

# Chicago-Kent Law Review

---

Volume 79

Issue 1 *Symposium: Do Children Have the Same First Amendment Rights as Adults?*

Article 2

---

April 2004

## On Protecting Children from Speech

Amitai Etzioni

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [First Amendment Commons](#), [Internet Law Commons](#), and the [Juvenile Law Commons](#)

---

### Recommended Citation

Amitai Etzioni, *On Protecting Children from Speech*, 79 Chi.-Kent L. Rev. 3 (2004).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol79/iss1/2>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [jwenger@kentlaw.iit.edu](mailto:jwenger@kentlaw.iit.edu), [ebarney@kentlaw.iit.edu](mailto:ebarney@kentlaw.iit.edu).

# ON PROTECTING CHILDREN FROM SPEECH

AMITAI ETZIONI\*

## INTRODUCTION

When freedom of speech comes into conflict with the protection of children, how should this conflict be resolved? What principles should guide such deliberations? Can one rely on parents and educators (and more generally on voluntary means) to protect children from harmful cultural materials (such as Internet pornography and violent movies) or is government intervention necessary? What difference does historical context make for the issue at hand? Are all minors to be treated the same? What is the scope of the First Amendment rights of children in the first place? These are the questions here explored.

The approach here differs from two polar approaches that can be used to position it. According to a key civil libertarian position, materials that are said to harm children actually do not have such an effect, and even if such harm did exist, adults should not be reduced to reading only what is suitable for children. Hence, as long as speech qualifies as protected for adults, it should be allowed.<sup>1</sup> In short, the First Amendment should trump other considerations.<sup>2</sup>

\* University Professor, George Washington University; Director of the Institute for Communitarian Policy Studies and editor of the quarterly journal *The Responsive Community*; author of *MY BROTHER'S KEEPER: A MEMOIR AND A MESSAGE* (2003); former president of the American Sociological Association and Senior White House Advisor during the Carter Administration. I am indebted to Marjorie Heins and Nancy Willard for several corrective comments on a previous draft of this Article, and especially to Eugene Volokh for very encompassing and thorough criticisms. I am greatly indebted to Mackenzie Baris for extensive research assistance and editorial suggestions, as well as to Elizabeth Jarvis, Deirdre Mead, and Amanda Roberts.

1. See Combined Proposed Findings of Fact of the ACLU and ALA Plaintiffs, *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) (Nos. 96-963, 96-1458), available at <http://archive.aclu.org/issues/cyber/trial/finding.htm>.

2. Civil libertarians find very little speech they would agree to bar. For instance, they hold that using children to make child pornography is indeed a crime because children are abused, but once a tape is made, it should not be suppressed since the children were already harmed and suppressing the tape would create a precedent for limiting speech. Thus, when the Supreme Court upheld a New York state statute making the sale of child pornography illegal, the ACLU's Jack Novik denounced child pornography as "ugly, vicious stuff" that should be fought

In contrast, many social conservatives argue that pornography undermines the moral culture and corrupts character. Hence, such material should be barred, the way child pornography is, in order to protect children and adults alike—although additional protection of children is surely welcome. In short, according to this approach, protecting people and the community from harmful cultural products takes precedent over free speech when there is a conflict.

Neither of these positions focuses on the difference between children and adults. To put it strongly, quite a few civil libertarians lean towards treating children like adults, and many social conservatives focus on the child in all of us, on our vulnerabilities. Both focus on pornography and each, for its own reasons, is less mindful of the effects of exposure to violence.<sup>3</sup>

The position developed here<sup>4</sup> builds on extensive social science findings that there are cultural materials harmful to children—although we shall see that the greatest harm is not caused by the materials on which recent attempts to protect children have focused. I suggest the starting point of such deliberations should be an agreement that there be no *a priori* assumptions that either free speech or protection of children trumps the other, and that there are systematic ways to work out the relationship between these two core values.<sup>5</sup> I realize that to discuss the First Amendment in balance with something else is not a concept readily acceptable to those who treat free speech as the most primary right and who, while recognizing that it must be squared occasionally with other values, put the onus of proof completely on those making claims against it. My approach treats free speech as one of several values that must be balanced. Moreover, I hold that the balance between these two core values, like all others, is affected by historical context, in which excessive leanings in favor of one value (and neglecting the other) need to be corrected in the following time period if a reasonable balance is to be preserved. This

through stronger laws against exploitation of minors, but denounced the Court's decision, saying, "Government intrusion into freedom of speech is expanded." *Impact of Court's Child Pornography Ruling Assessed*, CHRISTIAN SCI. MONITOR, July 7, 1982, at 3.

3. See, e.g., DAVID BURT, DANGEROUS ACCESS, 2000 EDITION: UNCOVERING INTERNET PORNOGRAPHY IN AMERICA'S LIBRARIES 2-3 (2000).

4. This idea is further developed in AMITAI ETZIONI, THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY (1996) [hereinafter THE NEW GOLDEN RULE].

5. The choice of the term "value" rather than "right" is deliberate here; rights imply things much less given to balancing with other considerations than values, for which one recognizes possible conflicts that will have to be worked out.

principle guides us in exploring whether one can rely on voluntary means to treat the issue at hand or whether government intervention is needed. And I not only treat minors as having fundamentally different rights from adults, but also take into account differences among minors of various ages.

It should be noted that the discussion here focuses on the right to “consume” speech rather than to produce it. The main question is not whether children should be entitled to make movies, produce CDs, and so on, but whether their access to the harmful content found in some cultural materials should be limited.

The discussion proceeds by providing some background (Part I), and then extensively examining five case studies to provide key examples for explorations of the issues at hand (Part II). Readers familiar with the cases or less interested in the fine print may wish to turn to the discussion of the lessons drawn from these cases regarding the proper relationship between speech and the protection of children (Part III). In this section, I pay special attention to the merit of separating the access children have to cultural materials from the access adults have—or if this cannot be fully accomplished, the possibility of minimizing the extent to which limitations on children “spill over” onto adult access—rather than dealing with “all patrons” as if they were of one kind. Also, I take it for granted that commercial speech can more readily be limited than other speech, and that while voluntary means of curbing access are superior to semi-voluntary ones, there might be room for some regulation.

This section is followed by an examination of the evidence of the scope and nature of the harm some cultural materials inflict on children, with special attention to the important differences in the effects of pornographic and violent content on children (Part IV). The need to correct the delicate balance between speech and the protection of children is viewed in the historical context in which it occurs (Part V), followed by an examination of differences among children according to their ages (Part VI). The Article closes by briefly reviewing the implications of the conclusions drawn up to this point for political theory (Part VII) and discussing whether the standards for limiting speech could be communal or must be national, and the implications of this factor for the protection of children (Part VIII).

## I. BACKGROUND: CONTENT CONTROLS FAIL THE TEST

Congress has made several attempts to limit the access children have to materials that it considers harmful to them.<sup>6</sup> The constitutional challenges to these laws reveal a major flaw in these approaches and explain the current focus of other attempts to deal with the same problem. The issue has not been the need or legitimacy of taking special measures to protect children. In several cases, the Supreme Court has affirmed that the government has a compelling public interest in protecting children.<sup>7</sup> *Ginsberg v. New York* confirmed that “the State has an interest ‘to protect the welfare of children’ and to see that they are ‘safeguarded from abuses.’”<sup>8</sup> Moreover, it specifically recognized that some cultural products can cause harm to children, and that children are entitled to protection from such materials. The decision in *Ginsberg*, which upheld a New York state statute prohibiting the sale of pornographic magazines to minors under the age of seventeen, relied on two basic principles regarding children: that children should not be allowed the same access to certain types of materials as adults, and that the state is entitled to pass laws aiding parents in carrying out their duties.<sup>9</sup> The Court ruled that though the materials in question were legal for adults, the Constitution permits the state to “accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see.”<sup>10</sup> Furthermore, the Court stated 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. . . . Parents and others. . . who have th[e] primary responsibility for children’s well-being are entitled to the support of laws designed to aid discharge of that responsibility.<sup>11</sup>

The Court later reaffirmed this position in *FCC v. Pacifica Foundation*,<sup>12</sup> which upheld an FCC ruling restricting the broadcast of

6. See, e.g., Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended at 47 U.S.C. § 223 (2000)); Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736 (1998) (codified as amended at 47 U.S.C. § 231 (2000)); Children’s Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763A-335 (2001) (codified as amended at 20 U.S.C. § 9134 and 47 U.S.C. § 254(h) (2000)).

7. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (upholding the “interests of society to protect the welfare of children, and the state’s assertion of authority to that end”).

8. 390 U.S. 629, 640 (1968) (quoting *Prince*, 321 U.S. at 165).

9. *Id.* at 637, 639.

10. *Id.* at 637.

11. *Id.* at 639.

12. 438 U.S. 726 (1978).

indecent speech to times of day when children were unlikely to be listening or watching unsupervised.<sup>13</sup> The Court reasoned that

children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the unwilling through the exercise of choice. At the same time, such speech may have a deeper and more lasting negative effect on a child than on an adult.<sup>14</sup>

The Court thus affirmed that “society may prevent the general dissemination of such speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat.”<sup>15</sup>

The matter then became how to separate speech from which children should be protected from other speech. As in other attempts to separate two kinds of speech (such as “fighting words”<sup>16</sup>), this has so far proven next to impossible.

When Congress took up the challenge of protecting children on the Internet, it first passed legislation attempting to shield children by controlling the content of the materials they could access. The most notable attempts, the Communications Decency Act of 1996<sup>17</sup> (“CDA”) and the Child Online Protection Act of 1998<sup>18</sup> (“COPA”), focused on restricting the type of content that could be posted on the Internet. These attempts largely failed when they were challenged in the courts. The Supreme Court ruled that the CDA’s prohibitions on “indecent transmission” and “patently offensive display” violated freedom of speech as protected by the First Amendment.<sup>19</sup> Though it affirmed the compelling interest of the government in “protecting minors from potentially harmful materials” on the Internet,<sup>20</sup> the Court found that “the CDA places an unacceptably heavy burden on protected speech, and that the defenses do not constitute the sort of ‘narrow tailoring’ that will save an otherwise patently invalid unconstitutional provision.”<sup>21</sup> The Court ruled that the scope of the legisla-

13. *Id.* at 733.

14. *Id.* at 757–58.

15. *Id.* at 758.

16. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). For a discussion of the fighting words doctrine and its application, see Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for its Interment*, 106 HARV. L. REV. 1129 (1993); Melody L. Hurdle, Recent Development, *R.A.V. v. City of St. Paul: The Continuing Confusion of the Fighting Words Doctrine*, 47 VAND. L. REV. 1143 (1994); and Michael J. Mannheimer, Note, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527 (1993).

17. Pub. L. No. 104-104, 110 Stat. 133 (1996).

18. Pub. L. No. 105-277, 112 Stat. 2681-736 (1998).

19. *Reno v. ACLU*, 521 U.S. 844, 859, 882 (1997).

20. *Id.* at 871.

21. *Id.* at 882.

tion was too broad, attempting to shield those under the age of eighteen from certain content at too great an expense to adults' access to protected speech.<sup>22</sup>

COPA was deemed unconstitutional by the District Court for the Eastern District of Pennsylvania, which issued a preliminary injunction blocking enforcement of the statute.<sup>23</sup> The Third Circuit Court of Appeals affirmed, striking down COPA on the grounds that its use of the community standards test—established by Supreme Court precedent in earlier obscenity cases<sup>24</sup>—violated the First Amendment when applied to the Internet.<sup>25</sup> The case went before the Supreme Court, which rejected the Third Circuit's reasoning, ruling that using "community standards" to determine what materials on the Internet are "harmful to minors" was not itself a violation of the First Amendment.<sup>26</sup> However, the Supreme Court also recognized that COPA might be unconstitutional for other reasons, and thus remanded to the Third Circuit to review the other free-speech issues surrounding the statute.<sup>27</sup> On remand, the Third Circuit again upheld the injunction, reasoning that COPA is neither narrowly tailored nor the least restrictive means available to achieve the government's goal of protecting children from harmful online materials, and also that it impermissibly encroaches on speech that is constitutionally protected for adults.<sup>28</sup> In October 2003, the Supreme Court again granted certiorari to the case to review this opinion by the Third Circuit.<sup>29</sup> Commentators speculate that the case may well be ruled unconstitutional.<sup>30</sup> In fact, in his concurring opinion in the case, Justice Anthony Kennedy stated that "there is a very real likelihood that the Child Online Protection Act . . . is overbroad and cannot survive."<sup>31</sup>

22. *Id.* at 874.

23. *ACLU v. Reno*, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999) (holding that for the purpose of granting a preliminary injunction, the plaintiffs established a substantial likelihood that COPA is unconstitutional).

24. *Roth v. United States*, 354 U.S. 476, 489 (1957).

25. *ACLU v. Reno*, 217 F.3d 162, 173–74 (3d. Cir. 2000).

26. *Ashcroft v. ACLU*, 535 U.S. 564, 585–86 (2002); *see also* Warren Richey, *Porn Cases Exacerbate Divide on High Court*, CHRISTIAN SCI. MONITOR, May 15, 2002, at 2.

27. *Ashcroft*, 535 U.S. at 585–86; *see also* Charles Lane, *Justices Partially Back Cyber Pornography Law*, WASH. POST, May 14, 2002, at A03.

28. *ACLU v. Ashcroft*, 322 F.3d 240, 265–67 (2003).

29. *Ashcroft v. ACLU*, 124 S. Ct. 399 (2003).

30. Linda Greenhouse, *Justices Give Reprieve to an Internet Pornography Statute*, N.Y. TIMES, May 14, 2002, at A17.

31. 535 U.S. at 591.

In June 2003, the Supreme Court ruled that still another law, the Children's Internet Protection Act of 2000<sup>32</sup> ("CIPA"), was constitutional.<sup>33</sup> The case is discussed below, but suffice to say that while the law is the best there is so far, it remains a very flawed approach.

In trying to deal with the tension between free speech and the protection of children, we run into difficulties separating protected and unprotected speech and ensuring that the protection of children will not limit adults' access to speech. Given these rulings, my approach prefers measures that attempt to restrict the *manner* in which children can access harmful material rather than measures directly restricting the content itself. I proceed by examining five cases in which the issue at hand comes to a head in order to provide grist for the mill of the examination that follows.

