THE FIRST AMENDMENT IMPLICATIONS OF REQUIRING BLOCKING AND BLOCKING TECHNOLOGY ON PUBLICLY ACCESSIBLE COMPUTERS

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Mr. Chairman and Members of the Commission. Before I begin my remarks I would like to thank you for the opportunity to address you this morning. The safety of children is of paramount importance to the Family Research Council (FRC). As the Internet has grown and evolved into the important communication tool it has now become, FRC has become increasingly concerned with the astounding ease with which minors have been able to access pornographic material via this revolutionary medium.

Today I'd like to address both the constitutionality and effectiveness of using blocking technology to restrict access to illegal pornography by minors via Internet accessible computers in public libraries. Because a public library maintains complete discretion over the materials that it selects for inclusion into its collection, a public library's act of acquiring intellectual content, whether that acquisition is facilitated through the Internet or one of the traditional means of acquiring material, does not create any sort of public forum with regard to the content included in its collection. Rather, it has maintained a non-public forum. As a non-public forum, a library may restrict material solely based upon its content unless the restriction is unreasonable or constitutes viewpoint discrimination. Furthermore, it is my opinion that even if a judge were to find that, in the absence of an express provision to the contrary, a library had created a limited public forum with regard to the content included in its collection, there are significant compelling interests justifying the use of blocking technology to prevent all patrons from accessing

obscenity and child pornography and to prevent minors from accessing material harmful to minors.

Imagine a ten-year-old walking into a public library and requesting a hard-core pornographic video such as "Debbie Does Dallas" or "Deep Throat." Although libraries commonly stock numerous videocassettes, the library will not comply with this request because it simply will not carry such titles. To illustrate, yesterday, I tried to obtain copies of these videocassettes from the Richmond Public Library. As I expected, not only did the library not include these videos in its collection but the librarian also refused to submit my interlibrary loan request for these tapes. Perhaps her reluctance was due to the fact that none of the other libraries from which the library regularly loans books listed the titles in their catalogues either. Just to make sure that the library's inability to meet our request was not merely the result of a more exclusive selection criteria for videotapes, I also asked if they subscribed to *Playboy, Penthouse,* or *Hustler.* As I expected, the library did not subscribe to any of these titles nor would it submit an interlibrary loan request to any other regional libraries. As with the videotapes, the other libraries did not list these titles among their magazine collections either.

Now if Richmond's public library has chosen not to provide these tapes, it certainly does not follow that it *must* allow its patrons to access equally graphic images on Internet accessible computers simply because the library has chosen to provide Internet access. Similarly, if the library has chosen not subscribe to *Hustler* in hard copy (a subscription likely to cost approximately $200 annually) it would be terribly inconsistent to argue that the discretionary factors leading to its refusal to select such magazines and videotapes in the first place has suddenly disappeared simply because a patron is using the Internet to

facilitate the acquisition of such material. It's just as inconsistent to conclude that the very material that others may be prosecuted for distributing, such as material created in violation of federal copyright laws, obscenity, and child pornography, *must* be provided to library patrons via Internet accessible computers simply because the library provides patrons Internet access. I would submit that such a conclusion is illogical and defies common sense.

Everyday, librarians make choices about what content to select for their collections. There are many factors librarians consider when making this choice – does a particular selection fit the needs of their patrons? Does the selection aid in presenting a wide breadth of knowledge and viewpoints on a particular topic? Finally, does the selection fit with the mission and purpose of the library? In making these choices it is clear that libraries reserve complete discretion to select all material that will be included in its collection. For those of you who don't believe this try walking into a public library and placing your own book on its shelves or, in the alternative, donate a book to your local public library. Rather than immediately accepting your donation, the library is likely to go through the same selection process it engages in when it decides whether to acquire any other book.

