determination). Assuming Ross's proposed limited access rights are recognized by a court, access to such information may be maintained, even when filters are otherwise required, by adding URLs for sites that are likely to contain such information (e.g., the websites maintained by Planned Parenthood and Sex Respect) to a white-list which will not be blocked even if the text-based filter erroneously identifies them as appropriate subjects for blocking. A system permitting anonymous requests to add URLs to such a list could be implemented to aid in identifying sites which are erroneously blocked. Such a solution is admittedly not perfect and certainly would present constitutional problems if filters were mandated for all patrons, including adults and minors whose parents do not object to unfiltered access. Here, however, I am only suggesting this solution as a means of more narrowly tailoring a parental opt-in or opt-out mechanism to target unprotected speech. Even if Ross's proposal is rejected, it would create a logistical nightmare for parents to be able to demand that public libraries customize filters for their individual children. This Article is only concerned with libraries enabling parents to use filters as a tool to prevent access to obscenity, child pornography, and material otherwise harmful to minors.

423. Indeed, it would seem appropriate for librarians and others across the nation to share information regarding sites which they have found to be erroneously blocked to facilitate the broadest possible correction of overblocking. This list of potentially overblocked sites should likewise be published for access by the general public, who could review it for purposes of making unblocking requests at their local libraries. Filtering companies could use this information to improve their products and to populate white-lists that permit access to such sites even when their software cannot be appropriately modified to avoid the misidentification.

proprietary claims to such lists.[424] Refusal to do so should make the use of their product impermissible for public libraries. Further, libraries may place unfiltered computers in areas where minors are denied access absent parental consent.

As minors have diminished First Amendment rights, Congress and the states may tie funding to requirements that libraries provide parents the option of filtered access for their minor children.[425] That Congress and the states may do this, however, does not mean that they should. Indeed, federal or state mandates in this area are unnecessary and unwise. Locally designed solutions are likely to best meet local circumstances. Local decision makers and library boards, responding to local concerns and the prevalence of the problem in their own libraries, should decide if minors' Internet access requires filters. They are the persons in the best position to judge local community standards for what is and is not obscene, as required by the *Miller* test.[426] Indeed, one nationwide solution is not needed, as the problems are local and, to some extent, uniquely so. Libraries in rural communities, for instance, have reported much less of a problem than libraries in urban areas.[427] A library in a rural community with only one or two computers with Internet access may find that even the limited filtering advocated here provides little or no additional benefit. Further, by allowing the nation's public libraries to develop their own approaches, they may be able to develop a better understanding of what methods work well and what methods add little or nothing, or are even counter-productive. Imposing a mandatory nationwide solution may well impede developing truly effective approaches that do not violate the First Amendment. The federal and state governments can best assist this effort by providing libraries with sufficient funding to experiment with a variety of constitutionally permissible approaches.

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424. *Cf.* AM. CIVIL LIBERTIES UNION, IN LEGAL FIRST, ACLU SUES OVER NEW COPYRIGHT LAW: SAYS BLOCKING PROGRAM LISTS SHOULD BE REVEALED, *at* http://www.aclu.org/Cyber-Liberties/Cyber-Liberties.cfm?ID=10546&c=55 (last visited Nov. 2, 2002).

425. *See* South Dakota v. Dole, 483 U.S. 203, 210-11 (1987) (holding that Congress may not use its spending power to induce states to violate the Constitution, but may condition funding on state action which is not constitutionally prohibited).

426. *See* Miller v. California, 413 U.S. 15, 24 (1973) (requiring application of "contemporary community standards" to determine whether a work appeals to a "prurient interest"). Some argue that decisions related to the content of speech in public institutions should generally be left to professionals (such as librarians) rather than elected officials, to insulate such decisions from improper motives. *See, e.g.*, RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 195-99 (1992) (advocating insulating the content of speech "from partisan political influence by committing [the issue] to the sound of professionals in the field"). Why the motives of professionals would necessarily be more pure than those of elected officials is not clear.

427. *See supra* note 138 and accompanying text.

In fairness to the American Library Association, its opposition to filters is based in part on the belief that:

> [f]ilters provide a false sense of security that children are protected when they are not. The issue of protecting children online is complex, and it requires complex solutions with parents, librarians and community members working together. Librarians care deeply about children, and are committed to helping them find the best and most appropriate information for their needs. We have taken numerous steps to help communities develop policies and programs that ensure that their library users have a positive online experience. The vast majority of library patrons use the Internet responsibly, as outlined by their local policies.[428]

The American Library Association has indeed promoted a variety of methods to manage the problems associated with Internet use in public libraries.[429] It is certainly true that installing filters could give many uninformed parents a false belief that nothing else is needed.

