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## Toward a Constitutional Regulation of Minors' Access to Harmful Internet Speech

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# Toward a Constitutional Regulation of Minors' Access to Harmful Internet Speech

-- Professor Dawn C. Nunziato

## I. INTRODUCTION

In his article *On Protecting Children from Speech*, Professor Amitai Etzioni argues forcefully in favor of the importance, and the feasibility, of protecting minors – especially younger minors – from harmful speech. He laments the fact that courts, in condemning Congress's efforts to regulate minors' access to harmful Internet speech, have focused almost exclusively on protecting the First Amendment rights of *adults* – at the expense of the interests of minors. Adverting to the problem of what we might call minor-to-adult spillover in such legislative efforts, courts have emphasized the ways in which such legislation has burdened adults' free speech rights, and have failed to focus sufficiently on minors' more limited free speech rights and on the beneficial effects such legislation may have on protecting minors from harm. Professor Etzioni contends that regulators have failed in their efforts to regulate minors' access to harmful speech because they have not regulated in a careful enough manner so as to avoid or reduce minor-to-adult spillover. He suggests that more careful regulation is both technically feasible and constitutionally desirable. Indeed, he contends, the technology exists to facilitate a finely-honed version of Internet speech regulation that would enable regulators to restrict older minors' (i.e., teenagers') access to certain categories of speech, while restricting younger minors' (i.e., children's) access to even further categories of speech, without impinging upon adults' free speech rights.

I substantially concur with these contentions and in this essay undertake a technological and doctrinal inquiry into precisely how regulators might overcome the manifold constitutional obstacles that courts have repeatedly held stand in the way of regulating minors' access to

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harmful Internet speech. In so doing, in Part I of this Essay, I first review the ways in which Congress has failed in its efforts over the past decade to craft a constitutional regulation of minors' access to harmful Internet content. Because these efforts involve content-based restrictions of speech that are disfavored under First Amendment jurisprudence, and because these efforts to restrict *minors'* access to such content have the spillover effect of also restricting *adults'* access to such content, courts have closely scrutinized these efforts and have held that every attempt thus far has failed to pass constitutional muster. The obstacles to crafting a constitutional regulation of minors' access to harmful Internet speech appear at this stage to be daunting and manifold. I closely examine the constitutional flaws such regulations were found to embody, with an eye toward considering whether and how these constitutional infirmities are remediable. In Part III, I apply the lessons learned from Congress's failed efforts, and consider in particular whether and how the use of filtering software to restrict only *minors'* Internet access to harmful sexually-themed speech in public libraries and public schools could be constitutionally implemented. In so doing, I work through the nuances of several complex First Amendment doctrines, including those involving content-based regulations of expression and prior restraints on protected speech. I examine in particular the proposal advanced by Professor Etzioni (and favorably received by the judiciary<sup>1</sup>) of subdividing the category of "minors" into *older minors* and *younger minors* (with perhaps even further subdivisions) for purposes of finely and narrowly tailoring the regulation of minors' access to harmful Internet speech.

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<sup>1</sup> See text accompanying notes x – y (discussing Third Circuit COPA decision on remand).

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II. CONGRESS'S EFFORTS TO REGULATE MINORS' ACCESS TO HARMFUL INTERNET CONTENT

Over the past decade, Congress has undertaken three major efforts to regulate minors' access to harmful Internet speech – the Communications Decency Act of 1996, the Child Online Protection Act of 1998, and the Children's Internet Protection Act of 2001.<sup>2</sup> Courts have found each of these efforts violative of the First Amendment, and have held that each statute failed to withstand the strict scrutiny applicable to content-based regulations of speech. Such strict scrutiny requires that Congress advance a compelling government interest within such legislation and that the legislation advance this interest in the least speech restrictive manner possible. While in each case, courts have found that the statute at issue satisfies the first of the two-prong strict scrutiny analysis – by advancing the compelling government interest of protecting minors from harmful speech – the courts went on to hold that Congress failed to advance this interest using the least speech-restrictive means possible. While Congress has attempted to learn from the constitutional infirmities and obstacles identified in earlier-enacted legislation, it has been unable to craft a regulation of minors' access to harmful Internet content that survives (or will likely survive<sup>3</sup>) strict scrutiny.

