Internet Filtering in Public Libraries

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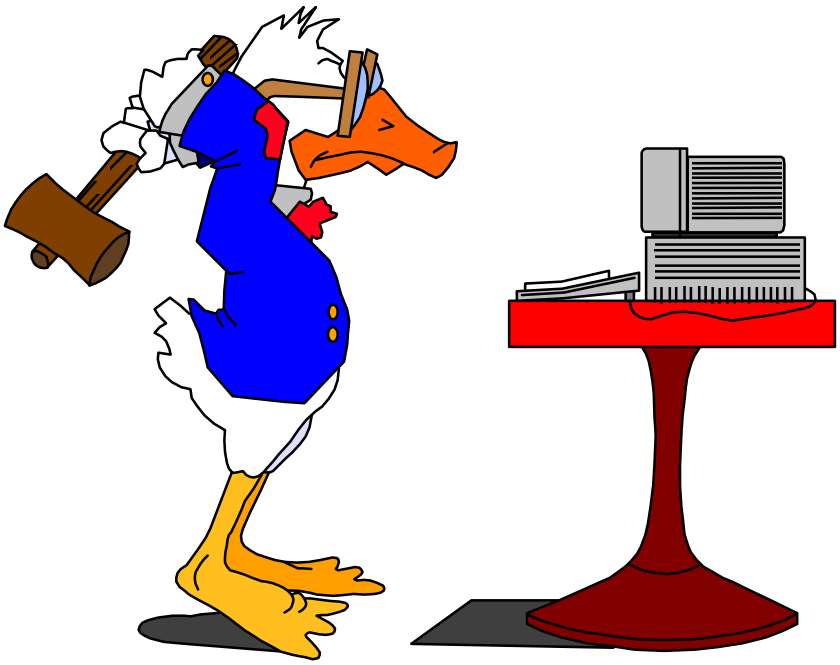

Last year, doctors diagnosed Judy Coughlin, a freelance writer and mother of two, with breast cancer. Determined to learn as much as possible about her life-threatening condition, Ms. Coughlin went to her local public library to study the disease. While researching on the library's Internet system, Ms. Coughlin soon discovered she could not view many sites concerning breast cancer. The library had installed an Internet filtering system on all of its computers. The filtering software, implemented to prohibit access to assertedly inappropriate sites, blocked many sites that mentioned the word "breast" in describing the latest medical and scientific knowledge about breast cancer. Shortly after this experience, Ms. Coughlin joined several other Virginia residents in a lawsuit against the library's Board of Trustees for violating the First Amendment. The case, Mainstream Loudoun v. Board of Trustees of the Loudoun County Public Library,[1] has sparked national debate about the nature of the Internet, public libraries, protection of children and freedom of expression.

This paper will address the issue whether public libraries can restrict Internet access through filtering software consistently with the First Amendment.[2] Part I provides a background of the Internet, public libraries, filtering software, and potential strategies for balancing the public and governmental interests involved in each. Part II describes the legal background with respect to book-banning and Internet protection. Part III analyzes public library filtering through traditional First Amendment doctrine and in light of unique

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1 No. 97-2049-A (E.D. Va. Oct. 22, 1997)

2 "Public library" here means government-funded libraries which are *not* in the public school system. Different considerations attach with regard to state interests when the formal education of school-children is involved. Cf. Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) (holding school officials may exercise editorial control over content in student newspapers for pedagogical reasons).

issues raised by this new technology. The Part determines that filtering violates the First Amendment. Part IV looks at the best arguments on the Library's behalf: a proposal for a new, technology-driven standard of strict scrutiny for Internet regulation, and a "government-as-speaker" position. The Part concludes that although persuasive in some respects, the arguments are unconvincing as a whole. Finally, Part V proposes a library Internet policy that would best serve both the interests of free speech and the protection of children. This policy would allow computers to be filtered, but only in children's sections, and only if unfiltered adult access is also readily available.

I. Practical Background

A. The Internet.

The Internet is a giant "international network of interconnected computers ... which enables[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world."[3] It is not a physical entity, but rather a system which integrates countless smaller groups of linked computer networks, thus comprising a "network of networks."[4] It is very difficult, if not impossible to determine the size of the Internet at any given time.[5] However, it is estimated that today over 9.4 million host computers are linked to the Internet worldwide; 60 percent of these are located with in the United States.[6] In all, over 40 million people worldwide are estimated to access the Internet, a number which is expected to grow to 200 million by

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3 Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2334 (1997).

4 American Civil Liberties Union v. Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996).

5 See id. at 831.

6 See id. This figure does not include the personal computers people use to access the Internet using modems.

1999.[7] The resulting system is a decentralized global medium of communication that links people, institutions, corporations and governments around the world. Dubbed "cyberspace," this body may be the "premier technological innovation of the present age."[8]

Because of the Internet's open, low-cost and easy-to-use nature, it has become the most accessible, dynamic, and democratic form of mass communication ever developed.[9] The start-up and operating costs of communication on the Internet are significantly lower than those associated with use of other forms of mass communication, such as television, radio and newspapers.[10] This enables operation of sites not only by large companies, such as Microsoft and Time Warner, but also by small, not-for-profit groups and individual speakers.[11] Cyberspace thus provides an easy and inexpensive way for all speakers to reach a large audience. Further, it allows relative parity among speakers. The Supreme Court has noted that through the Internet, "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."[12]

Indeed, low barriers to entry and easy accessibility cultivate incredibly diverse content on the Internet. Jurists recognize "the content on the Internet is as diverse as

[13] There are literally hundred of sites that discuss every imaginable topic. Users can easily access the sites they are interested in simply by plugging a few key words into a "search engine." Often, related sites are "linked" to one another, allowing users to

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7 Id.

8 American Library Ass'n v. Pataki, 969 F. Supp. 160, 161 (S.D.N.Y. 1997)

9 See Stephen C. Jacques, *Reno v. ACLU: Insulating the Internet, the First Amendment, and the Marketplace of Ideas*, 46 Am. U. L. rev. 1945, 1947 (1997); Reno v. ACLU, 117 S. Ct. at 2340.

10 See ACLU v. Reno, 929 F. Supp. at 843.

11 See id.

12 Reno v. ACLU, 117 S. Ct. at 2344.

13 ACLU v. Reno, 929 F. Supp. at 842.

move freely among them. The Web is thus comparable to "a vast library including millions of readily available and indexed publications."[14]

Such diversity of content inevitably includes some sexually explicit material.[15] Although such material is available to Internet users, it is unlikely to be accessed accidentally.[16] A document's title or description usually appears before the document itself, and almost all sexually explicit images are preceded by warnings as to the content.[17] After the user is aware of the site's nature, she must then take a series of deliberate, affirmative steps to access it.[18] Unfortunately, children who take such affirmative steps can access pornographic materials. In cyberspace there is no geography or identity, and age verifications are difficult and unreliable.[19] Because of this, many observers are concerned that children may be harmed by viewing sexually explicit material while using the Internet, and advocate cyberspace restrictions to prevent this.

Thus, the Internet's greatest asset is also its Achilles heel: attempts to regulate the system arise precisely because information of *every* type is easily available. This characteristic creates a double-edged sword in the context of public libraries: protecting children from harmful images in libraries is important, yet an unrestricted Internet is

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14 Reno v. ACLU, 117 S. Ct. at 2335.

15 Such material includes text, pictures, chat-rooms, bulletin boards, newsgroups, and other forms of Internet communication, and extends from the modestly titillating to the hardest-core. See ACLU v. Reno, 929 F. Supp. at 844.

