Filtering software:

Can technology provide a viable alternative to Internet regulation?

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Honors Thesis
1998-1999

Introduction

Most Americans believe that adults have a duty to protect the innocence of children. Toward that goal, the United States Congress and the legislatures of individual states have passed a mass of legislation designed to protect minors from those who would do them emotional, physical or sexual harm.[1]

Many also agree that American democracy is founded, in substantial part, in the First Amendment's guarantee of freedom of speech. In fact, the United States Supreme Court has found the right to speak so essential that any restraint on speech prior to publication "bear[s] a heavy presumption against its constitutional validity."[2]

But what happens when these two commonly-held values clash? The Supreme Court has ruled on some narrowly defined areas of contention, including obscenity[3] and child pornography.[4]

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[1]According to 1998-1999 edition of The Book of the States, published yearly by the Council of State Governments and the American Legislator's Association, all 50 states have some form of child welfare act designed to serve this purpose.

[2]*Bantam Books, Inc. v. Sullivan* 372 U.S. 58, 70 (1963).

[3]In *Miller v. California* 413 U.S. 15 (1973), the Court delineated a three-part test for obscenity:

(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.

Miller attempts to balance the censorship danger of content-based laws with the State interest in protecting the "sensibilities of unwilling participants" from exposure to pornography.

[4] In *New York v. Ferber* 458 U.S. 747 (1982) the Court decided that states may prohibit the distribution of child pornography without the stipulation that said material be obscene by the *Miller* test. According to the Court, the "prurient interest" and "patently offensive" conditions of

The growth of the Internet raises new questions of conflict, however.

As David Hudson of the Freedom Forum's First Amendment Center says, "The Internet has become a key battleground where the competing values of protection of minors and freedom of speech collide."[5]

And there is no end in sight. Online use is on the rise in homes, schools and libraries, the three major locations for children to gain access.

The number of Internet users has been doubling each year, and roughly 24 million people in North America alone now have online access, including nearly 18 million on the graphics-rich portion of the Net known as the World Wide Web.[6] Fifty million households worldwide are believed to be connected to the Internet.[7]

The percentage of United States public schools with at least one computer connected to the Internet rose from 35 percent in 1994 to 65 percent in 1996.[8] The percentage of connected

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Miller "bear no connection to whether a child has been physically or psychologically harmed in the production of the work." The Court also notes that even works which contain serious literary, artistic, political or scientific value "may nevertheless embody the hardest core of child pornography."

[5]David Hudson, "Pornography and the Internet: Tackling an old issue in a new medium," Freedom Forum Online 3 June 1998: 1 of 3. Visited 15 Nov. 1998. www.freedomforum.org/speech/series/cda.series.1.asp

[6]Mary Kathleen Flynn, "The battle for the Net" U.S. News & World Report Online. Visited 24 Jan. 1999. www.usnews.com/usnews/issue/micro.htm

[7]Kenneth Terrell, "Breaking the speed limit" U.S. News & World Report Online 10 August 1998. Visited 24 Jan. 1999. www.usnews.com/usnews/issue/980810/10mode.htm

[8]Sally Rutherford, "Notes and comments: Kids surfing the Net at school: What are the legal issues?" Rutgers Computer and Technology Law Journal 24 (1998): 1-2 of 30.

schools and the number of connected machines within each school is expected to continue to increase at a rapid rate because of substantial federal, state and local government spending initiatives rooted in President Clinton's goal to connect every classroom in America to the Internet by the year 2000.[9] An estimated 89 percent of those schools with Internet access had World Wide Web access, and 74 percent of schools with Web access made it available to students.[10] Of those schools without Internet access in 1996, 87 percent intend to be online by the year 2000.[11]

A 1996 study by the National Commission on Libraries and Information Science found that 44.6 percent of all public libraries have some type of Internet connection, up 23.7 percent from a similar study done in 1994. Internet access was available to the public in 83.4 percent of those libraries connected in 1996. Of libraries that were not online in 1996, 56.7 percent indicated that they planned to have some type of Internet connection by March 1997. If those libraries followed through on their plans, 76 percent of public libraries should now have some type of Internet connection, and 50.3 percent of all libraries are now providing Internet access to the public.[12]

Anecdotal evidence abounds for problems arising from the increasing availability of Internet access to children. Incidents range from the annoying to the intrusive to the extremely

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[9]"What Clinton wants in U.S. education," Indianapolis Star 5 Feb. 1997: A4.

[10]"Clinton, Gore cite progress in wiring nation's schools," U.S. Newswire 8 Feb. 1997.

[11]"Clinton, Gore cite progress in wiring nation's schools," U.S. Newswire 8 Feb. 1997.

[12]John Carlo Bertot, Charles R. McClure and Douglas L. Zweizig, The 1996 national survey of public libraries and the Internet (Washington: GPO, July 1996) 13.

dangerous.

For example, in a March 1998 episode from the Vancouver, Wash., library, someone left several sessions of a pornography site open on an Internet terminal. The next patron to use the terminal was unaware of how to close the pages. A librarian had to assist the patron in terminating the sessions while "another patron, a young teen, was sitting by the terminal watching and smiling."[13]

The previous month in the same library an irate mother whose 10-year-old daughter had been shown the Playboy homepage by a friend reported to library staff that "she would not allow her daughter in the library anymore and that she believed it to be a crime to show a minor pornography."[14]

In a more serious incident, three junior high school students, aged 11 to 13, were arrested in April 1995 after throwing a homemade fire bomb at a closed school building. The children told police that they had paid a fellow student five dollars for a bomb-making manual downloaded from the Internet.[15]

More recently, a 14-year-old girl from suburban Rochester, N.Y., disappeared with a 22-year-old man she had met in an Internet chat room devoted to vampire fantasies. The girl left home with the man in December 1996, apparently voluntarily, FBI investigators say. According to the executive director of the New York chapter of the National Center for Missing and

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[13]Margaret Tweet, "Citizens for Quality Community Standards," Filtering Facts: 1 of 3. Visited 15 Nov. 1998. www.filteringfacts.org/ftvan2.htm

[14]Tweet,1 of 3.

[15]Rutherford, 6 of 30.

Exploited Children, who became involved in the search for the girl, "an unhappy teenager may find a sympathetic ear on the Internet, yet feel a sense of control online that may not exist in real life — and that can be dangerous."[16]

What anecdotal evidence does not demonstrate is that the harm of child access to violence and pornography on the Internet can extend beyond the initial viewing.

The Supreme Court found in the landmark child pornography case of *New York v. Ferber*[17] that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."[18] The Court's comment is based on an article by Ulrich Schoettle, "Child Exploitation: A Study of Child Pornography,"[19] stating that "sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults."[20]

In a speech written to encourage passage of his Child Online Protection Act (COPA), Sen. Dan Coats (R-Ind.) points to research by Ann Burgess, Professor of Nursing at the University of Pennsylvania, stating that child pornography unnaturally accelerates children's psychological sexual development. According to Burgess, pornography short-circuits a child's normal development process, supplying misinformation about his sexuality and leaving him with

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[16]Rutherford, 5-6 of 30.

[17]*New York v. Ferber* 458 U.S. 747 (1982).

[18]*New York v. Ferber* 458 U.S. 747 (1982).

[19]Ulrich C. Schoettle, "Child Exploitation: A Study of Child Pornography," Journal of American Academic Child Psychiatry 19 (1980): 289-296.