The Constitutionality of Blocking Access to Obscenity, Child Pornography, and Material Harmful to Minors Has Yet to Be Fully Addressed By a Court of Law

Despite the public's confusion about the constitutionality of the use of blocking technology in libraries, the current case law is quite clear. No court has held the use of filters to be *per se* unconstitutional. There has been only one case in which a court has addressed the manner in which a public library has used blocking technology. In that case, *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 24 F. Supp. 2d

552 (E.D. Va. 1998), a federal district court held unconstitutional a public library board policy mandating the use of blocking technology to prevent its Internet accessible computers from being used to access material harmful to minors. The court, however, upheld the library board's right to restrict access to obscenity and child pornography on all of its Internet accessible computers. Furthermore, it did not rule on the question of whether the library could install filters on Internet accessible computers located in the library's children's section in order to block out obscenity, child pornography, and material harmful to minors. Therefore, we should not feel the need to limit our consideration of Internet blocking technology when considering the policies that have been proposed to the Commission thus far.

Public Libraries Have Wide Discretion to Regulate the Provision of Internet Access

The constitutionality of a library's decision to select content for inclusion into its collection is based upon a determination of whether the library has created a traditional public forum, a public forum created by government designation, or a nonpublic forum.[1] The forum analysis is the mechanism by which courts assess the extent to which the Government may limit a speaker's access to government-controlled property. Government controlled property is a "traditional public forum" if, similar to streets and parks, it has "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communication thoughts between citizens, and discussion public questions."[2] A court will conclude that government controlled property is a public

[1] *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802, (1985).
[2] *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983) *quoting Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939) (Roberts, J., concurring, joined by Black, J.).

forum if "the objective characteristics of the property, such as whether, 'by long tradition or by government fiat,' the property has been 'devoted to assembly and debate.'"[3] Speakers may be excluded from a traditional public forum based upon the content of their speech if that content is not entitled to protection under the First Amendment or when that exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.[4] The government may regulate the time, place, and manner of expressive activity in a content-neutral manner if the regulation is narrowly tailored to serve a significant government interest and leave open ample channels of communication.[5]

Under certain circumstances the government may create a public forum in government property that has not traditionally been devoted to broad public use. This "limited public forum" is created when the government intentionally opens "a nontraditional public forum for public discourse.[6] The government creates a limited public forum if "the policy and practice of the government" indicates an intent to "designate a place not traditionally open to assembly and debate as a public forum. … If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny."[7]

All other property subject to government control can be characterized as either a nonpublic forum or not a forum at all. In a non-public forum government can restrict speaker access if the regulation is reasonable "and not an effort to suppress expression merely because public officials oppose the speaker's view."[8]

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[3] *Arkansas Education Television Commission v. Forbes*, 523 U.S. 666, 677 (1998).
[4] *Perry* at 45.
[5] *Id.*
[6] *Arkansas* at 678.
[7] *Id*.
[8] *Perry* at 46.

It is at this point that the *Loudoun County* court made a fundamental mistake. Declaring Loudoun County Virginia's Internet blocking policy a violation of the First Amendment, the court failed to recognize that libraries perform a number of tasks – the performance of each creating legally distinct forums.

After reviewing the county's resolution authorizing the creation of the library, the court ruled that the library board created *a* limited public forum with regard to *all* of the library's function because its "primary objective" of "offering the 'widest possible diversity of views' in many different media," indicated the county's intent to create a "public forum for the limited purposes of the expressive activities they provide, including the receipt and communication of information through the Internet."[9]

Certainly, when libraries determine which patrons may be admitted to the library, they have created a limited public forum for the purpose of determining the activities those on the premises may take part in. However, there is a legal and practical difference between the services the library offers when it invites the public onto its premises for the purpose of accessing the publications in its collection and when the library selects intellectual content. Quite simply, the main task of a library is to select materials and all libraries are selective about their content – much more so than they are about whom enters their premises. To reject this premise is to assert that by stepping onto a library's premises an individual is granted a constitutional right to place a book of their choice on its shelves. Certainly, no librarian would concede that much freedom to those individuals he or she would welcome into the library to enjoy its resources.

