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*57 THE FLIP SIDE OF THE FIRST AMENDMENT: A RIGHT TO FILTER

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Table of Contents

Introduction

In United States v. American Library Ass'n, [FN1] the United States Supreme Court was presented with a constitutional challenge to the Children's Internet Protection Act (CIPA), which required all public libraries receiving federal funding for internet access to install software that would block pornographic material from appearing on any computer terminal. [FN2] Facing the Court was a host of concerns, including the availability and amount of pornographic material on the internet, the ability of children to access that pornography, the interest of parents in shielding children from internet pornography, and the difficulties in doing so without some outside assistance. [FN3] In addressing these concerns, the Court also had to consider, at least implicitly, a number of larger themes including the role of the internet, both in society and in our *58 constitutional scheme. [FN4] Was the internet to continue to be treated like the print media, and accorded the widest latitude of freedom under the First Amendment, or did the internet pose new risks for society, with children even more vulnerable in an online world?

Set against these issues were the layers of myth and expectation that have built up over time about the First Amendment and Freedom of Speech in a democratic society. If there is one enduring image of free speech, it is the street corner speaker standing on a soap box, proclaiming her opinions on the public issues of the day and inviting debate from the gathered crowd. But is this image at all accurate during an age of 500 television channels, twenty-four-hour cable, and an unlimited internet? Is it realistic to view the internet in terms of an eighteenth-century printing press? Is it at all constructive to continue, in an age of overwhelming indecent speech, to argue that any restriction on sexually explicit speech carries with it the specter of censoring vital political speech upon which our democracy depends? [FN5]

American Library Ass'n followed in the wake of a long line of caselaw that established broad protections for the internet. Beginning with Cubby, Inc. v. Compuserve, [FN6] continuing with Blumenthal v. Drudge, [FN7] and stretching into Reno v. ACLU [FN8] and Ashcroft v. ACLU, [FN9] the courts have consistently been pro-internet in their decisions, answering in the affirmative the question of whether, in a First Amendment sense, the internet was going to be treated more like newspapers (with the broadest constitutional protection) rather than like broadcasters (having the least). However, in American Library Association this enthusiastic support was finally tempered.

*59 I. Assessing a New Freedom in the Internet Age - the Freedom to Filter

One of the most striking characteristics of the current media climate is the sheer abundance of information and images. And nowhere is that abundance more evident than with the internet and the overload of information it is injecting into contemporary life. [FN10] Many commentators have looked on this abundance with admiration, as if all of the information and viewpoints will revitalize American democracy-as if people and society are still a dry sponge, able to soak up whatever flood of information comes their way-as if the biggest handicap to American cultural life was a drought of media speech. Yet one obvious problem caused by this overload of information is the explosion of pornography and offensive speech. Along with every other kind of speech, pornography is in plentiful supply on the internet. [FN11] Pornography is a particularly worrisome problem on the internet, since "(n)inety percent of ***60** children between the ages of five and seventeen . . . now use computers." [FN12] Almost seventy percent of the current traffic on the internet is adult-oriented material. [FN13] Additionally, approximately two-hundred new pornographic web sites are created each day. [FN14] In addition to the overwhelming supply, online pornography cannot be neatly cordoned off from where children can gain access to it. It is not like the adult bookstore, which has a windowless door through which children are not permitted to step. Online pornography is just a mouse-click away from coming into anyone's home.

To address these problems of abundance and access, Congress has tried on several occasions to construct doorways that will seal off sexually explicit material from children. In 1996 it passed the Communications Decency Act, which prohibited the transmission over the internet of indecent material to anyone under the age of eighteen. [FN15] This prohibition, however, was struck down as unconstitutional in Reno v. ACLU. [FN16] Next, Congress passed the Child Online Protection Act (COPA). [FN17] This statute forbade any person from using the World Wide Web to make "any communication for commerical purposes that is available to any minor and that includes any material that is harmful to minors." [FN18] Once again, the Court struck down this law in Ashcroft v. ACLU. [FN19] Then, with the Child Pornography and Prevention Act, Congress expanded the federal prohibition on child pornography to include computer-generated images of minors engaging in sexually explicit conduct, ("virtual child pornography") [FN20] which was overturned in Ashcroft v. Free Speech Coalition. [FN21] Eventually, Congress went from a prohibition mentality to a filtering ***61** mentality, and it passed the Children's Internet Protection Act. [FN22] This Act required public libraries receiving federal funds for internet access to equip all computer terminals with software that would block out any pornographic material. [FN23] Filtering has become the great hope of those troubled by all of the offensive and unwanted material on the internet. It offers not only a way to process the unfathomable amounts of information on the web, but also offers a way for parents to shield children from offensive material. [FN24] Indeed, given the flood of information in the media today, free speech may come to mean the freedom to filter, [FN25] for without such freedom, an individual could be swallowed up in a sea of media speech, completely unable to navigate. [FN26]

***62** The rapid evolution of filtering technology and the increased use of filters has spawned a similar growth of legal analyses. [FN27] First Amendment scholars have examined in depth the constitutional implications of various filtering schemes and devices. [FN28] Of course, a government-mandated filtering scheme would obviously raise certain First Amendment concerns, but the practice of filtering in general has enjoyed a long line of judicial support.

II. The Legal Foundations of a Right to Filter

Essentially, filtering is editing and editing is a process that has been going on since human beings first began communicating. The greater the supply of information, the greater the need for editing. [FN29] The constitutional right to edit was recognized in Miami Herald Publishing Co. v. Tornillo. [FN30] In Tornillo, the Court upheld the right of newspapers to edit their content as they saw fit, without any outside constraints. [FN31] Later, in Denver Area Educational Telecommunications Consortium, Inc. v. FCC, [FN32] the Court affirmed the right of cable operators to edit out sexually explicit programming. [FN33] In the Communications Decency Act of 1996, Congress even attempted to encourage internet providers to edit out sexually offensive material by granting them immunity from libel and defamation suits regarding any content they ***63** disseminated. [FN34] So, in a "sort of tacit quid pro quo arrangement with the service provider community, Congress . . . conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted." [FN35]

Outside the specific issue of editing, there is also judicial support for a general right to exclude certain kinds of speech (a support that seems to be growing amidst the information-abundant media society in which we now live). Courts have allowed time-manner-place restrictions to completely prohibit certain means of conveying speech, when those means serve to cause a certain information overload to people in a certain geographic area. For instance, in Heffron v. International Society for Krishna Consciousness, Inc., [FN36] the Court upheld a statute which forbad members of a religious sect from selling or distributing their religious material in face-to-face encounters with State Fair attendees. [FN37] Additionally, in Members of the City Council of Los Angeles v. Taxpayers for Vincent, [FN38] the Court sustained an ordinance that completely prohibited the posting of signs (even political posters) on public property. [FN39]

***64** The captive audience doctrine has also been used to exclude speech from intruding on unwilling listeners, [FN40] as has an individual's Right to Privacy. This right of privacy from the unwanted intrusion of speech, even when that individual is in a public venue, was recognized by the Supreme Court in Hill v. Colorado. [FN41] In Hill, the Court upheld a Colorado statute prohibiting anyone from coming within eight feet of another person outside of an abortion clinic for the purpose of passing out a leaflet or engaging in oral protest or counseling. [FN42] The Court found that the statute was content-neutral, even though the law was aimed at abortion protestors. [FN43] The Court also recognized that the speech of the protestors was protected by the First Amendment, and that the public streets and sidewalks that were covered by the statute were "quintessential" public forums for free speech. [FN44] Yet despite the burdens imposed by the statute on the speech rights of protestors, the Court noted that "(i)t is also important . . . to recognize the significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication." [FN45] Then the Court went on to cite a line of caselaw recognizing the "right to be let alone." [FN46] It interpreted this caselaw as "repeatedly recogniz(ing) the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer . . . to avoid exposure."' [FN47]

***65** The dissent in Hill argued that "the right to be let alone" was a right that was only conferred as against the government, and not as against private protestors. [FN48] The dissent further argued that the speech burdens imposed on the protestors were significant. [FN49] Eight feet is not a normal conversational distance, the dissent claimed, especially when the goal is not to protest but to engage in counseling and educating--activities that cannot be done at a distance and at a high-decibel level. [FN50] Furthermore, the dissent argued, "(i)t does not take a veteran labor organizer to recognize . . . that leafletting will be rendered utterly ineffectual by a requirement that the leafletter obtain from each subject permission to approach." [FN51] And yet, despite these arguments, the Court ruled in favor of the privacy interests of people in a public place wishing to be shielded from (or to edit out) the speech of other individuals.