The ALA's unwillingness to permit parents the option of deciding whether their children receive filtered or unfiltered access, however, unnecessarily removes from parents one tool which they may wish to use in crafting a solution appropriate for their own children.[430] To entirely foreclose the use of filters is as likely to impede development of effective solutions as is imposition of a nationwide requirement that filters be used in all public libraries.

The limited use of filtering advocated here imposes no set solution for all libraries, or even within a given library. Each parent can decide for each of his or her children whether filtering should be a component of the complex solutions that the ALA acknowledges are necessary to address issues of accessibility of unprotected speech through the Internet. Just as the federal and state governments should not impose one solution for all libraries within their jurisdictions, libraries need not and should not limit parents to solutions that exclude their choosing to filter their own children's access as a component of managing the problems discussed here.

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428. *See* AM. LIBRARY ASS'N, PRESS RELEASE, ALA APPLAUDS FED. COURT RULING ON THE CHILDREN'S INTERNET PROTECTION ACT, *available at* http://www.ala.org/cipa/cipatrial9.html (May 31, 2002) (quoting ALA President John W. Berry).

429. *See, e.g.*, GUIDELINES AND CONSIDERATIONS, *supra* note 160 (suggesting adoption of Internet policies, education of users, and recommendation of educational Internet sites).

430. The ALA is not alone in the view that minors' access to the Internet may not be filtered. The ACLU has taken a similar position. ACLU, FAHRENHEIT 451.2: IS CYBERSPACE BURNING? HOW RATING AND BLOCKING PROPOSALS MAY TORCH FREE SPEECH ON THE INTERNET, *at* http://www.Aclu.org/Cyber-Liberties/Cyber-Liberties.cfm?ID=&c=5 (Mar. 17, 2002) ("Library blocking proposals that allow minors full access to the Internet only with parental permission are unacceptable.").

E. *Blocking Pop-Ups*

The *American Library Association* court noted that some sites containing unprotected speech employ pop-up windows to advertise other such sites.[431] This exacerbates the problems caused when such sites are accessed as they display sometimes offensive content on the computer monitor despite a patron's effort to exit the site he or she accessed, perhaps inadvertently.[432] This problem may be addressed by installing software which blocks pop-up windows.[433] Installing such software does not prevent patrons from accessing the sites advertised through such pop-ups, but only prevents web publishers from forcing their advertisements onto the computer screen of a patron who has not requested them. A patron who already knows the URL for the advertised sites, or locates it through a search engine, may still access the site unless it is otherwise blocked by a filter. As the use of such software is content-neutral, no First Amendment objections should prevent their use.[434] Thus, the problems associated with pop-up ads may be addressed directly—and much more effectively—without the use of mandatory text-based filters.

VII. CONCLUSION

The Internet has made a vast storehouse of the world's information readily available to the public at large. While some have used this medium to spread hate, promote violence, and disseminate obscenity, child pornography, and other material harmful to minors, all-in-all this new technology has been a boon to humanity. Recognizing this, and appreciating its role in closing the digital divide, public libraries have seized upon this opportunity to enrich the resources available to their patrons. Once a library elects to provide Internet access to its patrons, it may not block adult access to a broad amount of constitutionally protected material in order to effectively block unprotected speech. Yet, public libraries must not ignore the real concerns created by the harmful content this makes accessible within their walls. Librarians have an obligation to make reasonable efforts to prevent access to unprotected speech. They must institute

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431. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 419 (E.D. Pa. 2002).

432. *Id.*

433. For a list of software available to block pop-up advertisements, see, e.g., *Tucows Ad Killers*, *at* http://www.tucows.com/adkiller95.html (last visited Nov. 2, 2002).

434. Blocking pop-up ads may be seen as serving the same function as prohibiting the playing of games, e-mail, chat, and instant messaging on library computers. *See* Am. Library Ass'n v. United States, 201 F. Supp. 2d at 422. Pop-up ads fall outside the scope of traditional library services and actually interfere with patrons' use of library computers to locate the information they need and want. This is true without regard to the actual content of the ads contained within the pop-up window.

effective measures, which may include appropriately administered filters. Specifically, libraries may offer filtered access to all adult users, who may choose on their own whether to utilize the filter. They may use black-list filters to block access to URLs which have been personally examined by a librarian who determined that they contained unprotected speech. In addition, libraries may filter the Internet access of minors either on an opt-out or opt-in basis upon parental request. Filters are but one tool available and, by themselves, will not effectively address the problem of unprotected speech being accessed in public libraries. Removing filters entirely from the set of tools available, however, is neither required by the First Amendment nor by any public policy consideration. So long as adult patrons and parents of minor children have the ability to elect to use filters or not, courts should approve their use.