## II. FIVE CASES

The five cases studied here—those of Loudoun County, Virginia; Kern County, California; the Children's Internet Protection Act; restrictions on tobacco advertising; and television ratings and the V-chip—are not exhaustive. I chose them because they allow me to examine what I consider the two crucial dimensions of the issue at hand: (1) To what extent do the limitations succeed in curbing only the access of children, or are there also "spill over" effects that limit the access of adults? (2) To what extent are the measures involved mandated by the government and designed to directly control (*e.g.* ban) certain forms of access rather than enhance the ability of parents and educators to guide their charges? The reason for choosing these two dimensions will become evident as the argument unfolds.

The issues in all of these cases are multi-layered because, typically, when the access of minors is limited, the access of adults is also limited to some extent.<sup>34</sup> The Courts therefore tend to examine the issue in light of two different questions. In some cases, it is quite constitutional for the access of adults to be curbed for certain materials, such as child pornography.<sup>35</sup> The question then becomes whether or

32. Pub. L. No. 106-554, 114 Stat. 2763A-335 (2000).

33. *United States v. American Library Ass'n*, 123 S. Ct. 2297 (2003).

34. For a full discussion of this concept, see Eugene Volokh, *Speech and Spillover*, SLATE (July 19, 1996), at <http://slate.msn.com/default.aspx?id=2371>.

35. The United States Code makes it a crime not only to produce child pornography, which constitutes the sexual exploitation of minors, 18 U.S.C. § 2251 (2000), but also to distribute or possess child pornography, 18 U.S.C. § 2252 (2000). The justification for prohibiting the possession of child pornography as well as its production was laid out in *New York v. Ferber*, which



not those who put the limitations in place followed the proper procedures to determine that the material in question should be blocked. However, if the material in question cannot be constitutionally blocked from adults, the question still remains as to whether the same holds true for minors. In looking at the five cases at hand, I focus on the second question.

A. *Loudoun County, Virginia Library Case*

In July 1997, the Board of Trustees of the Loudoun County Library, in Virginia's conservative Loudoun County,<sup>36</sup> adopted a policy requiring all library computers to have blocking software, but allowing the filters to be disabled when adults used the computers, or when minors were accompanied by a parent or guardian.<sup>37</sup> The policy was revised later that fall, however, after several members voiced their concern that it was not strict enough.<sup>38</sup> The updated policy blocked access to all sexually explicit material, regardless of the patron's age, and required written permission from a parent or guardian for anyone under eighteen who wanted to use the Internet on a computer in a Loudoun County library.<sup>39</sup> Adult patrons who wished to have a specific site unblocked (not the filter itself disabled) needed to submit a written request providing one's name, the site to be unblocked, and the reasons one wanted access; the librarian would then review the requested site and manually unblock it if she deemed it appropriate under the terms of the policy.<sup>40</sup> The stated purpose of the policy was to prevent a "sexually-hostile environment" from forming due to the display of pornographic Internet sites and to exclude pornographic materials from the electronic resources available at the library, as

states that "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." 458 U.S. 747, 759 (1982).

36. See Victoria Benning, *2 Conservatives to Leave Library Board*, WASH. POST, June 13, 1996, at V1; Justin Blum, *For Black, Core Support Was the Difference*, WASH. POST, Feb. 8 1998, at V01; Peter Pae, *Abortion Rights Group Opens Office in "Conservative Country"*, WASH. POST, June 20, 1994, at B1.

37. American Civil Liberties Union, *Virginia Library Board Adopts Internet Restrictions*, <http://archive.aclu.org/news/w080597c.html> (Aug. 5, 1997).

38. American Civil Liberties Union, *Virginia County Restricts Net Access in Libraries*, <http://archive.aclu.org/news/w102497a.html> (Oct. 24, 1997).

39. *Id.*

40. *Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library*, 24 F. Supp. 2d 552, 556 (E.D. Va. 1998).

they had always been excluded from the print resources.<sup>41</sup> Whether deliberately or unwittingly, the policy clearly inhibited the access of adults by requiring that they disclose their name and preferences—in writing—before being able to access sexually explicit material.

Soon after, a grassroots group called Mainstream Loudoun County joined with several civil liberties groups to challenge the library policy in court, alleging that Loudoun County's policy, "as written and as implemented," violated the First Amendment rights of both the Internet site providers blocked by the software and Loudoun County Library patrons wishing to access the Internet by discriminating against protected speech on the basis of content.<sup>42</sup> Furthermore, the plaintiffs argued, even if the library was justified in blocking the content in question, they did not follow the correct procedures in doing so; therefore the policy constituted an unconstitutional prior restraint.<sup>43</sup>

In November 1998, the U.S. District Court for the Eastern District of Virginia declared Loudoun County's policy overly broad and unconstitutional.<sup>44</sup> The District Court found that the Loudoun County policy did involve First Amendment issues because the use of blocking software was more akin to an active decision to remove materials from the library than to a passive decision simply not to acquire them.<sup>45</sup> It also held that strict scrutiny was the appropriate standard by which any restriction of this kind of speech should be judged.<sup>46</sup> The Court then proceeded to evaluate the specific speech prohibited by the policy: obscenity, child pornography, and material deemed "harmful to juveniles" by Virginia statutes. It found that while neither obscenity nor child pornography are protected by the First Amendment, the definition of "harmful to juveniles" in the Virginia Code includes speech that the courts have held to be constitutionally protected for adults.<sup>47</sup> Having established that at least some of the content blocked by the Library was constitutionally protected, the Court then applied a three-prong test to determine whether the limitations imposed were constitutional. The Court asked: (1) whether the inter-

41. Loudoun County Public Library, *Policy on Internet Sexual Harassment*, <http://www.loudoun.net/mainstream/Library/summintpol.htm> (Oct. 20, 1997).

42. *Mainsteam Loudoun*, 24 F. Supp. 2d at 557.

43. *Id.*

44. *Id.* at 570.

45. *Id.* at 561.

46. *Id.* at 562.

47. *Id.* at 564.

ests asserted by the state, in this case “minimizing access to illegal pornography” and “avoidance of creation of a sexually hostile environment,” are compelling; (2) “whether the limitation[s] [imposed by the policy are] necessary to further those interests”; and (3) whether the policy is “narrowly tailored to achieve those interests.”<sup>48</sup>

The Court found that though the policy did not claim to further a compelling interest, it failed to meet the second and third parts of the test.<sup>49</sup> Loudoun County did not demonstrate to the Court’s satisfaction that without the policy a sexually hostile environment might exist in the libraries, individuals would access obscene material or child pornography, or minors under the age of eighteen would view materials that are harmful to them.<sup>50</sup> Nor was the Court persuaded that the means the County decided upon were narrowly tailored to meet the compelling government interests.<sup>51</sup> The judges found that there were less restrictive means available to shield children from harmful material, such as privacy screens, casual monitoring of Internet activity by librarians, or installing filtering software on only some of the computers.<sup>52</sup>

They also ruled that the policy was “over inclusive because, on its face, it limits the access of all patrons, adult and juvenile, to material deemed fit for juveniles.”<sup>53</sup> Quoting *Reno v. ACLU*, the Court noted that, in this instance, the spillover onto the ability of adults to receive protected speech and material was too great, for “[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”<sup>54</sup>

In the case of Loudoun County, the policy promulgated by the Library Board empowered librarians to decide what speech to censor without providing “sufficient standards and adequate procedural safeguards.”<sup>55</sup> In other words, librarians were given full discretion to

48. *Id.* at 564–66.

49. *Id.* at 567–68.

50. *Id.* at 565 (requiring that harms be “real, not merely conjectural” (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) and *Johnson v. Los Angeles Fire Dep’t*, 865 F. Supp. 1430, 1439 (C.D. Cal. 1994))).

51. *Id.*

52. *Id.* at 568.

53. *Id.* at 567.

54. *Id.* at 565 (quoting *Reno v. ACLU*, 521 U.S. 844, 885 (1997)).

55. *Id.* at 568–69.

determine which sites to unblock, with no established guidelines of any sort to help define what constitutes material that is harmful to minors, and no provisions for further review (*i.e.*, by the Library Board or, perhaps more appropriately, by attorneys familiar with these legal standards).

The Court was particularly concerned with the lack of transparency in the blocking criteria used by Log-On Data Corporation, the makers of the X-Stop filtering software. Manufacturers like Log-On usually consider their blocking criteria to be proprietary information, and therefore protected trade secrets, in spite of the fact that this “en-trust[s] all preliminary blocking decisions—and, by default, the over-whelming majority of final decision[s]—to a private vendor . . . that . . . does not base its blocking decisions on any legal definition of obscenity or even on the parameters of defendant’s Policy.”<sup>56</sup>

### B. *Kern County, California Library Case*

In 1996, the Kern County Board of Supervisors, in California, passed a resolution to “prevent disruption of the educational purpose and atmosphere of the public libraries of Kern County through the display of sexually explicit material and to restrict access by minors over the Internet at County public libraries to harmful material as defined in the California Penal Code.”<sup>57</sup> Following the resolution, Kern County signed a contract with the N2H2 software company to supply BESS Internet filtering software for over fifty computers in the County’s libraries. The Director of Libraries requested that N2H2 customize the blocking software so that it block only material defined as harmful to minors by the California Penal Code, in accordance with the clause in the resolution stating the intention to filter this type of content “to the maximum extent possible, consistent with constitutional principles and available technology.”<sup>58</sup>

In the fall of 1996, N2H2 president Peter H. Nickerson informed Kern County that his company would be unable to customize the BESS filtering software to block out material based on the definitions of the California Penal Code, partly because “it seems that this is . . . a legal matter and we do not have the legal expertise in house to make that judgment” as to which websites did or did not meet the

56. *Id.* at 569.

57. Kern County Board of Supervisors, *Resolution 96-341*, [http://www.kerncountylibrary.org/using\\_policy\\_internet\\_resolution.html](http://www.kerncountylibrary.org/using_policy_internet_resolution.html) (July 30, 1996).

58. *Id.*

legal criteria for “harmful matter.”<sup>59</sup> Despite this clearly stated inability to tailor the software to block only illegal material, Kern County installed BESS filtering software on all computers in all libraries with access to the Internet.<sup>60</sup>

Concerned with the inability of “BESS or any other software program to make distinctions between protected and unprotected speech” and the use of filtering software to prevent some library patrons from being offended by material accessed by other patrons, the ACLU claimed that the County knowingly denied access to “many sites on the Internet that are valuable and constitutionally protected both for adults and for minors.”<sup>61</sup> The County counsel repeatedly made assurances that the Internet policy did not violate the First Amendment, while the ACLU argued that the technical limitations of the filtering software created the danger of censorship. Noting the American Library Association’s opposition to blocking software in libraries<sup>62</sup> and recent policy decisions in San Jose and Santa Clara refusing to install filters on library computers, the ACLU’s Ann Beeson wrote a letter demanding that Kern County remove the Internet filters on library computers within ten days or face a legal challenge in federal court.<sup>63</sup> Ms. Beeson added a threat: the county would be liable for the ACLU’s substantial attorneys’ fees if the ACLU prevailed in its claims, and removing the filters was the only way the County could avoid costly litigation. The ACLU’s demands were not qualified in any way. Rather than calling for the removal of filters from certain computers that would be accessible only to adults or for differing levels of filtering depending upon the age of the patron, the ACLU demanded that filtering software be removed from all computers.<sup>64</sup>

59. Letter from Ann Beeson, National Legal Dept., ACLU, to B.C. Barmann, Office of the County Counsel, County of Kern, <http://archive.aclu.org/issues/cyber/kerncodemand.html> (Jan. 21, 1998).

60. *Id.*

61. *Id.*

62. The ALA has released a statement on the use of filtering software:

The use in libraries of software filters to block constitutionally protected speech is inconsistent with the United States Constitution and federal law and may lead to legal exposure for the library and its governing authorities. The American Library Association affirms that the use of filtering software by libraries to block access to constitutionally protected speech violates the *Library Bill of Rights*.

American Library Association Intellectual Freedom Committee, *Statement on Library Use of Filtering Software*, [http://www.ala.org/alaorg/oif/filt\\_stm.html](http://www.ala.org/alaorg/oif/filt_stm.html) (July 1, 1997).

63. Beeson, *supra* note 59.

64. *Id.*

Although the County could have refused to comply with the ACLU's demands, it would then have faced a lengthy and expensive legal battle. Under these pressures, the Kern County Board of Supervisors decided to "resolv[e] any constitutional concerns or any intention of initiating litigation,"<sup>65</sup> and in January of 1998 it directed all Kern County libraries with only one terminal with Internet access to disable the filters and only enable them if requested to do so by a patron, noting that the County intended to install a second computer in these branches within two weeks. Branches with two or more online computers were ordered to disable filters on half of their terminals. But all patrons, both children and adults, had the choice whether or not to use the filtered or unfiltered computer.<sup>66</sup> The ACLU hailed this as a victory that would "allow *all* adult and minor patrons to decide for themselves whether to access the Internet with or without a filter."<sup>67</sup>

### C. *Children's Internet Protection Act*

In 1996, several programs were established to make public funds available to schools and libraries to allow them to purchase computers and provide Internet access. The E-rate program, which was established by the Telecommunications Act of 1996 and administered by the Federal Communications Commission, enables eligible schools and libraries to receive discounts on telecommunications and Internet access services. The Library Services and Technology Act ("LSTA") provides grants, administered at the state level, for the purchase of computers used to access the Internet, or to pay for direct costs associated with accessing the Internet.<sup>68</sup>

In 1999, Senators John McCain (R-AZ) and Fritz Hollings (D-SC) sponsored the Children's Internet Protection Act ("CIPA"),<sup>69</sup> which was passed by Congress as part of an omnibus bill and signed by President Clinton in December 2000.<sup>70</sup> It requires schools and li-

65. Letter from Bernard C. Barmann, Sr., Kern County Counsel, to Ann Beeson, ACLU Foundation, <http://archive.aclu.org/news/n012898d.html> (Jan. 27, 1998).

66. Memorandum from Marje Rump to all Kern County Library Branches, *Internet Public Access*, <http://archive.aclu.org/news/n012898d.html> (Jan. 27, 1998).

67. Letter from Ann Beeson, ACLU National Legal Department, to Bernard C. Barmann, Sr., Kern County Counsel, <http://archive.aclu.org/news/n012898d.html> (Jan. 28, 1998) (emphasis added).

