THE LIBRARY INTERNET FILTER: ON THE COMPUTER OR IN THE CHILD?

I. INTRODUCTION

> [Jesus] took a little child and had him stand among them. Taking him in his arms, he said to them, "Whoever welcomes one of these little children in my name welcomes me; and whoever welcomes me does not welcome me but the one who sent me."[1]
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> "And if anyone causes one of these little ones who believe in me to sin, it would be better for him to be thrown into the sea with a large millstone tied around his neck. If your hand causes you to sin, cut it off. It is better for you to enter life maimed than with two hands to go into hell, where the fire never goes out. And if your foot causes you to sin, cut it off. It is better for you to enter life crippled than to have two feet and be thrown into hell. And if your eye causes you to sin, pluck it out. It is better for you to enter the kingdom of God with one eye than to have two eyes and be thrown into hell . . . ."[2]

Door to door salespersons for water filtration systems, attempting to both alarm and educate potential customers, boldly proclaim, "Either *buy* a filter or *be* a filter!"[3] As concerned as we may be about removing contaminants from our drinking water, we should be much more concerned about removing harmful material from our children's view of the Internet. As children's access to the Internet expands both at school[4] and now in public libraries,[5] standards must be established. Who will set

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1 *Mark* 9:36-37 (New International).

2 *Mark* 9:42-47 (New International).

3 The author has heard this technique used by door to door water filtration salespeople on more than one occasion.

4 According to a study released by the National Center for Educational Statistics in February, 1998, seventy-eight percent of all U.S. schools (approximately 64,000) now have Internet access. According to a news release by the U.S. Office of Personnel Management, President Clinton has established a goal of having the Internet available to every classroom in the country by the year 2000. *OPM Director Presents Computers to San Francisco Elementary School*, U.S. Office of Personnel Management, Oct. 16, 1998, *available in* 1998 WL 729732. This goal is also shared by British Telecommunications that has committed to providing all classrooms in the United Kingdom with high-speed access to the Internet by 2000. Paul J. Deveney, *World Watch*, WALL ST. J., Oct. 8, 1997, at A17.

5 The percentage of libraries offering Internet access has more than doubled in the last two years, growing from 28 percent in 1996 to 60 percent in 1998. Patrick LaKamp & Jay Rey, *Protection vs. Freedom Some Fear Kids Will Find Internet Porn at Library*, BUFFALO NEWS, June 6, 1998, at A1. *See also Internet Usage Away From Home, Work Expected to Double*, DETROIT NEWS, Apr. 16, 1998, at E3.

these standards? What standards should be set? What Free Speech issues must be addressed to insure constitutional standards are upheld?[6]

This note explains why Internet filtering systems in public libraries do not violate the First Amendment of the Constitution. Filtering systems are necessary to minimize children's exposure to obscene Internet material and to maintain the public library's reputation as a safe and quiet place, dedicated to learning.[7] Without filtering systems, public libraries run the risk of becoming battlezones, unsafe to both children and employees.[8]

II. WHAT BROUGHT US TO THIS POINT?

A. The Explosion of the Internet

The Internet began as a Department of Defense project in 1969 called ARPANET, initially linking mainframe computers from four major universities.[9] The purpose of ARPANET was to provide for delivery of messages through multiple routes, leaving the United States less vulnerable to nuclear attack.[10] While ARPANET no longer exists, it provided the foundational concept for the Internet, now used to link millions of people to each other and to information around the world.[11] As technology advanced, what started as electronic messaging or text, evolved

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6 "Congress shall make no law . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

7 Brown v. Louisiana, 383 U.S. 131, 142 (1966).

8 In *Reno v. ACLU*, 117 S. Ct. 2329, 2336 (1997), the Court recognized the desire of parents to screen sexually explicit text and other materials from their children's view. At a public library, without filtering software, children may either personally access or unintentionally observe another patron accessing pornography forbidden at the child's home. In *Ginsberg v. New York*, 390 U.S. 629, 639 (1968), the Court recognized the "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

Several federal courts have held that the presence of pornography in the workplace is evidence of a hostile working environment. *See* Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316 (8th Cir. 1994); Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990); Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989); Lipsett v.University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988); Bennett v. Corroon & Black Corp., 845 F.2d 104 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991); Barbetta v. Chemlawn Services Corp., 669 F. Supp. 569 (W.D.N.Y. 1987).