[20]*New York v. Ferber* 458 U.S. 747 (1982).

a distorted sexual perspective that encourages irresponsible, dehumanized sexual behavior. Research also has "established a direct link between exposure and consumption of pornography and sexual assault, rape and molesting of children."[21] In addition, Burgess believes pedophiles use pornography to lower children's barriers to sexual exploration so that they can exploit them.[22] A study by the University of Alabama found that

> Prolonged consumption of common pornography spawns doubts about the value of marriage as an essential societal institution ... leads to a diminished desire for progeny ... trivializes rape as a criminal offense ... [and] trivializes sexual child abuse as a criminal offense .... Prolonged exposure to nonviolent and violent pornography promotes insensitivity toward victims of sexual violence ... [and] promotes men's belief of having the propensity for forcing particular sexual acts on reluctant female partners.[23]

As for violence, "the evidence that violent TV increases aggressive behavior in children is well documented."[24] Researchers on the National Television Violence Study (NTVS) report looked at "hundreds of experimental and longitudinal studies and concluded that viewing violence in the mass media can lead to aggressive behavior and become part of lasting behavioral patterns."[25] The NTVS found evidence that repeated exposure to violent programming can

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[21]Dan Coats, "Proceedings and debates of the 105th Congress," Congressional Record 8 Nov. 1997: 9 of 23.

[22]Coats, 9 of 23.

[23]Dolf Zillman, "Effects of prolonged consumption of pornography," Pornography: Research Advances & Policy Considerations (Hillsdale, New Jersey: Lawrence Erlbaum Associates, 1989) 154-155.

[24]John Seel, "Plugged in, spaced out, and turned on" Journal of Education 179 (Fall 1997): 22.

[25]Mary A. Hepburn, "T.V. violence! A medium's effects under scrutiny" Social Education 61 (Sept. 1997): 4 of 7.

desensitize viewers to victims and violent acts in the real world and lead them to become "emotionally comfortable" with violent content, perhaps even to the extent that they gain an appetite for it.[26] Although I have been unable to find any studies exploring the link between the Internet and violence, analogizing Internet violence to TV violence requires only a small stretch of the imagination. John Seel links modern technology to issues of character formation. According to Seel, "the pervasiveness of electronic entertainment reinforces the supremacy of the autonomous self .... The artificial reality of electronic entertainment never challenges the sovereignty of selfishness. Rather, it panders to it and promotes the 'spoiled only child' syndrome."[27]

In an attempt to protect children from the seedier side of the Internet, Congress passed the Communications Decency Act (CDA), sponsored by Sen. James Exon (D-Neb.), as a part of the Telecommunications Reform Act of 1996. The Act was signed into law by President Clinton on Feb. 8, 1996. The CDA quickly gained attention as an instrument to censor speech on the Internet and was challenged immediately by the American Civil Liberties Union (ACLU) and other online groups.[28]

The ACLU's attack on the CDA in *ACLU v. Reno*[29] focused on two sections of the bill.

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[26]Hepburn, 4 of 7.

[27]Seel, 27-28.

[28]Kim L. Rappaport, "Notes and comments: In the wake of Reno v. ACLU: The continued struggle in Western constitutional democracies with Internet censorship and freedom of speech online" The American University International Law Review 13 (1998): 9 of 39.

[29]*ACLU v. Reno* 117 S. Ct. 2329 (1997)

The first penalized the transmission of "obscene" or "indecent" material to a recipient the sender knows is a minor. The second criminalized sending or posting "patently offensive" material in a manner available to minors. Because of the Court's previous decision in *Miller v. California* that obscenity was a class of speech not deserving of First Amendment protection,[30] the obscenity section of the bill was not at issue. The Second District Court in Philadelphia and then the Supreme Court eventually found that the Internet deserves full First Amendment protection because of the amount of incredibly diverse information that freely flows through cyberspace. "The [Supreme] Court supported the district court's finding that the Internet is a unique communications medium that has never been subject to government regulation and thereby afforded it the highest level of First Amendment protection."[31]

According to the Court, "there are four characteristics of Internet communication that support such protection."[32] First, the barrier to entry on the Internet is very low. A single user can reach millions of listeners at a cost significantly lower than that of other media. Second, this low entry barrier is the same for both speakers and listeners, allowing a user to become both a speaker and a listener simultaneously. Third, ease of access results in a diverse array of information being published online. Finally, the Internet creates "relative parity among speakers"[33] because the

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[30]See Note 1 for a synopsis of the Miller standard.

[31]Rappaport, 13 of 39.

[32]James V. Dobeus, "Comment: Rating Internet content and the specter of government regulation," The John Marshall Journal of Computer & Information Law 16 (1998): 23 of 30.

[33]*ACLU v. Reno* 117 S. Ct. 2329 (1997).

medium allows free communication among all who wish to comment on a subject.[34]

The Court also found a problem with the CDA's stipulation that obscene and indecent sites should use credit cards to verify age. It believed that because adults without credit cards would be unable to access certain sites, the requirement would serve as an unwelcome restriction of speech.[35]

In response to the Court's invalidation of the heart of the CDA, Congress passed the Child Online Protection Act (COPA), sponsored by Sen. Dan Coats (R-Ind.). According to Coats, "The bottom line is that, unless commercial distributors of pornography are met with the force of law, they will not act responsibly."[36]

Coats argued that COPA differed from the CDA in two aspects. First, COPA provides for a "harmful-to-minors" standard rather than an "indecency" or "patently offensive" text as in the CDA. Second, the Act targets only commercial pornographers.[37]

COPA makes commercial website creators criminally liable if minors access harmful material from their site and imposes fines and/or imprisonment for authors who fail to restrict access to commercial Web material that is harmful to minors. The Act includes the credit card

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[34]Dobeus, 23 of 30.

[35]Peter G. Drever, III, "Comment: The best of both worlds: Financing software filters for the classroom and avoiding First Amendment liability," The John Marshall Journal of Computer & Information Law 16 (1998): 9 of 24.

[36]Coats, 5 of 23.

[37]David Hudson, "Porn foes, Congress revive effort to sanitize the Net," Freedom Forum Online 5 June 1998: 1 of 2. Visited 15 Nov. 1998. www.freedomforum.org/speech/series/cda.series.3.asp

stipulation questioned by the courts in the CDA case.[38]

President Clinton signed COPA on Oct. 21, 1998, but the law has never been enforced. The ACLU challenged the Act on the basis that it, like the CDA, will limit the availability of constitutionally protected speech to adults. Opponents of the Act say that "compliance with COPA will require, in numerous instances, the reduction of speech to the lowest common denominator — that which is acceptable to children." They believe that, because people are concerned about privacy, requiring a person to "surrender valuable and easily exploited credit card information in order to access such free material will, in most instances, prevent the exchange of communication."[39]

U.S. District Judge Lowell Reed granted a temporary restraining order against COPA on Nov. 19, 1998, the day before the Act was scheduled to go into effect. Reed then extended the restraining order until Feb. 1. On Feb. 2, the judge ordered that the injunction against COPA remain in effect until a full trial could be held. The U.S. Justice Department had 60 days to decide whether to proceed with a full trial in front of Reed or appeal the injunction to the 3rd U.S. Circuit Court.[40] Since Reed's decision in early February, Senate Majority Leader Trent Lott has named five members to a commission created by COPA to study ways of controlling online

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[38]Richard Raysman and Peter Brown, "Regulating Internet content, privacy" New York Law Journal 10 Nov. 1998: 2 of 6.