68. See 20 U.S.C. § 9141 (2000).

69. S.97, 106th Cong. (1999).

70. Pub. L. No. 106-554, 114 Stat. 2763A-335 (2000); see also Press Release, Senator John McCain, Congress Passes Internet Filtering For Schools, Libraries,

braries that receive federal discounts on Internet access or public funding for computers to install “technology protection measure[s]” (*i.e.* filtering software) to block out material deemed to be “obscene,” “child pornography,” or “harmful to minors.”<sup>71</sup>

CIPA defines minors as individuals under the age of seventeen and the phrase “harmful to minors” as

any picture, image, graphic image file, or other visual depiction that (A) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion; (B) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.<sup>72</sup>

CIPA’s scope is rather modest. It does not impose a control on schools and libraries in general; it merely sets conditions for those schools and libraries that seek to use federal funds to connect to the Internet, which includes some 4,500 libraries and a large number of public schools across the United States.<sup>73</sup> To obtain these funds, a school or library must prepare a request that includes numerous details, and CIPA merely adds the one additional requirement that they commit to installing filters. Those schools and libraries choosing not to comply with CIPA, as well as those not demonstrating a good faith effort at compliance within a year and a half of the enactment of the law, will no longer receive the said discounts or subsidies.<sup>74</sup>

The ACLU and ALA joined to bring a legal challenge against CIPA, which was heard by a special three-judge panel in Philadelphia in March of 2002.<sup>75</sup> The ACLU and ALA contended that available filtering technology is not sophisticated enough to block only unprotected material and that even if it were, requiring it to be installed on all computers linked to the Internet without first going through the

[http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.Viewpressrelease&Content\\_id=872](http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.Viewpressrelease&Content_id=872) (Dec. 15, 2000).

71. CIPA § 1703(b)(1), 114 Stat. at 2763A-336.

72. *Id.* at § 1703(b)(2).

73. Peg Brickley, *Internet Decency Standards Pose Ethical and Financial Problems for Many Companies, Schools and Libraries*, CORP. LEGAL TIMES, Oct. 2001, at 80.

74. CIPA § 1712 (f)(1), 114 Stat. at 2763A-340.

75. *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002); *see also* John Schwartz, *Law Limiting Internet in Libraries Challenged*, N.Y. TIMES, Mar. 25, 2002, at A18. Other plaintiffs include the Multnomah (Ore.) County Public Library system, librarians, patrons, website providers and Jeffrey L. Pollock, a Republican candidate for Congress who was a proponent of mandatory filtering software until he learned that his campaign website was blocked by a popular filtering program.

proper procedures for determining what materials can be lawfully blocked constitutes “prior restraint.”<sup>76</sup> According to the plaintiffs’ pretrial brief, CIPA was “lacking both narrow and reasonably defined standards, and without adequate (or, in fact, any) procedural safeguards.”<sup>77</sup> They further alleged that the blocking programs are both over- and under-inclusive: they block constitutionally protected, but perhaps controversial, speech or websites containing arbitrary keywords<sup>78</sup> while allowing through vast quantities of the materials they claim to block.<sup>79</sup> They argued that CIPA also passed the buck on censorship to private companies that design and sell filtering programs. Decisions about which keywords to use and which sites to block were made by third-party, non-government entities, a fact which does not, they contended, exempt the restrictions of expression from constitutional scrutiny.<sup>80</sup>

Furthermore, the plaintiffs contended, CIPA’s provisions for disabling the filtering software for adults allowed for, but did not require, librarians to approve exceptions for “bona fide” or other lawful research and contained no definition of these terms, leaving the decision to unblock software at the discretion of the librarian or administrator.<sup>81</sup> The ALA argued that, *de facto* if not *de jure*, this policy restricted the options of all patrons, leaving them with the choice of a computer with blocking software or no computer at all. In addition, the ALA argued, CIPA offered no such research exceptions to minors wishing to access constitutionally protected but technologically blocked material and speech in libraries that received E-rate funds.<sup>82</sup>

76. Plaintiffs’ Joint Pretrial Brief at 8, *Am. Library Ass’n v. United States*, 201 F.Supp. 2d 401 (E.D. Pa. 2002) (Nos. 01-CV-1303, 01-CV-1322), available at [http://archive.aclu.org/court/pretrial\\_brief.pdf](http://archive.aclu.org/court/pretrial_brief.pdf) [hereinafter ALA/Multnomah County Joint Pretrial Brief].

77. *Id.* at 11.

78. *Id.* at 9–10. For example, filters have blocked websites such as [www.the-strippers.com](http://www.the-strippers.com) (wood varnish removal service), [www.muchlove.org](http://www.muchlove.org) (a non-profit organization dedicated to rescuing animals), and that of House Majority Whip Richard “Dick” Armey. See *id.*; Amy Keller, *Dick’s Quandary?*, <http://politicsonline.com/coverage/rollcall2/> (Oct. 5, 2000).

79. ALA/Multnomah County Joint Pretrial Brief, *supra* note 76, at 8–9.

80. *Id.* at 9.

81. CIPA §§ 3601(a)(1), 1712(f)(1), 114 Stat. at 2763A-337 to 2763A-340 (codified at 20 U.S.C. § 9134 (2000) and 47 U.S.C. § 254(h) (2000)).

82. ALA/Multnomah County Joint Pretrial Brief, *supra* note 76, at 10. Although CIPA allows a research exemption for all patrons at schools and libraries receiving Museum and Library Services Act funds and Secondary Education Act funds, 20 U.S.C. § 9134(f)(3) (2000), it allows only exemptions for adults in libraries receiving E-rate funds, 47 U.S.C. § 254(h)(6)(D) (2000).



Finally, the plaintiffs pointed out that CIPA mandated that all patrons—both adults and minors—of the public libraries receiving discounts on Internet access view only material suitable for children.<sup>83</sup>

The government's simple answer to the problems civil libertarians had with CIPA was: if you don't like it, don't apply. Therefore the government could tell any library that disagreed with CIPA conditions that it was free to decline acceptance of federal subsidies. It is not discriminatory to ask that "federal money . . . [not] be used to give kids access to dirty peep shows," argued Janet LaRue, senior director of legal studies at the Family Research Council.<sup>84</sup> Donna Rice Hughes, a member of the Child Online Protection Commission and author of *Kids Online: Protecting Your Children In Cyberspace*,<sup>85</sup> agreed, stating, "If they don't want to use protection tools, fine. Then they don't get federal money for Internet access."<sup>86</sup> Indeed, installation of the filters was not wholly mandatory or compulsory; each library system could make its decision on an individual basis. Recipients of putative federal subsidies do not have the right to demand a subsidy, much less the right to demand that a subsidy be granted unconditionally.

The ACLU and ALA contended that the government's arguments ran contrary to the E-rate program's mission to "bridge the 'digital divide' between those people with easy access to the Internet and those without."<sup>87</sup> Libraries in areas with wealthier and more liberal residents willing to forgo federal subsidies in favor of First Amendment principles could do so and still find the funds to remain open. Libraries in poorer areas, however, would be all but compelled to install filters or face losing what, for some, constitutes a majority of their budget. Judith Krug, director of intellectual freedom at the ALA, argued that this makes CIPA more than a poorly worded policy—it makes it discriminatory.<sup>88</sup>

Ultimately, many supporters of CIPA see the court case not as a dispute about legal precedent, but as a fundamental disagreement

83. See Robert O'Harrow Jr., *Curbs on Web Access Face Attack: Content Filters for Children Also Restrict Adults, Groups Say*, WASH. POST, Mar. 20, 2001, at A4.

84. *Id.*

85. DONNA RICE HUGHES, *KIDS ONLINE: PROTECTING YOUR CHILDREN IN CYBERSPACE* (1998).

86. John Schwartz, *Internet Filters Used to Shield Minors Censor Speech, Critics Say*, N.Y. TIMES, Mar. 19, 2001, at A15.

87. Brickley, *supra* note 73.

88. Bob Keaveney, *Not Even Dick Arney Can Get Through Some Internet Filters*, DAILY REC., Mar. 9, 2002, at 13A.

about society's role in protecting children. They hold that civil libertarians err too much on the side of protecting spillover into the First Amendment rights of adults at a heavy cost to children and allow for ideology to reach extreme levels. In an e-mail debate with the ALA's Judith Krug, Mike Millen, an attorney affiliated with the Pacific Justice Institute, opined that

[f]or reasons that are mystifying to most of America, these anti-filtering groups will not come out and say, 'Yes, hard-core pornography in the hands of young children is harmful, wrong and ought to be stopped.' . . . While the American Library Association may not endorse children viewing obscene materials, it also refuses to condemn or do anything about it.<sup>89</sup>

Another CIPA co-sponsor, Rep. Ernest Istook (R-OK), concurs, writing in a letter to Congressional colleagues, "They [civil libertarians] treat it as 'someone else's problem' and falsely label it 'censorship' if they're not permitted to expose our children to the very worst things on the Internet, *using federal tax dollars to do so.*"<sup>90</sup>

Lawmakers and advocates argue that it is irresponsible not to attempt to protect children from harmful materials that are available at the click of a mouse in a local library, and they see no realistic solutions being offered by an opposition that is focused only on First Amendment rights. Mr. Millen sums up their position as follows:

I think our philosophical difference is again playing itself out here. If you believe that numerous children are being harmed daily by exposure to hard-core porn on the Internet, the trade-off of a child occasionally losing access to a blocked site (or having to ask for parental help to have it unblocked) is well worth having. However, if you believe that library-accessible porn doesn't hurt kids, then of course the balance would tip in favor of unfettered access. Most parents believe the former.<sup>91</sup>

In May 2002, the three-judge panel ruled against CIPA, and the Supreme Court heard arguments on the case in spring of 2003. The judges in Philadelphia justified their ruling in a 195-page opinion that focused on content for all, but not on the question of the extent of minors' First Amendment rights—a bias which is a clear result of

89. *Should Libraries Pull the Plug on Web Site Obscenity? Kids, Porn and Library Censors*, S. F. CHRON., Aug. 5, 2001, at D4, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/08/05/IN195749.DTL> (debate between Judith Krug of the ALA and Mike Millen of the Pacific Justice Institute).

90. Ernest J. Istook, Jr., *Protect Our Children from Internet Obscenity!*, <http://www.house.gov/istook/CIPADearColleague.pdf> (last visited Oct. 22, 2003) (emphasis in original).

91. *Should Libraries Pull the Plug on Web Site Obscenity?*, *supra* note 89.

CIPA seeking filtering for all patrons rather than only for minors.<sup>92</sup> The ruling barely mentions minors, and the legal examination deals merely with First Amendment rights in general. Even when the Court discusses group-specific blocks, it briefly covers blocks on all kinds of content—racially offensive material, material that offends the employees of the library, or material that the librarians consider inappropriate (such as dating sites). The First Amendment rights of children were not the focus, although the protection of children is the purpose of the Children’s Internet Protection Act.

The Court was impressed by the list of wrongly blocked sites provided by the plaintiffs, which included numerous websites for churches, health-related sites on topics ranging from allergies to cancer, and the websites of several political figures. Hence, the Court stated that filtering programs are

blunt instruments that not only ‘underblock,’ *i.e.*, fail to block access to substantial amounts of content the library boards wish to exclude, but also, central to this litigation, ‘overblock,’ *i.e.*, block access to large quantities of material that library boards do not wish to exclude and that is constitutionally protected.<sup>93</sup>

Proponents of the filters argued that they are getting better all the time and that they are more than 99% accurate.<sup>94</sup>

The Court recognized but dismissed the argument that when one goes to a library one does not find all materials that are “protected” speech either—such as *Hustler* magazine or XXX-rated video tapes—on the grounds that providing Internet access is more akin to opening up a public forum than to the process by which the library actively selects books to purchase. Once such a public forum is provided, the library cannot selectively exclude certain speech on the basis of its content without subjecting the exclusion to strict scrutiny.<sup>95</sup> I note that the court also disregarded another issue: were a child to check out a pornographic library book, he would need to ask a librarian to retrieve it and would leave a record when he checks it out, thus creating a kind of barrier that does not exist when accessing information on computers.

92. *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002).

93. *Id.* at 406.

94. David Burt, spokesman for the N2H2, Inc. software filtering company, claims that his company’s filters have a “99-plus percent accuracy rate.” John Schwartz, *Court Blocks Law That Limits Access to Web in Library*, N.Y. TIMES, June 1, 2002, at A1.

95. *Am. Library Ass’n*, 201 F. Supp. 2d at 409.

The U.S. Department of Justice decided to appeal the court ruling and prevailed in the Supreme Court. In June 2003, the Court ruled 6–3 to overturn the lower court decision, thus allowing CIPA to stand. The statute views only pornography as harmful to children, ignoring gratuitous violence. The Court disregarded the fact that CIPA is unnecessarily burdensome on adults; for adults to have to ask librarians to unlock filters entails a considerable violation of their privacy, and it is sure to have a chilling effect on their speech rights.<sup>96</sup>

#### D. *Restrictions on Tobacco Advertising*

It is not only violent and pornographic material from which parents, activists, and legislators have sought to shield children; the advertising of harmful products to minors has also been subject to regulation and subsequent debate and has raised First Amendment issues. (A wit once suggested that tobacco was pornographic because it has no redeeming social merit.) The marketing of tobacco products, in particular, has come under intense scrutiny, as new information about “Big Tobacco’s” media campaigns aimed at children has come to light. RJ Reynolds Vice President of Marketing C.A. Tucker made the tobacco industry’s desire to reach this audience abundantly clear in a presentation to the RJR Board of Directors in 1974, stating, “This young adult market, the 14–24 group . . . represent(s) tomorrow’s cigarette business. As this 14–24 age group matures, they will account for a key share of the total cigarette volume for at least the next 25 years.”<sup>97</sup> A document from Phillip Morris was uncovered providing information about how the company placed products in child-oriented entertainment like *Who Framed Roger Rabbit?* and *The Muppet Movie*.<sup>98</sup>

Given that 80 percent of adult smokers started smoking before they were eighteen,<sup>99</sup> addicting youngsters is of great interest for the industry in a period when adults have curtailed their smoking habits. Moreover, ads are a significant factor in promoting smoking among

96. The reasoning of the Justices’ opinions needs to be further explored on another occasion.

97. National Association of Attorneys General, *Tobacco Settlement Agreement at a Glance*, [http://www.naag.org/issues/tobacco/msa\\_at\\_a\\_glance.php](http://www.naag.org/issues/tobacco/msa_at_a_glance.php) (Nov. 6, 1998) [hereinafter NAAG Tobacco Settlement Summary].