9 ROBIN ROWLAND & DAVE KINNAMAN, RESEARCHING ON THE INTERNET: THE COMPLETE GUIDE TO FINDING, EVALUATING, AND ORGANIZING INFORMATION EFFECTIVELY 157 (1995). The universities included the University of California at Los Angeles, University of California at Santa Barbara, Stanford University, and University of Utah. *See id.* at 158.

10 *See id.*

11 *Reno*, 117 S. Ct. at 2334.

into transmission of pictures, sounds, and even video clips.[12] No single organization controls the Internet's World Wide Web ("WWW"), so no centralized point exists to limit or block individual Web sites.[13] Due to the Internet's lack of structure, control of its content is limited only by the limitations of human thought.[14] Pornography is now the Internet's third leading commercial activity, with annual gains of $100 million per year.[15] A plethora of images are accessible for no charge.[16] Further, the Internet's inherent nature prohibits an Internet Service Provider ("ISP") from detecting the age of a user.[17] Attempts by Congress to regulate the Internet have failed constitutional challenges.[18]

B. The Communications Decency Act of 1996

On February 8, 1996, President Clinton signed the Communications Decency Act ("CDA") into law.[19] The CDA prohibited the knowing transmission of obscene or indecent communications to persons under eighteen.[20] This communication could take the form of either messages or images that "in context, depict[] or describe[], in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs . . . ."[21] The CDA's life was short-lived; the U.S. Supreme Court struck down the Act in 1997.[22] The Court held that the CDA had an impermissible chilling affect on adult free speech.[23] As an

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12 *Id.*

13 *Id.* at 2336. A Web site consists of a collection of Web pages, each containing information and potentially "links" to other Web sites. *Id.* at 2335.

14 *Id.*

15 Donna Rice Hughes, *Don't Cry 'censorship'*, USA TODAY, Mar. 19, 1997, at 10A.

16 Search engines on the Internet allow the user to enter freeform text. For example, by typing the phrase "free nude celebrity pictures" into a search engine called Alta Vista, over 100 nude pictures of celebrities may be viewed without any registration process, credit card entry, or age verification.

17 *Reno*, 117 S. Ct. at 2336-37.

18 The Communications Decency Act was struck down by the U.S. Supreme Court in *Reno*, 117 S. Ct. at 2351.

19 Communications Decency Act of 1996, Pub. L. No. 104-104 §§501-552, 110 Stat. 56, 133-42 (codified at 47 U.S.C. § 223).

20 See *id.* § 223(a).

21 *See id.* § 223(d)(1)(B).

22 *See generally Reno*, 117 S. Ct. at 2329.

23 *Id.* at 2344. Additionally, the Court viewed the CDA as overreaching, quoting *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 127 (1989), equating the CDA's effect on free speech as "burn[ing] the house to roast the pig." *Reno*, 117 S. Ct. at 2350 (internal quotations omitted).

alternative to legislation, the Court suggested the use of filtering software.[24]

C. The Internet School Filtering Act

Senator John McCain (R-Ariz.), Chairman of the Senate Commerce Committee, recently sponsored the Internet School Filtering Act,[25] designed to protect students from accessing pornography and other inappropriate material on-line in schools and libraries. This bill cuts off federal Internet subsidies for schools and libraries that do not install software to block indecent material.[26] Concurrently, a revised version of the CDA, introduced by Senator Dan Coats (R-Ind.), criminalizes commercial distribution of material on the Internet that is "harmful to minors."[27] Material harmful to minors is material that "i) taken as a whole and with respect to minors, appeals to the prurient interest in nudity, sex, or excretion; ii) depicts . . . in a patently offensive way with respect to what is suitable for minors . . . sexual contact . . . acts, or lewd exhibition of the genitals; and iii) lacks serious literary, artistic, or scientific value."[28] Under this bill, a distributor may avoid penalties by requiring a credit card, debit card, access code, or adult personal identification number, as established by the FCC.[29]