16 See id.

17 See id. Generally, purveyors of adult materials build descriptive protections into their Web sites, including a gatekeeper page with no objectionable material telling anyone under eighteen to go elsewhere. See John Schwartz, *DejaVu.com: The Internet Brings the Biggest Issues to the Fore Again*, Washington Post, February 15, 1998, at C1.

18 See ACLU v. Reno, 929 F. Supp. at 845.

19 See Reno v. ACLU, 117 S. Ct. at 2336. For example, some sites require the use of credit cards (in part) for age verification. However, this method has its limitations, as vendors cannot see their customers. A twelve-year-old girl, for instance, might secretly use her parents' credit card on the Internet with less possibility of detection as a minor than in the physical world.

invaluable in broadening the collective knowledge available in these traditional places of information and learning.

B. Public Libraries

Public libraries are special places "dedicated to quiet, to knowledge and to beauty."[20] They play a crucial role in the egalitarian access to ideas -- a role vital to human understanding, intellectual fulfillment and a democratic system of governance. The Supreme Court has noted that "access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner."[21] Public libraries provide the community with such broad access to a spectrum of ideas.

The social importance of public libraries is reflected in their numbers: there are 8929 public libraries in the United States today, plus 7017 branches, for a total of 15,946 library buildings.[22] The community value of public libraries is reflected not only by the regularity of "real-space" visits to them,[23] but also by the fact that their resources are accessed electronically with increasing frequency. For example, the U.S. Library of Congress fields over 30 million electronic requests per month.[24]

Electronic recourses provide unprecedented opportunities to expand the scope of information available in public libraries. Recognizing this, public libraries are quickly

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

[21] Board of Education v. Pico, 457 U.S. 853, 867 (1982)

[22] American Library Association, *How many libraries are there in the United States?* (visited March 17, 1998) <http://www.ala.org/library/fact1.html> (Source: The National Center for Education Statistics: *Public Libraries in the United States* (1995)).

[23] The Loudoun plaintiffs estimate that last month, almost 45% of all U.S. households visited a public library, and among households with children under the age of eighteen, 60% did. Plaintiffs-Intervenors Proposed Complaint for Declaratory and Injunctive Relief at 7, Mainstream Loudoun (No. 97-2049-A).

connecting to the Internet. Today, 72% of public libraries are connected to the Internet (compared to 44% in 1996) and 60% offer Internet access to the public (up from 28% in 1996).[25] Many people do not own or cannot afford a personal computer. For these individuals, Internet access is most easily available through public institutions, like public libraries. Without such public access, opportunities to participate in and benefit from the spectrum of ideas on the Internet would be diminished for less affluent citizens. This is troubling for many reasons, including the possibility that the democratic nature of the Internet could be destroyed if only the wealthy have access to it. Libraries are thus critical to realizing the dream of universal access to the Internet.

C. Filtering and Blocking Technologies

Attempting to balance the competing interests of protecting children and employees while still providing Internet access, many libraries have turned to "filtering" software. These programs select and block certain Internet sites based on sexual or other "offensive" content. Some library boards are concerned enough to allocate significant funds for filtering. For example, the Warren, Michigan, City Council recently approved contracts totaling $7460 to buy Internet filters.[26]

Internet sites are selected to be filtered in one of two ways. First, a filtering company can block sites based on specified key words. For example, a company might choose to block all sites that contain the words "breast" or "Nazi." Second, filtering

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[24] U.S. Library of Congress, *Recent 12-Month Traffic Summary* (visited April 4, 1998) <http://lcweb.loc.gov/stats/month12.cum.gif>.

[25] American Library Association, *How many libraries are on the Internet?* (visited March 17, 1998) <http://www.ala.org/library/fact26.html>. (Source: *The 1997 Survey of Public Libraries and the Internet: Summary Results* (ALA/OITP, 1997)).

companies can employ individuals to decide which sites to block. The two methods can be used in combination. Blocked categories often include topics like hate speech, sexually explicit information, "adult" information, criminal activity, information on violence, or information on alternative lifestyles, such as homosexuality.

There are several problems with the currently available technology. First, all filtering software is overinclusive.[27] Filtering cannot discriminate between illegal speech, like obscenity, and merely indecent (and thus constitutionally protected) speech. Filtering also tends to block useful speech in areas like medicine, history and politics. In the "breast" example above, the key-word filter would not only block pornographic sites but also some that discuss breast cancer. The "Nazi" filter would exclude not only hate speech but also historical accounts, political debates, and sites that oppose Nazi ideology. Adding human evaluators does little to reduce such sweeping restrictions. Company researchers are not attorneys or librarians, but subjective "harried individuals who spend about one and a half minutes on each Web page."[28] As a result, filtering software blocks too much information.[29]

Conversely, filtering software is inevitably underinclusive. Some estimates state that no filter blocks out more than 90% of the pornography on the Internet.[30] Cyberspace

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[26] *Filters lock out porn on Internet*, Detroit News, March 12, 1998, at C5.

[27] For example, "X-Stop" the Loudoun filtering device (considered to be among the most restrictive) blocks more than 50,000 Web sites. David Nakamura, *Web Filter Can't Block Criticism; Loudoun Libraries Feel Heat for Effort to Screen Out Smut*, Washington Post, January 11, 1998 at B1.

[28] Id. If Supreme Court Justices cannot define pornography, how can some programmers in Anaheim?

[29] The Loudoun library filtering system is again illustrative: it blocked information on sex education, gay and lesbian rights, and breast cancer as well as the home pages of The Mormon Church, the Society of Friends, and the Yale University biology department.

[30] David Pedreira, *Library to propose smut filters for its Web-linked computers*, Tampa Tribune, March 14, 1998, at 1.

Criticism; Loudoun Libraries Feel Heat for Effort to Screen Out Smut, Washington Post, January 11, 1998 at B1.

Steinhardt contends "[i]n the physical world, people censor the printed word by burning books. But in the virtual world, you can just as easily censor controversial speech by banishing it to the farthest corners of cyberspace with blocking and rating schemes."[34]

D. Strategies for the Internet in Public Libraries

1. Public Libraries.

Public libraries that provide Internet access have had to choose whether and how to filter their systems. Various strategies adopted by local libraries across the U.S. cover a broad spectrum of possible restrictions. Some choose not to filter at all. Others have filtered only those computers in the children's sections of the library, leaving adult access unimpeded.[35] A slight variation on this method is to have filtered and unfiltered computers available to both adult and minor patrons, with no parental consent required for minors to access the unfiltered computers.[36] More conservative approaches block all computers in the library.[37]

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[33] Id.

[34] American Civil Liberties Union, *Is Cyberspace Burning?* (visited February 19, 1998) <http://www.aclu.org/news/n080797a.html>.

[35] Public libraries which have chosen to filter only in children's areas include: Prince William County Library (Eric L. Wee, *Prince William Approves Open Internet Access; Library Board Rejects Plan to Filter Web Sites*, Washington Post, January 23, 1998 at B6); Boston Public Library (Telephone Interview with June Eislestein, Assistant to the Director for Community Library Services, Boston Public Library (Mar.24, 1998)); Carnegie Library (Michael Newman, *Some Things, The Web Can't Change*, Pittsburgh Post-Gazette, January 18, 1998 at E3); and Broward County Library (Lane Kelley, *Library Won't Restrict Net Access for Adults*, Ft. Lauderdale Sun-Sentinel, March 13, 1998 at 1B).

[36] Kern County, Santa Clara County and San Jose public libraries are among those which have adopted this somewhat liberal policy. ACLU, *ACLU Hails Victory as California Library Agrees to Remove Internet Filters from Public Computers* (visited February 19, 1998) <http://www.aclu.org/news/n012898d.html>.

[37] The Loudoun County Library policy mandates filtering on all computers. The Warren County libraries also intend to adopt this more restrictive policy. *Filters lock out porn on the Internet*, Detroit News, March 12, 1998 at C5.