98. *Id.*

99. Centers for Disease Control and Prevention, *Tobacco Use Among Middle and High School Students—United States, 1999*, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4903a1.htm> (Jan. 28, 2000).

minors; it is not peer pressure alone that pushes minors to smoke, and the content of the peer pressure itself is influenced by ads.<sup>100</sup> Statistics indicate a strong correlation between certain tobacco advertisements and the numbers of young people who smoke. A study by the FDA found not only that “cigarette and smokeless tobacco use begins almost exclusively in childhood and adolescence,”<sup>101</sup> but also that there is “compelling evidence that promotional campaigns can be extremely effective in attracting young people to tobacco products.”<sup>102</sup> Reports by the Surgeon General and the Institute of Medicine stated that “there is sufficient evidence to conclude that advertising and labeling play a significant and important contributory role in a young person’s decision to use cigarettes or smokeless tobacco products,”<sup>103</sup> noting that kids smoke a smaller number of brands than adults and that “those choices directly track the most heavily advertised brands, unlike adult choices, which are more dispersed and related to pricing.”<sup>104</sup> A 1991 study published in the *Journal of the American Medical Association* found that “30% of 3-year-olds and 91% of 6-year-olds could identify Joe Camel as a symbol for smoking.”<sup>105</sup> Another study revealed that “[t]he largest increase in adolescent smoking initiation was in 1988, the year that the Joe Camel cartoon character was introduced nationally.”<sup>106</sup>

In 1997, the Federal Trade Commission filed a complaint against RJ Reynolds Tobacco Company, charging that the company’s deliberate attempts to target younger smokers in their advertising constituted a violation of the Federal Trade Commission Act and calling on the company to “cease and desist from advertising to children”

100. For a discussion of the importance of the content of peer pressure, see AMITAI ETZIONI, *A COMPARATIVE ANALYSIS OF COMPLEX ORGANIZATIONS* 279–302 (revised ed. 1975).

101. Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44619, 45239 (Aug. 28, 1996) (capitalization omitted) [hereinafter Nicotine in Cigarettes].

102. *Id.* at 45247.

103. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 558 (2001) (quoting Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41314, 41332 (Aug. 11, 1995)).

104. *Id.*

105. Nicotine in Cigarettes, 61 Fed. Reg. at 45246 (citing Fischer, Schwartz & Richards, *Brand Logo Recognition by Children Aged 3 to 6 Years, Mickey Mouse and Old Joe the Camel*, 266 J. AM. MED. ASS’N 3145 (1991)).

106. National Center For Chronic Disease Prevention and Health Promotion, *Trends in Smoking Initiation Among Adolescents and Young Adults*, [http://www.cdc.gov/tobacco/research\\_data/youth/ythstart.htm](http://www.cdc.gov/tobacco/research_data/youth/ythstart.htm) (July 21, 1995).

through the Joe Camel character or others like it.<sup>107</sup> The FTC had considered banning Joe Camel as early as 1993, but free-speech concerns raised by civil libertarian groups led to the matter being dropped.<sup>108</sup> However, in 1994, four states sued the tobacco companies for reimbursement of healthcare expenses resulting from tobacco use. These states were gradually joined by others, until forty-one states had filed lawsuits against the tobacco companies. In 1997, a group of state Attorneys General drafted a settlement proposal that they hoped would settle all the suits. Soon after, Senator McCain drafted legislation attempting to make the proposed settlement law. In addition to requiring the companies to make payments to the states, this bill would have placed limitations on cigarette advertising.

As class-action lawsuits, litigation by states looking to recoup lost healthcare costs from smoking-related illnesses, and Congressional legislation to increase the price of tobacco products through taxes and restrict marketing practices all loomed in 1997, the tobacco industry sought to broker a deal with state governments to stem the oncoming tide.<sup>109</sup> The terms of the 1998 settlement (after the initial 1997 proposal fell apart) specified that Big Tobacco pay states in excess of \$240 billion over twenty-five years, embark on a \$1.7 billion campaign to study youth smoking habits and fund anti-smoking advertising, and accept limitations on advertising practices that appeal to children. Among the tobacco industry's self-imposed restrictions, according to the 1998 settlement, are a complete ban on the use of cartoon characters in the advertising, promotion, packaging, or labeling of tobacco products; a ban on tobacco industry brand name sponsorship of events that have a substantial youth audience or of team sports (*e.g.* basketball, baseball, and football); and substantial restrictions on outdoor advertising, with the substitution of existing product advertisements with anti-smoking campaign material (on billboards and other displays).<sup>110</sup>

Civil libertarians came out against the terms of the settlement, decrying the efforts to eliminate the marketing of tobacco products to

107. Complaint at 5, *In the Matter of R.J. Reynolds Tobacco Company* (Federal Trade Comm'n Docket No. 9285), available at <http://www.ftc.gov/os/1997/05/d9285cmp.htm> (May 28, 1997).

108. Paul Farhi, *Push to Ban Joe Camel May Run Out of Breath*, WASH. POST, Dec. 4, 1993, at C1.

109. *Justice Dept. Suing Tobacco Firms*, USA TODAY, Sept. 22, 1999, at <http://www.usatoday.com/news/smoke/smoke287.htm>.

110. NAAG Tobacco Settlement Summary, *supra* note 97.

youth as a violation of freedom of speech. The ACLU has stated that “[w]e [should] allow consumers to make decisions for themselves and stop government from deciding for us what speech we should be free to hear about legal products.”<sup>111</sup> They also claimed that restrictions on advertising to minors “effectively suppresses a large amount of speech that adults have a constitutional right to receive.”<sup>112</sup> Robert Levy of the Cato Institute went even farther, calling the restrictions on marketing contained in the settlement “ridiculous” and “draconian.” Levy testified before Congress that “there is no evidence” establishing a link between advertising and the decision of minors to begin smoking.<sup>113</sup>

### E. V-Chips and Labeling

Several measures have been introduced—either by law or by various industries under government or public pressure—to help parents and educators protect children from violent and pornographic materials. In the media, these include the ratings and labeling systems adopted by the movie, television, and music industries. The Motion Picture Association of America appoints a ratings board to set ratings (PG-13, R, etc.) for movies, and the National Association of Theater Owners supports these ratings by asking theaters to bar admittance of those under the recommended age limit.<sup>114</sup> In 1990, the Recording Industry Association of America introduced a uniform labeling system to inform parents if an album contains sexually explicit lyrics or foul language. Some stores voluntarily refrain from selling music with such labels to minors.<sup>115</sup>

111. American Civil Liberties Union, *Paternalism and the Harkin-Bradley Bill: Proposal on Tobacco Advertising Would Violate the First Amendment*, <http://archive.aclu.org/news/n032195.html> (Mar. 21, 1998).

112. American Civil Liberties Union, *Testimony of the American Civil Liberties Union for the Senate Commerce, Science and Transportation Committee Tobacco Hearing on Advertising, Marketing and Labeling*, <http://archive.aclu.org/congress/t030398a.html> (Mar. 3, 1998) [hereinafter ACLU Testimony].

113. Statement of Robert A. Levy, Senior Fellow in Constitutional Studies, Cato Institute, before the Committee on the Judiciary, United States Senate, <http://www.cato.org/testimony/ct-bi071697.html> (July 16, 1997).

114. Classification and Ratings Administration, *Questions & Answers: Everything You Always Wanted to Know About the Movie Rating System*, <http://www.filmratings.com/questions.htm> (last visited Oct. 22, 2003) [hereinafter CARA Q&A].

115. American Civil Liberties Union, *Popular Music Under Siege*, <http://archive.aclu.org/library/pbr3.html> (1996).

Though the ratings system for movies has been in effect since the 1960s,<sup>116</sup> television ratings did not exist until recently. The Telecommunication Act of 1996 set requirements that all new television monitors of a certain size be built with V-chip technology. V-chips allow a user to block all programming that carries a certain rating. The law also gave the FCC the power to set guidelines for rating television programs and to require broadcasters to transmit these ratings in such a way that individuals would be able to block programs with a certain rating using V-chip technology.<sup>117</sup> Since the law gave the television industry a year to enact a voluntary ratings system before the FCC would begin to set the ratings itself,<sup>118</sup> the National Association of Broadcasters, the National Cable Television Association, and the Motion Picture Association of America jointly created the *TV Parental Guidelines*, a voluntary rating system. Following criticism by advocacy groups, the associations revised the ratings system, which the FCC found to be acceptable.<sup>119</sup>

Though the rating system was voluntarily adopted by the industry, and blocking could only be activated by individuals who chose to use their V-chip and were free to determine what setting to use, civil libertarians were still not satisfied. The ACLU initially protested the Telecommunications Act's provision that could have allowed the FCC to set guidelines because government-set labels on TV programs would force "private individuals and companies to say things about their creative offerings that they have no wish to say, and even puts words into their mouths." They feared that FCC-prescribed ratings would "have the unconstitutional purpose and effect of restricting expression because it is unpopular or controversial."<sup>120</sup> When the industry released its voluntary ratings system, the ACLU called it "government-coerced censorship" and said it was "another example of the government's heavy-handed effort to dictate the use of our remote controls." They also objected to voluntary labeling of music albums

116. CARA Q&A, *supra* note 114.

117. Telecommunications Act of 1996 § 551(b)(1), Pub. L. No. 104-104, 110 Stat. 56, 140 (codified as amended at 47 U.S.C. § 303(w) (2000)).

118. *Id.* at § 551 (e)(1)(A), 110 Stat. at 142.

119. Federal Communications Commission, *Commission Finds Industry Video Programming Rating System Acceptable; Adopts Technical Requirements to Enable Blocking of Video Programming (The "V-Chip")*, [http://ftp.fcc.gov/Bureaus/Cable/News\\_Releases/1998/nrcb8003.html](http://ftp.fcc.gov/Bureaus/Cable/News_Releases/1998/nrcb8003.html) (Mar. 12, 1998).

120. American Civil Liberties Union, *Reply Comments In the Matter of Industry Proposal for Rating Video Programming*, <http://archive.aclu.org/congress/l050897a.html> (May 8, 1997) [hereinafter ACLU Comments on Ratings].



on similar grounds, asserting that “even ‘voluntary’ labeling is not harmless” and arguing that labeling provides no help to parents.<sup>121</sup>

The ACLU also opposed the V-chip<sup>122</sup> as “a heavy-handed attempt by federal bureaucrats to control what is aired on television”<sup>123</sup> and worried that it would censor such important works as *Schindler’s List*, *Roots*, and *Gone With the Wind* because they contain violence, and would “empower bureaucrats and television executives to make decisions for parents.”<sup>124</sup> Marjorie Heins, formerly with the ACLU and now with the Free Expression Policy Project, claimed that there is no evidence “that explicit sex information and even pornography . . . by themselves cause psychological harm to *minors of any age*.”<sup>125</sup> The ACLU also argued that the V-chip would be an “electronic babysitter” that robs parents of their ability to make choices for their children and to discuss programming with them.<sup>126</sup> Similarly, Rhoda Rabkin, arguing against government enforcement of age-graded ratings systems, contends that “parents know better than anyone else the level of maturity of their children and are therefore best equipped to judge the appropriateness of books, television shows, music, movies, and games.”<sup>127</sup>

Civil libertarians have even criticized measures in which the government has no involvement whatsoever, such as the existence of commercial software programs like Cybersitter and Cyber Patrol that allow parents to block out harmful content on the Internet. Though the ACLU admits that it prefers such programs to ratings systems or

121. American Civil Liberties Union, *Revised TV Ratings System is Product Of Government-Coerced Censorship, ACLU Charges*, <http://archive.aclu.org/news/n071097a.html> (July 10, 1997); *Popular Music Under Siege*, *supra* note 115.

122. Aside from the reasons discussed in the text, the ACLU also opposed V-chips as forms of government censorship. Though the government requires that the V-chip be built into televisions, it is voluntarily activated and used.

123. American Civil Liberties Union, *FCC Gives Final Approval To V-Chip Technology*, <http://archive.aclu.org/news/n031298a.html> (Mar. 12, 1998).

124. American Civil Liberties Union, *ACLU Expresses Concerns on TV Rating Scheme; Says “Voluntary” System is Government-Backed Censorship*, <http://archive.aclu.org/news/n022996b.html> (Feb. 29, 1996).

125. Marjorie Heins, *Screening Out Sex: Kids, Computers, and the New Censors*, AM. PROSPECT, July/Aug. 1998, at 38, 41 (emphasis added); *see also* Marjorie Heins, *Rejuvenating Free Expression: An Argument for Minors’ First Amendment Rights*, DISSENT, Summer 1999, at 43.

126. Paul Farhi, *FCC Set to Back V-Chip*, WASH. POST, Mar. 6, 1998, at G3.

127. Rhoda Rabkin, *Guarding Children: No Need for Government Censorship*, CURRENT, May 2002, at 16, 19.

statutes restricting speech, it says they “present troubling free speech concerns.”<sup>128</sup>

### III. LESSONS: FIRST APPROXIMATION

In the first three cases discussed above, neither the courts nor civil libertarians have focused directly on a key question that policy-makers (and the society at large) face, namely the subject of this examination: how to protect children from harmful cultural products.

In the Loudoun County, Kern County, and CIPA cases, this question was overshadowed by concerns over the extent to which the measures violated the First Amendment rights of *adults*. Hence, the relevant lessons must be drawn from secondary considerations. The Loudoun case, in which the Board of Trustees sought to ban access to pornography (and not just child pornography or obscenity, which are deemed unprotected by the Constitution) for everyone, not only for children, reflects—whether deliberately or inadvertently—a socially conservative position. In recent decades, the courts have tended to overthrow such restrictions.<sup>129</sup>

The Board of Trustees in Loudoun County retested, in effect, some of the issues raised by the CDA when it required that filters be installed on all computers and demanded gross violations of privacy for adult patrons who wished to access materials screened out by the filters (*e.g.*, an adult wishing to read about anal intercourse and HIV would have to fill out a form giving his name, address, and the topic he wished to explore, then submit it to a librarian). If this policy would not have a chilling effect on adult access to speech, it is hard to imagine what would. Moreover, under the Loudoun County policy, the librarians—who are, given that we are dealing with public libraries, effectively government agents—would be free to determine whether or not such a request would be granted, without having to be accountable for the criteria used or subject to challenge. No wonder the question of children’s rights was barely broached.

In Kern Country, the Library Board initially formulated a similar policy. Although it tried to limit the extent to which protected speech was blocked by seeking filters specially designed to screen out only unprotected speech and speech considered harmful to minors under

128. American Civil Liberties Union, *Fahrenheit 451.2: Is Cyberspace Burning?*, <http://archive.aclu.org/issues/cyber/burning.html> (Aug. 7, 1997) [hereinafter *Fahrenheit 451.2*].

129. See, *e.g.*, *Reno v. ACLU*, 521 U.S. 844, 882 (1997); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999); *Am. Library Ass’n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997).

California law, it did not provide separate computers for adults and children, but, as in Loudoun County, installed filtering software on all computers. The main issue was again whether the curbs are constitutional for anyone. When the County was challenged, it in effect swung to the opposite extreme, removing filters from half the computers and allowing all patrons—minors included—to choose whether to use a filtered computer or an unfiltered one, rather than attempting to distinguish between the First Amendment rights of adults and minors.

