Policy Implications of Filtering, Labeling, and Rating

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I. Introduction:

While the vital movement to protect children from online exposure to detrimental pornography has received another recent setback in the 3rd Circuit (ACLU v. Reno III)[1], it is important to recognize that ample support remains in the Courts of official jurisdiction and public opinion to achieve this objective. Contrary to the picture painted by constitutional contortionists, the **First Amendment grants us the liberty to protect our children** from exposure to harmful material they are not prepared for **without depriving them** of access to the ample educational and cultural **benefits of the Internet** or the **privileges of a free society.** In addition, providing this selective protection does not consequently relegate adult choices to only that which is suitable to children.

II. Compelling Interests and Concerns

a. The Inherent Government Interest

The Supreme Court has established that "the **government has a compelling interest** in protecting the physical and psychological well-being of minors from the adverse effects of pornography." (Ginsberg v. NY)[2] This interest includes the efforts to **shield minors from the influence of categorically non-obscene literature** by adult standards, (Sable Comm. v. FCC)[3] as well as other common forms of free expression.

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1 2000 WL 801186 (3rd Cir. (Pa.))(affirming the District Court's grant of a preliminary injunction in "confidence" of its unconstitutionality)

2 390 U.S. 629, 639-640 (1968) (also adding that the government had an interest in supporting "parents' claim to authority in their own household" in justifying the regulation of otherwise protected expression)

3 492 U.S. 115, 126 (1988)

b. +/- of the Internet

The Internet is a welcome, invaluable educational and cultural resource. Like broadcasting and literature, it is easily accessible to children. (though it also avails itself to those too young to read.) The Internet, however, is also widely recognized as a global forum for variants of exploitive, vulgar, and indecent material that are neither instructive nor beneficial for minors.

c. Is There Really a Problem?

Opponents believe that panels such as these ideally wouldn't be necessary, because at root **they don't feel that a problem even exists**.[4] Some typically infer that religiously motivated fringe groups are once again orchestrating a **paternalistic "obsession with indecency and porn**." The reality is that concern for children's exposure to the plethora of pornography on the Web is a **bi-partisan, mainstream, majority movement** embraced by a multiplicity of cultural and religious perspectives.[5] The harmful effects of pornographic exposure on minors have long been recognized by librarians, educators, and the fields of medicine and psychology. They also have received noteworthy attention from the Surgeon General (1986 report) and the White House (1997).[6]

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4 Lawrence Lessig, What Things Regulate Speech: CDA 2.0 vs. Filtering, 38 Jurimetrics J. 629, 633. (1998) "I am not now advocating a CDA 2.0 -like solution because I believe that there is any real problem (of child access to Internet porn). In my view (ideally), it would be best if things were just let alone...My view is that nothing is better than something."

5 The commentary from Lessig and the ACLU denying any "problem" is astounding. Over the last couple of years, articles have flooded the country's newspapers with complaints from parents and librarians. Just one example, in Minneapolis (MN.), librarians have made a sex-discrimination claim against the library with the EEOC charging that youths' access to Internet sex sites has created an indisputably hostile, offensive, and palpably unlawful working environment." (Newsweek, July 8, 2000)

6 Last December's White House initiated Internet Online Summit: Focus on Children was an explicit recognition of the breadth of concern for Internet pornography and predation and its effects

A recent "Hardball" episode with Chris Matthews of MSNBC (07/13/00, discussing the cultural ramifications of the populace's mounting passion for Internet porn) revealed an Austin, Texas-based poll showing that on average, one third **(32.7%)of all Internet users are logged onto pornographic sites at any given time**. Certainly, there is no legal issue at face value in this statistic, as long as these sites steer clear of constitutionally recognized obscenity and/or child pornography. The number does become more morally problematic, and legally remediable, when you begin to postulate the **percentage of minors included in that figure**. Parents have indicated that they would like to see our leaders mobilize to address the issue, as evidenced by numerous news reports on the subject over the last few years and by their support for the trail of federal, state, and local attempts to regulate children's exposure to the indecent "negative externalities" of the 'Net.

d. Libraries Share in this Interest

Inherently, Public Libraries, share the State's duty in safeguarding the physical and psychological well-being of minors from any such harmful material (see NY v. Ferber).[7] It is in this context, the protection of children in their formative years, that libraries may constitutionally use filtering systems or designate certain terminals with filtering software. In absence of such devices, libraries may become liable for the inevitable harm to innocents exposed to pornography for the first time.