III. American Library Ass'n and the Modernization of Pico

Board of Education v. Pico [FN52] involved a constitutional challenge to a school library's decision to remove certain books from its collection. [FN53] The removal occurred after the local school board had directed that a list of books be taken off the library shelves. [FN54] The board characterized the books as "'just plain filthy,' and concluded that '(i)t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers."' [FN55] In its opinion, the Supreme Court focused on the distinction between removing books from the library and acquiring them in the first place. [FN56] The Court recognized that school boards have broad discretion in the management of school affairs, and that "local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values."' [FN57] But this discretion, though applicable to the acquisition of library books, does not apply to their removal. The Court stated that the government "may not, consistently with the spirit of the First ***66** Amendment, contract the spectrum of available knowledge." [FN58] A removal of books from a library, according to the Court's reasoning, violated the right to receive information--a right which is "an inherent corollary of the rights of free speech." [FN59]

The Pico decision rested upon a precise distinction. School boards were completely free to decide which books to add to their library, but once the book was placed on the shelf, all freedom of discretion ended. Once in possession of speech, school authorities could only expunge that speech in certain narrowly-defined circumstances. Apparently, according to the Court, the First

Amendment only looked at the acquisition of new speech, never at the subsequent editing or use of that speech. Thus, Pico was a decision not yet confronting the flood of speech in a world of the internet. It was a decision not yet confronting the problems of an information glut, or of a world in need of a freedom to filter.

Sixteen years later, Pico served as a guiding precedent for one of the first internet filtering cases to be litigated. [FN60] In Mainstream Loudoun v. Board of Trustees, [FN61] an association of patrons sued the county library for installing software on internet computers which "block(ed) child pornography and . . . material deemed Harmful to Juveniles under applicable Virginia statutes." [FN62] The Loudoun Court relied heavily on Pico, agreeing with the plaintiffs that blocking out internet sites was similar to removing a library book because of disagreement with its content. [FN63] By purchasing internet access, the "library ha(d) made all Internet publications instantly accessible to its patrons," and that "by purchasing one such publication, the library has purchased them all." [FN64] In likening the internet to a collection of encyclopedias, the Court saw the library's failure to provide access to a subset ***67** of internet resources (numbering perhaps in the hundreds of millions) as analogous to blacking-out disagreeable portions of those encyclopedias. [FN65] Thus, even though the library had not viewed a minute fraction of everything available on the internet, by granting internet access to its patrons it had completely given up any freedom to then filter the information or images available on the web. It was as if the Loudoun court gave librarians no other choice than take-it-or-leave-it in connection with the internet. It was like signing up for cable, and then being forced to accept whatever the cable company gave you, even if it included the Playboy Channel.

Both Pico and Loudoun implicitly recognized a right to edit or exclude. However, they qualified that right, giving it power only if done at the point of acquisition of information. However, this qualification is overly simplistic, and it ignores the realities of the current information marketplace. Given the constant tide of information being generated over the internet, is it reasonable to expect that editing decisions can all be made at some initial, acquisitive point in the process? [FN66]

IV. The American Library Ass'n Decision

In the years leading up to the American Library Ass'n decision, the use of filtering software in libraries had become the biggest free speech controversy since the Communications Decency Act. [FN67] Librarians had long been excluding many print materials simply because of economic and spacial constraints; but with the internet, libraries now faced the question of whether to make content-based decisions not to provide access to certain sources. [FN68] In the past, librarians have struggled with monitoring minors' access to an increasing number of controversial texts; but these struggles were minimal compared to the headaches brought on by the internet's endless rows of cyber-shelves. [FN69]

***68** In addressing the constitutional challenge to the CIPA, [FN70] the American Library Ass'n Court recognized that "there is . . . an enormous amount of pornography on the Internet, much of which is easily obtained," and that the "accessibility of this material has created serious problems for libraries, which have found that patrons of all ages, including minors, regularly search for online pornography." [FN71] Furthermore, according to the Court, library patrons could "expose others to pornographic images by leaving them displayed on Internet terminals or printed at library printers." [FN72]

In upholding the blocking requirement, the Court took a different view of a library's role than the court in Loudoun. The American Library Ass'n Court saw the librarian more as an editor and selector than as a provider of unlimited information. "The librarian's responsibility . . . is to separate out the gold from the garbage, not to preserve everything." [FN73] This responsibility is met by giving the public "not everything it wants, but the best that it will read or use to advantage." [FN74] A "hypothetical collection of everything that has been produced is not only of dubious value, but actually detrimental to users trying to find what they want to find and really need." [FN75] The Court did not see librarians as serving a recipient's right to view everything existing within the marketplace of information: "A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, . . . but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality." [FN76] Moreover, the Court stated, "because of the vast quantity of material on the Internet and the rapid pace at which it changes, libraries cannot possibly segregate, item by item, all the Internet

material that is appropriate for inclusion from all that is not." [FN77] Or, in other words, in the world of the internet, there has to be a freedom to filter.

American Library Ass'n did not recognize the right to receive that was the foundation of the holding in Pico. The American Library Ass'n Court was much more willing to allow intermediaries the right to filter. Implicit in its ***69** decision was the acknowledgment that speakers have a right to speak, but that intermediaries and users have a right to edit. [FN78] This freedom to filter can justify certain burdens on the access to sexually explicit speech.

Although the CIPA did not impose a complete ban on a patron's internet access to pornography, it did require any adult wishing to view such material to ask a librarian to unblock the desired site. The opponents of the CIPA argued that this requirement was overly restrictive, since some patrons might be too embarrassed to approach a librarian with their request; but as the Court ruled, "the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment." [FN79]

V. The Court's Revisionist Thinking on the Internet

Up until American Library Ass'n, the courts have generally expressed a very optimistic vision of the internet. In Blumenthal, the Court glowingly described the internet as enabling "people to communicate with one another with unprecedented speed and efficiency," representing "an extraordinary advance in the availability of educational and informational resources to our citizens." [FN80] The court also stated that the internet should remain unregulated so as "to maintain the robust nature of Internet communication." [FN81] Earlier, in Zeran, a negligence action brought against an internet service provider, the court upheld judgment for the provider, stating that the internet has "flourished, to the benefit of all Americans." [FN82]

However, the landmark internet case was Reno v. ACLU, in which the Court struck down provisions in the Communications Decency Act of 1996 which prohibited the internet transmission of indecent messages to anyone ***70** under eighteen years of age. [FN83] In its decision, the Court described the nature of the internet:

The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services. From the publishers' point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information. [FN84]

Although recognizing the presence of sexually explicit material on the internet, the Court found that "users seldom encounter such content accidentally." [FN85] With pornographic material normally preceded by warnings as to its content, the Court concluded that "the 'odds are slim' that a user would enter a sexually explicit site by accident." [FN86] Unlike television or radio, according to the Court, "(a) child requires some sophistication and some ability to . . . retrieve material and thereby to use the Internet unattended." [FN87]