The *Loudoun County* court's failure to make this distinction is indicated by the fact

[9] *Mainstream Loudoun v. Board. Of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552, 562 (1998).

that it used as precedent a case involving the removal of a homeless man from the premises of a library which in no way implicates the government's ability to select content.[10] The government has substantially different interests when fulfilling these distinct roles and making these decisions.[11] The fact that there are no cases on record involving successful challenges of a library's acquisition choice demonstrates just how much deference the courts pay to the acquisition choices of libraries.[12]

The *Loudoun County* court also failed to understand the nature of Internet technology when it ruled that the library purchased all of the available content on the Internet when it chose to provide Internet access to its patrons. The provision of Internet access is indistinguishable from the selection of content that librarians engage in daily. By signing onto the Internet and individual has not brought the material on the Internet into the library. Rather, an individual is using the Internet to facilitate the selection of content that, once selected, will be brought into the library. The patron only selects content and brings it into the library when he or she accesses or downloads a particular site. Certainly, a patron has not selected the content of the millions of pages he or she never viewed simply because he or she signed onto the Internet.

When a state provides speech, it has no obligation to provide all speech. A state may act in a more restrictive manner when acting as a provider of speech (when the government purchases speech in order to provide it to the public) than it may when acting

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[10] *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242 (1992).
[11] See *Brooklyn Inst. Of Arts & Sciences v. City of New York*, 64 F. Supp. 2d. 184, 203 (E.D.N.Y. 1999) ("Public libraries are, of physical and fiscal necessity, selective; they do not contain every book published.").
[12] Mark Nadel, *The First Amendment's Limitation on the Use of Internet Blocking in Public and School Libraries: What Content Can Librarians Exclude?*, 78 Tex. L. Rev. 1117, 1124 (2000).

as a sovereign (regulating private speech on behalf of the general welfare of society).[13] There is no constitutional requirement that the government provide access to pornographic images through public libraries. An individual has a right to access legal pornography through his or her own computer but not via a publicly funded computer, and certainly does not have a right to access illegal pornography via a government-funded computer.[14] The U.S. Supreme Court has stated, "Environments such as a prison, public schools, the military, or the government workplace 'must allow regulation more intrusive than what may lawfully apply to the general public.'"[15] (Emphasis added.)

Libraries that choose to provide Internet access to their patrons have not opened up a public forum. Instead, libraries have simply reserved Internet use for patrons with a legitimate research purpose consistent with the library's overall mission of providing patrons access to particular content. Rejecting the assertion that a local television channel created a public forum by deciding to air a political debate in which only certain candidates were allowed to participate, the U.S. Supreme Court stated "the Court has rejected the view that traditional public forum status extends beyond its historic confines, see *ISKCON*, *supra,* at 680-681; and even had a more expansive conception of traditional public fora

[13] This distinction was recognized, again, by the U.S. Supreme Court in its recent decision in *NEA v. Finley*, 118 S. Ct. 2168 (1998) when it held that there is no constitutional right to government funding of the arts: "And as we held in *Rust*, Congress may 'selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem another way.'"

[14] In *Capital Sq. Review Bd. v. Pinette*, 115 S. Ct. 2440 (1995), the Court stated: "It is undeniable, of course, that speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State."

[15] See *Turner v. Safley*, 482 U.S. 78, 84-85 (1987); *Connick*, 461 U.S. at 143; *Tinker*, 393 U.S. at 507; *GMC* 131 F.3d at 276. In these environments, the government is permitted to balance constitutional rights against institutional efficiency in ways it may not ordinarily do. *Waters v. Churchil*, 511 U.S. 661, 675 (describing governmental power to restrict speech in the name of efficiency; *Safley* 482 U.S. at 88 (Noting balancing between First Amendment rights and governmental interests.)" *Amatel v. Reno*, 156 F.3d 192 (1999) *cert. denied*, 67 U.S.L.W. 3781 (1999).

been adopted, see, *e.g.*, 473 U.S., at 698-699 (KENNEDY, J., concurring in judgments), the almost unfettered access of a traditional public forum would be incompatible with the programming dictates a television broadcaster must follow."[16] When libraries choose to offer patrons Internet access, they are acting to "reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission,' to use it."[17] In fact, it often goes unnoticed that most libraries already restrict access to certain Internet services. Most libraries have limited Internet access policies that typically prohibit their Internet access from being used to access email accounts, chat rooms, or the Usenet groups. Furthermore, many library policies explicitly state that their resources may not be used to engage in any activity that violates federal copyright laws. It is intellectually dishonest to assert that libraries may chose not to allow patrons to access certain Internet services because they lead to a wasteful use of library resources. Equally dishonest is the assertion that libraries may take steps to prevent the use of their resources for all criminal activity *except* any activity involving obscenity, child pornography, or material harmful to minors.