The Loudoun County Library policy is an example of one of the more restrictive filtering approaches in the country. Library patrons who seek access to a Web site that is blocked by the filter receive a message that reads, "Violation!! Violation!! Violation!! Access to this site has been blocked. Please click on your bookmark or go to some other Website."[38] The Loudoun policy requires the placement of terminals in full view of library staff to facilitate enforcement.[39] If the patron continues to seek access to the prohibited site, library staff will inform her that she is in violation of the policy. If, after the embarrassment of being confronted by a librarian, the patron still pursues access, she will be told to leave the library. Failure to leave is considered trespass, and police are to be called to remove the patron from the library.[40]

2. Interest Groups.

Many special interest groups advocate their own policy views regarding the controversial issue. The ACLU, for example, urges libraries not to filter at all, but rather to publicize and provide links to particular sites recommended for children, to install Internet terminals in ways that minimize public view, and to impose content neutral time limits on Internet use.[41]

The American Library Association (ALA) maintains a similar view. "While [filtering] can be a useful tool for parents at home, [its] use in a library is questionable at best," as libraries are obligated to meet the information needs of the entire community. [42]

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[38] Plaintiffs-Intervenors Brief at 10, Mainstream Loudoun (No. 97-2049-A).

[39] Plaintiff's Brief at 5, Mainstream Loudoun (No. 97-2049-A).

[40] Loudoun County Public Library, *Policy on Internet Sexual Harassment*, adopted October 20, 1997.

[41] ACLU, *Fahrenheit 451.2: Is Cyberspace Burning?* (visited February 19, 1998) <http://www.aclu.org/issues/cyber/burning.html>.

[42] ALA, *McCain introduces Internet School Filtering Act; ALA registers concern* (visited March 17, 1998) <http://www.ala.org/news/v3n13/v3n13a.html>.

Further, publicly supported libraries "are governmental institutions subject to the First Amendment, which forbids them from restricting information based on viewpoint or content discrimination."[43] The ALA notes that the historical role of libraries is to bring people together with information, not block it. The organization therefore refuses to endorse the use of filtering in libraries because "studies have shown that legally protected and useful information about sexuality, politics and other sensitive subjects may be blocked."[44]

3. Congress.

On the other hand, Congress is considering a bill to encourage library filtering as a technological shield for children in cyberspace. The Senate recently approved the Internet School Filtering Act, S 1619, denying eligibility for telecommunications discounts (currently allocated to schools and libraries that have Internet systems) if they do not certify the use of a filtering program. A public library would have to certify that it offers at least one filtered computer. If the library wanted to remove the software, it would have to notify the FCC of the change. Senator John McCain[45] introduced the legislation as a means of protecting children from harmful materials. "The same Internet that can benefit our children is also capable of inflicting terrible damage on them. And this harm can be prevented," he contended.[46] Senator McCain claims that the bill abides by constitutional free speech protections because it does not restrict what is on the Internet. "The

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43 ALA/Intellectual Freedom Committee, *Statement on Library Use of Filtering Software* (visited March 17, 1998) <http://www.ala.org/alaorg/oif/filt_stm.html>.

44 ALA, *ALA speaks out at Internet summit* (visited March 17, 1998) <http://www.ala.org/news/v3n8/v3n8a.html>.

45 Senator McCain is a Republican from Arizona and chairman of the Senate Commerce, Science and Transportation Committee.

46 Doug Abrahms, *Internet users face new limits, McCain bill focuses on schools, libraries*, Washington Times, February 10, 1998 at B8.

prevention lies not in censoring what goes onto the Internet, but rather in filtering what comes out of it onto the computers our children use outside the home." [47] The Internet School Filtering Act is not yet law and must go through further Congressional procedure before adoption.[48]

II. Legal Background

Two primary Supreme Court cases form the legal infrastructure for evaluating whether the First Amendment protects Internet speech in public libraries: Board of Education v. Pico[49] and Reno v. ACLU.[50]

A. Board of Education v. Pico: A Motivation Inquiry

In Pico, the Supreme Court considered the First Amendment restrictions on a local school board's authority to remove "objectionable" books from public school libraries.[51] The Court recognized school boards' significant discretion with regard to curriculum and the daily operation of schools, especially in light of the fact that public

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47 Washington Post, March 13, 1998 at A6. This rationale is weakened by the Supreme Court's recognition of a First Amendment right to *receive* information. See discussion infra Part IIA.

48 This paper will not address the specific issue of S 1619's constitutionality beyond that which is apparent from the general discussion. Note, however, that the issue of *school* filtering will face a different standard of review than that which is applied to non-school public libraries, as there is a compelling governmental interest in the inculcative function of primary and secondary education. Additionally, note that the constitutionality of S 1619 with regard to libraries may depend on how many computers the library owns. If a library has *only one* Internet-accessible computer, and that computer must be filtered, it provokes a much stronger probability of a constitutional violation than if the library has twenty computers, only one of which is filtered.

49 457 U.S. 853 (1982).

50 117 S. Ct. 2329 (1997)

51 The board ordered nine books, which it characterized as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy," be removed from the high school. 457 U.S. at 857. The books were: Eldridge Cleaver, Soul on Ice (1968); Alice Childress, A Hero Ain't Nothin' But A Sandwich (1973); Best Short Stories by Negro Writers (Langston Hughes ed. 1967); Oliver Lafarge, Laughing Boy (1929); Desmond Morris, The Naked Ape (1967); Piri Thomas, Down These Mean Streets (1967); Kurt Vonnegut, Jr., Slaughterhouse Five (1969); Richard Wright, Black Boy (1945); and Go Ask Alice (anonymous 1971).

schools serve a valuable inculcative function in preparing children as citizens and instilling them with community values.[52] However, the Court noted such discretion is not unqualified. It "must be exercised in a manner that comports with the transcendent imperatives of the First Amendment."[53] Finding the school board had violated these imperatives, a plurality held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in the books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion."[54]

Justice Brennan, writing for the plurality, outlined the basis of the decision. First, the plurality recognized a constitutional right to *receive* information as an inherent corollary of rights to free speech and press.[55] The Court noted that its precedents focus not only on "the role of the First Amendment in fostering individual self-expression , but also on its role in affording the public access to discussion, debate and the dissemination of information and ideas."[56] Given this constitutional right to receive information, "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."[57] The right to receive information is now a well-recognized element of First Amendment jurisprudence.[58]

Second, Justice Brennan asserted a "motivation" analysis to evaluate whether a given book removal is content-based.

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52 457 U.S. at 863-64.
53 Id. at 864.
54 Id. at 872.
55 Id. at 867.
56 Id. at 866 (quoting First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)).
57 Id. at 866 (quoting Griswold v. Connecticut, 381 U.S. 479 at 482 (1965)).
58 See, e.g., Kreimer v. Joint Free Public Library of Morristown, 958 F.2d 1242 (1984).

> [W]hether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution.[59]

Justice Brennan's analysis thus involves two inquiries: first, whether the state *intended* to deny access to ideas with which it disagreed, and, second, whether this intent was a *decisive factor* in the decision-making. This inquiry into motivation was a bit of a departure from the Court's traditional analysis. Historically, the Court had been reluctant to recognize improper legislative motive as a basis for declaring a law unconstitutional.[60] Nonetheless, state motivation is now an accepted component in the jurisprudence of book censorship.