These optimistic views of the internet have been echoed by scholars and commentators. [FN88] Even in a decision predating American Library Ass'n by just one year, the Supreme Court described the internet as "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." [FN89] However, in Ashcroft, the Court began to back off from its earlier view in Reno and found that children could access internet pornography simply "by stumbling upon (it)." [FN90]

A basis of the Court's holding in American Library Ass'n was the finding that children could indeed unintentionally be exposed to sexually explicit material on the internet. [FN91] By this time, national surveys had showed that a quarter of all school children had inadvertently downloaded ***71** pornography while at a public library. [FN92] This finding coincided with other studies that had been conducted on internet pornography. [FN93] As the Washington Post described it, the internet was "the largest pornography store in . . . history." [FN94] Contrary to the Court's implication in Reno, studies found that most children demonstrate "a (computer) proficiency that far surpasses that of their parents" and generally have little problem finding whatever material they want on the internet. [FN95] Adolescents between the ages of twelve and seventeen have been cited as one of the largest consumers of adult-oriented material on the internet. [FN96] Consequently, by the time American Library Ass'n came to the Court, there had evolved a realization of all the ways in which the Reno Court was wrong in its view of indecency on the internet.

Despite requiring a credit card for access, most pornography sites offer extensive free previews,

thereby allowing children to see graphic sexual and violent images without going through any age verification process. [FN97] Furthermore, even though many pornographic sites carry disclaimers, warning viewers that the material contains sexually explicit images, "these disclaimers 'are about as effective as constructing a retaining wall out of tissue paper."' [FN98] In addition, search engines have made it even easier for inexperienced users to find sexually explicit Web sites. Because internet searches take only a few seconds, they can easily be executed by a student in a classroom while the teacher is in a different part of the room, and the student can exit the site in a matter of seconds if an authority figure approaches. Finally, with approximately forty percent of internet content originating from foreign ***72** sources, domestic laws alone cannot keep pornography from getting on the internet and to the attention of children. [FN99]

VI. Reconsidering the Captive Audience Doctrine

Although American Library Ass'n did not rely upon the captive audience doctrine, the Court's opinion carries some implications for the future of that doctrine. Under the captive audience doctrine, the state may place restrictions on speech if that speech intrudes onto an unwilling listener who is essentially a captive audience. The doctrine has been applied to unwanted material coming into the home, [FN100] and to unwanted speech when the degree of captivity makes it impractical for the unwilling listener or viewer to avoid exposure. [FN101] However, absent the somewhat rare application of the captive audience doctrine, it is normally the burden of the viewer to simply avert her eyes. [FN102]

In the past, the courts have shied away from the captive audience doctrine, in large part because the unwilling listener or viewer could fairly easily avert their eyes from the offensive speech. If a drive-in movie theater was playing a movie with offensive scenes in it, one could avoid driving by it during the two hours that the movie was playing. If a speaker in a town park was yelling out offensive speech, one could cross the street and walk the other way. This is not the case with the internet. If it is as easy as the Court in American Library Ass'n says it is to access indecent speech on the internet, if there is no way for parents to adequately site-or content-block, and if the internet is indeed an integral part of contemporary life, then is it even feasible to expect people to avert their eyes to all the sexually explicit speech that pops up on the internet? Captivity can be measured in many different ways. To parents of young children gaining access to sexually explicit material online, it does not matter if the captivity is of the child's own doing--namely, that of turning on the computer and clicking the mouse--it just matters that their children are in fact being held captive by an unwelcome intruder.

***73** The internet has essentially erased the boundaries between public and private spaces. [FN103] It can be accessed anywhere. Therefore, the " (c)aptive audience doctrine should not focus on particular spaces like the home. Rather, it should regulate particular situations where people are particularly subject to" unwanted speech. [FN104] Captivity in this sense is about the right not to have to flee, rather than the inability to flee. [FN105] With regard to the internet, perhaps the doctrine is about parents not always having to be on guard, every second of their children's usage. Perhaps it is about not having to ban all internet use by their children because of the impracticalities or impossibilities of constant monitoring.

In modern society, accessing the internet has become a basic function of everyday life, as much as having to commute to work on city buses or having to walk past an adult theater on the way to school. Therefore, children at a computer screen should be seen as a captive audience--being where they have every right to be, where they have to be in terms of their educational development, and where their parents really have no way of effectively shielding them from unwanted or offensive images or material. [FN106] In Bethel School District No. 403 v. Fraser, [FN107] the Court recognized "the obvious concern . . . to protect children--especially in a captive audience-- from exposure to sexually explicit, indecent, or lewd speech." [FN108] Prior to the internet, it was easier to segregate sexually explicit speech away from children. [FN109] Adult theaters and bookstores could restrict entry to anyone without a valid identification. Stores that sold adult magazines could stock those magazines behind the counter or place them in sealed plastic bags, ***74** prohibiting access to children. [FN110] In American Booksellers v. Webb, [FN111] for instance, a statute was upheld that banned the display in any public place where minors might be present of materials "harmful to minors." [FN112] In connection with the regulation of indecent materials, states could follow a two-pronged approach. [FN113] First, they could use zoning laws to regulate the location of "adult-oriented'

establishments." [FN114] Second, they could require an age identification to enter those establishments. But in the electronic world of the internet, these methods for regulating minor's access to indecency are ineffective or nonexistent. [FN115] For instance, even though some adult-material Web sites charge for access to their sites, children can get a healthy dose of the material before they are ever required to input a credit card number. [FN116] Therefore, through the internet, children can access material which state pornography laws prohibit them from purchasing at retail stores.

In the past, with most media, it has been possible to restrict access by children to indecent speech without also foreclosing access by adults. As Justice Powell wrote in his concurring opinion in FCC v. Pacifica Foundation, "(s)ellers of printed and recorded matter and exhibitors of motion pictures and live performances may be required to shut their doors to children, but such a requirement has no effect on adults' access." [FN117] However, with television and radio, Powell argued, children and adults cannot be effectively separated in ***75** the audience. [FN118] This difficulty, as the Pacifica Court reasoned, provided one of the justifications for giving broadcasters a lesser First Amendment protection than the print media enjoyed. [FN119] It can also justify restrictions placed on indecent speech carried over the internet.

American Library Ass'n can be seen as laying the parameters of a captive audience doctrine applicable to the internet. Children are just as captive in front of a computer screen at the library as in front of a television screen at home. In Action for Children's Television v. FCC, [FN120] the court analyzed in depth the difficulties that parents had in supervising their children's television-watching. [FN121] This same analysis, however, would also apply to the ability to supervise computer use. In fact, given the speed with which one can access and exit internet sites, it is most likely more difficult to supervise computer use than television viewing.

As Justice Breyer recognized in his dissent in United States v. Playboy Entertainment Group, Inc., [FN122] "over 28 million school age children have both parents or their only parent in the work force." [FN123] Consequently, many of these children may be spending unsupervised time logged on to computers at a public library or at friends' houses. In supporting a law which required sexually-oriented cable channels to limit their transmission to the hours ***76** between 10 p.m. and 6 a.m., Justice Breyer proposed that, to protect children from indecent speech, an opt-in scheme may be preferred over an opt-out one. [FN124] The opt-in scheme would essentially require that those adults wishing to view the adult programming take affirmative steps to obtain or subscribe to such programming; whereas the opt-out scheme (or the averting one's eyes approach [FN125]) would put all the burden on the unwilling viewer to make sure that such programming was kept away from their children.