Regardless of the intellectual content libraries offer, all libraries seek to provide efficient, quality access to material.[18] In doing so, libraries must exercise discretion when selecting particular works in order to fulfill this goal. Certainly the conclusion that libraries must offer "broad rights of access for outside speakers" with regard to the selection of content is antithetical to the general purpose of libraries to provide efficient access to the highest quality of use material.[19]

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[16] *Arkansas* at 679
[17] *Id.*
[18] Nadel at 1138.
[19] *Arkansas* at 674.

Librarians have always chosen not to select material that is inconsistent with their vision of their obligation to provide a service to their patrons. Librarians will generally decline to purchase materials that they conclude are factually inaccurate or filled with misinformation. By choosing to do so the library has not prohibited the dissemination of such materials and patrons wishing to review such materials are free to purchase those works as consumers or to access it on a privately owned computer. The First Amendment does not prohibit libraries from using reasonable nonpartisan standards to exclude content that it finds to be "defective" just as it does not prohibit public museums from excluding what they, in their professional judgment, believe to be "bad" art.

Libraries omit XXX-rated material from their collections, despite its popularity with some patrons. Most librarians probably do not consider sexually materials designed merely for prurient purposes to be within the scope of their goals, even if such photos are clearly not obscene. When allocating their limited budgets, most have no difficulty declining subscriptions to XXX-rated magazines and similar material. Such decisions have gone unchallenged.

Blocking Technology is an Effective Method of Restricting Minors' Access to Illegal Pornography in Public Libraries

Opponents of the use of blocking technology in public libraries argue that the technology is an ineffective method of preventing children from accessing pornography and adults from accessing obscenity and illegal pornography. This argument is outdated and insincere.

A library's inability to provide a selection of all known literary works is a problem faced by librarians and library patrons daily. When a book of choice is not

available in a public library, there are a number of options a patron may pursue in order to obtain that book. Traditionally, the patron will ask the librarian to do a search for the piece. If the book has been checked out, a patron may wait up to a month before obtaining a copy of the book. If the library does not carry the book, the patron has the option of borrowing a copy from another library through an interlibrary loan. If neither of these options work, the patron must pursue other options for obtaining the book. In practice, the use of blocking technology in a library is very similar to this selection process.

As blocking technology has evolved, both server and user based technology has responded to consumer needs and are highly effective at blocking pornographic material while allowing for the selection of legitimate research materials.[20] A recent report released by FRC titled *Dangerous Access, 2000 Edition: Uncovering Internet Pornography in America's Libraries*, revealed that those libraries that do employ blocking technology on their Internet accessible computers have encountered little to no patron dissatisfaction with the technology and a minute number of incorrect blocks. A 1998 survey of twenty-four public library administrators who use filters found on 1.6 complaints per month alleging wrongly blocked sites.[21] According to *Dangerous Access*, the logs of Tacoma, Washington indicate that only 0.07 percent of the sites blocked there were incorrectly blocked and in Cincinnati, Ohio only 0.01 percent were incorrectly blocked.[22]

[20] On July 20, 2000, the Commission heard testimony from panelists addressing the "Effectiveness of Filtering, Labeling and Rating Technologies."
[21] David Burt, *Dangerous Access, 2000 Edition: Uncovering Internet Pornography in America's Libraries*, Family Research Council 38 (2000).
[22] *Id*.

In order to investigate the effectiveness of blocking technology for my own satisfaction, I performed my own Internet search on my FRC owned computer. FRC uses blocking software manufactured by "Surf Watch." Attached to my testimony is an appendix containing the results of this search. A search of "breast augmentation" on WebCrawler brought back 14,457 results and my search of "penile implants" brought back 2,387 results. Under both categories I was able to access sites that provided detailed descriptions of various procedures including full color before and after photographs from successful patients. In addition, my search of "Essex" brought back 5,361 results, "Woodcock" 706 results, a photograph of Michelangelo's David, and a full listing of all of Shakespeare's works within which the term "breast" appears.