CIPA similarly fails to draw a distinction between the access of adults and children, requiring that filters be placed on *all* computers in a school or library, regardless of the age of the patrons who would use them. Civil libertarians smartly challenged its use in public libraries, where adult patrons would have their access curbed, without mentioning schools, in which the issue of children's rights would have come into focus. The ruling against CIPA could have direct implications for the voluntary use of filters by public schools as well. Nancy Willard points out that the factual findings and analysis provided by the courts raise significant questions regarding the constitutionality of the use of these products in public schools.<sup>130</sup>

In dealing with these cases, the courts have focused first on whether the suggested curbs limit the access of adults to blocked materials that are constitutionally protected, and second on whether the proper (and rather strict) procedures to determine that the material was unprotected were followed. Given the inherent difficulties in sorting out which speech is or is not protected<sup>131</sup> and the high procedural hurdles, such curbs have been found lacking, not only by their critics, but also by the courts.

The courts have not pointed the legislature (or any other party) toward a third approach that would filter neither everything nor nothing, but would provide *separate computers for children and adults*. The courts either ruled in favor of the civil libertarians (as in the Loudoun County case) or were indirectly used to intimidate other libraries (as in the Kern County case), resulting in a situation where children were allowed the same rights as adults in choosing whether or not to use a filter. CIPA initially was faulted for the same weak-

130. NANCY WILLARD, THE CONSTITUTIONALITY AND ADVISABILITY OF THE USE OF COMMERCIAL FILTERING SOFTWARE IN U.S. PUBLIC SCHOOLS 7, <http://netizen.uoregon.edu/Constitutionality.pdf> (2002).

131. This problem of distinguishing protected from unprotected speech was discussed eloquently by Justice Brennan in his dissenting opinion in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73-74 (1973).

ness.<sup>132</sup> The decision mentions briefly such a possibility, but places it among several other remedies, including the curious idea of librarians warning those looking at inappropriate material with a “tap on the shoulder.”<sup>133</sup>

The first lesson that appears from the cases at hand, albeit indirectly, is that if the goal is to protect children and not to curb adult access to speech, the government should urge or require libraries to have *separate computers for children and adults* (the way many libraries have special sections for children’s books or the way video rental stores have separate X-rated sections for adults only). Those computers set aside for children would be equipped with filters, while the others could provide unencumbered access to adults, or contain filters set to a different, much less stringent level (for example, to block only illegal materials, such as child pornography, to the extent technically possible). If a library has only one computer, there could be set-aside times for children and for adults. We shall refer to this as the *child-adult separation approach*. Such separation greatly reduces the conflict between protecting free speech and protecting children, although it leaves open the question of the scope of the harm done to children by the said material and what their own free speech rights are, issues I address below.

We must take into account two different situations. In one, whatever curbs are mandated are strictly for children, for example, filters on computers in a primary school (to keep the case pure, let’s say the computer in the teachers’ lounge is left unfiltered). In the other situation, full separation of children and adults is not practical, hence any curbs advanced for children might limit the access of adults. (For example, if there are children’s hours on the one computer at a library, the amount of time adults may have unencumbered access may be limited.) Eugene Volokh uses the term “spillover” to describe such a situation. He correctly points out that the proper way to frame the issue is not to ask whether there is any spillover, but to examine how significant the spillover is. Spillover rarely can be avoided completely.<sup>134</sup> The assumption is (as the courts have recognized) that there is a compelling public interest in protecting children from harmful material; thus, if a protective measure can be introduced that has minimal spillover, that small amount might be a price worth paying.

132. For a full discussion of the CIPA ruling, see *supra* notes 92–96 and accompanying text.

133. *Am. Library Ass’n v. United States*, 201 F.Supp. 2d 401, 423–24 (E.D. Pa. 2002).

134. Volokh, *supra* note 34.

This issue was not tested in the first three cases examined here because civil libertarians could argue that the spillover on adults was so considerable that even if there were benefits for children, the situation was not acceptable. (They did not have to unveil their argument that these materials do not harm children, a position that they correctly realize is much more difficult to sustain.) *So far, I have suggested that the best public policies provide for full child-adult separation so that limitations on children's access will not spillover to adults; next best are those that minimize spillover to adults.*<sup>135</sup> (In contrast, measures that involve significant spillover, especially if the gain to children is limited, are unacceptable.) Such balancing is commonly found constitutional in other areas in which two major values come into conflict, for instance privacy and the public interest.<sup>136</sup>

The restrictions imposed on tobacco advertising cast additional light on the criteria that might be applied in sorting out the First Amendment rights of children. The ACLU objected to these restrictions, arguing, "adults cannot be reduced to reading only what is fit for children"<sup>137</sup> and "attempts to reduce the exposure of minors to tobacco advertisements cannot avoid restricting the same information for the adult population."<sup>138</sup> In Justice Frankfurter's inimitable phrase, such limitations "burn the house to roast the pig."<sup>139</sup> But one may wonder if there will be a shortage of material enticing adults to smoke if cartoon characters especially seductive to children would no longer be used and if tobacco ads would be excluded from a few magazines popular with minors. The ability of adults to access information about tobacco products is thus not limited in any meaningful way.

From a constitutional viewpoint, it is important to take into account the *type* of speech being limited. Tobacco ads concern commercial speech, not speech that has political or social content, and therefore fall in the category of speech that the courts generally have recognized as having a lower level of First Amendment protection.<sup>140</sup>

135. Such an assertion is supported by the ruling in *Ginsberg v. New York*, 390 U.S. 629 (1968).

136. For an in-depth discussion of the balancing of privacy with various public interests, see AMITAI ETZIONI, *THE LIMITS OF PRIVACY* (1999).

137. American Civil Liberties Union, *ACLU Joins Opposition to Tobacco Pact; Says Speech Limits are Unconstitutional*, <http://archive.aclu.org/news/n032498b.html> (Mar. 24, 1998).

138. ACLU Testimony, *supra* note 112.

139. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

140. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976).

Finally, there is the matter of who enforces the limitations. The restrictions on tobacco ads reflect an agreement reached between tobacco companies and state governments, not limitations legislated by the government.<sup>141</sup> It follows that *when speech is commercial and when the curbs are at least semi-voluntary*, such measures should be more readily acceptable than curbs on other speech, for which children may not be ready (*e.g.* Mapplethorpe's photographs).

Labeling, the V-chip, and privately marketed Internet filtering software allow further examination of the question of whether we can do without government intervention. These devices provide a continuum of the levels of voluntarism. Movie ratings and labeling on music are akin to tobacco ads in that they have been voluntarily introduced, but under considerable government pressure. Moreover, the criteria for what rating or label a film or album receives are set by the industry, and their use and standards are enforced by the industry, to the extent that they are enforced at all. Thus, unlike tobacco ads, which were part of a legal agreement and could therefore be enforced, the government does not determine what is labeled PG-13 versus R or force movie theaters to card teenagers or otherwise pay mind to the age of theatergoers. Still, they system is not fully voluntary.

The government did require that the V-chip be built into all TV sets.<sup>142</sup> But all that V-chips do is provide parents and educators with a tool for controlling what their charges may watch and the choice of whether or not to use it. The use of V-chips is not required or even actively fostered by the government through educational campaigns<sup>143</sup> (despite the fact that most people seem unaware of the chip or how to use it) or by any other means. Nor is the government monitoring who activates their chips and who neglects to do so. Nor is the government involved in either setting the ratings on specific programming or de-

141. One can fairly argue that this voluntary agreement was achieved under economic pressures exerted by the government. The same applies to poor neighborhoods that might find it more difficult than richer ones to pass up E-rate funds in order to avoid the restrictions included in CIPA. However, if one could deem any contract or voluntary agreement coercive any time there is an economic incentive for one of the sides to enter it, or the parties are not economically equal, there would very little left in American society that would be voluntary—and by ACLU and ALA lights, constitutional.

142. Actually, a previous law required that decoder circuitry be built into all television sets to allow closed captioning, and nobody objected at the time. Television Decoder Circuitry Act of 1990 § 3, Pub. L. No. 101-431, 104 Stat. 960 (codified as amended at 47 U.S.C. § 303(u) (2000)). The Telecommunications Act of 1996 required that this circuitry also be fashioned so it could block programs based on content codes. Telecommunications Act of 1996 § 551(c), Pub. L. No. 104-104, 110 Stat. 56, 141 (codified as amended at 47 U.S.C. § 303(x) (2000)).

143. Information about the V-chip and its use is available at <http://www.fcc.gov/vchip>, but the government is not actively promoting it through such means as advertisements or brochures.

termining at what level an individual V-chip is activated, which in turn determines what is screened out.<sup>144</sup>

Finally, screening software that is sold on the free market, purchased at will by parents, and activated in line with their educational preferences is completely voluntary. Such software provides an ideal test of the issue at hand because no First Amendment rights are involved. Free-speech rights are claims people have against their government, not claims children have against their parents. When a parent tells a child that he or she is not ready to read *Lady Chatterley's Lover* or *Mein Kampf*, the parent may be ill advised, but he or she is not violating anyone's rights. On the contrary, parents and other educators are discharging a duty in this situation that is not subject to First Amendment claims.<sup>145</sup>

Civil libertarian objections to many of these voluntary devices, including labeling and television ratings, are difficult to fathom and draw heavily on such rhetorical devices as claiming that they constitute "censorship"<sup>146</sup>—a claim that makes people see red, even when no censorship is actually involved. (To be accurate, there is one form of voluntary filtering that even the ACLU does not mind: in the Multnomah County library system, a person turning to use a public computer would first be asked if he wants to use a filter or not. ACLU attorney Chris Hansen, who is a member of the CIPA plaintiff's legal team, simply allowed, "We don't have a problem with that.")<sup>147</sup>

144. In 1999 the FCC established a V-chip Task Force to ensure correct implementation of FCC rules regarding the V-chip and television ratings. The Task Force was also charged with gathering information on the "availability, usage and effectiveness of the V-Chip." Federal Communications Commission, *FCC Chairman William E. Kennard Establishes Task Force to Monitor and Assist in the Roll-out of the V-Chip To Be Chaired By Commissioner Gloria Tristani*, [http://www.fcc.gov/Bureaus/Miscellaneous/News\\_Releases/1999/nrmc9026.html](http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1999/nrmc9026.html) (May 10, 1999). The Task Force has not yet released a report on the effectiveness of the V-chip or the current ratings system, as the author was unable to find any outside report on this matter.

145. Though public school teachers are government actors, meaning the First Amendment does technically apply, there is Supreme Court precedent that allows teachers and administrators to limit a student's speech rights under certain circumstances. In *Tinker v. Des Moines Independent Community School District*, the Supreme Court held that First Amendment protection does not extend to student speech which "materially disrupts class work or involves substantial disorder or invasion of the rights of others." 393 U.S. 503, 513 (1969). Later, in *Bethel School District No. 403 v. Fraser*, the Court held that a student's right to speech must be "balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." 478 U.S. 675, 681 (1986) (emphasis added).

146. *Popular Music Under Siege*, *supra* note 115; ACLU Comments on Ratings, *supra* note 120.

147. Brickley, *supra* note 73.

Does it follow that the best way to proceed is to rely merely on systems that are voluntary and thus avoid the constitutional issues involved? Few would disagree that voluntary treatments are preferable to government interventions that contain coercive elements and public costs. Persuasion is clearly more effective than imposition of mores—if it can be made to work. However, when it comes to the protection of children from harmful cultural materials, voluntary protections are highly ineffectual. Most parents and educators do not activate the V-chips in their televisions;<sup>148</sup> movie theaters, and most assuredly CD shops and video rental stores, often do not enforce the rating and labeling systems in place;<sup>149</sup> and only a minority of parents purchase protective filtering software for their home computers.<sup>150</sup> One may argue that a major educational campaign could alter this behavior, but experience with other such campaigns suggests that one cannot avoid the question of whether or not additional measures are justified.

To review the discussion so far: the courts ruled that *there is a compelling public interest to protect children from harmful cultural products which should remain freely accessible to adults.*<sup>151</sup> (This, in turn, implies that children have lesser free speech rights than adults.) However, they found that *controlling content does not allow the desired separation between children and adults.*<sup>152</sup> *Separation of access should avoid this issue. If complete separation is not possible, systems that have little spillover on adult access seem justified, while those that have significant spillover may not. Voluntary measures are to be preferred per se, even if enhanced, but do not provide adequate protection of children.* Therefore, government interventions are needed.

#### IV. THE SCOPE AND NATURE OF THE HARM

The examination so far has taken for granted that the courts correctly ruled that there are cultural products that harm children. The

148. Jim Rutenberg, *Survey Shows Few Parents Use TV V-Chip to Limit Children's Viewing*, N.Y. TIMES, July 25, 2001, at E1.

149. Andy Seiler, *Movie Theaters Vow to Enforce Ratings*, USA TODAY, Nov. 7, 2000, at 1D.

150. According to a Princeton Survey Research Associates poll, only 38 percent of the parents of children who use the Internet polled said they had software on their home computers that prevents users from accessing certain types of material. Roper Center at the University of Connecticut, *accession number 0383943, question number 028* (July 20, 2001) (on file with Chicago-Kent Law Review).

151. See *Ginsberg v. New York*, 390 U.S. 629 (1968).

152. See *Reno v. ACLU*, 521 U.S. 844, 882 (1997).



discussion now turns to the relevant evidence addressing not merely the scope, but also the nature, of that harm. A recurrent theme running through civil libertarian arguments is that exposure to cultural materials causes no discernable harm—while limiting access does. For instance, in response to efforts to label music with offensive lyrics, the ACLU asserted that “[n]o direct link between anti-social behavior and exposure to the content of any form of artistic expression has ever been scientifically established.”<sup>153</sup> Although the ACLU recognizes the existence of social science studies showing harm, it challenges or attempts to invalidate these studies and argues that they do not justify regulating television.<sup>154</sup> For instance, arguing against the voluntary ratings system for television, the ACLU testified that “the social science evidence is in fact ambiguous and inconclusive” and that “the effects of art and entertainment on human beings are more various, complex, and idiosyncratic than some political leaders or social scientists would suggest.”<sup>155</sup>

The question of whether there are elements in our culture that harm children is the subject of a huge literature.<sup>156</sup> As far as one can determine, there is a considerable, although by no means universal, consensus among those who have studied the matter that significant harm is caused.<sup>157</sup> The next question is what specific items of culture cause significant harm. Here, social science evidence, the courts, and the legislators are at considerable odds. *While the courts and legisla-*

153. *Popular Music Under Siege*, *supra* note 115.