D. American Library Association and American Civil Liberties Union Oppose Implementation of Filtering Software in Schools and Public Libraries

Despite the Court's apparent approval of filtering software[30] and probable approval by both houses of Congress and the President,[31] both the American Library Association ("ALA") and the American Civil Liberties Union ("ACLU") oppose the use of filtering software in public schools

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[24] Although the Court does not literally use the term "filter," it refers to "a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available." *Id.* at 2347 (quoting ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996) (internal quotations omitted).

[25] S. 1619, 105th Cong. (1998).

[26] *Id.*

[27] S. 1482, 105th Cong. (1998).

[28] *Id.*

[29] *Id.*

[30] *See supra* note 24.

[31] Since both houses of Congress and the President approved the CDA, proposed legislation less stringent and designed to pass constitutional muster will almost certainly receive approval.

and public libraries.[32] Instead, as will be discussed later in this note, the ALA and ACLU propose five other less restrictive alternatives.[33] Because of this opposition, implementing filtering software in public libraries will not occur without a struggle.

III. WHAT TYPE OF FORUM IS A PUBLIC LIBRARY?

A. Forum Analysis Overview

The Supreme Court has identified three classifications for fora, including "the traditional public forum, the public forum created by government designation, and the nonpublic forum."[34] The level of allowable government restriction on speech is dependent on the forum's classification.

B. The Public Forum

A traditional public forum is a place "which by long tradition or by government fiat have been devoted to assembly and debate. . . ."[35] This category includes streets, parks, public sidewalks, and other public places that "have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[36] The government cannot restrict speech in a public forum unless it is "necessary to serve a compelling state interest" and is "narrowly drawn to achieve that end."[37]

C. The Designated or Limited Public Forum

A designated public forum embodies "public property which the state has opened for use by the public as a place for expressive activity."[38] "Reasonable time, place and manner regulations *are* permissible. . . ."[39] All content-based restrictions must be "narrowly drawn to effectuate

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[32] ACLU White Paper, *Censorship in a Box: Why Blocking Software is Wrong for Public Libraries* (visited Apr. 12, 1999) <http://www.aclu.org/issues/cyber/box.html#battling>.

[33] *Id.*

[34] Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

[35] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (quoting Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939)).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* (emphasis added).

a compelling state interest."[40] Government inaction does not create a designated public forum.[41] Instead, the forum is constructed by "intentionally opening a nontraditional forum for public discourse."[42]

The Court has recognized the limited public forum as a sub-category of the designated public forum.[43] In a limited public forum, constitutional protections are provided "only to expressive activit[ies] of a genre similar to those that government has admitted to the limited forum."[44] The activities that the government permits in a limited public forum need only be reasonable and viewpoint neutral.[45]

D. The Nonpublic Forum

If a forum has not traditionally been open to assembly and debate and the government has not taken affirmative action to open the forum for expressive activity, it is a nonpublic forum.[46] In a nonpublic forum, the state is treated as a private property owner.[47] Although treating a government entity as a private property owner may seem unusual, the U.S. Supreme Court has recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[48] In this setting, the government may enact and enforce "time, place and manner regulations, . . . [to] reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression because public officials oppose the speaker's view."[49]

E. Library Classification

Classifying a public library may best be accomplished by ascertaining what a public library is not. First, a public library is not a traditional public forum.[50] Patrons cannot engage in speeches that would disrupt

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40 *Id.* at 46.