It is my opinion that the First Amendment would prohibit librarians from abdicating complete responsibility for final access decisions to a private third party, which will not be subject to First Amendment constraints. However, by working closely with companies providing blocking services to obtain a list of blocked sites or the criteria by which blocking companies chose to block a particular category of Websites, librarians can ensure that they maintain final control over content selection so as to prevent any unreasonable restrictions on content or viewpoint discrimination.

Moreover, even if a site is incorrectly blocked virtually all companies that provide blocking services will unblock a site upon request within 24 to 48 hours. A patron, however, can usually receive immediate assistance from the librarian on duty. All blocking services allow for the user, usually with some type of password or special identification, to override the product's instructions to block a particular site. In the event that a patron's attempt to access a legitimate research site is thwarted by an incorrect

blocking instruction, that patron need only file a request with the librarian on duty to have the site unblocked. Such requests are usually complied with within minutes of having been registered. Furthermore, opposition arguments that blocking technology blocks out whole websites with valuable content due to some "inappropriate" pages is indistinguishable from a librarian's choice not to purchase printed books and magazines with valuable content because they also include "inappropriate" material. Absolute perfection is not, nor has it ever been, required under the First Amendment.

Public Libraries Have Numerous Compelling Interests Justifying The Use of Blocking and Blocking Technology on Its Internet Accessible Computers

There is no doubt that libraries, whether they are adjudged to be a traditional, limited public forum, or a non public forum, may choose not to provide access to content that does not receive protection under the U.S. Constitution such as obscenity, child pornography, material created in violation of copyright laws, or defamatory speech. Furthermore, as a nonpublic forum, libraries exercising their discretion to select materials for inclusion in its collection may restrict speech that does receive protection under the First Amendment because the forum has not been opened up for the benefit of third party speech. If courts reach the appropriate legal conclusion that libraries are not a public forum, the analysis could and would stop at this point. However, even if the Internet were to be ruled a limited public forum, the are numerous compelling interests justifying a library's decision to place blocking and blocking technology on Internet accessible computers to block access to illegal pornography.

Government Has A Compelling Interest in Eliminating Obscenity and Child Pornography

The U.S. Supreme Court has consistently held that the First Amendment does not

protect obscenity and child pornography. "The lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words … are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[23]

There is no right to publicly and commercially disseminate or exhibit obscene materials, even though private possession in one's own home is protected. Furthermore, the Court has clearly state that any rights of possession existing in one's home does not follow that individual out of the home, "we have declined to equate the privacy of the home … with a 'zone' of 'privacy' that follows a distributor or a consumer of obscene materials wherever he goes. … Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a 'live' theater stage, any more than a 'live' performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue."[24] The Court's conclusion was based upon its concern that public dissemination of obscenity carries with it the danger of offending the sensibilities of unwilling recipients or exposure minors to such material, "public distribution of obscene

[23] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 172 (1942). In *Miller v. California*, 413 U.S. 15, 24-25 (1973), the U.S. Supreme Court announced the constitutional test and definition for obscenity currently used by federal law and most state laws. The test seeks to address three possible qualities of speech: whether the material appeals to the prurient interest; depicts sexual conduct in a patently offensive way; and lacks serious literary, artistic, political, or scientific value. "The case also categorically reaffirmed that obscene materials are not protected speech, recognized that the States have a legitimate interest in criminalizing the dissemination or exhibition of obscene materials and could use community standards as a measure of the views of the average person for the prurient and patent offensiveness findings of fact." National Law Center for Children and Families, National Law Center Memorandum of Law On Legal Issues Involving Use of Filtering Software By Libraries, Schools and Business to Screen Acquisition of

materials … is subject to different objections. For example, there is always the danger that obscene material might fall into the hands of children, see *Ginsberg* v. *New York, supra,* or that it might intrude upon the sensibilities or privacy of the general public."[25] The Court has also held that consenting adults do not enjoy any right to receive, transport, or distribute obscenity even if for private use or not for commercial or pecuniary gain.[26] The *Loudoun County* court also recognized the government's compelling interest in preventing the distribution of obscenity and child pornography and in preventing the creation of a hostile environment in violation of federal sexual harassment laws.[27]

The Court recently affirmed the constitutionality of the enforcement of federal obscenity and child pornography statutes in cyberspace.[28] "Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles."[29] It's particularly instructive that the Court relied upon blocking technology as a possible means of the government achieving its interest of protecting children from material harmful to minors, "By contrast, the District Court found that "despite its limitations, currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate for their children will soon be widely available.'"[30]

Pornographic Material From the 'Internet' is Both Lawful and Constitutional 10 (1997) [hereinafter Law Center].