154. ACLU Comments on Ratings, *supra* note 120.

155. *Id.*

156. See, e.g., F. Scott Andison, *TV Violence and Viewer Aggression: A Cumulation of Study Results 1956–1976*, 41 PUB. OPINION Q. 314 (1977); Eric F. Dubow & Laurie S. Miller, *Television Violence Viewing and Aggressive Behavior*, in TUNING IN TO YOUNG VIEWERS: SOCIAL SCIENCE PERSPECTIVES ON TELEVISION 117–47 (Tannis M. MacBeth ed., 1996); Leonard D. Eron et al., *Does Television Violence Cause Aggression?*, 27 AM. PSYCHOLOGIST 253 (1972); Richard B. Felson, *Mass Media Effects on Violent Behavior*, 22 ANN. REV. OF SOC. 103 (1996); L. Rowell Huesmann et al., *Intervening Variables in the TV Violence-Aggression Relation: Evidence from Two Countries*, 20 DEV. PSYCHOL. 746 (1984); NATIONAL INSTITUTE OF MENTAL HEALTH, TELEVISION AND BEHAVIOR: TEN YEARS OF SCIENTIFIC PROGRESS AND IMPLICATIONS FOR THE EIGHTIES (David Pearl et al. eds., 1982); John L. Sherry, *The Effects of Violent Video Games on Aggression: A Meta-Analysis*, 27 HUMAN COMM. RES. 409 (2001); Stacy L. Smith & Edward Donnerstein, *Harmful Effects of Exposure to Media Violence: Learning of Aggression, Emotional Desensitization, and Fear*, in HUMAN AGGRESSION: THEORIES, RESEARCH, AND IMPLICATIONS FOR SOCIAL POLICY 167–202 (Russell G. Geen & Edward Donnerstein eds., 1998).

157. See *supra* notes 119–131 and accompanying text.

tors focus almost exclusively on pornography<sup>158</sup>—by far the strongest data concerns the effects of depictions of violence.

In response to the few state statutes attempting to limit the access of minors to depictions of violence,<sup>159</sup> the courts have explicitly held that cultural images of violence are protected by the First Amendment.<sup>160</sup> To wit: In the case of *Video Software Dealers Association v. Webster*,<sup>161</sup> which challenged a Missouri statute prohibiting the sale or rental to minors of videos containing violent material,<sup>162</sup> the district court stated that “violent expression is protected by the First Amendment.”<sup>163</sup>

In contrast, researchers have much stronger evidence about the harms caused by violence depicted in the media and on the Internet than they do on the harms of pornography. While they commonly and wisely reject simplistic notions that the media is “the” cause of vio-

158. Though *Ginsburg v. New York* recognizes in general the duty of legislators in “safeguarding minors from harm,” it discusses only the availability and possible harm of “sex material.” 390 U.S. 629, 640–41 (1968). Similarly, the current California Penal Code defines “harmful material” as matter that “appeals to the prurient interest” and “depicts or describes in a patently offensive way sexual conduct.” CAL. PENAL CODE § 313(a) (West 2003).

159. MO. REV. STAT. § 573.090 (2003); TENN. CODE ANN. § 39-17-911 (2002); COLO. REV. STAT. ANN. § 18-7-601 (West 2003). For further discussion, see Jessalyn Hershinger, Note, *State Restrictions on Violent Expression: The Impropriety of Extending an Obscenity Analysis*, 46 VAND. L. REV. 473 (1993).

160. For further discussion of this issue, see Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL RTS. J. 107 (1994).

161. 773 F. Supp. 1275 (W.D. Mo. 1991), *aff’d*, 968 F.2d 684 (8th Cir. 1992).

162. MO. REV. STAT. § 573.090 (1993) provides:

Video cassettes, morbid violence, to be kept in separate area—sale or rental to persons under seventeen prohibited, penalties

1. Video cassettes or other video reproduction devices, or the jackets, cases or coverings of such video reproduction devices shall be displayed or maintained in a separate area if the same are pornographic for minors as defined in section 573.010, or if:

(1) Taken as a whole and applying contemporary community standards, the average person would find that it has a tendency to cater or appeal to morbid interest in violence for persons under the age of seventeen; and

(2) It depicts violence in a way which is patently offensive to the average person applying contemporary adult community standards with respect to what is suitable for persons under the age of seventeen; and

(3) Taken as a whole, it lacks serious literary, artistic, political, or scientific value for persons under the age of seventeen.

2. Any video cassettes or other video reproduction devices meeting the description in subsection 1 of this section shall not be rented or sold to a person under the age of seventeen years.

3. Any violation of the provisions of subsection 1 or 2 of this section shall be punishable as an infraction, unless such violation constitutes furnishing pornographic materials to minors as defined in section 573.040, in which case it shall be punishable as a class A misdemeanor or class D felony as prescribed in section 573.040, or unless such violation constitutes promoting obscenity in the second degree as defined in section 573.030, in which case it shall be punishable as a class A misdemeanor or class D felony as prescribed in section 573.030.

163. *Video Dealers Ass’n*, 773 F. Supp. at 1278.

lence and sexually inappropriate conduct,<sup>164</sup> they repeatedly and systematically find that unfettered exposure is “merely” one major cause for several forms of anti-social behavior.

While a large number of studies are simple one-time observations, several rigorous longitudinal studies have been conducted. For instance, the study conducted by Lefkowitz et al., determined that “[t]he relation between boys’ preferences for violent television at age eight and their aggressiveness revealed itself *unequivocally in our study*.”<sup>165</sup> They also found that “[t]he greater was a boy’s preference for violent television at age eight, the greater was his aggressiveness both at that time and *ten years later*,”<sup>166</sup> and later found greater incidents of serious crime at age thirty.<sup>167</sup> The results here are consistent with other studies that have shown aggressive tendencies in children who view violent material.<sup>168</sup>

In another study, researchers compared the aggression levels of children in three Canadian towns. The first town (Notel) had no television service due to its geographical location in a valley, the second town (Unitel) had received only one station for the last seven years, and the third town (Multitel) had received Canadian and American broadcast television for fifteen years.<sup>169</sup> The researchers found that following the introduction of television in Notel, both boys and girls at various age levels were more physically and verbally aggressive than they had been before the introduction of television.<sup>170</sup> Research-

164. See SISSELA BOK, *MAYHEM: VIOLENCE AS PUBLIC ENTERTAINMENT* 57 (1998).

165. MONROE LEFKOWITZ ET AL., *GROWING UP TO BE VIOLENT: A LONGITUDINAL STUDY OF THE DEVELOPMENT OF AGGRESSION* 115 (1977) (emphasis in original).

166. *Id.* at 115–16 (emphasis in original).

167. L. Rowell Huesmann et al., *Stability of Aggression Over Time and Generations*, 20 DEV. PSYCHOL. 1120 (1984). For criticisms of the methods and findings of this study, see MARJORIE HEINS, *NOT IN FRONT OF THE CHILDREN: “INDECENCY,” CENSORSHIP, AND THE INNOCENCE OF YOUTH* 248–250 (2001); Jonathan L. Freedman, *Effect of Television Violence on Aggressiveness*, 96 PSYCHOL. BULL. 227, 241–243 (1984).

168. See, e.g., Albert Bandura, *Influence of Models’ Reinforcement Contingencies on the Acquisition of Imitative Responses*, 1 J. PERSONALITY & SOC. PSYCHOL. 589 (1965); Edward Donnerstein et al., *The Mass Media and Youth Aggression*, in REASON TO HOPE: A PSYCHOLOGICAL PERSPECTIVE ON VIOLENCE AND YOUTH 219–250 (Leonard D. Eron et al. eds., 1994); see also SURGEON GENERAL’S SCIENTIFIC ADVISORY COMMITTEE ON TELEVISION AND SOCIAL BEHAVIOR, *TELEVISION AND GROWING UP: THE IMPACT OF TELEVIEWED VIOLENCE* (1972).

169. Tannis MacBeth Williams, *Background and Overview*, in THE IMPACT OF TELEVISION: A NATURAL EXPERIMENT IN THREE COMMUNITIES 4 (Tannis MacBeth Williams ed., 1986).

170. Lesley A. Joy et al., *Television and Children’s Aggressive Behavior*, in THE IMPACT OF TELEVISION: A NATURAL EXPERIMENT IN THREE COMMUNITIES *supra* note 169, at 334–35.

ers also found that children in Multitel exhibited higher levels of both verbal and physical aggression than those in Unitel.<sup>171</sup>

A report by the Senate Committee on Commerce, Science and Transportation summarizes research in this area and concludes that watching significant amounts of televised violence negatively affects human character and attitudes; promotes violent behaviors; influences moral and social values about violence in daily life; and often results in a perception of a nastier world and an exaggerated probability of being a victim of violence.<sup>172</sup> On a similar note, University of Michigan psychologist Leonard Eron has testified that meta-analyses of current research estimate that “10% of all youth violence can be attributed to violent television.”<sup>173</sup>

Several studies followed children into adulthood and concluded that viewing violent material increases the likelihood of aggressive behavior and, in some instances, criminal behavior. For example, one study found greater incidents of serious crime at age thirty in young people who watch violent television at age eight.<sup>174</sup> A recent study in *Science* comes to similar conclusions. Johnson et al., found that those who reported watching higher amounts of television in adolescence later reported higher rates of aggressive behavior in late adolescence and early adulthood. The authors also found a higher rate of aggressive acts at a mean age of thirty in those who reported heavier television viewing at a mean age of twenty-two.<sup>175</sup>

James P. Steyer, who examined well over a hundred studies conducted over thirty years, identified four particular ways that media violence has been shown to impact children, which he sums up in simple language as follows:

It can make them fearful and lead them to believe that the world is a mean and violent place. It can cause some kids to act violently and aggressively toward others. It can teach them that violence is

171. *Id.* at 320–21.

172. EDITH FAIRMAN COOPER, TELEVISION VIOLENCE: A SURVEY OF SELECTED SOCIAL SCIENCE RESEARCH LINKING VIOLENT PROGRAM VIEWING WITH AGGRESSION IN CHILDREN AND SOCIETY, CRS Rep. 95-593, at 2 (May 17, 1995).

173. Testimony of Leonard D. Eron before the Senate Committee on Commerce, Science and Transportation Regarding Safe Harbor Hours in TV Programming, <http://www.senate.gov/~commerce/hearings/0518ero.pdf> (May 18, 1999).

174. Huesmann et al., *supra* note 167, at 1120–34.

175. Jeffrey G. Johnson et al., *Television Viewing and Aggressive Behavior During Adolescence and Adulthood*, 295 SCI. 2468, 2470 (2002).

an acceptable way to deal with conflict. And it can desensitize them toward the use of violence in the real world.<sup>176</sup>

The effects of exposure to pornography on minors are much less established.<sup>177</sup> Ethical considerations prevent researchers from conducting experiments that directly test the effects of pornography on children. Even if correlative studies existed, they would not allow for causal inferences.<sup>178</sup> Because of the paucity of studies on the effects of pornography on children, those who make strong arguments about why it is undesirable to expose children to such materials must do so without evidence supporting their claims.<sup>179</sup> However, studies do exist on the effects of pornography on young, college-aged adults. Studies show that young adults exposed to pornography that is combined with violence hold more callous views towards rape and sexual coercion than those not exposed.<sup>180</sup> The report of the Surgeon General's Workshop on Pornography and Public Health hypothesized that "[i]t is certainly reasonable to speculate, however, that the results of such exposure on less socially mature individuals with less real world experience to counteract any influences of this [pornographic] material would be equally (or more) powerful than those seen in college students."<sup>181</sup> A meta-analysis of forty-six studies conducted between 1962 and 1995 on the effects of pornography on adults found that pornography is "one important factor which contributes directly to the de-

176. JAMES P. STEYER, *THE OTHER PARENT: THE INSIDE STORY OF THE MEDIA'S EFFECT ON OUR CHILDREN* 72 (2002).

177. Due to ethical considerations, one cannot expose minors to pornographic material in order to test its effects on them.

178. For further discussion of the issues involved in studying the effect of pornography on children, see COMM. TO STUDY TOOLS & STRATEGIES FOR PROTECTING KIDS FROM PORNOGRAPHY & THEIR APPLICABILITY TO OTHER INAPPROPRIATE INTERNET CONTENT, NATIONAL RESEARCH COUNCIL, *YOUTH, PORNOGRAPHY AND THE INTERNET* (Dick Thornburgh & Herbert S. Lin eds., 2002); ALTHEA C. HUSTON ET AL., *MEASURING THE EFFECTS OF SEXUAL CONTENT IN THE MEDIA: A REPORT TO THE KAISER FAMILY FOUNDATION*, <http://www.kff.org/content/archive/1389/content.pdf> (1998) [hereinafter Kaiser Report].

179. The lack of social science findings on the matter did not stop the Supreme Court from issuing their ruling in *Ginsberg v. New York*. The Court notes:

To be sure, there is no lack of "studies" which purport to demonstrate that obscenity is or is not "a basic factor in impairing the ethical and moral development of . . . youth and a clear and present danger to the people of the state." But the growing consensus of commentators is that "while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either."

390 U.S. 629, 641-42 (1968) (quoting Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7, 52).

180. Kaiser Report, *supra* note 178, at 13-14.

181. EDWARD P. MULVEY & JEFFREY L. HAUGAARD, *REPORT OF THE SURGEON GENERAL'S WORKSHOP ON PORNOGRAPHY AND PUBLIC HEALTH* at 23, [http://profiles.nlm.nih.gov/NN/B/C/K/H/\\_/nnbckh.pdf](http://profiles.nlm.nih.gov/NN/B/C/K/H/_/nnbckh.pdf) (Aug. 4, 1986).

velopment of sexually dysfunctional attitudes and behaviours” and that “exposure to pornographic material puts one at increased risk for developing sexually deviant tendencies, committing sexual offenses, experiencing difficulties in one’s intimate relationships, and accepting the rape myth.”<sup>182</sup>

*Overall, the social science data strongly support the need to protect children from harmful material, especially from exposure to violence in the media and on the Internet.*<sup>183</sup> There is no reasonable doubt that exposure to a torrent of images of violence in the media harms children significantly. The evidence on pornography (which itself may contain violence) is less strong. *When considering how to protect children, the current preoccupation with curbing pornographic material and not violent material should be reversed.*

The reasons both civil libertarians and social conservatives tend to focus on pornography rather than on violence require a separate examination. Civil libertarians may realize that their case is much weaker when it comes to the effects of depictions of violence; social conservatives may associate violence with manhood. But these are merely speculations. Whatever the reasons, both sides push the public dialogue, legislators, and the courts to focus on the lesser harm, drawing attention away from the greater harm.