[39]Patrick S. Campbell, "Speedbumps on information highway; the Child Online Protection Act: like CDA (Clearly Dead on Arrival)?," Multimedia & Web Specialist Nov. 1998: 3 of 4.

[40]David Hudson, "Federal judge deals blow to COPA," Freedom Forum Online 2 Feb. 1999: 1 of 4. Visited Apr. 27, 1999. www.freedomforum.org/speech/1999/2/2copa.asp

pornography. The committee's mission was to examine ways to reduce minors' access to inappropriate materials online through technological means.[41] The Justice Department filed an appeal to Reed's ruling with the circuit court on Apr. 2. A three-judge panel of the court is expected to review the preliminary injunction ruling sometime in late summer or early fall.[42]

So what's a Congressman to do? Perhaps nothing. In *ACLU v. Reno*, the Supreme Court looked to computer software known as filters to help adults protect children online. And in his injunction against COPA, Judge Reed noted that

> The record before the court reveals that blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or website operators.[43]

In this thesis I will examine the effectiveness of such filters in protecting America's children going online in their homes, public schools and public libraries from what many have termed the Internet's "red light district." Section One considers the technological capabilities of filters. Section Two examines the relevant case law concerning adults' right to speak as guaranteed by the First Amendment and children's right to access speech in three common fora for child Internet use: the home, the public school and the public library. Section Three examines

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[41]Cheryl Arvidson, "Lott names COPA commission members despite legal challenges to law," Freedom Forum Online 2 Feb. 1999: 1 of 2. Visited Apr. 27, 1999. www.freedomforum.org/speech/1999/2/8copa.html

[42]David Hudson, "Justice Department appeals ruling that blocked enforcement of COPA," Freedom Forum Online 5 Apr. 1999: 1 of 2. Visited Apr. 27, 1999. www.freedomforum.org/speech/1999/4/5copa.asp

[43]David Hudson, "Federal judge deals blow to COPA," Freedom Forum Online 2 Feb. 1999: 1 of 4. Visited Apr. 27, 1999. www.freedomforum.org/speech/1999/2/2copa.asp

judicial action concerning Internet filtering. Section Four applies the relevant case law and judicial action to the capabilities of filters to determine what legislative opportunities exist for regulating commonly used filtering techniques. Section Five explores the practical applications of filters in combination with other methods of protecting children online. Section Six examines the ethical questions raised by filtering. Finally, I suggest avenues for future research on the subjects of filtering and child Internet protection.

Section one: The technological capabilities of filters

In *ACLU v. Reno*, the Supreme Court put forth technological solutions as a less restrictive alternative to government regulation of the Internet, and even before the Court had decided that case, President Clinton had come out in favor of privately implemented technology solutions.[44]

Like many products, Internet filters come in several different varieties that range from the inexpensive and crude to the expensive and nearly subtle. This section briefly describes the major categories of filters available in software market of today and the near future and examines their attractions and detractions.

Keyword blocking filters, referred to by filter vendors as "content identification," "content analysis," "Dynamic Document Review," or "phrase blocking," employ a pre-determined list of supposedly objectionable terms to block Internet content. Nearly all "objectionable" words relate to sexuality, human biology or sexual orientation.

According to librarian Karen Schneider, "Despite these fancy names, [keyword filters] do

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[44]Rappaport, 29-30 of 39.

not function as advertised."[45] These filters rely on what Schneider calls the "naive assumption" that words never have more than one meaning. This kind of filter has been known to block words such as "breast" and "sex." By blocking the word breast, keyword filters restrict access to sites on breast cancer. Even the term "Mars exploration" has been blocked because it contains the letters s-e-x in succession.

A keyword filter that identifies an objectionable term in the body of a Web page can take one of four actions, depending on the filter: stop the file in transit, display the file but obscure the targeted term, deliver some but not all of the file or shut down the browser or even the computer.[46] Files viewed by browsers using keyword filtering can be slow to load because the filter must scan each page for objectionable terms before displaying it.

Because keyword blocking is inexpensive to implement, it is a favorite of low-end, cheap filtering products. Even more advanced products may include keyword filtering options, however, because of the constantly increasing number of sites on the Internet. As Schneider says, "Keyword blocking is the only line of defense against any website that has not been manually identified by a human content selector."[47]

In filters that use the second technology, site blocking, employees of the filtering company identify Internet sites to be placed on access or denial lists. The sites reviewed by

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[45]Karen G. Schneider, "Figuring out filters: A quick guide to help demystify them," School Library Journal Feb. 1998: 36.

[46]Schneider, 36.

[47]Schneider, 36.

employees are initially chosen by automated pre-identification technology.[48] Amazingly, I have been unable to find any studies examining the process that site blocking filterers follow to decide which sites they will block.

Some site blocking filters can block at the domain level of a site, while others are capable of blocking down to the directory and file levels.[49] The problem with domain-level blocking is that some sites contain both objectionable and unobjectionable pages. For example, a domain-level filter would block out the entire Playboy site, including the magazine's recent interview with former President Jimmy Carter. Users of site filters can create their own "access/deny" lists to override the settings provided by the manufacturer, however.[50]

Most site blocking filters organize site lists in arbitrary categories in order to give the user a choice of blocking topics. These categories vary in number between filters, from six (Surfwatch) to 29 (Websense).[51] Standards for classifying sites are determined by each software manufacturer, but most site filters have a least one category for sexual activity, one for bomb-making and another for chat.[52] Schneider believes that site filters are more precise when it comes to pornography because pornography-related Web pages have keywords that are easily identified

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[48]Schneider, 36.

[49]For example, in the address http://www.wlu.edu/~hhsmith/artwick.html, "wlu.edu" would be the domain level of the page, "~hhsmith" would be the directory level and "artwick.html" would be the file name.

[50]Schneider, 36.

[51]Schneider, 36.

[52]Schneider, 36.

by automated tools. She notes that filters become less precise the farther content strays from this category.[53]

Protocol blocking filters deny a user access to all the resources of a particular sector of the Internet. Most filters can disable telnet, ftp, gopher, Internet Relay Chat (IRC) and Usenet.[54] Because of the dangers frequently reported in connection with chatting, parents might wish to completely disable IRC for their children. Libraries and schools might wish to disable any or all of these protocols in the name of resource allocation or file security.[55]

Time blocking filters can prove valuable for libraries and schools because they allow libraries to limit available protocols depending on the time of day. This technology can help libraries and schools cut down on computer traffic during the busiest hours. Schneider suggests that time filtering programs' capabilities be extended to limiting a single user's online time. Such a feature might also prove valuable in the home for parents who wish to ration their child's daily online activity. As yet, no browser offers such a capability.[56]

Client blocking gives libraries the power to determine what level of Internet access each computer they own will have. For example, a library could activate a filter in its children's room,

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[53]Schneider, 36.

[54]Telnet allows remote access to DOS-based text. For example, I use telnet to access my Liberty account from my home in West Virginia. Ftp, or file transfer protocol, lets two networked computers shuffle files stored on their systems back and forth. Gopher is a menu-based information bank. IRC lets users "talk" by typing messages back and forth to one another in real time. Usenet is the foundation for many discussion and news groups.

[55]Schneider, 38.

[56]Schneider, 38.

but disable it in the adult services area. Some filters allow users to make very specific configurations for individual computers.[57]

Schneider also recommends that more filters include a user blocking capability. User blocking would allow libraries and schools to customize each user's Internet access level. That way, parents could communicate to libraries and schools what kind of access they want their child to have. A child's user profile could then be set accordingly.[58] For larger libraries, this kind of system could result in hours of additional manpower and expense, however.