As part of the motivation inquiry, the Court distinguished the *removal* of books from the failure to *acquire* them in the first place. Justice Brennan was careful to limit the holding to the issue of book removal, noting that "the action before us does not involve

[61] Justice Blackmun, concurring, pointed out that schools' finite resources often require officials to make choices between subjects to be offered, and that some subjects are excluded "simply because school officials have chosen to devote their resources to one rather then to another subject."[62] He observed "a profound practical and evidentiary distinction between [removing and failing to acquire a book]: removal, more than failure to acquire, is likely to suggest that an impermissible political motivation may

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[59] 457 U.S. at 871 (internal footnotes omitted).

[60] See, e.g., Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868) (refusing to consider the legislature's subjective purpose for limiting an individual's habeas corpus rights); _____, 391 U.S. 367 (1968) (refusing to inquire into Congress's motives in enacting the Selective Service Act to punish the destruction of draft cards).

[61] 457 U.S. at 862.

be present."[63] While there are many reasons why a book is not obtained (the most obvious being limited resources), there are few legitimate reasons why a book, once acquired, should be removed from a library not filled to capacity.[64]

The Pico plurality's motivation test is efficacious in that it refuses to insulate a government agency's motives from judicial review, and adds a useful factor in evaluating whether a given policy is content-neutral.[65] Pico is still the dispositive case on the issue of book-banning, and remains strong precedent for the proposition that books may not be removed from libraries for the purpose of suppressing unpopular or unorthodox ideas.

B. Reno v. ACLU: Full First Amendment Protection for the Internet

The recent case of Reno v. ACLU allowed the Supreme Court to decide what level of First Amendment protection to afford speech on the Internet. Given its tendency to create new First Amendment rules for different communication media, the question was open to debate.[66] In Reno, however, the Court extended the fullest First Amendment protection to the Internet, thus securing for it the same constitutional standing as books, and subjecting communicative restrictions in cyberspace to strict scrutiny.

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62 Id. at 879, n1.

63 Id.

64 Id.

65 The Pico motivation test has a few weaknesses. First, it fails to clarify which party has the burden of proving motivation. Second, it does not define improper motivation. Finally, it fails to say what evidence is sufficient to prove improper motivation. See Elizabeth M. Gamsky, *Judicial Clairvoyance and the First Amendment: The Role of Motivation in Judicial Review of Book Banning in the Public Schools*, 193 U. Ill. L. Rev. 731 (1983).

66 See *Freedom of Speech and Association Clauses: Indecent Speech -- Communications Decency Act*, 111 Harv. L. Rev. 329 (1997). Although the Court has denied full First Amendment protection to many other types of broadcast media, the prior systems had either historically been subject to broad government regulation, suffered from scarcity, or been regarded as invasive. The Reno Court found that the Internet involved none of these constitutional weaknesses. See id.

At issue was the Communications Decency Act (CDA), a federal law which criminalized sending or displaying "obscene," "indecent," and "patently offensive" Internet communications to anyone under eighteen years old.[67] The Court found that the CDA was a content-based blanket restriction on speech and thus could not be regulated as a form of time, place and manner regulation.[68] Further, the challenged provisions were facially overbroad and vague in violation of the First Amendment. The law covered much non-pornographic material with educational value, as well as constitutionally protected "indecent" speech.[69] Further, although the Court recognized a government interest in protecting children from the wide range of sexually explicit material available on the Internet, it found this interest does not justify unnecessarily broad suppression of speech addressed to adults.[70] "[T]he Government may not "reduce the adult population to only [71] The burden on adult speech is especially unacceptable if less restrictive alternatives would be at least as effective.[72]

In sum, the Reno Court gave the Internet full First Amendment protection and declared unconstitutional any restrictions on it that are content-based or overbroad. It found the federal statute which prohibited "indecent" or "offensive" communications to be both.

C. The Marketplace of Ideas

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67 See 117 S. Ct. 2338-39

68 Id. at 2348.

69 Id. at 2346. Sexual expression which is indecent but not obscene is protected by the First Amendment. Sable Communications of California v. FCC, 492 U.S. 115, 126 (1989).

70 See id.

71 Id. (internal quotation marks omitted).

72 See id.

Animating the reasoning in Pico and Reno, and crucial to any discussion of the First Amendment, is the classical Holmesian notion of a democratic marketplace of ideas.[73] According to Justice Holmes, the best way to ascertain truth is through a robust debate encompassing every available argument. When views must compete in an open "marketplace" accessible to all observers, the flaws in the inferior ones will inevitably be revealed and the best ideas will prevail. "The best test of truth is the power of the thought to get itself accepted in the competition of the market."[74] It is largely because of this time-tested notion that free speech maintains a "preferred position" in our constitutional hierarchy,[75] requiring the government to "remain neutral in the marketplace of ideas."[76]

One precious benefit of an open information market is the cultivation of a healthy democracy. James Madison recognized this benefit as he discussed the formation of a new democratic republic:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.[77]

While encountering all viewpoints may not always be painless, it is crucial to protecting democratic governance. The Supreme Court recognizes and willingly accepts this tension:

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national

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73 Justice Holmes formally introduced the marketplace doctrine in his dissent in Abrams v. United States, 250 U.S. 616, 630 (1919).

74 Id.

75 Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

76 FCC v. Pacifica Foundation, 438 U.S. 726, 745-46 (1978).

77 9 Writings of James Madison 103 (G. Hunt ed. 1910).

> strength and of the independence and vigor of Americans who grow up and live in this ... often disputatious society.[78]

Intelligent political discourse requires not only that speakers be unimpeded, but also that listeners have open access to the speech. The dissemination of ideas can accomplish little if audiences are not free to receive and consider them. "It would be a barren marketplace of ideas that had only sellers and no buyers."[79] Citizens must have the opportunity to freely discuss every aspect of the ideas they will implement in a participatory system of governance. To achieve this, speech must be both unfettered and informed.

It is precisely the informative nature of the Internet that makes it a medium ideally suited to accomplish Holmes' ideal marketplace. Scholars note cyberspace "has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country -- and indeed the world -- has yet seen . . . [t]he Internet is a far more speech-enhancing medium than print, the village green or the mails."[80] Historically, a chief criticism of the marketplace theory has been that it is unrealistic because economic barriers preclude having one's voice heard by a wide audience.[81] However, the Internet antiquates these barriers, providing low-cost, egalitarian communication and instantaneous distribution of opinions. In this way, the Internet embodies the essence of democracy: equal participation.[82]

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78 Tinker v. Des Moines School Dist., 393 U.S. 503, 508-509 (1969).

79 Board of Education v. Pico, 457 U.S. 853, 867 (1982).

80 ACLU v. Reno, 929 F. Supp. 824, 883 (1996).

81 See Lawrence H. Tribe, American Constitutional Law S 12-1 (2d ed. 1988) (challenging the concept of a free marketplace generating truth, "especially when the wealthy have more access to the most potent media of communication than the poor."); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 Duke L.J. 1, 16-17, 38-39 (arguing marketplace theory flawed because mass media accessible only to select portion of society due to monopolistic practices, economies of scale, unequal distribution of resources, and limitations of mass communication technology).

82 Jacques, supra note 9, at 1989.

III. Analysis

A. First Amendment

1. Is filtering content-based or content-neutral?

In considering the First Amendment implications of library Internet filtering policies, courts will apply traditional First Amendment doctrine, modified by the unique twists this new technology brings to the analysis. The first step is to determine whether the government restriction is content-based or content neutral. This is a critical step; if this prohibition is content-based it will face strict scrutiny and almost certainly be found in violation of the constitution.[83] This is because the Supreme Court recognizes "content-based burdens on speech raise[] the specter that the government may effectively drive certain ideas or viewpoints form the marketplace. As the Court noted in Reno, "[a]ny content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig."[84]

A government restriction on speech is content-based if the state regulated the speech because of its communicative impact.[85] To determine whether a library board's decision is aimed at the communicative impact of the banned materials, the Pico motivation inquiry comes into play. As discussed above, the Pico test asks, first, whether the agency intended to deny access to unpopular ideas, and, second, whether this motivation was a decisive factor in making the decision. This test can be illustrated by

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[83] See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (noting First Amendment does not permit government to proscribe speech based on disapproval of its content); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("Content-based regulations are presumptively invalid.").