41 Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

42 *Id.*

43 *Perry*, 460 U.S. at 46 n.7.

44 Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991).

45 *Perry*, 460 U.S. at 46.

46 *Cornelius*, 473 U.S. at 802.

47 *Perry*, 460 U.S. at 46.

48 *Id.* (quoting U.S. Postal Service v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981)).

49 *Id.*

50 A traditional public forum is a place that has a long tradition of being devoted to "assembly and *debate*." *Id.* at 45 (emphasis added). Debate certainly cannot occur in a

the quiet and peaceful atmosphere of the library. Further, the government may regulate the use and activities in a library, so long as this is done in a "reasonable and nondiscriminatory manner . . . ."[51] A library patron may be restricted from engaging in traditional First Amendment activities, such giving speeches or any other conduct "disruptive [of] the quiet and peaceful library environment."[52]

Second, a public library does not qualify as either a designated public forum or a limited public forum.[53] Because a library is opened for a designated purpose and is separated from both the traditional public forum and the designated public forum, the Supreme Court has stated that "the separated property is a special enclave, subject to greater restriction."[54] The library is not a limited public forum because no expressive activities have been admitted to the forum.[55]

Finally, by process of elimination, if forum analysis is to be used, a public library must be a nonpublic forum.[56] This classification gains support from the Second Circuit in *General Media Communications, Inc. v. Cohen*,[57] which classified military bookstores as nonpublic forums.[58] The court in *Cohen*, citing the U.S. Supreme Court, stated, "when the state reserves property for its 'specific official uses,' it remains nonpublic in

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"quiet" atmosphere, one of a library's characteristics according to *Brown v. Louisiana*, 383 U.S. 131, 142 (1966).

[51] *Id.* at 143.

[52] Kreimer v. Bureau of Police, 958 F.2d 1242, 1256 (3d Cir. 1992).

[53] A designated public forum is public property "opened for use by the public as a *place for expressive activity*." *Perry*, 460 U.S. at 45 (emphasis added). Expressive activity is inapposite to the purposes of a public library as "a place *dedicated to quiet*, to knowledge, and to beauty." *Brown*, 383 U.S. at 142 (emphasis added).

[54] International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 680 (1992).

[55] The library is not a limited public forum for the same reasons it is not a traditional or designated public forum—the library is a place of quiet. *Brown*, 383 U.S. at 142. Nevertheless, one circuit has held a public library to be a limited public forum. *Kreimer*, 958 F.2d 1242. However, this case did not involve expressive activity. *Id.* at 1247. Instead, the library in *Kreimer* established policies on personal hygiene due to a homeless man's alleged disruptive presence. *Id.* The court concluded that the library could place reasonable restrictions on library patrons, including prohibitions against loitering, inappropriate dress, and offensive bodily hygiene. *Id.* at 1270.

One federal district court recently held a public library to be a limited public forum. Mainstream Loudoun v. Board of Trustees, 24 F. Supp. 2d 552 (E.D. Va. 1998). The court based its decision on the fact that the "defendant intended to designate the Loudoun County libraries as public fora for the limited purpose of the expressive activities they provide, including the receipt and communication of information through the Internet." *Id.* at 563.

[56] By eliminating the traditional public forum the designated public forum, and the limited public forum, the only remaining option is the nonpublic forum. *Perry*, 460 U.S. at 45-46.

[57] 131 F.3d 273 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 2637 (1998).