In American Library Ass'n, the Court essentially chose the opt-in approach suggested by Justice Breyer in his Playboy Entertainment dissent. With the blocking software in effect in the libraries, the adults who desire to access sexually explicit internet sites have to make an affirmative request of the librarians to do so. An opt-out burden was not put on the parents and children who wished to avoid indecent material; the duty was not placed on the unwilling viewers to be constantly on alert for such material.

VII. The Shifting of Burdens Under an Opt-in Scheme

The courts do not permit an outright ban on indecent speech. [FN126] In general, they do not even permit burdens on such speech, even if those burdens are imposed because of a compelling state interest in protecting ***77** children. [FN127] In Playboy, for instance, the Court found that confining the Playboy Channel's programming to the hours of 10 p.m. to 6 a.m. posed too great a burden on adults who wanted to view indecent material. [FN128] This, however, was the only side of the speech equation at which the Court really looked. The programming confinement was intended to help shield children from indecent programming, but the Court did not (other than with assumptions) examine the ability of parents to opt-out if the regulations were struck down. Instead, the Court passed over the whole issue by simply stating that it was the duty of the viewer to "avert their eyes." [FN129]

In American Library Ass'n, however, the Court did tolerate the imposition of burdens on adults who wished to access indecent internet speech. Whereas in Denver Area Educational Telecommunications Consortium, Inc. v. FCC a requirement that people had to make a specific request from their cable operator to receive indecent programming was considered an unconstitutional burden, in American Library Ass'n the requirement that adults approach librarians in person to have the blocking ***78** software disabled so that they could access

sexually explicit sites was not considered an impermissible imposition. [FN130]
A realization of the quantity and accessibility of indecent speech, as well as the potential effects of such speech on minors, has seemed to make the courts more willing to follow the approach proposed by Justice Breyer in his dissent in Playboy--an approach that requires willing adults to assume the burdens of opting-in to indecent speech, rather than requiring unwilling recipients to bear all the burden of opting-out. [FN131] Such an approach was taken in two cases where the Second and Ninth Circuits upheld restrictions on dial-a-porn services. [FN132] Thus, as long as the burdens do not amount to a complete ban, they may be allowable under this new opt-in scheme that seems to be gaining strength and to which American Library Ass'n gave impetus.

***79** VIII. The Categorizing of Speech

Over the decades, a kind of hierarchy of speech has evolved within First Amendment jurisprudence. At the bottom of this hierarchy is speech that receives no constitutional protection. Such speech includes obscenity and defamatory speech and fighting words. [FN133] Higher on the ladder is what First Amendment scholars have called "low value" speech, which includes commercial speech. [FN134] At the top of the hierarchy is all the rest of the speech which qualifies for full First Amendment protection. [FN135]
Indecent speech has generally fallen in this top category, entitled to full First Amendment protection. [FN136] Indecent speech is not merely speech that "borders on obscenity," [FN137] but may include all "patently offensive" material that has any literary, artistic, scientific or political merit (thus avoiding the category of obscenity). [FN138] Indecent speech, though constitutionally protected, still may be regulated if the content is offensive to a compelling state ***80** interest. [FN139] In certain media (e.g., broadcast), indecent speech has received lower levels of protection. [FN140] For instance, in Pacifica, the Court upheld a FCC prohibition on indecent speech, citing the pervasive presence of broadcast, as well as the " slight social value" of indecent speech. [FN141] On the other hand, Sable gave indecent speech full protection when it occurred within the dial-a-porn medium, because that medium was not as invasive or prevalent as broadcasting. [FN142]
Any government attempt to impose a content-based restriction on indecent speech is strictly scrutinized, requiring a compelling governmental interest and the absence of any less restrictive means of achieving that interest. [FN143] Recently, however, and as suggested in American Library Ass'n, courts have seemed more willing to downgrade indecent speech to a lower rung on the constitutionally protected ladder. [FN144] In Action for Children's Television, where the Court upheld the broadcast restriction on indecent programming to the hours of 10 p.m. to 6 a.m., the Court ruled that the burdens on indecent broadcasters were justified by the compelling state interest in preventing minors from being exposed to such broadcasts. [FN145] The Court stated that "a democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens," [FN146] and that Congress, in passing the time-channeling law, had taken "note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material." [FN147] In Urofsky v. Gilmore, [FN148] ***81** where a group of university professors challenged the constitutionality of a statute restricting state employees from accessing sexually explicit material on computers owned by the state, the court noted that the statute did not prohibit all access to such materials, since an employee could always get permission from their agency head to access the material. [FN149]
Furthermore, state employees remained free to obtain such material from their personal computers. But more important, the test of whether a First Amendment issue was involved was whether the speech at issue (the sexually explicit material) touched "upon a matter of public concern;" [FN150] and in the court's opinion, the speech in Urofsky was not of that nature. [FN151]
Even though the determination, in a public employment context such as presented by Urofsky, of whether speech involves a matter of public concern is not dispositive of whether it possesses independent First Amendment protection, the fact that the speech at issue was indecent speech does give credence to the argument that courts are increasingly willing to categorize such speech into a lower-protection level. This is reflected in the language in Bethel School District, where the Supreme Court noted the "marked distinction" between a political protest and mere sexual innuendo. [FN152]

IX. Rethinking the Right to Receive

In Board of Education v. Pico, the Court based its decision on a recognition that "the Constitution protects the right to receive information and ideas." [FN153] This right to receive, the Court stated, "is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, (since) . . . the right to receive ideas follows ineluctably from the sender's First Amendment right to send them". [FN154] The Court then found that the school library is "the principal locus of such freedom" to receive. [FN155] ***82** Earlier, in Loudoun, the court defined the relevant "expressive activities" as the "receipt and communication of information through the Internet." [FN156]
The Loudoun and Pico decisions seem to rely on this right to receive. Yet such a right would contradict the dictates of Rust v. Sullivan. [FN157] Furthermore, a right to receive seems to imply a similar right of access, or right to know, which has never been recognized by the Court. [FN158]

Conclusion

American Library Ass'n may mark a turning point in First Amendment doctrine, as it functions in the Information Age. With speech so abundant, the focus may turn increasingly to issues involving the control that users and recipients can exercise over the speech they receive (or wish not to receive). Although editing and information selectivity has always been vital to the communicative process, those functions may yet become an ingredient in the First Amendment models that come to govern new communication technologies, because even though the internet is not invasive in the same way that broadcast was seen to be in Pacific, it is invasive in terms of its wealth of unwanted material and the ease of access to that material.

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[FN1]. 539 U.S. 194 (2003).

[FN2]. See United States v. Am. Library Ass'n, 539 U.S. 194 (2003).

[FN3]. See Am. Library Ass'n, at 194-96.

[FN4]. See id.

[FN5]. See id. at 231 (Souter, J., dissenting). Justice Souter likened the filtering of internet pornography in public libraries to "McCarthyism" in the 1950s. See id.

[FN6]. 776 F. Supp. 135 (S.D.N.Y. 1991). In Cubby, the Court held that an internet service provider could not be held liable for libelous statements made by independent third parties in a "forum," or "electronic bulletin board," carried by that provider. See Cubby, Inc. v. Compuserve Inc., 776 F. Supp. 135, 137 (S.D.N.Y. 1991).

[FN7]. 992 F. Supp. 44 (D.D.C. 1998) (holding that an internet service provider could not be held liable for defamatory statements made in a gossip columnist web site).

[FN8]. 521 U.S. 844 (1997) (striking down provisions in the Communications Decency Act of 1996, which prohibited the sending of indecent material over the internet to anyone under the age of eighteen).

[FN9]. 535 U.S. 564 (2002) (invalidating, on First Amendment grounds, the provisions of the Child Pornography Prevention Act of 1996 which expanded the federal prohibition on child pornography to include "virtual child pornography").