[84] Reno v. ACLU, 117 S. Ct. at 2530.

[85] See Cohen v. California, 403 U.S. 15 (1971).

examining the distinction between removing and failing to acquire books. Removing books from library shelves implies a suppressive motive which failure to obtain simply does not.[86] No court has ever held a library in violation of the constitution for failing to acquire certain books.

This distinction will be the basis for library boards' most interesting First Amendment argument. They may claim the choice to install the Internet with filtering software merely represents an acquisition of a *portion* of Internet materials, and a refusal to acquire the rest.[87] Just as no one can require a library to subscribe to "Playboy," no one can require it to access playboy.com. As one library administrator put it, "the county has no obligation to allow people to view pornography on the taxpayers' dime."[88]

Such reasoning, however is disingenuous and question-begging. The taxpayers pay no more for Internet access that includes playboy.com than they would without the adult site. In fact, it costs *more* to filter. Moreover the act / omission distinction is important. Traditionally, library boards' failure to acquire certain books meant that they had simply done nothing. In the current filtering cases, the board has to take active, affirmative steps to reduce access to the Internet, and they must expend resources to ensure certain sites do not appear on their computers.

Positing the removal / acquisition distinction, the Pico Court pointed to limited resources as a justification for judicial restraint in evaluating the failure of libraries to obtain books. Because of limited space and resources, the acquisition of some books

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86 See Board of Education v. Pico, 457 U.S. at 879, n.1.

87 Of course, this argument is much stronger for libraries which acquire filtered Internet access in the first instance (without ever having *un*filtered access). For those libraries which subscribed to the open Internet in the past, and *later* added filtering software, the argument is inapposite.

necessarily precludes the addition of others. Courts accepted libraries' prioritization of subjects as an unavoidable consequence of financial and spatial opportunity costs, and deferred to the expertise of librarians in their choice of which materials deserved highest priority. On the other hand, the removal of a book which was already purchased and had found space on the library shelf implied a censorious motive.

The unique nature of the Internet is such that it transcends the boundaries of space and expense. Access to cyberspace is virtually free,[89] and while it provides vast quantities of information, it requires only the space of a single computer. Because of these unique characteristics, the library boards' argument that it is merely failing to acquire certain sites must fail. In the real world, the removal / acquisition distinction works because the library's failure to obtain a book can be imputed to non-censorious motives such as the need to conserve money or space. With the Internet, however, these reasons fall to the wayside. Once the Internet is accessed, "objectionable" sites cost nothing and occupy no additional space. The only cost is in their removal. Therefore, the only reason a library would choose to block a site is because it disagrees with the communicative message on it.[90] Therefore, blocking decisions fail the Pico motivation test and are revealed to be content-based.

Additionally, any legal decision will likely hinge largely on what real-world metaphor the court accepts for the Internet. Advocates of filtering liken the Internet to an

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[88] David Pedeira, *Library to propose smut filters for its Web-linked computers*, Tampa Tribune, March 14, 1998 at 1 (quoting Hillsborough County Administrator Daniel Klaman).

[89] It is especially cheap in the public library context, where the cost of linking up to the Internet is spread across the entire population. Plus, once Internet access is obtained, *every* site is included, at the same flat rate.

[90] See, e.g., Cohen v. California, 403 U.S. 15 (1971) (holding that the offense cause by defendant's "Fuck the Draft" message on jacket could only arise from its communicative impact).

inter-library loan, while opponents argue that cordoning off parts of the Internet is like cutting articles out of an encyclopedia set.[91] The real question may be whether a library can *reduce* the *research resources* its patrons can access. Given that the Supreme Court has already likened the Internet to one vast library[92] and lower courts aver the Internet comprises a *single* body of knowledge,[93] it is likely courts will agree with the encyclopedia comparison. Like the removal / acquisition distinction above, recognition of the encyclopedia metaphor indicates Internet restrictions are content-based.

Finally, filtering policies are content-based because, as a practical matter, many systems explicitly acknowledge they screen certain viewpoints. For example, in the Loudoun case, the library board chose "X-Stop" filtering software in part because of the company's claim that the program blocks sites based on evaluation of content (as opposed to key word blocking).[94] The consequent blocked sites display a definite political bent. Although X-Stop blocks speech promoting safer sex practices, supporting gay and lesbian youth, promoting career opportunities for women, opposing censorship of the Internet, and providing access to previously banned books, it does not block a variety of sites that express contrary viewpoints. Sites promoting abstinence rather than safer sex practices, opposing homosexuality, disapproving employment by women outside the home, and favoring Internet censorship are not filtered.[95] The software distinguishes among sites that

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[91] Amy Harmon, *Net Filter v. Free Speech at the Library*, Sacramento Bee, March 15, 1998 at F1.

[92] Reno v. ACLU, 117 S. Ct. at 2335.

[93] ACLU v. Reno, 929 F. Supp. at 836-37.

[94] David Nakamura, *Web Filter Can't Block Criticism; Loudoun Libraries Feel Heat for Effort to Screen Out Smut*, Washington Post, January 11, 1998 at B1.

[95] Specifically, the Loudoun plaintiffs allege that although X-Stop blocks The Safer Sex Page, which provides methods for protection during sex against sexually transmitted diseases, it does not block The Safest Sex Home Page, which promotes abstinence before marriage as the only protection against sexually transmitted diseases; while the system filters the Web site of the American Association of University Women, which promotes equal education and employment opportunities for women, it does not

discuss the same subject matter but advocate different viewpoints, distinctions which practically define the textbook concept of content-based suppression.

For these reasons, it is clear that Internet filtering software implemented in public libraries is a government-sponsored, content-based regulation of speech.[96] Once a regulation is determined to be content-based, it stands little chance of passing the constitutional test of strict scrutiny.[97]

2. Strict scrutiny.

The standard of strict scrutiny mandates that when a restriction is content-based, the government must demonstrate a compelling interest[98] and the restriction must be necessary and narrowly tailored to meet that objective.[99]

a. Compelling state interest

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block the Web site of "Concerned Women for American," which discourages women from working outside the home; although the filter blocks the Books for Gay and Lesbian Teens / Youth Web site, which provides support to the gay and lesbian community, it does not block sites like the American Family Association's Web page entitled "Homosexuality in America: Exposing the Myths" and the Family Research Council's Web page, entitled "Debunking the Myth of Gay Youth Suicide," both of which condemn homosexuality; and although the software blocks the Renaissance Transgender Association Web site, which furnishes support to the transgender community, it does not block Web pages that condemn transgender behavior. Brief for Plaintiffs-Intervenors at 13-20, Mainstream Loudoun (No. 97-2049-A).

[96] Therefore, a time, place and manner restriction that the government can impose on speech on a content-neutral basis is inapplicable.

[97] In fact, some scholars argue that the analysis stops here, that once it is clear the regulation is content-based, no further weighing of interests is necessary. Justice Kennedy has argued that a regulation that discriminates on the basis of content is per se invalid and that "[n]o further inquiry is necessary to reject the State's argument that [such a]statute should be upheld." Simon & Schuster, 502 U.S. at 124 (Kennedy, J., concurring). Ordinary First Amendment evaluation, however, does include strict scrutiny analysis.