[58] *Id.* at 276.

character . . . ."[59] Likewise, "[i]t is also well established that the presence of some expressive activity in a forum does not, without more, render it a public forum."[60] As a result, the library may enforce restrictions against both communicative and non-communicative behavior providing the restrictions are reasonable and viewpoint neutral.[61]

F. An Alternative: Forum Analysis May Not Be Applicable for Public Libraries

A distinct possibility exists that the courts will not apply a forum analysis to a public library. Recently, the U.S. Supreme Court in *Arkansas Educational Television Commission v. Forbes*,[62] refused to apply a forum analysis in a public broadcast setting. The Court first addressed the forum analysis issue, recognizing that "[a]lthough public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine, candidate debates present the narrow exception to the rule."[63] The need for editorial discretion was a critical factor in the Court's position that a public broadcast setting should not generally be vulnerable to a forum analysis.[64] Citing *Columbia Broadcasting System, Inc. v. Democratic National Commission*,[65] the Court concluded, "In effect, we would exchange 'public trustee' broadcasting, with all its limitations, for a system of self-appointed editorial commentators."[66]

Similarly, librarians must constantly use editorial discretion in selecting material for library acquisition. Just as public broadcasters are not compelled to allow third parties to control a station's programming,[67] so libraries cannot cater to every patron's demands. For this reason, a public library should not be subject to a forum analysis. If this protection is removed, libraries may chose to avoid entire categories of information instead of facing First Amendment liability.[68] In other words, if a librar-

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[59] *Id.* at 279 (citing Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995)).

[60] *Id.* (citing United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 130 n.6 (1981)).

[61] *Perry*, 460 U.S. at 46.

[62] 118 S. Ct. 1633 (1998).

[63] *Id.* at 1640.

[64] *Id.* at 1639.

[65] 412 U.S. 94, 124 (1973).

[66] *Forbes*, 118 S. Ct. at 1640.

[67] *Id.*

[68] The Court in *Forbes* recognized a similar potential problem in broadcasting, remarking "[w]ere it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air

ian is faced with constant complaints about Internet pornography, the librarian may prefer to eliminate access to the Internet altogether.

If forum analysis is inapplicable to the library setting, library restrictions need only be reasonable and viewpoint neutral, resembling a nonpublic forum.[69] Reasonable restrictions do not have to be the "most reasonable or the only reasonable limitation."[70] Additionally, the restriction does not need to be narrowly tailored or the government's interest compelling.[71] Instead, the restriction "must be assessed in the light of the purpose of the forum and all the surrounding circumstances."[72]

IV. DOES AN INTERNET FILTER LIMIT FREE SPEECH?

A. Government's Compelling Interest to Protect Children

The U.S. Supreme Court has recognized on numerous occasions the government's compelling interest to protect the safety of children, both physically and psychologically.[73] "[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[74] "This interest extends to shielding minors from the influence of literature that is not obscene by adult standards."[75] In *Ginsberg*, the Court rejected the notion that citizen's right to "read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult of a minor."[76] Nevertheless, the Court issued this caution, "to withstand constitutional scrutiny, 'it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.'"[77] The Court must go beyond showing

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candidates' views at all. A broadcaster might decide 'the safe course is to avoid controversy' . . . ." *Id.* at 1643 (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 656 (1994)).

69 Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392-93 (1993).

70 Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 808 (1985).

71 *Id.* at 809.

72 *Id.*

73 Denver Area Educ. Telecomm. Consortium v. FCC, 116 S. Ct. 2374, 2387 (1996); Sable Communications of California, Inc. v FCC, 492 U.S. 115, 126 (1989); New York v. Ferber, 458 U.S. 747, 756-757 (1982); Ginsberg v. New York, 390 U.S. 629, 639-40 (1968).

74 Bellotti v. Baird, 443 U.S. 622, 635 (1979).

75 *Sable*, 492 U.S. at 126; *see also Ferber*, 458 U.S. at 756-57; *Ginsberg*, 390 U.S. at 639-40.

76 390 U.S. at 636.