One of the newest filters on the market, ImageCensor, attempts to carry out a kind of keyword blocking for images. The program claims it can analyze the hues and color composition of images to determine if they have prurient content. According to *Playboy* magazine, ImageCensor's Web page reads like a CIA manual:

> Once ImageCensor detects an explicit image, a variety of actions can be taken. ImageCensor can capture the current application window and store it in the ImageCensor log, where it can be viewed later and used as evidence. If the program is running on a network, the name of the user can be recorded along with the image. In situations where the use of the computer is partly supervised — a classroom, for example — the program can sound a short alarm to alert the supervisor. Once pornographic images have been detected, the user can be prevented from using the system until the correct password is entered.[59]

If successful, ImageCensor's technology might help fill the gap between the rapidly growing Internet and the ability of site filtering to keep up. Until the efficacy of the program is proven, however, the danger of indiscriminate blocking arises. For example, how can

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[57]Schneider, 38.

[58]Schneider, 38.

[59]Chip Rowe, "Filtering out 'bad' ideas," Playboy March 1998: 47.

ImageCensor's analysis tell the difference between works of nude art and pornography?

As Schneider says, "Internet filters are mechanical tools wrapped around subjective judgment. They are designed to block content — usually content a company has identified and categorized."[60] As a result, filtering software has many critics, even among the online savvy.

The ACLU and many of its allies in the software industry have parted ways since their victory against the CDA. Once the champion of filtering during the battle in *ACLU v. Reno*, the ACLU now believes that such technological solutions are not truly solutions. The group fears that the filters are both underinclusive, in that they do not keep all inappropriate material from children, and overinclusive, in that they restrict adults' First Amendment right to free speech.[61]

Jonathon Wallace, a leading opponent of filtering software and co-author of *Sex, Laws and Cyberspace*, believes that "evidence of numerous bad blocks by these products is widespread and easily substantiated. In my opinion, it is filtering advocates who are making misrepresentations about these products."[62]

On the other side of the debate are people like Greg Young, X-Stop's vice president of corporate communications. Young told the Freedom Forum that "the reports that filtering software block a lot of useful information are completely overblown. Prior to the CDA being struck down, the ACLU and others used filters as a reason to strike down the law. Now these

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[60]Schneider, 36.

[61]Rappaport, 33 of 39.

[62]David Hudson, "Filtering out Net indecency: Porn foes look for a technological solution," Freedom Forum Online 8 June 1998: 3 of 4. Visited 15 Nov. 1998. www.freedomforum.org/speech/series/cda.series.4.asp

same groups are saying filters are the devil."[63]

Stories about misblocked sites abound, including a famous incident in which part of the White House website was censored because a filtering package blocked occurrences of the word "couple," which was used to describe President and Mrs. Clinton.[64]

The complaints about overinclusiveness may have been true in 1995, but are no longer valid in 1998, according to Young. "The old technology, which blocked sites based on words or phrases, did block some legitimate sites, but the new technology, which uses search arrays and direct address blocking, actually finds Web sites before blocking them."[65]

The cost of the increased precision Young talks about is that blocking devices require frequent and sometimes expensive updates to keep up with the growth of Internet sites.[66]

Another trouble lies in software companies' tendency to block web sites simply because of the viewpoint they expound. Sites containing constitutionally protected speech that have been blocked include the Society of Friends homepage and a site devoted to women professors in higher education. Moreover, companies often fail to disclose a list of those sites that their software blocks. Critics charge that "This practice allocates power in the blocking software

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[63]David Hudson, "Filtering out Net indecency: Porn foes look for a technological solution," Freedom Forum Online 8 June 1998: 3 of 4. Visited 15 Nov. 1998. www.freedomforum.org/speech/series/cda.series.4.asp

[64]David J. Loundy, "Filtering software poses legal pitfalls" Chicago Daily Law Bulletin 12 March 1998: 2 of 4.

[65]David Hudson, "Filtering out Net indecency: Porn foes look for a technological solution," Freedom Forum Online 8 June 1998: 3 of 4. Visited 15 Nov. 1998. www.freedomforum.org/speech/series/cda.series.4.asp

[66]Rutherford, 11 of 30.

companies to conclusively determine what Internet content will be accessible to its customers" and push for all "block lists" to be disclosed.[67]

Finally, some scholars say that blocking by URL[68] is "fundamentally an impossible proposition."[69] Because of the burgeoning size of the Internet, many fear that small filtering companies do not possess the resources to screen their block lists carefully. As a result, software may block whole domains instead of simply screening out objectionable files. In such a case, an entire Internet service provider, such as Washington and Lee, could have its pages censored if one community member decided to post adult-rated material.[70]

An alternative to site rating by software makers is the proposal that Internet authors rate their own sites. At the foundation of the voluntary rating system lies the Platform for Internet Content Selection (PICS). PICS is not a rating system in itself. Instead, it is a set of protocols that enables blocking software to associate a rating label with Internet content.[71]

PICS is similar in conception to the V-chip now used to display television ratings. A PICS-enabled browser checks the author's site rating against the browser user's settings for desirable content. The browser can be set to block sites that do not contain ratings.

Unlike television, however, the Internet is not a consistent medium. The Internet

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[67]Dobeus, 29 of 30.

[68]A Uniform Resource Locator (URL) is used to denote the unique Internet address of a web site. A URL can be analogized to a web site's street address.

[69]Loundy, 2 of 4.

[70]Loundy, 2 of 4.

[71]Dobeus, 3 of 30.

transmits video, sound, still images and text indiscriminately. This inconsistency compounds rating problems. Critics of PICS also point out that rating systems are incompatible with Internet fora other than the Web, including e-mail, Usenet and IRC.[72] Content in these protocols changes from second to second, even more rapidly than on the Web.

A 1997 study by *PC Week* showed that even though "page ratings and browsers that respond to those ratings, not legislation, are the answers [the online community has] offered ... [But] we who work around the Web have done little to rate our content."[73] The study showed that, although *Playboy* and Microsoft use PICS technology to rate their pages, they "were more the exception than the rule."[74]

Because PICS is not a rating system in itself, Web authors must choose a rating scheme in order to label their content. RSACi, the most popular of the PICS rating systems currently available, is regulated by the Recreational Software Advisory Council (RSAC). RSAC calls its rating system an "objective content-labeling advisory system."[75] Using RSACi, Internet authors can rate their own websites by completing an online questionnaire regarding the levels and intensity of violence, sex, nudity and language on their site.[76]

Authors are required to enter a contractual agreement with RSAC subjecting the content

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[72]Rappaport, 34 of 39.

[73]"Web site ratings shame on most of us," PC Week 3 Feb. 1997: 19 of 23.

[74]"Web site ratings shame on most of us," PC Week 3 Feb. 1997: 19 of 23.

[75]Dobeus, 4 of 30.

[76]Dobeus, 4 of 30.

provider to legal liability if he "willfully misrepresents" the content of his site. RSAC randomly selects websites each day to undergo an evaluation to ensure that the author-selected label accurately reflects the page's content.[77]

RSACi has its detractors. Critics charge that the ratings categories are highly subjective and must be interpreted the same way by all raters for ratings to be consistent. They point to cultural diversity within the United States and to foreign sites as making such a goal impossible. As one skeptical commentator said, "There can be no doubt that the rating process will be skewed when content providers interject their personal cultural, religious, and moral values into the RSACi rating scheme. As a result, two people who cherish different cultural ideologies will likely rate content differently."[78]

Because of the difficulties demonstrated by their mixed track record, the final result of the Court's decision that technological measures such as filters are a less restrictive alternative than the CDA is a shift in the burden of Internet censorship from online publishers to individuals.