[98] Speech can be regulated by the government if the regulation is based on one of five reasons. These categories include speech that is obscene (including child pornography), fraudulent, defamatory, advocates imminent lawless behavior, or constitutes "fighting words." See New York v. Ferber, 458 U.S. 747, 773 (1982) (holding statute prohibiting the distribution of child pornography did not violate First Amendment); Roth v. U.S., 354 U.S. 476, 485(1957) (holding First Amendment does not protect obscene speech). The Court later defined obscenity in Miller v. California, 413 U.S. 15, 24 (1973), as work (a) appealing to the average person's prurient interest; (b) depicting sexual conduct in a "patently offensive" way; and (c) lacking serious literary, artistic, political or scientific value.

[99] See Simon & Schuster, 502 U.S. at 118.

Library boards argue there are at least three compelling state interests in filtering certain material from the Internet. First, there is the well-recognized compelling interest in protecting the people from exposure to obscenity.[100] This interest is especially powerful with regard to shielding minors from obscene or even merely indecent messages.[101] Librarians note that "the greatest area of complaints from the public deal with children's

[102] In filtering their computers, the library argues, it is merely attempting to prevent the harm to children that may occur if they view sexually explicit images. This interest is lessened to some degree by the fact that Internet users do not constitute a captive audience. The Internet is not as pervasive a medium as, say, television or radio, and children must take several rather sophisticated, affirmative steps to reach pornographic sites.[103]

Second, the need to protect children's well-being gives rise to a compelling interest in preventing child pornography. This second state interest lies not in protecting the viewer from sexually explicit images, but in preventing the exploitation of the children ensnared in a thriving child pornography market.[104] Because this interest is so strong, states may prohibit the private possession of child pornography.[105]

Third, libraries claim, and courts recognize, a governmental interest in preventing sexual harassment.[106] By filtering sexually offensive pictures and words, the library seeks

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100 See Sable Communications v. FCC, 492 U.S. 115, 126 (1989).

101 Id.

102 Telephone Interview with June Eiselstein, Assistant to the Director for Community Library Services, Boston Public Library (Mar.24 1998).

103 Reno v. ACLU, 117 S. Ct. at 2343.

104 See Osborne v. Ohio, 495 U.S. 103, 109 (1990).

105 See id.

106 See Urofsky v. Allen 1998 WL 86587, 6 (E.D. Va.).

to prevent the distraction, offense, upset and falling morale of employees or patrons involuntarily exposed to sexually explicit materials in the workplace.

b. Narrowly Tailored

The next step is determining if the library filtering system is both necessary and narrowly tailored to advance -- in other words, does it "fit" -- these compelling state interests. The doctrine of overbreadth establishes that a state restriction is facially void if it "does not aim specifically at evils within the allowable area of [government] control, but ... sweeps within its ambit other activities that constitute an exercise of protected expressive or associational rights."[107] Such analysis "ordinarily compares the *statutory* line defining burdened and unburdened conduct with the *judicial* line specifying activities protected and unprotected by the first amendment; if the statutory line includes conduct which the judicial line protects, the statute is overboard and becomes eligible for invalidation on that ground."[108] Unrestricted library filtering plainly fails the overbreadth test, notwithstanding any asserted state interest. It blocks a great deal of protected speech in its attempts to reduce obscene materials and suppresses speech that adults have a constitutional right to receive and transmit.[109] It covers much non-pornographic material with educational value. As a "one size fits all" solution, it cannot adapt to the varying ages and maturity levels of individual users. Technologically imperfect filtering systems inevitably censor speech that patrons are constitutionally entitled to access and substantially curtails the amount of information patrons can access. As such, a policy like

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[107] Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (finding void on its face statute prohibiting all picketing because it banned peaceful picketing protected by the First Amendment).

[108] Tribe, supra note 81, at S 12-24, 710 (emphasis in original).

[109] Reno v. ACLU, 117 S. Ct. at 2329.

that adopted by the Loudoun library, which blocks all patrons from much Internet access fails First Amendment overbreadth analysis.

Specifically, with regard to the protection of children from harmful images, the policy is both overbroad and does not present the least restrictive alternative. The filtering is overbroad because it suppresses much protected speech. In some instances, the protected speech would be suitable for either adult or child viewing,[110] in others, only adult viewing would be constitutionally protected.[111] Thus, the government's interest in protecting minors is not equally strong for all of the sites that are blocked. As the Supreme Court noted in Reno, the government interest in protecting children from harmful materials does not justify the unnecessarily broad suppression of speech addressed to adults.[112]

Unqualified filtering is also not the least restrictive alternative libraries can use to advance their interest in protecting children. For example, many libraries filter computers only in children's areas, giving parents the option to direct their children to the screened computers, while still allowing adults to access the unblocked terminals in the adult section.[113]

Prevention of child pornography is undoubtedly an important state interest. However, the Court has held that there must be a close "fit" between the government interest and the restriction used to achieve it. Library filtering does not "fit" the interest of preventing child pornography. Commentators argue that existing laws are sufficient to

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110 For example, the Web site of the Mormon Church.

111 The adult viewing of non-obscene pornography is protected by the First Amendment.

112 Reno v. ACLU, 117 S. Ct. at 2346.

113 See supra text accompanying note 36.

convict those guilty of distributing child pornography over the Internet.[114] The Reno Court noted that "[t]ransmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles."[115] Further, these laws, targeted directly at the criminal activity itself, do not entail the overbroad restriction on protected speech that the Internet filtering does. While states may prohibit the private possession of sexually explicit nude photos of children, the Supreme Court has only allowed such restrictions when child pornography was the *only* material at issue.[116] If the state law shut down a corner newsstand that it thought might sell child-pornographic magazines, it would violate the constitution as an overbroad restriction of protected speech. In their desire to deter a few pornographic magazines, states may not also shut down constitutionally protected speech.

Finally, sexual harassment is an asserted state justification for library filtering systems. A state may claim an interest in avoiding the potential distraction and legal responsibility of sexual images in the library. A library may be held liable as an employer for sexual harassment via the acts of its patrons if it had actual or constructive knowledge

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[114] See Stephen C. Jacques, *Reno v. ACLU: Insulating the Internet, the First Amendment, and the Marketplace of Ideas*, 46 Am. U. L. Rev. 1945, 1967 (1997). Jacques points out that in United States v. Thomas, 74 F.3d 701 (6th Cir. 1996), for example, the Sixth Circuit upheld the conviction of a couple who operated a computer bulletin board that distributed obscenity in violation of 18 U.S.C. 1456. Similarly, the U.S. District Court for the western District of Virginia upheld the conviction of a man for engaging in conduct involving the sexual exploitation of minors in violation of 18 U.S.C. 2252 in United States v. Ownby, 926 F. Supp. 558 (W.D. Va. 1996). Jacques argues that such convictions are demonstrative of an effective, already-existing regime of criminal enforcement of child-pornography laws.

[115] Id. at 2348, n.44. See 18 U.S.C. SS 1464-1465 (criminalizing obscenity); S 2251 (criminalizing child pornography).

[116] In the case of Osborne v. Ohio, supra, note 105, the disputed statute made it a crime to possess nude photos of minors except for "proper purposes" such as medical or scientific ones. No other communicative material was regulated; there was no impact on constitutionally protected speech.

of the harassment and failed to take immediate and appropriate remedial action.[117] However, this interest is not enough to overcome strict scrutiny analysis.[118] To begin, a library can take immediate and appropriate remedial action in a way that does not chill speech. Placing monitors in more secluded positions or installing "privacy filters" (so that only the computer user can view the images on her monitor) could eliminate the possibility of employees and patrons glimpsing other viewers' screens. Such action would be remedial *and* content-neutral.