[24] *Paris v. Slanton*, 413 U.S. 49, 66,67 (1973).

[25] *Stanley v. Georgia*, 394 U.S. 557, 567 (1973) (holding that possession of obscene material cannot be prohibited in one's residence). (The court was distinguishing the private, secluded nature of the home from the public.)

[26] *U.S. v. Orito*, 413 U.S. 139, 141-42 (1973).

[27] *Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552 (1998).

[28] *Reno v. ACLU*, 521 U.S. 844, at 877 n.44 (1997).

[29] *Id.*

[30] *Reno* at 844.

Unlike obscenity, the mere possession of child pornography, in addition to the production, receipt, transportation and distribution of child pornography are prohibited.[31] Concerning child pornography, the Court has concluded, "materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come" and that "encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity."[32] Of child pornography the Court has stated, "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance … the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled."[33]

In addition to U.S. Supreme Court precedent, federal law prohibits the transportation (including the mailing[34]), sale, distribution and receipt of obscene material;[35] possession with intent to sell, and sale, of obscene material on federal property;[36] the transportation, shipping, receipt and distribution of child pornography; the sale or possession with intent to sell of child pornography; and the knowing possession of visual

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[31] *New York v. Ferber*, 458 U.S. 747 (1982). Child pornography is defined as follows: An unprotected visual depiction of a minor child (federal age is under 18) engaged in actual or simulated sexual conduct, including a lewd or lascivious exhibition of the genitals. See *New York v. Ferber*, 458 U.S. 747 (1982), *Osborne v. Ohio*, 495 U.S. 103 (1990), *U.S. v. X-Citement Video, Inc*., 115 S. Ct. 464 (1994). See also *U.S. v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987), *cert. denied*, 484 U.S. 856 (1987), *U.S. v. Knox*, 32 F.3d 733 (3rd Cir. 1994), *cert. denied*, 115 S. Ct. 897 (1995). In 1996, 18 U.S.C.§ 2252A was enacted and § 2256 was amended to include child pornography that consists of a visual depiction that is or appears to be of an actual minor engaging in sexually explicit conduct. See *Free Speech Coalition v. Reno*, No. C-97-0281 SC, judgment for defendants, Aug. 12, 1997, unpublished, 1997 WL 487758 (N.D. Cal 1997).
[32] *Osborne at 111*.
[33] *New York v. Ferber*, 458 U.S. 747, 757 (1982).
[34] 18 U.S.C. § 1461 (1999).
[35] 18 U.S.C. §1462 (1999), 18 U.S.C. § 1465 (1999).
[36] 18 U.S.C. § 1460 (1999).

depictions of child pornography made in whole or in part of materials transported in interstate or foreign commerce.[37] Furthermore, most state laws make it illegal to use computer transmissions to disseminate, exhibit, or distribute obscenity within a state. Finally, all states criminalize the distribution, dissemination, and exhibition of child pornography and most prohibit possession, as well. Libraries and educational institutions utilizing "interactive computers services" could be found to be subject to the provisions of these laws.[38]

There is a Constitutional Mandate to Prevent Children From Accessing Material Harmful to Minors

The U.S. Supreme Court has consistently recognized society's "compelling interest" in protecting minors from sexually explicit material defined as "harmful to minors." The societal availability of pornography erodes public standards of morality affecting all members of the community and in particular children. In *Ginsberg v. New York,*[39] the U.S. Supreme Court recognized the observations of psychiatrist Dr. Gaylin of the Columbia University Psychoanalytic Clinic, reporting on the views of psychiatrists in 77 Yale Law Journal at 592-593:

> 'Psychiatrists ... made a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, i.e. disapproved. It is outside of parental standards and not a part of his identification process. To openly permit implies parental approval and even suggests seductive encouragement. If

[37] 18 U.S.C. § 2252 (1999).
[38] Law Center, supra note 23, at 39.

this is so of parental approval, it is equally so of societal approval – another potent influence on the developing ego.'