III. Filtering Devices are Reasonable, Necessary, and not Viewpoint Discriminatory

a. Recent Case Law Favors Constitutionality of Filtering

Opponents have pointed to the recent Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library [8] lower court decision in arguing the unconstitutionality of library filtering. The opinion, innately narrow and highly contextual, has been overruled in principle by the 4th Circuit decision in Urofsky v. Gilmore, [9] which held that **restrictions** on viewing Web based sexually

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on children. See Bruce Watson of Enough is Enough, "Public Hearing: National Commission for Library Information and Science", (11/10/98)

7 458 U.S. 747, 756-758 (1982) (holding child pornography an unprotected form of speech)

8 24 F. Supp.2d 552 (1998)

9 1999 WL 61952 (4th Cir. (Va.)) (02/10/99)

explicit material for state employees (on state owned or leased terminals) **were constitutionally valid**.

b. The Loudoun decision can also be criticized for its erroneous classification of public libraries as "limited public forums." Recent related cases, such as General Media Comm. v. Cohen,[10] have rendered similar government-sponsored facilities either as nonpublic forums or **facilities where aesthetic decisions are allowed to be made for collection and distribution of material**. 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." (Perry Educ. Ass'n v. Perry Local Educator's Ass'n)[11]

c. Filters Continue the Library's Tradition of Excluding Pornographic Material from Minors

In recognizing the **library's tradition of content-based selection and exclusion**, the fact that public libraries do not carry the likes of ***Hustler*** and ***Deep Throat*** indicates that they **do not regard this material to be within their mission of open access** to information.[12] Consequently, libraries **should be equipped** to maintain this levelheaded policy of **restricting minors' access to such items as any new medium** for them develops.

d. The Court has upheld as a reasonable limitation, restrictions of broadcasts of political candidates and their platforms, for example, in the considerations of "educational value and the public interest."(see Arkansas Educ. Television Comm. v. Forbes)[13] Similarly, ensuring that certain pornographic material is not accessible to children at computer terminals by **utilizing filtering devices is a reasonable function** for a library in **service of the "public interest, educational value, and convenience**." Libraries are not open forums by government designation, but instead are government agencies which **can exercise editorial discretion with their purchasing power**. (See NEA v. Finley)[14]

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10 131 F. 3d 273, cert. denied, 118 S. Ct. 2637 (1998)

11 460 U.S. 37, 45 (1983)

12 Filtering Facts, Responses to Arguments Against Filtering, <http://www.filteringfacts.org/resp.htm>

13 118 S. Ct. 1633 (1998) (Emphasizing that editorial discretion may be exercised by a governmental agency procuring art)

14 Id at 2168.

e. Filters are Effective and Not Overly Restrictive

Even though libraries are not necessarily compelled to use the least restrictive means to accomplish this goal, **filtering software just happens to be the least restrictive (effective) instrument** to block harmful material currently available. The **alternatives** advocated by the American Library Association and the ACLU: (1) Acceptable Use Policies for parents, teachers, and librarians, (2) Time Limits, (3) Driver's Ed for the Web, (4) Recommended Reading, (5) Privacy Screens, etc...**rely merely on education, time limits, and even privacy screens** to accomplish the goal. These procedures fail, however, since they ignore the reality of prepubescent curiosity and recalcitrance, the abundance of "copycat" or "stealth" porn sites which are designed to trap innocent users, and overall, tend to **only limit the *amount* of pornography exposure without addressing the main issue of *access***.

f. Opponents have criticized filters for their propensity to over exclude and consume the limited time of library officials. In response, 1) it is important to weigh the harm that results from minimal, easily correctable levels of product imperfection versus the potentially devastating effects on thousands of lives as a result of their interaction with obscenity and female exploitation in the absence of such mechanisms. In a 1998 survey of 24 random libraries (who bucked threats of ACLU driven suits to participate), only 3.6 hours of librarian commitment was needed for implementation of terminal filters per month and only 1.6 complaints (per month) about excessive filtering were made by adults (the latter # significantly was effected by a suspicious number of filings at one particular Austin, TX facility). 2) In addition, it is spurious to suggest that perfect results are a prerequisite for legislative remedy.

g. Alternatives are More Problematic and Less Effective

To advocate the implementation of filtering software is not to discourage research and investigation of other means to address the issue. Several Court members, specifically Justice O'Connor in her separate concurrence in the Reno v. ACLU case,[15] have suggested that ***Internet zoning*** would be constitutional as long as it maintained the freedom of adult users to gain access to protected speech. Opponents have expressed concern that versions of these programs, such as "kid friendly Internet services" that only allow access for children controlled by the service provider, **would also limit the amount of educational information available** for children.

***Age verification devices* also present a constitutionally sound route**. They would require adult Web sites to bar entry to adult sites without proof of age via either a credit card number or an electronically signed statement. There are,

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[15] 521 U.S. 844, 886 (1997) (O'Connor, J., concurring in part, dissenting in part).

however, some problems with this method. For one, they **assume no transaction costs**. Besides imposing a **significant financial burden** on adult sites, it has been pointed out that even if administrative costs could be externalized, **noncommercial providers may not be able to afford the setup**, perhaps validating one of the Supreme Court's concerns about discriminatory results in the original Reno case.[16] Proposals for government sponsored devices would palpably prove to be overly expensive, bureaucratic, and intrusive. In addition, **AVSs would not be foolproof.** Once a password is given, it is subject to shared copies, not to mention the fact that many **kids today have been given access to their parents credit** cards (often specifically for the purpose of online purchasing).[17]

Rating systems alone (as opposed to the PICS application) would not be as effective on the Internet as in other arenas (films etc.), since **access would still be possible** despite notification of indecency and obscenity.