Further, the library's argument relies on their interest in stopping the distraction and offense to employees involuntarily exposed to sexually explicit materials they might see on other Internet users' monitors. Their policy thus targets the "secondary effects" of Internet speech.[119] However, the Supreme Court has placed employee harms outside the scope of the secondary effects doctrine for sexual harassment purposes.[120] "Listeners' reactions to speech are not the type of 'secondary effects' we referred to in Renton ... The emotive impact of speech on its audience is not a 'secondary effect.'"[121]

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[117] The Equal Employment Opportunity Commission (EEOC) recognizes such "third party" harassment as a legally cognizable wrong. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. S 1604.11(e) (1993).

[118] There is an entire body of scholarship addressing the issue of tension between the First Amendment and Title VII. This paper does not seek to review that body of literature in its entirety. For further discussion, see generally Johnson v. County of Los Angeles Fire Department, 865 F. Supp. 1430 (C.D. Cal. 1994); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991); Jules B. Gerard, *The First Amendment in a Hostile Environment: A Primer on Free Speech and Sexual Harassment*, 68 Notre Dame L. Rev. 1003 (1993); Mark N. Mallery and Robert Rachal, *Report on the Growing Tension Between First Amendment and Harassment Law*, 12 Lab. Law. 475 (1997); Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 Chi.-Kent L. Rev. 701 (1995).

[119] See Renton v. Playtime Theatres, 475 U.S. 41 (1986) (holding that the state could zone adult theatres if the restriction does not target the communicative impact of the speech, but rather the "secondary effects" (i.e., falling property prices, higher crime) of a red-light district).

[120] Urofsky v. Allen, 1998 WL 86587 (E.D. Va. 1998).

[121] R.A.V. v. City of St. Paul, 505 U.S. at 394.

Additionally, federal courts have been reluctant to allow claims of sexual harassment to restrict Internet use. The recent case of Urofsky v. Allen,[122] is illustrative. There, the Eastern District of Virginia considered whether a Virginia law which restricted state employees' access to sexually explicit materials on state-owned computers was constitutional. The court found that the law violated the First and Fourteenth Amendments because it was overinclusive and did not advance the state's compelling interest in preventing sexual harassment in the workplace. The statute was overinclusive because it blocked much protected speech, including speech which was not even sexually offensive. Further, it is not legally established that merely viewing sexually explicit images on someone else's computer constitutes sexual harassment.[123]

The Urofsky court noted that content-neutral statutes exist to deter the creation of a sexually hostile work environment.[124] These authorities already provide civil penalties for acts of sexual harassment, and cut across media to include print displays of sexually hostile material.[125] State obscenity laws also provide criminal penalties for the most extreme displays of sexual material.[126] The Urofsky court found that the state policy

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122 1998 WL 86587 (E.D. Va. 1998).

123 To constitute hostile environment sexual harassment, behavior must be "severe or pervasive enough" that it would be understood as abusive or hostile by both a "reasonable person" and the affected employee. Harris v. Forklift Systems, 114 S. Ct. 367, 371 (1993). It is implausible that occasionally glimpsing sexual images on someone else's monitor could create a "pervasively abusive" atmosphere. Indeed, some formulations of sexual harassment would simply not include a librarian's inadvertent glancing at another's computer images, because librarians are both male and female, and equally probable to glimpse any Internet pictures. Justice Ginsburg's definition of a hostile environment, for example, asserts "[t]he critical issue ... is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Id. at 372 (Ginsburg, J., concurring). Because both male and female librarians are equally likely to glance at risqué pictures, such actions would not fit Justice Ginsburg's definition of hostile environment sexual harassment.

124 See e.g., 42 U.S.C. 2000e-2(a)(1); 29 C.F.R. 1604.11(a); see also Harris v. Forklift Sys., 510 U.S. 17 (1993); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

125 1998 WL 86587, 7.

126 Id. See, e.g., Va.Code Ann. S 18.2-372 et seq.

presented no improvement over already-existing laws concerning computer use and the Internet. The court concluded:

> [T]he Act does not constitute a "reasonable response" to the Commonwealth's legitimate interests ... Although workplace efficiency and the avoidance of hostile work environment claims are undoubtedly important governmental interests, the Act fails to advance these interests in a direct and material way. Moreover, the Act restricts speech far beyond what is necessary to advance the interests is purports to address. Most troubling of all, the Act's poor fit and the availability of content-neutral alternatives suggest that the Act was intended to discourage discourse on sexual topics, "not because it hampers public functions but simply because [the state] disagrees[s] with the content of employees' speech."[127]

Loudoun-type library Internet filtering policies are closely analogous to this situation. First, such policies are over and under-inclusive. They falsely equate all sexual expression with sexist harassment.[128] While filtering blocks much protected speech, other alternatives (like placing terminals in more private positions or installing privacy screens) are more effective and would not block speech. Additionally, as no filtering system excludes all pornographic material, patrons may be able to view sexually explicit pictures despite filtering. Second, the obvious lack of "fit" between the library board's purported

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[127] Id. at 8, (quoting Rankin v. McPherson, 483 U.S. 378, 384 (1987). Note that this decision, protecting Internet speech in government workplaces, was decided in a context that receives less First Amendment protection than public libraries. Employers do have some discretion with regard to the speech they allow in the workplace, and the First Amendment only comes into play when there is a public employer and the speech deals with matters of public concern. See id. Still, the court here found that the limited First Amendment protection in the workplace was sufficient to protect employee speech on the Internet. This protection is considerably stronger outside the workplace, especially in a place like a public library, dedicated to the dissemination of ideas.

[128] This deficiency threatens both free speech *and* women's equality for at least three reasons. First, characterizing as harassment any speech which is vaguely sexual trivializes the issue, deflecting attention and resources from legitimate problems of gender discrimination in the workplace. Second, false equation between sexual expression and sexual harassment undermines women's interests in the workplace by making it harder for women to secure jobs and succeed in them. Third, women's equality is generally undermined by the presumption that the mere presence of sexual expression is harassing. This supposition resurrects the conventional idea that sex and sexual expression are inherently degrading to women -- a premise that was used in the past to bar women from many opportunities. For example, judges justified upholding laws barring women from practicing law or serving on juries by citing the need to "protect" women from vulgar or sexual language. See Strossen, supra note 118, at 725-26.

interest and the sweep of its restrictions casts serious doubt on the board's asserted need for the statute. This lack of fit suggests application of the Pico motivation test would reveal that library policy had other actual purposes than merely preventing sexual harassment. Moreover, the harms asserted appear to be adequately addressed by existing content-neutral enforcement mechanisms. This further undercuts the ostensible justifications for the policy. Filtering library computers simply does not do enough to advance the state interest in preventing sexual harassment, but does filter much protected speech. As such, it cannot pass constitutional strict scrutiny.[129]

Because wholesale library filtering is an overbroad, content-based government regulation of protected Internet speech, the First Amendment prohibits it.

B. Original Arguments for the Library

Under the traditional analysis, libraries which choose to filter all of their computers will be found in violation of the First Amendment. Because of this, libraries may propose some innovative arguments that go beyond the customary free speech inquiry.

1. A new standard of strict scrutiny: technological feasibility

There is little question that there is a valuable state interest in keeping obscenity out of libraries. Many library boards, parents and educators support Internet filtering as a means of being able to provide Internet access while still minimizing obscene material. Filtering advocates believe such software is the only technology that libraries can use to advance this interest today. Nonetheless, filtering violates the First Amendment. Forced

[129] Even if patron actions could be viewed as workplace harassment, violative of Title VII, the First Amendment would surmount such a claim as constitutional provisions supersede statutory authority per the Supremacy Clause. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

to choose between unrestricted Internet access or no access at all, libraries might choose simply not to install the Internet. Given the compelling state interests, and the fact that technological overbreadth prevents the libraries from filtering despite these interests, perhaps a new standard of scrutiny is appropriate for dealing with this technological dilemma.