States criminalize disseminating harmful "soft-core" pornographic material to minors, even though the material may not be obscene for adults[40] and governmental regulations may also act to facilitate parental control over children's access to sexually explicit material.[41] The Court has ruled that, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'"[42]

The most recent U.S. Supreme Court case to address congressional efforts to regulate sexually explicit material in order to protect children, *Reno v. ACLU*,[43] left the right of states to enforce such "harmful to minors" laws undisturbed. In Reno, the Court reiterated its prior definitive holdings that protecting children from exposure to obscene and harmful material is a matter of "compelling" and "surpassing" state interest.[44] This area of the law is quite settled, as evidenced by the fact that there are very few prosecutions for providing harmful matter to minors, because convenience stores, video stores, theaters, and even "adult" porn shops comply with state "harmful to minors" and display laws.[45]

Most states have enacted "harmful to minors" legislation, patterned after the New

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[39] 390 U.S. 629, at 642, n.10 (1968).
[40] *Id*.
[41] See *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1282 (1992); and *Sable Communications v. FCC*, 492 US 115 (1989).
[42] *Ginsberg* at 639.
[43] *Reno*.
[44] Law Center, *supra* note 23, at 40.
[45] *Id*.

York statute upheld by the U.S. Supreme Court in *Ginsberg v. New York,*[46] which placed controls on the dissemination of "harmful matter" to minors even though that matter may not be obscene for adults. In *Ginsberg,* the Supreme Court definitively held that the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex can be made to depend on whether the citizen is an adult or a minor; that protecting children from exposure to obscene or harmful material satisfies a compelling state interest; and that parents and others who have the primary responsibility for children's well-being are entitled under the U.S. Constitution to receive the support of laws designed to aid discharge of that responsibility.[47]

The Court has also held that obscene Dial-a-Porn may be banned from phone systems,[48] and indecent Dial-a-Porn may be regulated by credit cards, access codes, or subscription so as to avoid access by minors.[49]

The Legal Effects of Failing to Filter out Pornography

By distributing illegal material at taxpayer expense, public schools and libraries are creating contempt for the laws under which private individuals may be prosecuted. Under the legally recognized test to determine whether material is "obscene"[50] or "harmful to

[46] 390 U.S. 629 (1968). Harmful to minors is defined as any written, visual, or audio matter of any kind that: 1) the average person, applying contemporary community standards, would find, taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion; 2) the average person, applying contemporary community standards, would find depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, ultimate sexual acts, normal or perverted, actual or simulated, sado-masochistic sexual acts or abuse, or lewd exhibitions of the genitals, pubic area, buttocks, or post-pubertal female breast; 3) a reasonable person would find, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors. As with obscenity, in order to be found to be material harmful to minors, material must meet all three of these individual tests. Law Center *supra* note 23, at 7.

[47] Law Center, *supra* note 23, at 40.

[48] *Sable Communications v. FCC*, 492 U.S. 115 (1989). 492 U.S. at 124-26.

[49] *Sable*, 492 U.S. at 121-22, 128-31.

[50] Obscenity is determined using the following test: 1) Whether the average person, applying contemporary adult community standards, would find that the material, taken as a whole, appeals to a prurient interest in

minors," that material must be judged in light of community standards. "Community standards" are determined in the community from which the jury pool is drawn. Each juror is presumed by law to know what the views of the average or reasonable person are (in the same way that jurors in civil cases are held to know what constitutes "reasonable" conduct under the "reasonable person" standard for negligence, and so on). Failure to keep pornography out of libraries may result in sexually oriented businesses pointing to its availability in local public libraries as proof that their own material is now "accepted" in a community.[51] Recently, the publisher of a pornographic magazine in Arizona used this very argument to defend against his arrest for distributing material harmful to minors in violation of a state law prohibiting the distribution of material harmful to minors via sidewalk vending machines that are accessible to minors. He argued that the Phoenix Public Library