[FN10]. The deep, or invisible web (made up of information stored in databases), is estimated to be 400 to 550 times larger than the commonly defined World Wide Web (or visible web). The deep or invisible web contains nearly 550 billion individual documents. Bright Planet, Deep Web FAQ, at http://www.brightplanet.com/deepcontent/deep_web_faq.asp (last visited Feb. 23, 2004). For a discussion on the abundance of speech and information over the internet, see

Monroe E. Price, The Newness of New Technology, 22 Cardozo L. Rev. 1885, 1910-12 (2001) (citing the "abundance of the internet" and the consequences of "information overproduction"). For an overall discussion on information overload in contemporary society and its effects, see generally Kristan J. Wheaton, The Warning Solution: Intelligent Analysis in the Age of Information Overload (2001); David Lewis, Information Overload (1999); David Shenk, Data Smog: Surviving the Information Glut (1997); Neil Postman, Technopoly: The Surrender of Culture to Technology (1993); Richard Saul Wurman, Information Anxiety (1989).

[FN11]. Pornography has become a fourteen billion dollar a year business. See Paul S. Boyer, Purity in Print 345 (2002). With the explosive growth of the internet, "it is clear that society is demanding some method for shielding itself, or at the very least for shielding children." Thomas B. Nachbar, Paradox and Structure: Relying on Government Regulation to Preserve the Internet's Unregulated Character, 85 Minn. L. Rev. 215, 218 (2000). Many of the public complaints and worries regarding the internet involve sexually explicit material. In fact, Time magazine devoted a special issue to "cyberporn." See Philip Elmer-Dewitt, On a Screen Near You: Cyberporn, Time, July 3, 1995, at 38. President Clinton told "horror stories about the inappropriate material for children that can be found on the Internet," and described how "children can be victimized over the Internet." President's Remarks Announcing Steps To Make the Internet Family Friendly, 33 Weekly Comp. Pres. Doc. 1077 (July 16, 1997).

[FN12]. See Mitchell P. Goldstein, Congress and the Courts Battle over the First Amendment: Can the Law Really Protect Children from Pornography on the Internet? 21 J. Marshall J. Computer & Info. L. 141, 143 (2003). Studies have shown that most adult-oriented commercial web sites do not use age verification measures, and that about a quarter of them employ practices like mouse trapping that keep users from exiting the site. See id. at 144. Moreover, approximately three quarters of them displayed adult content on the first page, which was accessible to everyone. See id. at 145.

[FN13]. See Elizabeth M. Shea, The Children's Internet Protection Act of 1999: Is Internet Filtering Software the Answer? 24 Seton Hall Legis. J. 167, 174 (1999).

[FN14]. See id. See also H.R. Rep. No. 105-775, at 10 (1998).

[FN15]. See 47 U.S.C. § 223(a) & (d) (1994).

[FN16]. 521 U.S. 844, 874-85 (1996) (holding that the Act's provisions were unconstitutionally vague and burdensome to the First Amendment rights of adults).

[FN17]. See 47 U.S.C. § 231 (Supp. V. 2000).

[FN18]. 47 U.S.C. § 231(a)(1).

[FN19]. See Ashcroft v. ACLU, 535 U.S. 564, 586 (2002).

[FN20]. See 18 U.S.C. § 2256(8)(A)-(D) (2000).

[FN21]. 535 U.S. 234 (2002).

[FN22]. Consolidated Appropriations Act, 2001 § 1701, Pub. L. No. 106- 554, 114 Stat. 2763, 2763A-335 (codified as amended at 20 U.S.C. § 7001, 20 U.S.C. § 9134(f), 47 U.S.C. § 254(h) & (1) (2000)).

[FN23]. See 47 U.S.C. § 254(h) & (1). This law (which was at issue in American Library Ass'n) was a modification of an earlier library filtering practice struck down in Mainstream Loudoun v. Board of Trustees, 2 F. Supp. 2d 783 (E.D. Va. 1998).

[FN24]. See Reno v. ACLU, 521 U.S. 844, 881 (1997). In Reno, the Court hinted that it might have accepted a law which provided for filters rather than an outright prohibition of indecent

speech, but it also recognized that effective screening software did not currently exist. See Reno, 521 U.S. at 881. In her concurring opinion, Justice O'Connor wrote that "(a)lthough the prospects for the eventual zoning of the Internet appear promising, I agree with the Court that we must evaluate the constitutionality of the CDA as it applies to the Internet as it exists today." Id. at 891 (O'Connor, J., concurring).

[FN25]. See, e.g., J.M. Balkin, Media Filters, the V-Chip, and the Foundations of Broadcast Regulation, 45 Duke L.J. 1131, 1143 (1996). The V-chip is not only a blocking filter for children, but also a selecting filter for parents. See id. Professor Balkin goes on to discuss the general acceptance of informational filtering in society: book publishers screen manuscripts; bookstores choose books; magazine editors select articles. See id. "In the Information Age, it seems, power does not rest with those who have access to information. It rests with those who filter it." Id. at 1147.

[FN26]. For a discussion and analysis of internet filtering devices and systems, and of the ratings systems used in connection with filtering devices, see Nachbar, supra note 11, at Part I; R. Polk Wagner, Filters and the First Amendment, 83 Minn. L. Rev. 755, 760-69 (1999). The V-Chip is essentially a filtering device used on the television. See 47 U.S.C. § 330(c)(1)- (4) (Supp. II 1997). See also Kevin W. Saunders, Electronic Indecency: Protecting Children in the Wake of the Cable and Internet Cases, 46 Drake L. Rev. 1, 33 (1997). Under the proposal made here, neither objection would apply, since it would be outside private groups doing the rating.

[FN27]. See supra note 26. See also Madeleine Schachter, Law of Internet Speech (2001); Kathleen M. Sullivan, First Amendment Intermediaries in the Age of Cyberspace, 45 UCLA L. Rev. 1653 (1998); Eugene Volokh, Freedom of Speech in Cyberspace from the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex, 1996 Univ. Chi. Legal F. 377.

[FN28]. See supra notes 25, 26 and 27.

[FN29]. For a discussion on the need for selectivity in the modern world of information overload, see Justin Long, Plugged In, Reno Gazette-Journal, June 16, 2003, at E3("(W)e are all drowning in information."); David Adams, Spinning Around, Sydney Morning Herald, May 20, 2003, at 7 ("The challenge is not so much to get hold of (information) as it is to be discriminate about what we do expose ourselves to."); David Gelernter, Candy-Coated Electronics, Wall St. J., Apr. 15, 2003, at A14 ("To cope with the ever-increasing info-onslaught."); David Bowen, Drowning in Information, Fin. Times, Mar. 21, 2003, at P15 ("(T)he web delivers too much unfiltered content").

[FN30]. 418 U.S. 241, 258 (1974) (ruling that editing is a constitutionally protected function). See also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (1995) (holding that the First Amendment protects the freedom to create one's own mix of speech). See generally Volokh, supra note 27, at 385. Filter technologies also "raise the prospect of a novel form of expressive association: the negative association of all those who do not want to see, hear, or read the same sorts of things." Sullivan, supra note 27, at 1676.

[FN31]. See Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974).

[FN32]. 518 U.S. 727 (1996).

[FN33]. See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).

[FN34]. See 47 U.S.C. § 230(b)(1) & (2); Blumenthal v. Drudge, 992 F. Supp. 44, 50 (D.D.C. 1998).