77 *Sable*, 492 U.S. at 126 (quoting Schaumburg v. Citizens For A Better Env't, 444 U.S. 620, 637 (1980) (internal citations omitted)).

a compelling interest; the "means must be carefully tailored" to achieve only the targeted interest.[78]

B. Filters are the Least Restrictive Means

Balancing the government's compelling interest to protect children with accommodating First Amendment interests of free speech is complex.[79] Children need more protection from harmful speech than they need First Amendment protection to engage in speech.[80] Limits still exist, as demonstrated by the Court rejecting the CDA, as to the breadth of adult communication the government can proscribe in order to protect children.[81] The government must use the "least restrictive" means available that will still accomplish the protective purpose.[82]

The ACLU, support by the ALA, has proposed several alternatives to blocking software that it argues would be less restrictive than blocking software, but just as effective.[83] The five alternatives proposed include: (1) Acceptable Use Policies – published guidelines providing carefully worded instructions for parents, teachers, students and libraries regarding the use of the Internet; (2) Time Limits – must be content neutral and not discriminate against patrons; (3) "Driver's Ed" for Internet Users – require completion of an Internet seminar, similar to a driver's education course, before access is allowed; (4) Recommended Reading – promote and provide links to websites recommended for children; and (5) Privacy Screens – designed to protect users' privacy when viewing sensitive information and avoid unwanted viewing of websites by other patrons.[84] While these recommendations are arguably less restrictive than installation of software filters, they do not protect children from Internet pornography.[85]

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[78] *Id.*

[79] *See Denver Area Educ. Telecomm. Consortium*, 116 S. Ct. at 2387.

[80] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986).

[81] Reno v. ACLU, 117 S. Ct. 2329, 2348 (1997).

[82] *Id.*

[83] ACLU White Paper, *Censorship in a Box: Why Blocking Software is Wrong for Public Libraries* (visited Apr. 12, 1999) <http://www.aclu.org/issues/cyber/box.html#battling>.

[84] *Id.*

[85] Common sense rejects the effectiveness of the measures recommended by the ACLU. Although guidelines may be helpful in creating awareness of potential harm to children, they will not actually protect the child. Time restrictions will not limit access to pornography, only the amount of pornography viewed per session. Further, our society does not trust education to limit minors from participating in harmful activities. For example, it is widely known that minors may not purchase alcohol, cigarettes, or pornography, in spite of widespread attempts to educate the public on these matters. Providing recommended reading and website links for children will only assist a child from inadvertently accessing

Filtering software is the least restrictive means of protecting children from Internet pornography. As the Court in *Reno* held, it is currently impractical, if not infeasible to identify the age of an Internet user and prohibit access to inappropriate material.[86] Placing a credit card restriction on pornographic websites could impermissibly restrict adults not possessing credit cards access to these websites.[87] The placement of pornography on the Internet, considered protected adult speech, can only be restricted if less restrictive alternatives designed to protect minors are unavailable.[88] Therefore, if placement of pornography on the Internet cannot be prevented, the only alternative is to block the images from receipt.[89]

C. Lasciviousness is Not a Viewpoint

Restrictions in a nonpublic forum, a limited public forum, and when forum analysis is inapplicable need only be viewpoint neutral.[90] View-

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pornographic sites. The child intentionally accessing pornography will not be inhibited by this measure in any way. Finally, privacy screens, although possibly effective for reducing unintended viewing of another patron's screen, will actually assist a child in accessing Internet pornography without being detected.

[86] 117 S. Ct. at 2336-37.

[87] *Id.* at 2337.

[88] *Id.* at 2346. The Court had previously distinguished "pornography" as protected speech from "obscenity," which is unprotected. *Id.* at 2340.