A colleague, reviewing a previous version of this Article, raised several cogent questions. How is violence defined? Should children be protected from all forms of violence? And would not such a ban prevent their being exposed to a large variety of novels, books of history, and even news? Defining violence is surely not more difficult than pornography, and is probably easier. Violence, for the purposes at hand, is best defined as the use of physical force with the intent to harm, maim, or kill. Which kinds and forms children should be protected from (and what difference age makes) is an issue we face only once we move away from the current position that all of it is free speech, including, say, showing a sadistic movie to children six years or younger. Once we are ready to curb access to violent content, sev-

182. Elizabeth Oddone-Paolucci et al., *A Meta-Analysis of the Published Research on the Effects of Pornography*, in *THE CHANGING FAMILY AND CHILD DEVELOPMENT* 52–53 (Claudio Violato et al. eds., 2000).

183. The argument that exposure to violence itself, in the home and in the streets, has a worse effect is a valid one, but it does not invalidate the additional harm done by the violence portrayed in cultural materials. Moreover, portrayals of violence in the media are one factor that breeds and nurtures actual violent behavior. See *supra* notes 164–176 and accompanying text. All this is not to suggest that pornography is not harmful; only that it seems—in the absence of evidence—less so than images of violence.

eral rules, often suggested before, come to mind. We can limit the showing of such material on television to late hours; we can discourage the use of gratuitous violence in the media as well as in video games; we can urge that its depictions be negatively framed; and so on. More details require and deserve a separate study.<sup>184</sup>

## V. HISTORICAL CONTEXT

Societies tend to lose their balance between conflicting core values in one direction or another.<sup>185</sup> They then move to correct, often tilting too far in the opposite direction because they lack a precise guidance mechanism. Through much of American history, until the 1960s, rights were neglected, including those of women, minorities, and the disabled. However, communitarians have shown that during the next generation, rights were pushed to the point that the public interest and the moral culture were undermined.<sup>186</sup> As of the early 1990s, a counter-correction set in, which arguably went overboard in the opposite direction, especially in the wake of September 11, 2001.<sup>187</sup>

Viewed in this context, since the 1920s civil libertarians have worked to promote rights in general, and the right to free speech in particular, as profound self-evident truths. Typically, the First Amendment is presented as if it were semi-sacred, and any attempts to curb it as sacrilegious and outright offensive. Civil libertarians believe it self-evident that the right to free speech ought to trump all other considerations—or at least that the onus of proof is on those who seek to advance other values, and that the test for such proof should be set very high indeed. Moreover, the very suggestion that free speech (and rights in general) reflects but one set of societal values, albeit a very important one, and that there is such a thing as the common good (above and beyond that invested in rights), such as the well-being of children, may well seem strange, if not false, to civil

184. For a description of the role of violent content in determining television ratings, see <http://www.mpaa.org/tv>. For the criteria used in granting film ratings, see <http://www.filmratings.com>.

185. For a further discussion of this balancing and re-balancing, see THE NEW GOLDEN RULE, *supra* note 4, at 58–84.

186. For an excellent discussion, see MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

187. For further discussion, see Amitai Etzioni, *Implications of Select New Technologies for Individual Rights and Public Safety*, 15 HARV. J.L. & TECH. 257 (2002).

libertarians and others imbued with the values of a rights-centered society.<sup>188</sup>

Communitarians have repeatedly pointed out and documented that individualism has been excessive since the 1970s and the common good in general has been neglected.<sup>189</sup> In the same period, children's rights have been pushed too far. One sees that the time has come to restore a better balance between rights and the common good in general, and in matters concerning the balance between free speech and the protection of children in particular. To put it differently, *various measures to protect children become much more acceptable once one realizes that free speech can be highly valued even if one ranks it somewhat lower than it has been recently held and that children are now to be more highly regarded.* Free speech can be ranked a notch or two lower—as is the case in all democratic societies other than the USA—without that freedom being compromised or society becoming illiberal. Indeed, as Richard Abel shows in his outstanding book *Respecting Speech*, we often limit speech for other purposes, including commercial ones. One may ask, perhaps a bit too rhetorically: Are children less worthy than intellectual property?

In the same vein, the more value a society puts on the well-being of children, the more it would be willing to curb free speech under certain circumstances. The argument advanced here is not that American society does not value children highly, but that it arguably does not value them as highly as other liberal democratic societies do relative to other concerns. Not surprisingly, these societies have fewer difficulties introducing measures to protect children from violent and pornographic materials.<sup>190</sup> Surely childcare policies in the United States offer further support for this thesis.<sup>191</sup> As Eugene Volokh has

188. See GLENDON, *supra* note 186, at 1–17; see also AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* 164–166 (1993).

189. For further discussion, see ROBERT N. BELLAH ET. AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985).

190. Many European nations ban the broadcasting of certain material considered harmful to minors. In addition, associations of Internet Service Providers have established codes of conduct for protecting minors and have established an Internet Content Rating Association to develop an international ratings system. Christopher J.P. Beazley, Report of the Committee on Culture, Youth, Education, the Media, and Sport to the European Parliament, session document A5-0037/2002, <http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//NONSGML+REPORT+A5-2002-0037+0+DOC+PDF+V0//EN&L=EN&LEVEL=3&NAV=S&LSTDOC=Y> (Feb. 20, 2002).

191. For a survey of child care policies in other nations, see SHEILA B. KAMERMAN & ALFRED J. KAHN, *CHILD CARE, FAMILY BENEFITS, AND WORKING PARENTS: A STUDY IN COMPARATIVE POLICY* (1981).



noted, civil libertarians believe that “[p]erhaps children’s increased vulnerability is a price worth paying for extra freedom for adults.”<sup>192</sup>

America’s rights-tilt, developed between 1960 and 1990, is gradually being corrected in response to communitarian urging.<sup>193</sup> Society has been willing to pay more mind to social responsibilities, the common good, and the moral culture than in the preceding decades.<sup>194</sup> *The attempt to better protect children from harmful material—as reflected in poorly drafted laws such as COPA and CIPA—fits into this societal agenda.* To put it differently, the Constitution is a living document, the understanding of which responds to the changing needs of the times, never has been fully specified,<sup>195</sup> and for which the implications are constantly being reinterpreted. The understanding of the First Amendment currently prevalent was fashioned largely after 1920, in response to Americans who were arrested for criticizing U.S. involvement in WWI—a drive led mainly by the ACLU, to its credit. Now that society has moved from too restrictive to too permissive, the time has come to realize that the First Amendment was not, in either text or spirit, intended to apply to both children and adults.

## VI. THE CONSTITUTIONAL IMPLICATIONS OF AGE-GRADED PROTECTIONS

Are children entitled to the same First Amendment rights as adults, or are they entitled only to lesser free speech rights? This question is crucial because if children have the same rights as adults, none of the ideas of separation and spillover would apply. Practically no one would argue that minors have no free speech rights. Few, if any, would favor banning a seventeen-year-old from making a political speech at a Young Republican club meeting.<sup>196</sup> On the other extreme, however, some do hold that children of any age should have First Amendment rights identical to those of adults, including the right to be exposed to harmful cultural materials. The question hence

192. Volokh, *supra* note 34.

193. See THE NEW GOLDEN RULE, *supra* note 4, at 73–77.

194. See AMITAI ETZIONI, MY BROTHER’S KEEPER: A MEMOIR AND A MESSAGE (2003).

195. Richard A. Posner, *The Truth About Our Liberties*, 12 RESPONSIVE COMMUNITY 4 (2002).

196. In *Tinker v. Des Moines Independent Community School District*, the Court ruled against a high school’s policy of expelling students for wearing black armbands to school in protest of the Vietnam War. 393 U.S. 503 (1969). The Court stated that, “Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.” *Id.* at 511.

stands as to the scope of protected speech when we deal with children. Or, conversely, from what speech are they to be protected—and in what manner?<sup>197</sup>

One's response is greatly affected by how one perceives children in general. There are greatly different views, historically and culturally, as to whether childhood should be considered a unique category, or whether children are "mini-adults" able to make their own decisions. There is also disagreement as to what age childhood concludes and children are able to act as autonomous adults.<sup>198</sup>

In further discussion of this matter it is crucial to distinguish between several terms often used interchangeably—minors, children, and teenagers—each of which has rhetorical consequences. Those who favor full First Amendment rights for children of all ages tend to use the term "young people," "youngsters," or "students" and point to examples of the harm done when teenagers access to information about, say, HIV or abortion is limited.<sup>199</sup> Those who favor controls tend to call all minors "children" and point to the harm done to toddlers when they are exposed to pornographic or violent material on television.

To allow for a clearer discussion, from here on the following terms will be used: *children* refers to those twelve and under and *teenagers* refers to those between the ages of thirteen and eighteen. *Minors* is used to refer to both groups together. The age at which a person reaches majority differs for different matters, such as being eligible to drive or to vote, although in the US eighteen is often considered the age at which one becomes an adult. However, there would be nothing sociologically shocking to set a different age, say seventeen, as an age for less-protected cultural access. The age-differentiated approach is at the heart of this matter.

The discussion so far has followed the way the issue is typically discussed by both sides: with relatively little attention to age differ-

197. In his discussion of children's rights, Harry Brighouse considers the types of rights children have, rather than the extent of their rights. He distinguishes between welfare rights (which pertain to the direct well-being of the child) and agency rights (which involve the right to make choices about how to act) of children. He argues that if children do not have the same rational capacity of adults, providing for the welfare rights of children often means curtailing their agency rights. His full discussion of this matter can be found in Harry Brighouse, *What Rights (if Any) do Children Have?*, in *THE MORAL AND POLITICAL STATUS OF CHILDREN* 31–52 (David Archard & Colin Macleod eds., 2002).

198. For an excellent history of how ideas about childhood have evolved, see PHILLIPPE ARIÈS, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* (Robert Baldick trans., 1962).

199. See, e.g., Heins, *Rejuvenating Free Expression*, *supra* note 125, at 43–49.

ences among minors. Although rating systems are age-graded and parents are free to set their V-chips to age specifications, government-set protections are not usually age-specific. CIPA requires filters on all computers, whether used by adults or children, as do the policies that were implemented in Loudoun and Kern counties. Nor are the curbs on tobacco ads age-graded.

Civil libertarians demand not only the removal of various protective devices for teenagers, but also unencumbered access for children of all ages—as if they were adults. (Social conservatives, in turn, want to treat all minors—and sometimes adults—as children.) Writing on the outcome of the battle over filters in Kern County, Ann Beeson, an ACLU National Staff Attorney, praised the County’s decision to “allow all adult *and minor* patrons to decide for themselves whether to access the Internet with or without a filter.”<sup>200</sup> In its basic charter, the American Library Association (“ALA”) demands that “the rights of users who are minors shall in no way be abridged,” in regard to Internet access.<sup>201</sup> This position is based on the Library Bill of Rights, which states, “A person’s right to use a library should not be denied or abridged because of origin, age, background, or views.”<sup>202</sup> Any age. It leads to a position most people would consider not only unreasonable, but also unbelievable for any serious professional association. According to the ALA, if a child of age seven loses a library book, the parents are responsible for replacing it. However, if the parents wonder which book their child has lost, the library should not (according to ALA recommendations) disclose this information.<sup>203</sup>

One may argue that such a policy is concerned with the child’s privacy rather than with First Amendment rights. Disregarding the question of whether children have privacy rights against their parents, there is a connection. The ALA fears that if parents can find out what

200. Beeson, *supra* note 67.

201. American Library Association, *Access to Electronic Information, Services, and Networks: An Interpretation of the Library Bill of Rights*, <http://www.ala.org/alaorg/oif/electacc.html> (Jan. 24, 1996).

202. AMERICAN LIBRARY ASSOCIATION, LIBRARY BILL OF RIGHTS § V, [http://www.ala.org/Content/NavigationMenu/Our\\_Association/Offices/Intellectual\\_Freedom3/Statements\\_and\\_Policies/Intellectual\\_Freedom2/librarybillofrights.pdf](http://www.ala.org/Content/NavigationMenu/Our_Association/Offices/Intellectual_Freedom3/Statements_and_Policies/Intellectual_Freedom2/librarybillofrights.pdf) (adopted June 18, 1948; amended February 2, 1961 and January 23, 1980; inclusion of “age” reaffirmed January 23, 1996 by the ALA Council).

203. The ALA advises its members that: “Librarians should not breach a child’s confidentiality by giving out information readily available to the parent from the child directly. Libraries should take great care to limit the extenuating circumstances in which they will release such information.” American Library Association, *Questions and Answers on Privacy and Confidentiality*, <http://www.ala.org/alaorg/oif/privacyqanda.html> (Jan. 22, 2003).

their children read, this may “chill” the children’s choices and thus undermine freedom of speech. Children may fear to access material their parents find objectionable. Indeed, this is a matter of concern for teenagers, especially older ones, but not for those twelve or younger. Laura Murphy, the director of the Washington, D.C. office of the ACLU evoked the case of a twelve-year-old who wants to read about homosexuality or HIV but fears to do so at home. Let’s grant that there are some such cases. But it does not follow that millions of children ought to be harmed by unlimited exposure to all manner of sexually explicit material in order to accommodate these few cases. Such children should be encouraged to discuss the matter with a school nurse, a public clinic, or some other source which will help them get the information they need without exposing all others to objectionable material.