[FN35]. Blumenthal, 992 F. Supp. at 52; see also 47 U.S.C. § 230(c)(2). "Fearing that the specter of liability would . . . deter service providers from blocking and screening offensive material . . . § 230 forbids the imposition of publisher liability on a service provider for the

exercise of its editorial and self(-)regulatory functions." Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997). Yet as the Blumenthal court recognized, the internet providers were taking advantage of this immunity benefit without accepting any of the burdens of editing that Congress intended. See Blumenthal, 992 F. Supp at 53.

[FN36]. 452 U.S. 640 (1981).

[FN37]. See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981). The Court upheld a law which required people selling or distributing literature at the Minnesota State Fair to do so from a fixed booth location, holding that the First Amendment "does not guarantee the right to communicate one's views . . . in any manner that may be desired." Id. at 647.

[FN38]. 466 U.S. 789 (1984).

[FN39]. See City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984). Aesthetics justified the ban: "the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property-constitutes a significant substantive evil within the City's power to prohibit." Id. at 807.

[FN40]. See Frisby v. Schultz, 487 U.S. 474, 484 (1988) (describing the home as a hallowed sanctuary, where individuals are entitled to respite from the bombardments of social life). See also Rowan v. United States Post Office Dept., 397 U.S. 728, 736 (1970) (sustaining a statute permitting addressees to prohibit all future mailings from a specified sender; conceded that the statute undoubtedly impeded the flow of ideas, but held that this effect was subordinate to the right of people in their homes "to be free from sights, sounds, and tangible matter we do not want."); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 59 (1976) (upholding a zoning ordinance that prohibited adult theaters from locating within 500 feet of a residential area, noting that "(t)here is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare."); United States v. On Lee, 193 F.2d 306, 315-16 (2d Cir. 1951) (holding that a "sane, decent, civilized society must provide some . . . oasis . . . some insulated enclosure, some enclave, some inviolate place which is a man's castle.").

[FN41]. 530 U.S. 703 (2000).

[FN42]. See Hill v. Colorado, 530 U.S. 703 (2000).

[FN43]. See Hill, 530 U.S. at 723.

[FN44]. Id. at 715.

[FN45]. Id. at 715-16.

[FN46]. Id. at 716 (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), Rowan, 397 U.S. 728, and Frisby, 487 U.S. 474 (ruling that the right to avoid unwanted speech can be protected in confrontational settings)).

[FN47]. Hill, 530 U.S. at 718 (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) (citing Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)).

[FN48]. See id. at 751 (Scalia, J., dissenting).

[FN49]. See id. at 756.

[FN50]. See id. at 756-57.

[FN51]. Id.

[FN52]. 457 U.S. 853 (1982).

[FN53]. See Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

[FN54]. See Pico, 457 U.S. at 856-58. This removal, the Court found, resulted from pressure by a parents' group. Id.

[FN55]. Id. at 857 (quoting Pico v. Bd. of Educ., 474 F. Supp. 387, 390 (E.D.N.Y.) (1979)).

[FN56]. See id. at 862.

[FN57]. Id. at 864 (quoting Brief for Petitioner at 10 (No. 80-2043)).

[FN58]. Id. at 866 (quoting Griswold v. Connecticut, 381 U.S. 479, 482 (1965)). Although the Court stated that a removal of books from the library would be unconstitutional if done with an impermissible motive, it also stated that "nothing in our decision . . . affects in any way the discretion of a local school board to choose books to add to the libraries of their schools." Id. at 871.

[FN59]. Pico, 457 U.S. at 867. Pico was preceded by Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir. 1976), in which the court held that the school board's decision in selecting textbooks was constitutionally protected, but that its removal of certain books from the library was not.

[FN60]. See Wagner, supra note 26, at 773.

[FN61]. 2 F. Supp. 2d 783 (E.D. Va. 1998).

[FN62]. Mainstream Loudoun v. Bd. of Trs., 2 F. Supp. 2d 783, 787 (E.D. Va. 1998) (quoting Loudoun County Pub. Library, Policy on Internet Sexual Harassment). Essentially, the software was meant to block out both hard and soft core pornography. See Loudoun, 2 F. Supp. 2d at 787.

[FN63]. See id. at 793.

[FN64]. Id.

[FN65]. See id. For a criticism of this aspect of the court's decision, see Julia M. Tedeske, Mainstream Loudoun and Access to Internet Resources at Public Libraries, 60 U. Pitt. L. Rev. 1265, 1285 (1999). See also Emily Whitfield & Ann Beeson, Censorship in a Box: Blocking Software is Wrong for Libraries, 16 Cable TV & New Media L. & Fin. 1 (1998).

[FN66]. The American Library Ass'n case takes a more realistic view of the information flow over the internet and of people's abilities to process it in a media society of over-abundant speech. See infra Section IV.

[FN67]. See Tedjeske, supra note 65, at 1266.

[FN68]. See id. at 1267.

[FN69]. See Eric L. Wee, Library Chief Seeks Full Web Access: Proposal Calls for Filters on Computers for Children, Wash. Post, July 5, 1997, Prince William Extra at 1.

[FN70]. See 47 U.S.C. § 254(h) (2000).

[FN71]. United States v. Am. Library Ass'n, 539 U.S. 194, 200 (citing Am. Library Ass'n v. United States, 201 F. Supp. 2d 401 (E.D. Va. 2002)).

[FN72]. Am. Library Ass'n, 539 U.S. at 200.

[FN73]. Id. at 204 (quoting William A. Katz, Collection Development: The Selection of Materials for Libraries 6 (1980)).

[FN74]. Id. (quoting Francis K.W. Drury, Book Selection xi (1930)).

[FN75]. Id. (quoting Brief for the United States, Joint Appendix, vol. 3, at 636 (Rebuttal Expert Report of Donald G. Davis, Jr.), available at http://www.usdoj.gov/osg/briefs/2002/3mer/2mer/2002-0361.mer.ja.vol.3.pdf (last visited Feb. 23, 2004)).

[FN76]. Id. at 205.

[FN77]. Id. at 208.

[FN78]. See generally Tedjeske, supra note 69, at 1291 (discussing a librarian's right of "content-based selectivity or 'editorial control'") (quoting Mark G. Yudof, When Government Speaks 240-45 (1983)).

[FN79]. Am. Library Ass'n, 539 U.S. at 209.

[FN80]. Blumenthal v. Drudge, 992 F. Supp. 44, 48 (1998) (quoting 47 U.S.C. § 230(a)(1) (2000)).

[FN81]. Blumenthal, 992 F. Supp. at 50.

[FN82]. Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (quoting 47 U.S.C. § 230(a)(4) (2000)). See also Ashcroft v. ACLU, 535 U.S. 564, 566 (2002) (quoting U.S.C. § 230(a)(3)) (recognizing that the "Internet . . . offer(s) a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity"); Cubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (stating that the internet is "at the forefront of the information . . . revolution . . . (making it possible) for an individual with a personal computer . . . to have instantaneous access to thousands of news publications from across the United States and around the world").

[FN83]. See Reno v. ACLU, 521 U.S. 844 (1997); see also 47 U.S.C. § 223(a) & (d).

[FN84]. Reno, 521 U.S. at 853.

[FN85]. Id. at 854.

[FN86]. Id. (quoting ACLU v. Reno, 929 F. Supp. 824, 844-45 (E.D. Pa. 1996)).

[FN87]. Id.

[FN88]. For optimistic outlooks on the internet's potential, see, e.g., Benjamin R. Barber, A Place For Us: How to Make Society Civil and Democracy Strong 75, 79-83 (1998); Jonathan Wallace & Michael Green, Bridging the Analogy Gap: The Internet, the Printing Press and Freedom of Speech, 20 Seattle U. L. Rev. 711 (1997); Lawrence Lessig, The Zones of Cyberspace, 48 Stan. L. Rev. 1403, 1407 (1996).