[89] This same principle applies to the publication of pornographic magazines. Although publication of the magazine is not prohibited, purchase of the magazine by a minor is forbidden in virtually every state. *See* ALA. CODE § 13A-12-200.5 (1994); ARIZ. REV. STAT. ANN. § 13-3506 (West 1989); ARK. CODE ANN. § 5-68-502 (Michie 1993); CAL. PENAL CODE § 313.1 (West Supp. 1997); COLO. REV. STAT. § 18-7-502(1) (1986); CONN. GEN. STAT. § 53a-196 (1994); DEL. CODE ANN. tit. 11 § 1365(i)(1) (1995); D.C. CODE ANN. § 22-2001-b-1(A) (1996); FLA. STAT. ch. 847.012 (1994); GA. CODE ANN. § 16-12-103(a) (1996); HAW. REV. STAT. § 712-1215(1) (1994); IDAHO CODE § 18-1515(1) (1987); 720 ILL. COMP. STAT 5/11-21 (West 1993); IND. CODE § 35-49-3-3(1) (Supp. 1996); IOWA CODE § 728.2 (1993); KAN. STAT. ANN. § 21-4301-c-a(2) (1988); LA. REV. STAT. ANN. § 14:91.11(B) (West 1986); MD. ANN. CODE, art. 27 § 416B (1996); MASS. GEN. LAWS ch. 272 § 28 (1992); MINN. STAT. § 617.293 (1987 & Supp. 1997); MISS. CODE ANN. § 97-5-27 (1994); MO. REV. STAT. § 573.040 (1995); NEB. REV. STAT. § 28-808 (1995); NEV. REV. STAT §§ 201.265(1), 201.265(2) (1997); N.H. REV. STAT. ANN. § 571-B:2(I) (1986); N.M. STAT. ANN. § 30-37-2 (Michie 1989); N.Y. PENAL LAW § 235.21(1) (McKinney 1989); N.D. CENT. CODE § 12.1-27.1-03 (1985 & Supp. 1995); OHIO REV. CODE ANN. § 2907.31-A(1) (Supp. 1997); OKLA. STAT. tit. 2 § 1040.76(2) (Supp. 1997); 18 PA. CONS. STAT. § 5903(c) (Supp. 1997); R.I. GEN. LAW § 11-31-10(a) (1996); S.C. CODE ANN. § 16-15-385(A) (Supp. 1996); S.D. CODIFIED LAWS § 22-24-28 (Michie 1988); TENN. CODE ANN. § 39-17-911(a) (1991); TEX. PENAL CODE ANN. § 43.24(b) (West 1994); UTAH CODE ANN. § 76-10-1206(2) (1995); VT. STAT. ANN. tit. 13 § 2802(a) (1974); VA. CODE ANN. § 18.2-391 (Michie 1996); WASH. REV. CODE § 9.68.060 (1988 & Supp. 1997); WIS. STAT. § 948.11(2) (Supp. 1995).

[90] *See supra* note 50; *see also* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) (the limited public forum is a sub-category of the designated

point discrimination is an effort to suppress a speaker's expressive activity because of a disagreement with a speaker's view.[91] A viewpoint is defined as "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered."[92]

The First Amendment allows the government to "choose to prohibit only that obscenity which is the most patently offensive in its prurience—i.e., that which involves the most lascivious displays of sexual activity."[93] In *Cohen*, the Second Circuit upheld the Military Honor and Decency Act which prohibits the sale or rental of materials where "the dominant theme . . . depicts or describes nudity, including sexual or excretory activities or organs, in a *lascivious* way."[94] The *Cohen* court concluded that "lasciviousness too is impliedly not a 'viewpoint.'"[95] This position was supported by the Supreme Court in *Fraser*, where the Court reasoned that a distinction based on lasciviousness is viewpoint neutral.[96] Consequently, an Internet filter blocking lascivious material would be viewpoint neutral.

D. An Internet Filter in a Public Library is Not Equivalent to a Removal of Books From a School Library

Opponents of public library filtering systems may argue that filtering systems are the equivalent of removing a book from the library's shelf. In *Board of Education., Island Trees Union Free School District No. 26 v Pico*,[97] the Court found that removal of books from a school library shelf *could* violate the First Amendment rights of students.[98] This decision was based on the Court's interpretation that the Constitution also "protects the right to receive information and ideas."[99] Schools may not remove books if motivated to suppress ideas contained in the books, but are allowed to remove books if the motivation was to remove a book

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public forum); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (if the government has not taken affirmative action to open the forum for expressive activity, it is a nonpublic forum).