Nor did the ACLU ever suggest or hint, as it was fighting CIPA and two previous attempts to protect children from Internet pornography using Internet filters, that it would accept them if they were limited to schools or even to only primary schools. On the contrary, in other situations, civil libertarians state the opposite position quite explicitly. The ACLU has written that “[i]f adults are allowed access, but minors are forced to use blocking programs, constitutional problems remain. Minors, especially older minors, have a constitutional right to access many of the resources that have been shown to be blocked by user-based blocking programs.”<sup>204</sup> The same position was struck by the ACLU when it charged the Loudoun County Library Board of Trustees in Virginia of “removing books from the shelves’ of the Internet with value to both adults *and minors* in violation of the Constitution.”<sup>205</sup>

These positions are difficult to entertain, as minors clearly are developmental creatures whose capabilities change a great deal as they mature. Children—according to practically all of a huge social science literature and elementary common sense—are different from adults in that they have few of the attributes of mature persons that justify respecting their choices. Children have not yet formed their own preferences, have not acquired basic moral values, do not have the information needed for sound judgments, and are subject to ready manipulation by others. In the same vein, parents and educators are

204. Fahrenheit 451.2, *supra* note 128.

205. American Civil Liberties Union, *ACLU Enters VA Library Internet Lawsuit on Behalf of Online Speakers*, <http://archive.aclu.org/news/n020698a.html> (Feb. 6, 1998) (emphasis added).

discharging their social duties when they shape the cultural environments in which children develop, which includes choosing the material to which children are exposed. The underlying assumption is developmental. Children begin life as highly vulnerable and dependent persons, unable to make reasonable choices on their own. Stanford Law Professor Michael Wald writes, in reference to the social science findings on the subject,

younger children, generally those under 10–12 years old, do lack the cognitive abilities and judgmental skills necessary to make decisions about major events which could severely affect their lives. . . . Younger children are not able to think abstractly, have a limited future time sense, and are limited in their ability to generalize and predict from experience.<sup>206</sup>

As children develop they gradually become capable of making moral judgments and acting on their own, and only then are they ready to be autonomous. As Colin Macleod and David Archard put it: children “are seen as ‘becoming’ rather than ‘being’” and “[t]he basic idea that children must be viewed as developing beings whose moral status gradually changes now enjoys near universal acceptance.”<sup>207</sup>

The Constitution basically deals with adults. Its application to children needs to be specifically worked out, rather than assumed to apply to them in the same way. Otherwise, a police officer who asks a child wandering in the streets where he is going could be charged with a violation of privacy (or maybe with age-profiling). Thus, to stop an adult a cop would need “reasonable suspicion.” A young child roaming the streets alone, however, is unusual enough to provide reasonable suspicion in and of itself. This issue has been visited explicitly in *Horton v. Goose Creek Elementary School District*.<sup>208</sup> Although the court ruled that students should not be considered to have lower expectations of privacy, and that “society recognizes the interest in the integrity of one’s person, and the fourth amendment applies with its fullest vigor against any intrusion on the human body,”<sup>209</sup> it also recognized that standards of reasonableness differ for children and adults.<sup>210</sup> There seems no reason to treat the First Amendment otherwise. The same point is also evident when it comes to “unlawful de-

206. Michael S. Wald, *Children’s Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 274 (1979).

207. David Archard & Colin M. Macleod, *Introduction*, in THE MORAL AND POLITICAL STATUS OF CHILDREN, *supra* note 197, at 2, 4.

208. 690 F.2d 470 (5th Cir. 1982).

209. *Id.* at 478.

210. *Id.* at 481–82.

tention;” it hardly applies to parents keeping their kids at home or sending them to their rooms.

To put it differently, whatever one considers the purpose and merit of the First Amendment—whether to ensure a free exchange of ideas, to maintain liberty, to enrich one’s life, and so on—none of this applies to toddlers. To speak of the right to free speech of a two-year-old is ludicrous, but that is precisely what happens when one speaks of all minors as if they are of one kind. One may say that it is obvious that when one talks about “minors” one does not mean to encompass toddlers. Still, the term avoids engaging the question of the age at which children command First Amendment rights, and what the scope of those rights is. One should assume that those who are somewhere between infancy and age thirteen have much lower capacities to contribute to and benefit from speech and are more vulnerable to harm from certain materials.

*Since one’s ability to deal with certain types of material increases as one grows older and develops, protections of minors should be age-graded.* Ideally, there would be many different types of labels and screening software that could take into account age differences (as well as other factors, such as the values of those who issue them.) Some might be issued by teacher’s colleges, some by religious groups, and some by the media, leaving parents and educators free to choose among them. (Given that age is merely a reasonable approximation for maturity, some parents may choose protections that have been prepared for somewhat older or younger children.)

When it comes to government-introduced measures, which I argued are needed at least for now, such complexity may not be possible. *Hence, a minimum of two gradations should be provided to take into account gradual maturing: one for children and one for teenagers.* It is difficult to justify treating high school students the same way as children in primary schools and kindergartens, and *vice versa*. But in no case should children or teenagers be treated simply as adults.

## VII. ROOTS IN LIBERALISM

To understand the underlying assumptions of civil libertarians’ case against protective measures, one needs to examine the roots of these assumptions in political theory and social philosophy. The tendency of civil libertarians to treat children as adults when it comes to First Amendment issues is not accidental. It is rooted in contemporary liberal political theory, especially in its more extreme libertarian

version. It clearly differs from the classical liberal theorists. John Locke, writing in his *Second Treatise on Government*, noted, albeit somewhat reluctantly: “Children, I confess are not born in this full state of Equality, though they are born to it. Their parents have a sort of Rule and Jurisdiction over them when they come into the World, and for some time after.”<sup>211</sup> He goes on to comment later, “Children being not presently as soon as born, under this Law of Reason were not presently free.”<sup>212</sup>

Nathan Tarcov notes that Locke’s concept of “parental power” derives from parental duty to take care of children, which extends until children become capable of taking care of themselves.<sup>213</sup> Until a child reaches an “Age of Discretion,” when he has acquired reason, “some Body else must guide him, who is presumed to know how far the Law allows a Liberty.”<sup>214</sup>

Similarly, John Stuart Mill immediately follows his assertion that “[o]ver himself, over his own body and mind, the individual is sovereign,” with the qualification that

this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury.<sup>215</sup>

This is not a text embraced by contemporary liberals or libertarians. Most avoid the issue by simply not discussing children from this viewpoint, as the indexes to scores of their books show.<sup>216</sup>

Contemporary liberals, especially libertarians, hold that we are to honor people’s choices and avoid paternalism because it is the individual who must live with the consequences of his or her own actions. But children are not prepared to assess the consequences of their choices, and families are deeply affected when kids abuse drugs, shoplift, or are dehumanized by harmful material. Paternalism means treating adults like children, not treating children as children. Pater-

211. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 322 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) (emphasis removed).

212. *Id.* at 323 (emphasis removed).

213. NATHAN TARCOV, *LOCKE’S EDUCATION FOR LIBERTY* 71–73 (1984).

214. LOCKE, *supra* note 211, at 325.

215. JOHN STUART MILL, *ON LIBERTY* 48 (Alan Ryan ed., Norton & Company 1997) (1859).

216. To take just one example from among many, the index to Ronald Dworkin’s *Taking Rights Seriously* includes neither “children” nor “minors.” RONALD DWORGIN, *TAKING RIGHTS SERIOUSLY* 291–92 (1977).

nalism is exactly what the law and society expects from parents, and we hold them accountable when they fail. Of course, as children grow older, they can and ought to be given more leeway to learn and to exercise their own judgment—with parents and other educators looking over their shoulders until they learn to fly solo.

Ultimately, the reason liberals shy away from dealing with children in political theory and social philosophy is that children threaten the very foundations on which their theory rests. Once one grants that they are human beings whose preferences are deeply affected by outside agents, including culture and values, in ways that they are unaware—that there are individuals who can be influenced, persuaded, or swayed by peers and leaders—it is hard to respect their choices as truly their own. Such cultural and social influences do not suddenly vanish when a minor achieves a given age and is called an adult. Thus, children point to the need for a social theory that can accommodate the role of profound external influences on individuals much better than liberalism does.

It also follows that dropping all protections from harmful cultural material is not justified even for adults, as is certainly the case with child pornography. So far the legal justification for banning child pornography has been that “the distribution network for pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.”<sup>217</sup> The 2002 decision in *Ashcroft v. Free Speech Coalition*, in which the Supreme Court overturned the Child Pornography Protection Act, weakened this precedent by allowing the distribution of “virtual” child pornography because no “real” children were harmed during its production.<sup>218</sup> However, virtual child pornography causes real harm by normalizing the kinds of behaviors it portrays, which would be illegal if carried out by real people, and thus I argue that there are grounds for banning child pornography, both real and virtual, based on its effects. Determining how and in what way to limit the access of adults—and determining what material should be limited—is a subject for another discussion altogether.<sup>219</sup>

217. *New York v. Ferber*, 458 U.S. 747, 759 (1982) (prohibiting not only the production of child pornography, but also the distribution or possession of child pornography).

218. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

219. For an additional discussion, see AMITAI ETZIONI, *Privacy as an Obligation*, in *THE COMMON GOOD* (forthcoming 2004).



## VIII. WHOSE STANDARDS?

Finally, I address the difficult question of how to go about determining what specific cultural materials are so harmful that we must block them for children. One argument against protecting children from harmful material is the lack of consensus regarding what is offensive. Although there were shared, historically fashioned community standards in the past, our current pluralistic society is said to preclude widespread agreement about what is objectionable. Jeffrey Narvil writes, "American notions of nudity as inherently indecent are strikingly ethnocentric," and "traditional, historical notions of propriety . . . may not exist in an increasingly diverse and multi-ethnic society."<sup>220</sup>

The concept of "contemporary community standards" was introduced in the 1957 case *Roth v. United States*,<sup>221</sup> in which the Supreme Court established a test for determining what is obscene and therefore outside the protection of the First Amendment.<sup>222</sup> This test was modified in *Memoirs v. Massachusetts*<sup>223</sup> and then in *Miller v. California*.<sup>224</sup> The test established by *Miller*, and then tweaked in numerous succeeding cases,<sup>225</sup> included the yardstick of whether "the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."<sup>226</sup>

The crux of civil libertarian objections to "contemporary community standards" lies in the argument that, although a community might be able to limit its own members based on what is agreed to be unacceptable in that community, in the cases at hand the limitations are set nationally. As the Supreme Court pointed out in its ruling striking down the CDA, when "community standards" are applied to something like the Internet, which is viewed by members of many communities, they will reflect the views of those with the lowest threshold of offense, thereby limiting the access of those in other

220. Jeffrey C. Narvil, *Revealing the Bare Uncertainties of Indecent Exposure*, 29 COLUM. J.L. & SOC. PROBS. 85, 90, 111 (1995).

221. 354 U.S. 476, 489 (1957).

222. *Id.*

223. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 418 (1966).

224. 413 U.S. 15, 24 (1973).

225. See, e.g., *Pope v. Illinois*, 481 U.S. 497 (1987); *Smith v. United States*, 431 U.S. 291 (1977); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Hamling v. United States*, 418 U.S. 87 (1974).

226. *Miller*, 413 U.S. at 24 (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

communities who would not be offended by the same materials.<sup>227</sup> Thus the ACLU defended the song “Cop Killer” (in which rap artist Ice-T fantasizes about killing a police officer) as reflecting “a radical attitude held by some inner city residents” and said that it is “impossible to know exactly what message a particular listener takes” from it. They further charged that voluntary plans to label music were an attempt to “impose on all Americans the tastes and values of political powerbrokers who don’t connect with the experiences and concerns of the young, the alienated, and minorities.”<sup>228</sup>

A similar argument involves the global nature of the Internet. Kelly Doherty writes that

[t]he community standard is extremely difficult to apply to the Internet because the Internet’s reach is worldwide. When someone in a country with a conservative community standard receives sexually explicit material via the Internet from a country that permits and encourages bigamy or nudity, for example, it becomes difficult to determine which community standard should govern.<sup>229</sup>

Phillip Lewis goes farther, arguing that for the Internet “[s]uch communication would be impossible, or at the very least, greatly restricted, by the application of the arbitrary and antiquated ‘community standard’ that Congress has advocated in its two attempts at Internet regulation (the CDA and the COPA) thus far.”<sup>230</sup>

These arguments, when critically examined, seem unsustainable. First, in reference to the notion that “as goes the Internet so goes the world,” one notes that the Loudoun and Kern County public libraries, and most others, are still very much local institutions. So are schools and many other institutions. Community standards are by no means merely historical relics, non-applicable to the Internet, as the Supreme Court just reminded us in its partial ruling on COPA.<sup>231</sup>

Nor are we without national standards. Justice O’Connor, writing in concurrence with the COPA ruling, countered skeptics who believe that a national standard is “unascertainable,” noting, “It is true that our Nation is diverse, but many local communities encompass a similar diversity. . . . Moreover, the existence of the Internet, and its facilitation of national dialogue, has itself made jurors more aware of the

227. *Reno v. ACLU*, 521 U.S. 844, 877–78 (1997).

228. *Popular Music Under Siege*, *supra* note 115.

229. Kelly M. Doherty, Comment, *WWW.OBSCENITY.COM: An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 AKRON L. REV. 259, 286 (1999).

230. Philip E. Lewis, Comment, *A Brief Comment on the Application of the “Contemporary Community Standard” to the Internet*, 22 CAMPBELL L. REV. 143, 166 (1999).

231. *Ashcroft v. ACLU*, 535 U.S. 564 (2002).

views of adults in other parts of the United States.”<sup>232</sup> Most relevant, the very Constitution and its First Amendment that liberals rise to defend reflect national values that some communities may well not endorse if left to their own devices, but we hardly exempt those communities from abiding by it. Of course, Congress is an institution authorized to speak for nationwide preferences and values. So is the Supreme Court.

Aside from upholding national standards in the protection of minors, communities should be given some leeway, in grey areas, to add some standards of their own. The term “grey areas,” to be defined by Congress and the courts, is used to indicate that communities would not be free to ignore the First Amendment, but only to add some measures or provide further definitions, for instance what they consider harmful, which movies should receive an R rating, and whether moviegoers should be carded before entrance. And, just as local governments can ban people from drinking alcohol in public or running around nude, they should also be allowed to ban the rental of XXX-videos to children in their libraries. Those who argue that the Internet makes it impossible to impose local standards should take heart from the fact that it is technically possible. At least they should agree that if possible, the Internet should not be given license to expose children in ways no other institution is allowed. *In short, if there are any reasons to refuse better protection of children in the media and on the Internet from harmful material, the lack of standards cannot be counted among them.*

#### IN CONCLUSION

The position that children have full speech rights is untenable in the face of the intentions and interpretations of the First Amendment. Our laws in general do not mechanically extend to children, but take into account that their capacities are still developing. There is no reason the right to free speech should be treated any differently. Children are clearly developmental creatures. Initially, they have few if any of the attributes of mature persons. For children to develop properly, parents and educators, and society at large, have not merely a right but a duty to shape the cultural environment in which they grow. Unbounded exposure to harmful cultural material undermines their proper development, especially, as data show, representations of

232. *Id.* at 588–89 (O’Connor, J., concurring).

violence (aside from violence itself). As children grow older and their capacities increase, they are entitled to broader speech rights, but they still require some protections. Thus, protections of children (and, to a lesser extent, of teenagers) are best set in ways that separate the various limitations by age, and that “spillover” as little as possible onto the access of adults. However, if protecting children requires some limitation on adults, especially their commercial speech, then these measures are justified when the harm is substantial and well documented. We see this more clearly once we recognize that the First Amendment does not trump all other considerations, and begin to value children more than we may have in the recent past.