Section two: Case law relevant to filtering

Pornography, child pornography and violent content comprise the principal dangers to children from the Internet's "red light district." Legislators draft bills like the CDA and COPA in an attempt to keep these materials out of children's hands. For example, Sen. Coats, the primary architect of COPA, describes the purpose of the Act as holding forth "a basic principle, that

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[77]Dobeus, 10 of 30.

[78]Dobeus, 20 of 30.

children should be sheltered from obscene and indecent pornography."[79] Although neither COPA nor the CDA attempted to restrict violent content, most popular Internet filters contain at least one category for violent content,[80] as does RSACi,[81] currently the most popular PICS rating system.

Having identified the Internet's danger zones for children, I turn next to a consideration of what rights adults have to produce these types of speech.

According to the Supreme Court's ruling in *Sable Communications of California, Inc. v. FCC*, adults have a First Amendment right to engage in indecent speech.[82] As a result, mandated filtering that limits adults' production of or access to indecent communication runs the risk of restricting speech protected by the First Amendment. Consequent, such methods could be ruled unconstitutional by the courts.

Obscene speech, as defined in *Miller*,[83] carries no constitutional protection, however. The Court ruled in *Chaplinsky v. New Hampshire* that "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene."[84] This distinction

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[79]Coats, 1 of 23.

[80]Schneider, 36.

[81]Dobeus, 4 of 30.

[82]*Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

[83]See note 1 above for a synopsis of the *Miller* standard.

[84]*Chaplinsky v. New Hampshire* 315 U.S. 568 (1942).

between obscenity and indecency kept the obscenity portion of the CDA from being declared unconstitutional in *ACLU v. Reno*.[85]

Like obscenity, some forms of violent speech are without First Amendment protection. "Fighting" words, characterized by *Chaplinsky* as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," also fall outside the constitutional banner.[86] The Court observed that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[87] As a result, mandating filtering of speech that qualifies as fighting words by the *Chaplinsky* standard would most likely be constitutionally sound.

The fighting words category does not contain all violent speech, however. For instance, in *R.A.V. v. City of St. Paul*, the Court refused to make so-called hate speech another unprotected category of speech under the First Amendment.[88] Because of this decision, restricting adults' ability to generate or receive violent speech that does not clearly fall within the fighting words outline could be declared unconstitutional.

Adults have a First Amendment right to communicate indecency and some forms of violent speech, but what right, if any, do children have to listen to or view such speech? Courts

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[85]*ACLU v. Reno* 117 S.Ct. 2329 (1997).

[86]*Chaplinsky v. New Hampshire* 315 U.S. 568 (1942).

[87]*Chaplinsky v. New Hampshire* 315 U.S. 568 (1942).

[88]*R.A.V. v. City of St. Paul* 112 S.Ct. 2538 (1992).

have ruled that a child's First Amendment right to access speech is contingent upon the atmosphere in which that speech is acquired and differs for the home, the schoolroom and the library.

In the home, the parental right to censor a child's reception of speech is generally considered all-encompassing. The Court said in *Parham v. J.R.* that, "absent a finding of neglect or abuse ... the traditional presumption that the parents act in the best interests of their child should apply."[89] In the same vein, the Court ruled in *Meyer v. Nebraska*[90] and *Pierce v. Society of Sisters*[91] that "the liberty of parents ... to direct the upbringing and education of children under their control" is protected against state action that "unreasonably interferes" with it.[92] This right includes permitting a child to view the prurient as well as restricting such material. In fact, the Court emphasized in *ACLU v. Reno* that the CDA's failure to allow a parent's purchase of indecent or patently offensive material for a child was one of the act's flaws.[93]

As for the classroom, the Court found in *Bethel School District No. 403 v. Fraser* that school authorities rightfully act "in loco parentis" when attempting to protect children "from exposure to sexually explicit, indecent or lewd speech."[94]

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[89]*Parham v. J.R* 442 U.S. 584, 604 (1979).

[90]*Meyer v. Nebraska* 262 U.S. 390 (1923).

[91]*Pierce v. Society of Sisters* 268 U.S. 510 (1925).

[92]Stephen G. Gilles, "Liberal parentalism and children's educational rights" Capital University Law Review 26 (1997): 2 of 34.

[93]*ACLU v. Reno* 117 S.Ct. 2329 (1997).

[94]*Bethel School District No. 403 v. Fraser* 478 U.S. 684. (1986).

Although public school students "do not shed their constitutional rights at the schoolhouse gate,"[95] the Court's decisions have noted that because most elementary and secondary school students are minors, their need to be protected from harmful speech frequently supersedes their First Amendment rights.[96] Therefore, the constitutional rights of children are "watered down in relation to the public at large and also generally fail to outweigh whatever interest schools themselves may assert."[97]

In *Tinker v. Des Moines Independent School District,* the Court decided that

> First Amendment rights are not absolute and may be subject to time, manner and place restriction so long as those restrictions are narrowly tailored to serve legitimate governmental interests. Schools may restrict expressive activity if such activity materially disrupts class work or involves substantial disorder or invasion of the rights of others.[98]

In *Fraser*, the Court held that local school boards are in the best position to determine what speech is appropriate for children to receive in the classroom.[99] As a result, teachers are permitted to restrict access to works on a classroom topic to those they believe would best meet the educational goals of the class.[100]

In contrast to the home, where the parent is supreme, and the classroom, where the

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[95]*Tinker v. Des Moines Independent School District* 393 U.S. 503 (1969).

[96]*Bethel School District No. 403 v. Fraser* 478 U.S. 684. (1986).

[97]James G. Sotos, "Court breathes new life into landmark ruling" Chicago Daily Law Bulletin 8 Oct. 1998: 1 of 4.

[98]*Tinker v. Des Moines Independent School District* 393 U.S. 513 (1969).

[99]*Bethel School District No. 403 v. Fraser* 478 U.S. 684. (1986).

[100]*Regan v. Taxation with Representation of Washington* 461 U.S. 540 (1983).

teacher is nearly so, the Court has held that the library is the principal locus of First Amendment freedom for students. According to its ruling in *Pico*, schools cannot remove books from library shelves based solely on their content.[101]

In conclusion, although adults have a First Amendment right to utter indecent and some forms of violent speech, children's right to listen to such speech is limited. Children have the greatest right to receive speech in the freedom of a library. Their rights are most restricted in the setting of the home, where parents' right to control access is greatest.

Section three: Judicial action concerning Internet filtering

Because of Congress' failure to pass any legislation regulating filtering, the only judicial action concerning the issue deals with constitutional, state or local provisions.

No major rulings regarding home or school filtering of the Internet have been handed down, but two landmark cases regarding library filtering have been decided within the past seven months. On Oct. 20, California Superior Court Judge George Hernandez ruled in *Kathleen R. v. City of Livermore* that Section 230 of the CDA provides public libraries with immunity for content on the Internet.[102] Barely one month later, U.S. District Judge Leonie M. Brinkema ruled Nov. 23 in *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library* that the Loudoun County, Va., Library Board's "Policy on Internet Sexual Harassment" violated the First

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[101]*Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico* 457 U.S. 864 (1982).