91 *See* Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995).

92 *Id.* at 831.

93 R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

94 General Media Communications, Inc. v. Cohen, 131 F.3d 273, 281 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 2637 (1998) (quoting 10 U.S.C. § 2489a(d)) (emphasis added).

95 *Id.* at 282.

96 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

97 457 U.S. 853 (1982).

98 *Id.* at 866.

99 *Id.* at 867 (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

because of its pervasive vulgarity.[100] This holding was also limited to the removal of books and not to the editorial discretion involved in the acquisition of books.[101]

The Internet is a dynamic media, constantly in a state of flux.[102] The static nature of a book cannot be equated to the dynamic nature of the Internet. Accordingly, when library patrons access information from the Internet, they are functioning in a similar capacity to a librarian purchasing a new book.[103] Editorial discretion may be exercised in determining what information flows into a library.[104] Filtering software simply serves as an allowable extension of the librarian in performing editorial discretion.[105]

If a public library does not have the Internet, then incorporating a filtering system into the purchase of the Internet only adds information to the library. However, even a public library already using the Internet may add a filtering system without violating the First Amendment. Assuming *arguendo* that installing an Internet filtering system is equivalent to removing a book from the library's shelf, the removal is allowable because the motivation is based on removing material that is pervasively vulgar.[106]

E. The Constitution Does Not Impose a Duty to Finance - Government Can Selectively Fund One Program Without Funding Alternative Programs

Although placement of pornographic material on the Internet may be permissible,[107] the government is not obligated to fund access to all permissible speech.[108] "[T]he Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."[109] Government dis-

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[100] *See Id.* at 871.

[101] *See Id.* 871-72.

[102] The Court in *Reno* recognized that the Internet and methods of information retrieval "are constantly evolving and difficult to categorize precisely." 117 S. Ct. at 2334.

[103] "[T]he World Wide Web . . . allows users to search for and *retrieve* information stored in *remote computers*, as well as, in some cases, to communicate back to designated sites." *Id.* at 2335 (emphasis added).

[104] *See Pico*, 457 U.S. at 871.

[105] An Internet filter can "prevent . . . children from accessing sexually explicit and other material which parents may believe is inappropriate for their children . . . ." Reno v. ACLU, 117 S. Ct. 2329, 2347 (1997).

[106] *See Pico*, 457 U.S. at 871.

[107] *See supra* note 89. Placement of material on the Internet is similar to a magazine's publication function. Although the government permits pornographic publication, it still prohibits minors from purchasing that material. *See Id.*

[108] *See* National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2179 (1998).

[109] *Id.*

cretion is permitted under the Constitution to "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program . . . ."[110] Libraries exercising this Constitutional discretion have "tak[en] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[111]

V. CONCLUSION

No where in America does our society allow minors to exercise personal discretion over matters that are extremely harmful. Purchase and consumption of alcohol and tobacco is illegal throughout the United States. We do not allow minors to purchase pornography or to enter establishments where pornography is on prominent display. The public library should not allow minors to view material from which minors are banned in every other fora. It would be a sad day when the reputation of a public library as a "place dedicated to quiet, to knowledge, and to beauty"[112] is forgotten and replaced by a reputation as the "best place to view pornography in town."

Installation of Internet filters in a public library does not limit protected adult speech. Filters do not stop the placement of material on the Internet, only the *retrieval* of certain objectionable material. Other less restrictive means suggested by the ACLU and ALA are not effective. It is time to make sure the filter is on the computer and not in the child. We are responsible for our children's safety; let's not drop the ball.

Brent L. VanNorman

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[110] Rust v. Sullivan, 500 U.S. 173, 193 (1991).

[111] *Finley*, 118 S. Ct. at 2173 (citing 20 U.S.C. § 954(d) (1998)).

[112] Brown v. Louisiana, 383 U.S. 131, 142 (1966).