[FN89]. Ashcroft, 535 U.S. at 566 (quoting 47 U.S.C. § 230(a)(3) (Supp. V 2000)).

[FN90]. Id. at 567.

[FN91]. See 537 U.S. 1017 (2002).

[FN92]. See 144 Cong. Rec. S8611 (daily ed. July 21, 1998). This accidental access contrasted sharply with the Court's argument in Reno that accidental encounters on the internet rarely occur. See Reno, 521 U.S. at 869.

[FN93]. See generally Peter G. Drever, III, The Best of Both Worlds: Financing Software Filters for the Classroom and Avoiding First Amendment Liability, 16 J. Marshall J. Computer & Info. L. 659 (1998); Glenn E. Simon, Cyberporn and Censorship: Constitutional Barriers to Preventing Access to Internet Pornography by Minors, 88 J. Crim. L. & Criminology 1015 (1998).

[FN94]. Crimes Against Children: The Nature and Threat of Sexual Predators on the Internet: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 105th Cong. 32 (1997) (statement of Cathy Cleaver, Dir. of Legal Policy, Family Research Council).

[FN95]. Id.

[FN96]. See Shea, supra note 13, at 184.

[FN97]. See id. at 179.

[FN98]. Id. (quoting Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearing Before the Subcomm. on Telecomms., Trade, and Consumer Protection of the House Comm. on Commerce, 105th Cong. 22 (1998) (statement of Ernest J. Istook, Jr., Rep., Oklahoma)).

[FN99]. See H.R. Rep. No. 105-775, at 20 (1998).

[FN100]. See Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970). Every person has the right to be let alone from sexually offensive material coming through the mails into their own home. See id. at 738.

[FN101]. See Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1974) (sustaining a municipality's policy of barring political advertisements on city buses, where commuters had no choice to look away).

[FN102]. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975).

[FN103]. See Reno v. ACLU, 521 U.S. 844, 890-99 (1997) (O'Conner, J., dissenting in part, concurring in part); Sullivan, supra 27, at 1675. See also J.M. Balkin, Free Speech and Hostile Environments, 99 Colum. L. Rev. 2295, 2311 (1999) (hereinafter Balkin, Free Speech).

[FN104]. Balkin, Free Speech, supra note 103, at 2312.

[FN105]. See id.

[FN106]. See Nachbar, supra note 11, at 220-21. As Professor Nachbar notes, "(v)ery few parents have the time to supervise all of the time that their children spend on the Internet." Id. at 220. Nor is parental monitoring "a real alternative for families in which both parents must, or choose, to work, or for those headed by a single parent." Id. Furthermore, "unless the parent were, for example, to open each . . . (w)eb page with the child looking away and only allow the child to view the page after a parental preview, there is no way to keep the child from taking in the content while the parent is evaluating its appropriateness." Id. at 221.

[FN107]. 478 U.S. 675 (1986).

[FN108]. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (upholding a school's restriction on an indecent speech at a school assembly).

[FN109]. See generally Ginsberg v. New York, 390 U.S. 629 (1968) (upholding law that

restricted the distribution even of printed matter to children, thereby establishing the rule that the government can adapt more stringent controls on communicative materials available to youths than on those available to adults).

[FN110]. See, e.g., Crawford v. Lungren, 96 F.3d 380, 382 (9th Cir. 1996) (upholding a statute that required new limitations on the methods of distribution to prevent exposing minors to indecent material). The court found no constitutional violation with a statute that banned the sale of "harmful matter" from unsupervised, sidewalk vending machines, unless identification cards were required. See id. at 385-89.

[FN111]. 919 F.2d 1493 (11th Cir. 1990).

[FN112]. See Am. Booksellers v. Webb, 919 F.2d 1493, 1512 (11th Cir. 1990) (challenging a Georgia law in a suit brought by a group of booksellers and publishers).

[FN113]. See Reno, 521 U.S. at 889 (O'Connor, J., dissenting in part, concurring in part). By regulating the two characteristics of geography and identity, a state can restrict a minor's access to "adult zones." See id. For instance, a minor had to enter an establishment that provides an adult dance show if he wants to see such entertainment; "(a)nd should he attempt to do so, the minor will not be able to conceal completely his identity (or, consequently, his age)." Id.

[FN114]. Shea, supra note 13, at 172.

[FN115]. See Simon, supra note 93, at 1043.

[FN116]. See id.

[FN117]. FCC v. Pacifica Found., 438 U.S. 726, 758 (1978) (Powell, J., concurring in part).

[FN118]. See Pacifica Found., 438 U.S. at 758. In Pacifica, a case involving an FCC decision to require broadcasters to channel indecent programming away from times of the day when there is a reasonable risk that children may be in the audience, the Court relied heavily on the intrusiveness rationale. See id. at 726. It reaffirmed that broadcasting should receive the most limited of First Amendment protections, since patently offensive, indecent material presented over the airwaves confronts a person in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. See id. at 748. So in the case of broadcasting, the rights of the public to avoid unwanted speech trump those of the broadcaster. The Court also justified its decision on the presence of children in the audience. The difficulty presented by broadcasting is that children and adults cannot be effectively separated in the audience. See id. at 749. The Court found unpersuasive the argument that the offended listener or viewer could quite simply turn the dial and tune out the unwanted broadcast, reasoning that because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. See id. at 748-49.

[FN119]. See id. at 749.

[FN120]. 58 F.3d 654 (D.C. Cir. 1995).

[FN121]. See Action for Children's Television v. FCC, 58 F.3d 654, 661 (D.C. Cir. 1995) (emphasizing FCC findings about the prevalence of homes in which children had radios or televisions in their own rooms to show that real parental control was impossible). Given the realities of modern life, children could be spending as much of their after-school hours at a library or community center or friend's house as at home.

[FN122]. 529 U.S. 803 (2000).

[FN123]. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 842 (2000) (Breyer, J.,

dissenting).

[FN124]. See Playboy Entm't Group, Inc., 529 U.S. at 843-44. Justice Breyer admitted that First Amendment standards are rigorous, but that they also permitted Congress to enact a law that provides measures to help people censor certain unwanted speech, even when those measures cause burdens on speakers. He argued that the First Amendment was not intended to leave millions of parents helpless in the face of media technologies that bring unwanted speech into their children's lives. See id. at 846. Justice Breyer's dissent implies that, in First Amendment terms, an opt-in law may be just as valid as an opt-out law-e.g., a law requiring a person desiring adult programming to affirmatively direct that it be offered him, versus a law requiring someone not wanting adult programming having to direct that such programming be blocked.

[FN125]. This was the scheme (the "averting one's eyes" approach) chosen by the majority in Playboy. See id. at 813-14.

[FN126]. See Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 127 (1989) (striking down a ban on dial-a-porn telephone messages, on the grounds that broadcasting "can intrude on the privacy of the home without prior warning as to program content, and is 'uniquely accessible to children, even those too young to read"').

[FN127]. See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) (striking down regulations in the Cable Act of 1992 requiring cable operators to place indecent programs on a separate channel, to block that channel, and to unblock it within thirty days of a subscriber's written request for access). The Court was concerned with inconveniences and burdens to would-be viewers of indecent programming, including, for instance, the viewer who might want a single show, as opposed to the entire channel, or the viewer who might want to choose a channel without any advance planning (the "surfer"), or the one who worries about the danger to his reputation that might result if he makes a written request to subscribe to the channel. See Denver Area, 518 U.S. at 754. Yet, none of these burdens presented insurmountable obstacles - each one of these types of viewers could get access to the desired programming by simply following the established procedures. Likewise, in Reno v. ACLU, the Court held that government may not require listeners to opt in to speech that is deemed offensive by the majority when individual opt-out is feasible. See Reno v. ACLU, 521 U.S. 844, 874-77 (1997).
In its First Amendment decisions, the Court has taken the position that the First Amendment requires opt-out, even though, in terms of relative burdens, it may be easier for adults to access indecent material than it is for parents to have their children avoid it. Yet, the Court has never examined precisely how feasible it is for unwilling viewers or listeners to opt-out, certainly not in the same way that it has examined all the potential burdens placed on those wishing to opt-in. Furthermore, making opting-out even more difficult, the government cannot zone cyberspace--certainly not as it can do when restricting adult theaters to a red light district or requiring adult magazines to be sold in plain brown wrappers. To answer this problem, Justice Stevens noted in his opinion in Reno that there is another alternative to zoning in cyberspace-- that listeners can build their own fences at their end, with gates permitting them to screen offensive speech out. See Reno, 521 U.S. at 879.