[102]David Hudson, "Judge dismisses library Internet filtering suit in California," Freedom Forum Online 26 Oct. 1998: 1 of 3. Visited 13 Mar. 1999. www.freedomforum.org/speech/1998/10/26livermore.asp

Amendment.[103]

In *Livermore*, Kathleen R. filed suit against the city after her son used a public library computer to download pornographic images to a floppy disk on 10 different occasions. The boy then printed the material out at a relative's house and showed it to other children.[104] Kathleen R.'s suit was based in two claims: first, that the use of public money to allow children access to pornography constitutes a "waste of public funds" under the California Code of Civil Procedure; second, that the library's policy was a public nuisance.[105] The mother wanted to force the library to install filters to block access to obscene websites on its computers in the children's section. After Hernandez ruled that the CDA gave the library immunity from Kathleen R.'s suit, the mother filed a new suit claiming that the "city's role in transmission of sexually explicit material violated the parent's and child's constitutional rights." A constitutional claim has the power to override a federal statute.[106] Hernandez dismissed the constitutionally-based suit without comment on Jan. 14.

The *Mainstream Loudoun* case began in October 1997 when the county's library board adopted a policy "designed to prevent adult and minor Internet users from accessing illegal

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[103]Arvidson, 1 of 2.

[104]"ACLU backs effort to dismiss library filtering suit," Telecommunications Industry Litigation Reporter Aug. 1998: 10.

[105]"Judge rules section 230 blocks the Livermore library suit," Tech Law Journal 21 Oct. 1998: 1 of 3. Visited Nov. 15, 1998. www.techlawjournal.com/censor/81021.htm

[106]The Associated Press, "Court dismisses woman's attempt to force library to filter Net access," Freedom Forum Online 15 Jan. 1999: 1 of 2. Visited Mar. 14, 1999. www.freedomforum.org/speech/1999/1/15calibrary.asp

pornography and to avoid the creation of a sexually hostile [library] environment."[107] In order to enforce the policy, the library board installed X-Stop, an Internet filtering product, on all of its public online access terminals.

A host of individuals and organizations, spearheaded by People for the American Way Foundation and the ACLU, filed suit against the library board, claiming that the policy was unnecessarily restrictive under the First Amendment.[108] The plaintiffs argued that the "Policy on Internet Sexual Harassment" precluded adult access to constitutionally protected material because it restricted adult access to a level suitable for children.

Brinkema decided that the policy could serve as a prior restraint and was therefore subject to the "strict scrutiny" standard of review, meaning that it had to overcome a high burden of proof to pass constitutional muster. Because the policy contained no provision for administrative or judicial review, no time period during which review must be completed and was not the least restrictive measure available to the board, the judge concluded that the policy failed the strict scrutiny test.[109]

As a result, Brinkema enjoined the board from enforcing the policy. She noted in her opinion:

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[107]"Internet censorship proponents lose round two of historic court contest," Your School and the Law 12 Feb. 1999: 1 of 3.

[108]"Internet censorship proponents lose round two of historic court contest," Your School and the Law 12 Feb. 1999: 1 of 3.

[109]"Internet censorship proponents lose round two of historic court contest," Your School and the Law 12 Feb. 1999: 1 of 3.

> Although [the board] is under no obligation to provide Internet access to its patrons, it has chosen to do so and is therefore restricted by the First Amendment in the limitations it is allowed to place on patron access.[110]

Section four: Legislative opportunities for regulating filtering

Against the backdrop of previous courts' rulings, I next examine recent efforts by Congress to use Internet filtering to protect children in the home, in public schools and in public libraries.

Internet use requires a series of affirmative steps in order to reach material harmful to minors. Even before that process begins, however, parents must take action to bring the apparatus for Internet use into the home. According to some, "The parents are the gatekeepers of the message and can easily close the door to the world if they so choose."[111] Viewed in light of the great educational power of the Internet, this opinion is obviously myopic. If a child is only a few clicks away from "www.sex.com," so too is he within reach of the Library of Congress at "www.loc.gov" or the Museum of Modern Art, "www.moma.org."

From a constitutional standpoint, because of the parental authority recognized by the Supreme Court in cases like *Parham v. J.R, Meyer v. Nebraska* and *Pierce v. Society of Sisters*, those who would legislate Internet access in the home are restricted to measures that enable parents to make decisions for their children. For example, an act stating that parents could not

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[110]*Mainstream Loudoun v. Board of Trustees of the Loudoun County Library* 26 Media L. Rep. 1609 (1998).

[111]Lisa M. Fantino, "SYMPOSIUM: Panel III: Restricting speech on the Internet: Finding an appropriate regulatory framework," Fordham Intellectual Property, Media & Entertainment Law Journal 8 (1998): 16 of 43.

allow their children access to pornographic material would without a doubt be declared unconstitutional on the basis of these cases. Legislation that required Internet service providers to make filtering software available to their clients, thus helping parents filter the online world for their children if they so chose, would have a better shot at constitutional survival. So, although filtering in the home is undoubtably legal, the question of effectiveness or even overeffectiveness arises.

In an effort to "provide screening software to permit parents to control Internet access by their children,"[112] both houses of Congress introduced bills[113] during the 105th Congress requiring Internet service providers (ISPs) to offer their customers screening software designed to limit minors' access to material that is "harmful to minors"[114] or "unsuitable for children."[115] The House version of the legislation, called the Family Friendly Internet Access Act of 1997 (FFIAA), provided that filtering software be provided by ISPs "either at no charge or for a fee that does not exceed the cost of such software"[116] to the ISP. The Senate amendment stipulated that the software could be provided for a charge, but makes no mention of a limit.[117] S. AMDT. 3286 passed the Senate, but because H.R. 1180 never made it to the House floor, action on the

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[112]H.R. 1180.

[113]The bills introduced in the 105th Congress were H.R. 1180 and S.AMDT. 3286, an amendment to S. 2260, a Senate appropriations bill.

[114]S.AMDT. 3286.

[115]H.R. 1180.

[116]H.R. 1180.

[117]S.AMDT. 3286.

bill stalled.

Critics fear that the passage of legislation like the FFIAA will lead Congress next to propose legislation regulating the Internet industry's efforts to implement a voluntary rating system.[118]

On May 15, the U.S. Senate unanimously passed legislation designed to protect children from "unsuitable material on the Internet."[119] Under the measure, ISPs "would be encouraged to provide free filters voluntarily."[120] The bill assigns the Federal Trade Commission to monitor all ISPs with more than 50,000 customers and report whether they are voluntarily giving their users filters. If after one year the FTC found that fewer than 75% of American ISPs fail to provide free filters, the previously voluntary guideline would become a mandatory federal requirement.[121]

Senator Patty Murray proposed legislation during the 105th Congress that would have taken the regulatory scheme one step further. Murray's proposal required Internet authors to rate their speech and include parental warnings, and it criminalized the act of misrating a website.[122] One author says that, "These proposals seek to do indirectly what the CDA could not do

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[118]Dobeus, 5 of 30.

[119]Adam Clayton Powell III, "U.S. Senate backs law to require ISPs to offer free filters," Freedom Forum Online 14 May 1999: 1 of 2. Visited 17 May 1999. www.freedomforum.org/speech/technology/1999/5/14isp.asp

[120]Powell, 1 of 2.

[121]Powell, 1 of 2.