An estimated 85% of public libraries already have ***"acceptable use policies"*** as well, and yet there are still hundreds of examples of children's access to pornography. Neither do such policies protect kids from the proliferation of those "stealth" porn sites. (E.g. Search phrase "Pokemon pictures" would yield an irreversible entrance into a porn site where images of vaginal, oral, and anal sex is clearly visible)

h. Filters are not Viewpoint Based Restrictions

To pass Constitutional muster with the present Court, any action taken will not only need to demonstrate reasonability but **viewpoint neutrality** and general honoring of accepted First Amendment principles. Clearly, Internet filtering accomplishes these objectives since obligations tied to the eligibility for e-tax dollars, for example, would be constitutional based on selectivity for "activities it believes (or doesn't believe) to be in the public interest" (see Rust v. Sullivan)[18], in contrast to distinction founded on the "specific premises, perspectives, and standpoints...for discussions." (see Rosenberger v. Rector for the Court's definition of viewpoint discrimination)[19] The Court has already concluded that **distinctions for obscenities, offensive in their "prurience" and**

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16 Christopher Turlow, "Erogenous Zoning on the Cyber-Frontier," 5 Va. J.L. & Tech. 7, 50 (2000)

17 Elizabeth M. Shea, "Is Internet Filtering Software the Answer?" 24 Seton Hall Legis. J. 167, 200

18 500 U.S. 173, 193 (1991)

19 515 U.S. 819, 829 (1995)

"lasciviousness" are not viewpoint discriminatory. (See, e.g., Bd. of Educ. v. Pico)[20] Internet Filtering also can be implemented so as not to "unduly restrict adults" access to constitutionally protected speech by allowing libraries to separate terminals for adults and children. As even the **Loudoun opinion implied, such a procedure would have been a constitutionally less restrictive alternative to the policy presented in that case (filtering devices on *all* computers)**.[21] In addition, government funding can be tailored to control the gateway of accessibility to the Internet for children, and to **avoid controlling the web itself as a means of expression**. (as opposed to the interpretation of the CDA, struck down in ACLU v. Reno in 1998).

i. The Children's Internet Protection Act 1999 [22] would have withstood constitutional scrutiny since it; 1) only required compliance if a library wanted to receive e-rate funding, 2) it did not regulate the posting or transmission of content on the 'Net but, rather, blocked the receiver, enabling publishing of protected speech to continue, 3) it avoided setting a national standard for "harmful" speech, and allowed local communities flexibility to select their own choice of filtering software and to remove the devices if they chose.[23]

IV. Conclusion

It is interesting that **screening software was once widely anticipated** as the technological development that would eventually pacify the interests of both First Amendment guardians and concerned citizens. (See 39 Catholic Law Review 125, 151 (Fall 1999) ACLU attorneys had even referred to filter use as a less restrictive device in the first of the trilogy of ACLU v. Reno cases regarding the CDA.) The vigorous opposition which has now been exhibited against this effective and minimally restrictive instrument **exposes their radical and counterintuitive agenda**. In her book, ***Defending Pornography,*** ACLU President Nadine Strossen quotes with approval a writer's observation that:

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20 457 U.S. 853, 871 (1982) The removal of books from public school libraries because of their "pervasive vulgarity" would be permissible whereas removal of books because of their "ideas" would not.

21 Loudoun, 24 F. Supp.2d at 552.

22 S. 97, 106th Congress (1999)

23 S. 97 106th Congress. Last Action: Placed on Senate Legislative Calendar under General Orders. Calendar No. 262

"Pornography tells me...that ***none*** of my thoughts are bad, that anything goes."[24] The **same organization** also publicly **believes that any law** which "punishes the distribution or exposure of obscene, pornographic, or indecent material to ***minors*** **violates the First Amendment**. (ACLU Policy 4 (b), but see Ginsberg v. New York) This position **starkly contrasts that of the Court**. It has declared obscenity, and specifically child pornography, as "harmful to the physiological, emotional, and mental health of the child." (Ferber at 756-758), and also that classes of obscenity protected for adult viewing (indecent material) are subject to regulation for minors' viewing. (Ginsberg v. NY) The Court has also stated the belief that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to identify and avoid choices that could be detrimental to them." (Bellotti v. Baird)[25]

To deny legislative support for Internet filtering devices is to allow our Public Libraries, agencies that illustrate America's commitment to its future, to **encourage youths to impulsively trade in the tools of aesthetics and learning for those of female exploitation and utter vulgarity**. We should gratefully embrace the opportunity that filtering devices present to prevent such tragedy. To paraphrase President Lincoln during the famous Lincoln-Douglas debates, "True liberty requires responsibility, not absolute license."

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[24] Strossen, N. (1995). Defending Pornography: Free Speech, Sex and the Fight for Women's Rights, New York: Anchor Books, p. 161.

[25] 443 U.S. 622, 635 (1979)