[FN128]. See United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 817-18 (2000).

[FN129]. See id. at 813.

[FN130]. The courts in the past have been hostile to opt-in schemes. The guiding doctrine of First Amendment decisions has been that the government may not require listeners to opt in to speech deemed offensive by the majority when individual opt-out is physically or socially feasible. Courts have essentially assumed that the First Amendment requires opt-out. See Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965) (holding that the Post Office could not screen out communist mail from foreign sources and require potential recipients to request affirmatively its delivery (or opt-in); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 61 (1983) (holding that the federal government could not ban the unsolicited mailing of condom ads-a law

that in effect required opt-in); and Mainstream Loudoun v. Bd. of Trs., 2 F. Supp. 2d 783, 797 (E.D. Va. 1998) (finding the requirement that adult patrons wishing to view indecent materials on the internet submit a written request to the library staff as having a severe chilling effect on First Amendment freedoms).

[FN131]. See also Action for Children's Television v. FCC, 58 F.3d 654, 661 (D.C. Cir. 1995) (holding that a ban on indecent broadcast programming between the hours of 10 p.m. and 6 a.m. was not unconstitutional). The court also found that those parents who wished to expose their children to indecent programming would "have no difficulty in doing so through the use of subscription and pay-per-view cable channels, delayed-access viewing using VCR equipment, and the rental or purchase of readily available audio and video cassettes." Action for Children's Television, 58 F.3d at 663. The court then concluded that the ban did not "unnecessarily interfere with the ability of adults to watch or listen to such materials both because . . . (adults) are active after midnight and . . . have so many alternative ways of satisfying their tastes at other times." Id. at 667.

[FN132]. See Dial Info. Servs. Corp. of N.Y. v. Thornburgh, 938 F.2d 1535 (2nd Cir. 1991); Info. Providers' Coalition for Defense of the First Amendment v. FCC, 928 F.2d 866 (9th Cir. 1991). The upheld restrictions, promulgated pursuant to the Helms Amendment, required telephone companies to block all access to dial-a-porn services unless telephone subscribers submit written requests to unblock them, or scramble their messages and sell personal decoders--were enacted in response to the Supreme Court decision in Sable striking down a complete ban on dial-a-porn services.

[FN133]. See Miller v. California, 413 U.S. 15, 24 (1973) (holding that obscenity is not protected by the First Amendment).

[FN134]. See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985); Geoffrey R. Stone et al., Constitutional Law 1058-1169 (1986); Eugene Volokh, The First Amendment: Problems, Cases and Policy Arguments 114- 17 (2001) (discussing "low value" speech).

[FN135]. Although, according to Alexander Meiklejohn, the First Amendment protects only political speech, or speech necessary for the conduct of self-government. See generally Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948); Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People (1965). Alexander Meiklejohn believed that freedom of speech is necessary for intelligent self-governance in a democracy. Essentially, Meiklejohn took a Madisonian view of the First Amendment (seeing its protections as existing primarily to serve democratic government), rather than a marketplace view (which would see it from the standpoint of the individual speaker, and would strive to simply increase the amount of individual speech in the system). For further discussion on Meiklejohn's views, see Patrick M. Garry, The American Vision of a Free Press 74-78 (1990); Steven H. Shiffrin, The First Amendment, Democracy, and Romance 47-56 (1990).

[FN136]. The Code of Federal Regulations defines indecency as focusing on sexual and excretory activities or organs. See 47 C.F.R. § 76.701 (2002) (noting that an indecent program is one that "describes or depicts sexual or excretory activities or organs in a patently offensive manner.")

[FN137]. Alliance for Cmty. Media v. FCC, 56 F.3d 105, 130 (D.C. Cir. 1995).

[FN138]. See Alliance for Cmty. Media, 56 F.3d at 130; but see Action for Children's Television v. FCC, 852 F.2d 1332, 1339 (1988) (noting that work's serious merit does not necessarily imply that material is not indecent).

[FN139]. See Kelly Doherty, WWW.OBSCENITY.COM: An Analysis of Obscenity and Indecency Regulation on the Internet, 32 Akron L. Rev. 259, 269 (1999); Brian M. Werst, A Survey of the First Amendment "Indecency" Legal Doctrine and Its Inappplicability to Internet Regulation: A Guide for Protecting Children from Internet Indecency After Reno v. ACLU, 33 Gonz. L. Rev. 207,

225 (1998).

[FN140]. See Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969) (ruling that the different characteristics of each medium "justify differences in the First Amendment standards applied to them"). See also FCC v. Pacifica Found., 438 U.S. 726, 742 (1978). The well-known dualism in mass media law today is reflected in Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 241 (1974) (conferring the most protective First Amendment status on the print media) and Red Lion, 395 U.S. at 367 (granting a much less protective status on broadcasters).

[FN141]. See Pacifica Found., 438 U.S. at 746.

[FN142]. The difference in Sable was that the "dial-it medium requires the listener to take affirmative steps to receive the communication." Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 127-28 (1989).

[FN143]. See Reno v. ACLU, 521 U.S. 844, 874 (1997).

[FN144]. See also Dial Info. Servs. Corp. of N.Y. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991).

[FN145]. See Action for Children's Television, 852 F.2d 1332.

[FN146]. Id. at 1332.

[FN147]. Id.

[FN148]. 167 F.3d 191 (4th Cir. 1999).

[FN149]. See Urofsky v. Gilmore, 167 F.3d 191, 194 (4th Cir. 1999).

[FN150]. Urofsky, 167 F.3d at 195. See also Connick v. Myers, 461 U.S. 138, 146 (1983) (stating that speech involves a matter of public concern when it affects a "political, social, or other concern to the community").

[FN151]. See Urofsky, 167 F.3d at 196.

[FN152]. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 680 (9th Cir. 1986). In discussing the lower court's reliance on Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969), the Bethel Court dismissed that lower court's equation with the political speech at issue in Tinker (wearing a black armband to protest the Vietnam War) with the sexually suggestive speech in Bethel. See Bethel Sch. Dist., 478 U.S. at 680.

[FN153]. Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982) (quoting Stanley v. Georgia, 394 U.S. 557 (1969)).

[FN154]. Pico, 457 U.S. at 867.

[FN155]. Id. at 868-69.

[FN156]. Mainstream Loudoun v. Bd. of Trs., 24 F. Supp. 2d 552, 563 (1998).

[FN157]. See Rust v. Sullivan, 500 U.S. 173 (1991) (upholding congressionally-imposed speech restrictions limiting the information that could be received from health care providers employed by federally-funded family planning services).

[FN158]. See Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978). Nor does Pico state whether its right to receive means that the receiver can be passive and not have to make any effort to obtain the information. For further discussion on the right to receive, see Kimberly S. Keller, From Little Acorns Great Oaks Grow: The Constitutionality of Protecting Minors from Harmful

Internet Material in Public Libraries, 30 St. Mary's L.J. 549, 577 (1999).
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