[122]Dobeus, 5 of 30.

directly."[123]

Considering the public school's authority to determine curriculum and act *in loco parentis*, as determined in *Bethel School District No. 403 v. Fraser* and *Tinker v. Des Moines Independent School District*, filtering in the public school holds nearly equivalent status to filtering in the home. Thus, the use of filtering software within the classroom would be constitutional.[124]

The Court's ruling in *Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico* means that a school board cannot remove information that it disagrees with, but it "can configure its computer network to allow in only that material that will be used as part of the established curriculum."[125]

In fact, Glenn Kubota argues that *Pico's* intent test is applicable to software filters. He notes that the application of filtering software makes it highly difficult to prove the specific intent of a school board as would be required under *Pico* to defeat the use of filtering software. "Because the intent of the school is difficult to determine, the analysis articulated in *Pico* will generally be inconclusive and insufficient to find an infringement of a student's First Amendment right to receive information."[126]

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[123]Dobeus, 22 of 30.

[124]Note that in *ACLU v. Reno* the Court suggested filtering as a less restrictive alternative for a public library, which is a more rarified constitutional environment that the classroom.

[125]Drever, 19 of 24.

[126]Glenn Kubota, "Comment: Public schools usage of Internet filtering software: Book banning reincarnated?" Loy. L.A. Ent. L.J. 687, 704 (1997).

Thus, if Internet use is part of the curriculum, legislators may mandate that schools may use filtering software to regulate the content students can access without violating their First Amendment rights.[127]

According to one writer, "The introduction of the Internet as a learning resource does not dictate a higher standard of scrutiny." Although the Internet is a new medium, its use in the classroom falls within the traditional authority of educators to monitor classroom use of information as a part of the learning curriculum.[128]

The Court has also ruled, through a line of abortion cases, that the government may make and implement a value judgment by the allocation of public funding.[129] According to the Court, the existence of a constitutional right does not guarantee government funding of full access to the right. In addition, government may condition program funding to prohibit specific activities, meaning that recipients must accept such funding on the government's terms or not at all.[130]

Based upon the power given to the schools in *Fraser* and that allocated to the government in the abortion cases, governments could help schools buy equipment to access the Internet, but condition that financial assistance on the mode of computer use or allow educators to restrict the students' mode of computer use. According to Court opinions, even if children's First Amendment rights were not limited, government would have no burden to subsidize such rights

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[127]Drever, 19 of 24.

[128]Drever, 15 of 24.

[129]Drever, 16 of 24. Drever again refers to *Harris v. McRae* and *Rust v. Sullivan*.

[130]Drever, 15 of 24. Drever refers to *Harris v. McRae* 448 U.S. 297 (1980) and *Rust v. Sullivan* 500 U.S. 173 (1991).

by providing unlimited Internet access in the classroom.

Senator John McCain's (R-Ariz.) Internet School Filtering Act (ISFA) is based in these Court rulings. The bill, first introduced during the 105th Congress, would require all schools that receive federal funding to install filtering or blocking software on school computer systems. The local school board would have the sole authority to choose the software to be used. This provision was meant to ensure that a local community standard was employed in choosing the software. Schools that failed to conform to the certification process would be denied funding.[131]

McCain's bill did not pass the 105th Congress, but it has already been reintroduced for this term.

Mandating filtering in the public library will prove more difficult for Congress, however, because of the Court's holding that the library is "the principal locus of First Amendment freedom for students."[132] The Court even declared in *Board of Education v. Pico* that allowing schools to shape classroom curriculum was constitutional in part because of the availability of libraries as a source of speech.

The Loudoun County, Va., library board ran up against this problem when trying to filter its computers, and it is unlikely to be the last library board to do so. Although the Court advocated filtering as a less restricting alternative than Internet regulation in its *ACLU v. Reno* opinion, those who would filter in public libraries must be aware of the library's traditional status as a public forum and the strong constitutional protection that status confers.

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[131]Drever, 17 of 24.

[132]Drever, 18 of 24.

Nevertheless, McCain's ISFA also contains a provision requiring that libraries install filtering software on at least one of their machines or lose their federal funding.[133] So far, this bill is the only federal legislative attempt to impose filtering on public libraries.

The failure of the CDA and COPA has seen the battleground over online access for children move to the state level.

"We're seeing [state Internet regulation bills] all over the place," says Ann Beeson of the ACLU. Legislators have introduced these bills "at a rate of about 10 a year for the past three years."[134]

Many of the bills are patterned after the CDA or COPA. Others resemble the McCain bill.

Because of the global nature of the Internet, state laws may have an even higher constitutional hurdle to clear than do federal laws, however. The Constitution's commerce clause delegates the power to regulate interstate commerce to the federal government alone. As a result, state laws that concern commerce even remotely may be struck down on constitutional grounds.[135]

Section five: Filtering in practice and alternative measures

Aside from the technological option filtering offers, there are several "low-tech" methods

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[133]Drever, 17 of 24.

[134]David Hudson, "Taking aim at a global medium with state laws," Freedom Forum Online 8 June 1998: 1 of 3. Visited 15 Nov. 1998. www.freedomforum.org/speech/series/cda.series.5.asp

[135]David Hudson, "Taking aim at a global medium with state laws," Freedom Forum Online 8 June 1998: 1 of 3. Visited 15 Nov. 1998. www.freedomforum.org/speech/series/cda.series.5.asp

for increasing child safety on the Internet. This section examines ways to combine filters and low-tech measures to maximize child protection in the home, the public school and the public library.

One option for parents is a "tap on the shoulder" policy. In this method, parents place the computer with Internet access in a public area of the home, such as the living room. Thus, parents are more likely to notice a child accessing inappropriate material. Tap on the shoulder policies are most effective when used in conjunction with a parent-child discussion of what constitutes appropriate Internet use.

The National Center for Missing and Exploited Children offers a free booklet called "Child Safety on the Information Highway" to help parents and children define and reduce the risks of Internet use.[136] The pamphlet emphasizes that "The fact that crimes are being committed online, however, is *not* [emphasis in original] a reason to avoid using these services."[137] It also includes a section on the benefits of online use, advice for parents on how to reduce surfing risks and a model parent-child Internet use agreement.

The censoring options for schools are similar to those available in the home. Filters have the same drawbacks in the realm of the classroom that they have in the living room. More sophisticated models do allow a system to be customized to match the needs of the individual classroom teacher's curriculum or a parent's stipulation of the kinds of material he believes is

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[136]The National Center for Missing and Exploited Children has a web site at www.missingkids.com. Available on the site are an "Internet Safety Quiz for Kids" and information on how to send away for "Child Safety on the Information Highway."

[137]Lawrence J. Magid,"Child Safety on the Information Highway," National Center for Missing and Exploited Children (1994): 2 of 9.

appropriate for his child, however. In such a way, a classroom of students could be simultaneously using a computer lab, each with individually defined online rights. As a child matures, his online profile can be updated to allow for increased access.[138]

Somewhat parallel to the parent-child online agreement suggested for the home is the school trend toward adopting Acceptable Use Policies (AUP)s. Like a parent-child agreement, AUPs set forth clear rules on where, when and who can access what sorts of material from school Internet terminals. The typical AUP stipulates that a student will not seek out inappropriate materials, including pornography, while online and may ask that parents sign an agreement authorizing their child to use a school's online facilities.[139] These policies may help fill the void of new sites unchecked by filtering software.[140]

Like a filter customized for a particular child, AUPs can be customized to fit a particular school's needs.[141] One author notes that "By creating AUPs, school boards and administrators will be in effect creating a type of cyber community: one whose members define offensive content for themselves."[142] In this way those who develop the school's curriculum have the opportunity to determine acceptable content. As a result, when educational goals and needs shift,

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[138]Drever, 19 of 24.