> has materials available for minors which are infinitely more graphic than Defendant's newspaper. … A Comparison between Defendant's newspaper and materials the State itself has available for minors for free proves that the State's standards tolerate material which is infinitely more 'patently offensive' in terms of the written word, pictures and/or images evoked than anything in Defendant's newspaper.[52]

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sex (*i.e.*, an erotic, lascivious, abnormal, unhealthy, degrading, shameful, or morbid interest in nudity, sex, or excretion); 2) Whether the average person, applying contemporary adult community standards, would find that the work depicts or describes, in a patently offensive way, sexual conduct (*i.e.*, ultimate sex acts, normal or perverted, actual or simulated; masturbation; excretory functions; lewd exhibition of the genitals; or sadomasochistic sexual abuse); 3) Whether a reasonable person would find that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. In order to be found obscene, material must meet all three of these individual tests. Law Center *supra* note 23, at 7.

[51] Janet M. LaRue, Statement at Press Conference Introducing The Children's Internet Protection Act (March 2, 1999).

[52] *Defendant's Motion for Determination that the Newspaper in Question Is Not "Harmful to Minors,"* November 21, 1997 (visited June 29, 1999), http://blockingfacts.org/everson.htm.

The viewing of pornography in public places creates an "offensive, uncomfortable, and humiliating environment for women co-workers" and can "constitute or be evidence of sexual harassment in violation of state and federal civil rights laws and create or contribute to a hostile enforcement in violation of Title VII's general prohibition against sexual discrimination in employment practices." Businesses and offices, public and private, are constrained by various federal and state laws, with respect to conduct in the workplace, and the duty to take affirmative steps to eradicate workplace discrimination. The eradication of workplace discrimination is more than simply a legitimate governmental interest, it is a compelling governmental interest. State and federal govemments have a compelling interest in eliminating discrimination against women by removing barriers to their economic, political, and social advancement within our culture.[53] In addition to its connection to crimes against women, pornography demeans and objectifies women by reducing their worth to nothing more than a tool for male sexual gratification.

Libraries making good faith use of blocking and blocking technology to prevent children from accessing obscenity and material harmful to minors, and adults from accessing obscenity, are protected from civil liability by the "Good Samaritan" immunity, provided by federal law.[54] (The "Good Samaritan" immunity also extends to civil protection from suits by those who would try to force an institution to carry its material, even if that material is "protected.") Libraries are specifically provided immunity as providers or users of interactive computer services for "any action voluntarily taken in good faith to restrict access or availability of material that the provider or user considers to be obscene ... excessively violent, harassing, or otherwise objectionable, whether or not

[53] Law Center, *supra* note 23, at 32.
[54] 47 U.S.C. § 230(e)(2)(A).

such material is constitutionally protected." The law also protects an ISP, online service, or institution that filters out or restricts access to certain "hate speech" or other offensive pornographic or violent materials so as not to assist those speakers, even though their message would be available otherwise on the Web or in newsgroups.[55] Such filters could also provide a criminal law defense against the "knowing" transmission of illegal pornography inadvertently or deliberately accessed.

Conclusion

The revolutionary power of the Internet is undoubtedly one of the most important developments of the 20th Century. Its vast reach makes information once contained in isolated, distant locations accessible to millions of children at their local libraries, schools, or home. Most parents deeply desire for their children to take part in this revolution. The Internet has also quickly become the favorite tool of criminals, including pornographers, due to its quick and easy access and the absence of a strong law enforcement presence. It's no secret to children or adults that the most violent, offensive, and graphic forms of pornography are also readily available. Despite U.S. Supreme Court rulings affirming the applicability of federal obscenity and child pornography laws to the Internet, pornographers are well aware that the number of prosecutions of Internet crimes is substantially lower than the same crimes committed through other venues. In the absence of vigorous law enforcement efforts aimed at removing illegal pornography from the Internet, it is essential that parents receive assistance as they try to prevent their children from accessing material that would be illegal for them to access outside of a public library.

[55] *Id.*