To address the unique Internet problem, the Supreme Court could adopt a First Amendment test that requires the regulation be "as narrowly tailored *as technologically feasible*" to advance a compelling state interest.[130] This revised version of strict scrutiny would allow libraries to filter their Internet access. Imperfect as today's filtering software is, it is the only technology which allows children to go on-line, while still preventing them from seeing much indecent material. The reference to technological feasibility has the advantage of allowing imperfect filtering today, without foreclosing a stricter standard in the future, when filters may be more precise.[131] Additionally, this standard does not conflict with past First Amendment cases because measuring the narrow tailoring of any regulation implicitly included a technological evaluation. Nor will it reduce free speech protection for cases which do not deal with nascent technology - the technological inquiry would simply be extraneous in those cases. Under this new standard, library filtering would be constitutionally permissible.

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[130] The "technologically feasible" standard would entail a cost-benefit analysis, comparing the financial costs of providing more perfect filtering with its speech-enhancing benefits. Such analysis would not require a library to acquire very expensive software that was only marginally more accurate. Imperfect software would sometimes be constitutionally permissible, therefore, even if better filtering existed. A more speech-protective standard might be "as narrowly tailored as technologically *possible*," which would preclude any cost-benefit-analysis and instead require institutions to obtain the most perfect filtering software available, regardless of the cost.

[131] See generally, *Freedom of Speech and Association Clauses: Indecent Speech -- Communications Decency Act*, 111 Harv. L. Rev. 329, 334 (1997) (noting developing technology may change the legal basis for constitutional analysis of the Internet).

Tempting as this argument might be for library boards, it has several problems. First, there is no Supreme Court precedent that allows modification of the narrow tailoring standard. The Court would be breaking new ground, perhaps undermining the principle of stare decisis to implement this new rule. Second, the reasoning in Reno should guide other issues of speech and the Internet. There, the Court emphasized that the Internet is deserving of the highest level of constitutional protection. It reaffirmed the importance of unfettered adult speech, and held that adult speech cannot be abridged to the level appropriate for children.[132] Under the technological feasibility standard, the government could abridge a great deal of protected speech, thus regulating the marketplace of ideas and undermining the value of the entire First Amendment.[133] Third, the argument that libraries may choose not to provide Internet access at all if they cannot filter is unpersuasive. Libraries could filter only in children's areas, thus allowing parents to choose unfiltered computers for themselves and filtered for their children.[134] Moreover, as a matter of constitutional tradition, the Court will "presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it."[135] The public library is a unique place, dedicated to the preservation and dissemination of knowledge and varied ideas, where people expect to be able to access the most information possible. Blocking Internet access is not consistent with this expectation.

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[132] Reno v. ACLU, 117 S. Ct. at 2346.

[133] This standard is also subject to the criticism that it is result-oriented, creating a constitutional rule based not on the text of the Constitution itself or the Framers' intent, but manipulating First Amendment doctrine to fit a particular desired result.

[134] As such, the library might not pass its own "technological feasibility" test. It is possible to block only children's computers, or to take other "technologically feasible" (albeit technically unremarkable) steps like requiring parental supervision, installing privacy screens, and the like.

[135] 117 S. Ct. at 2351.

The First Amendment holds a "preferred position" in our constitutional hierarchy.[136] Given the choice between an overbroad restriction on protected speech or allowing some inappropriate materials, the error should be made on the side of allowing free expression.

2. Government as speaker

The library may attempt one last-ditch effort to establish constitutional authority to filter their Internet access. The library might argue that by paying for library Internet systems, the government is acting as speaker and thus can choose what it wants to say. This argument would rely on the case of Rust v. Sullivan.[137] In Rust, the Court held that Congress could pass a law banning a family planning clinic from counseling pregnant women about abortion if the clinic accepted federal money. The Court reasoned that by giving funding, the federal government became a "speaker" in the clinics, and could choose what it did not want to say. Analogously, federal funds that go to library Internet system may make the government a speaker there, too. Like the doctors who could not discuss abortion in Rust, the government may choose not to "speak" about "inappropriate" topics through library computers.

However, this proposition proves too much. If the government is a "speaker" through Internet funding, why not through the money it gives to buy *books*? If that is true, the government could censor any library book it chose, simply because it did not like the ideas contained in it. This argument affords a dangerously slippery slope, and is simply

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136 FCC v. Pacifica Foundation, 438 U.S. at 745-46.

137 500 U.S. 173 (1991).

not constitutionally permissible.[138] Additionally, many constitutional scholars doubt the precedential value of Rust. Many think it was wrongly decided.[139] Perhaps it was just the result of the highly-charged context of abortion, and a decision that will not apply to other First Amendment situations.

IV. Proposal

It is clear that libraries cannot remove books from their shelves simply because a few decision-makers do not agree with the books' content.[140] The Internet is analogous to books for First Amendment purposes, and is entitled to the highest First Amendment protection.[141] Blocking sites from accessibility is therefore like taking books off of library shelves. Such blocking violates the guarantee of free speech by reducing adult access to materials to that appropriate for children, a situation which is not constitutionally permissible.[142] Therefore, a library cannot, consistent with the First Amendment, put filtering software on all of its computers.

However, libraries can advance their interest in protecting children and preventing sexual harassment in a way that is less violative of free speech principles. The state has a great interest in shielding children's eyes from obscene material. Additionally, the state can regulate children's access to some materials that adults have the right to view.[143]

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138 See Board of Education v. Pico, 457 U.S. at 872 (holding government may not censor books to suppress unorthodox ideas).

139 See, e.g., Note, *Unconstitutional Conditions as "Nonsubsidies": When is Deference Inappropriate?* 80 Geo.L.J. 131, 135 (1991).

140 457 U.S. at 872.

141 Reno v. ACLU, 117 S. Ct. at 2346 (applying the highest level of First Amendment protection to Internet speech regulation).

142 Id.

143 See Board of Education v. Pico, 457 U.S. at 859.

Because of this, libraries can, without violating the First Amendment, filter computers in children's areas as long as they keep unfiltered terminals available in adult areas. This way, adults are not reduced to reading only what is appropriate for children. Plus, it is up to the discretion of parents, rather than the government, to choose what materials their children are ready to explore.[144]

Additionally, the unfiltered computers can be placed in such a way that they are not seen by passing patrons or library personnel, or privacy screens can be installed. The chances of sexual harassment via the unintentional viewing of obscene materials could be greatly reduced -- without any infringement on protected speech.

Children's safety and a harassment-free workplace are clearly goals that the government should strive to achieve -- but not at the cost of state control of what we read, study and consider. Libraries fulfill a vital role in our communities as sources of ideas, knowledge and learning. They allow the poorest citizens to reach and explore the same information as the most affluent. Public libraries are essential to ensuring informed public debate and decision-making in a democratic society. The Internet can be tremendous resource for libraries to expand their stores of knowledge. As an educational tool, disseminator of ideas and invaluable research device, the Internet multiplies public libraries' capacity to be a center for community scholarship, contemplation, and understanding. Internet access at public libraries is the closest entity to a true marketplace

[144] Many observers agree that placing responsibility of monitoring a child's Internet use with parents, not the government, is a better, more viable solution than content-based restrictions. See, e.g., James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. Cin. L. Rev. 177, 191-92 (1997); Angela E. Wu, *Spinning a Tighter Web: The First Amendment and Internet Regulation*, 17 N. Ill U. L. Rev. 263, 301 (1997).

of ideas ever attained. The government cannot shut down broad zones in this marketplace because it objects to what a few vendors are selling.