[139]Rutherford, 26 of 30.

[140]Drever, 20-21 of 24.

[141]Drever, 20-21 of 24.

[142]Drever, 22 of 24.

those changes can be easily identified and used to amend a school's AUP.[143]

Because of the Internet's status as an educational tool, schools must be careful not to violate a student's rights by denying him access without due process. Even if a student violates his AUP, the school must follow a series of steps in order to isolate itself from charges of a constitutional violation.[144] According to one author, AUP due process means:

1. The student must be given notice of the alleged infringement.
2. The student must be given a chance to respond.
3. The student cannot be denied access to the Internet without a hearing.[145]

The technological possibilities in libraries are very similar to those in schools. Libraries could feasibly create AUPs and require patrons to sign them before allowing access to machines. Libraries could perhaps place all machines in a public, open space and employ a "tap on the shoulder" method of enforcing their AUP. Machines in different sections of libraries could be set to different filtering standards. For example, online filtering in the children's section could be set to the maximum level, while the machines in adult sections were unfiltered. It is also possible to implement a login system in which users have individual filtering profiles. Many combinations of these measures are certainly imaginable.

Section six: Ethical questions raised by filtering

Attempts to protect children who are using the Internet raise the dilemma of balancing the need to shield children from physical, psychological and emotional damage with the desire to

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[143]Drever, 22 of 24.

[144]Drever, 22 of 24.

[145]Drever, 22 of 24.

promote freedom of expression in our society.

In light of research suggesting that child pornography and exposure to pornography and violence may cause lasting damage to children, the need for limiting their exposure to such elements becomes clear. Society has a vested interest in raising children who will become physically, psychologically and emotionally healthy adults. Without such adults, the governance of our country and quality of citizens' life could be damaged. Not shielding our children from the nasties of the Internet could jeopardize their potential as future citizens.

On the other hand, would we want children to grow up in a society that restricts freedom of speech to the lowest common denominator — that which is suitable for the purview of children? The right to freedom of speech underpins the foundation of American democracy. Without such a guaranteed right, Americans could become powerless to question the acts of their government and neighbors. Education and artistic creation could be silenced if the power of the majority disagreed with the ideas propounded by the weaker minority.

The standoff between child protection and freedom of speech makes it clear that the stakeholders in the battle over Internet filtering include the general population of the United States, as well as all children and their parents. I will now examine possible alternatives to absolute filtering or absolute freedom in the three fora that are the focus of this thesis: the home, the public school and the public library.

In the home, the parental right to monitor and modify a child's Internet use should be supreme. Honoring the desires of the parents within the home presents little danger to the public right to freedom of speech. It is possible to imagine situations in which children are denied

Internet access to constitutionally protected material. For example, a parent might restrict his teenage son or daughter's access to information about birth control or safe sex. Perhaps a large portion of the public would disagree with this outcome, but in the forum of the home the public should not have a right to override the decision. Exceptions should be made, of course, if parental acts stray into the realm of the truly harmful. Action should be taken against a parent who forces his child to engage in Internet conduct that makes the child uncomfortable, the online version of a "bad touch."

Legislation that assists parents in the task of monitoring and modifying by making filtering software available or funding Internet training classes would be welcome. Notably, my conclusion coincides with effective Supreme Court opinions on the subject. The line between the socially frowned upon and the truly harmful is notoriously difficult to pin down, however.

As for the public school, I believe that the appropriate standard for Internet use should vary according to age. This varying standard could reasonably be decided by public school officials. If officials wish to involve parents in the decision, they could do so through the use of customized AUPs. As a child ages, the question of Internet use in school will frequently become one of appropriateness rather than of morality. For example, school officials might believe that the use of chat rooms is "inappropriate" during school hours. Such use would not necessarily be immoral, however.

Once again, legislation that assists schools in making appropriate filtering decisions, such as providing up-to-date software and educational courses, would be welcome. Legislators who seek to further their political agendas through filtering legislation should be thwarted, however.

An example of this case might be legislating that students could not use school Internet resources to research controversial topics like homosexuality. Although children do not gain the full benefit of the speech clause until their 18th birthday, they should not be unnecessarily propagandized while held a captive audience, as in a public school.

The public library presents the most difficult clash between child protection and free speech. The United States recognizes its libraries as primary locale for exercise of First Amendment freedoms for children and adults alike. The gulf of appropriateness stretches wide between material suitable for adults and that suitable for young children. The Internet holds valuable resources for both groups, however, so a compromise must be reached.

In larger libraries with greater resources, technology may provide part of the answer. Time- and client-blocking filters can be used to segregate users into blocking groups, providing appropriate material depending on age or tastes or both. The card system that many libraries already use could be expanded to allow for electronic identification or users could be issued login names and passwords. (The second method is less secure because logins may be traded more easily than cards.)

For those libraries that have limited resources and perhaps only one computer, the decision becomes more difficult. Should one-computer libraries have to filter what may be a small town's only access to the vast store of the Internet's resources? No, in my opinion. If a library has only one Internet-access computer and no resources for implementing a technological solution, I believe the computer should remain unfiltered. Librarians should, of course, take all available precautions to ensure that children do not access harmful materials, but to filter the only

Internet-access computer in a library amounts to censoring speech to its lowest common denominator and refusing adults access to constitutionally protected speech. Even deciding to filter while providing an approval process to unblock sites, as Loudoun County, Va., attempted to do, places an undue burden and chill upon adult speech. In cases of minimal resources, instead of filtering, libraries should attempt to educate their patrons on what is appropriate Internet use. In fact, in all cases, libraries should offer training sessions for all patrons, not just parents and children, on the pleasures and dangers of the Internet.

Conclusion

Existing research demonstrates that filters are not the cure-all for child online protection that software companies and even the Supreme Court suggest. Filtering packages have several noteworthy pitfalls, as noted in Section One of this thesis. Case law on adults' First Amendment privilege to speak and children's privilege to access speech does leave the door open to limited forms of legislatively mandated filtering in the home, public school and public library, as discussed in Section Two, but Sections Three and Four point out how little success lawmakers have achieved in this arena. As discussed in Section Six, filtering in all three fora is ethically sound under certain conditions. In conclusion, although filtering may eventually prove the most efficacious method for protecting children from the Internet's "red light district," the technology in its current form is most effective when combined with other measures, as Section Five notes.

As I researched this thesis, I discovered several topics regarding filtering in need of further work. Most concern the abominable lack of statistical data on the topic. For instance, legislators and parents alike assume that the Internet can be a dangerous playground for children.

Anecdotal evidence appears to support this conclusion. But creditable studies backing up the viewpoint are nonexistent. How many children are viewing inappropriate material online? How often are they doing so? Where are they gaining access? These questions beg to be answered. Even more fundamentally, the number and accessibility of sites inappropriate for children and the number of users surfing those sites is also unknown. As for filters themselves, the savvy parent must wonder who selects the sites that will be blocked by filtering software. What kind of criteria are sites judged by, who makes that decision, and how is it implemented? Once again, no reliable data are available. Software manufacturers guard their "trade secrets" and even their blocked sites lists carefully. Finally, a comprehensive study of various popular filters' success rates is long overdue. Although some articles on different models' features exist, I could find no head-to-head comparison of overall blocking effectiveness. On a less "techie" level, I would encourage future researchers to consider the question of what combination of technology and old-fashioned moral education yields the most desirable and reliable results in protecting America's children going online in their homes, public schools and public libraries.

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