Many liberal theorists have condemned Congress's efforts to regulate minors' access to harmful speech,<sup>4</sup> while conservative theorists have bemoaned the intricate and well-settled First

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<sup>2</sup> Because it raises separate issues and has developed within a distinct line of First Amendment jurisprudence, I leave to others a discussion of Congress's efforts to restrict access to *child* pornography on the Internet. See, e.g. CARDOZO LAW REVIEW 2002 SYMPOSIUM, *The Fate of the Child Pornography Protection Act of 1996*, 23 CARDOZO L. REV. 1993.

<sup>3</sup> As of this writing, the Supreme Court has not yet handed down its decision in *American Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401 (E.D. Pa.) (three-judge court), *prob. jurisd. noted*, 123 S.Ct. 551 (2002).

<sup>4</sup> See, e.g., Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J.

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Amendment jurisprudence that has rendered these legislative efforts constitutionally infirm.<sup>5</sup> My approach differs from each of these. By attending carefully to the constitutional flaws in Congress's three legislative forays in this arena, I undertake the constructive project of setting forth specifications for a constitutional regulation of minors' access to harmful Internet speech.

A. THE COMMUNICATIONS DECENCY ACT OF 1996

Congress's first attempt to regulate minors' access to harmful Internet speech was embodied in the Communications Decency Act of 1996 (the CDA). Reacting to (since discredited) reports that a substantial percentage of the content available on the Internet contained hard core pornography (and other harmful sexually-themed expression)<sup>6</sup>, Congress sought to criminalize the transmission of such pornographic materials where such transmissions were available to minors. Such regulation was complicated by a number of factors. First, as a content-based restriction of speech, such regulation would be deemed presumptively unconstitutional and subject to exacting scrutiny.<sup>7</sup> Second, given the state of technology and the means of regulation chosen, such regulation inevitably restricted adults' constitutional right to access non-obscene sexually-themed expression – a right that the Supreme Court has taken pains to protect in the face of various governmental censorial efforts over the past years. Third, even

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CONST. L. 223 (1999).

<sup>5</sup> See, e.g., Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427 n. 27 (citing examples of such legal scholarship).

<sup>6</sup> See, e.g., Barry Glassner, *THE CULTURE OF FEAR, WHY AMERICANS ARE AFRAID OF THE WRONG THINGS* (1999) (describing unfounded and/or misleading data that fed public paranoia about influence on America's children including "cybersmut").

<sup>7</sup> See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (holding that the government cannot restrict speech on account of its content, "subject only to narrow and well-understood exceptions").

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to the extent that it restricted minors' access to sexually-themed expression, the legislation failed adequately to protect *minors'* (less robust) right to access sexually-themed expression. In short, to get such legislation right, Congress would need to either (1) understand and protect minors' right to access sexually-themed expression and limit the legislation's reach and effect to minors, or (2) understand and protect minors' limited constitutional right to access sexually-themed expression, and understand and protect adults' broad constitutional right to access sexually-themed expression, and ensure that the legislation effected no spillover from one category to the other.

Accordingly, in crafting the CDA, Congress would have been well-advised to begin its undertaking with a focus on the Supreme Court's finely-tuned obscenity jurisprudence<sup>8</sup> and its derivative jurisprudence of indecency or obscenity-for-minors.<sup>9</sup> While "obscene"<sup>10</sup> speech, properly defined, is wholly outside the protection of the First Amendment -- for any and all speakers and listeners -- "obscene for minors"<sup>11</sup> speech is speech that adults have a constitutional right to access (and engage in), while minors do not. The government therefore has a legitimate<sup>12</sup> interest in restricting minors' access to obscene-for-minors speech, but does *not* have a legitimate interest in restricting *adults'* access to such speech. In order to restrict *adults'*

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<sup>8</sup> See text accompanying notes x – y.

<sup>9</sup> See text accompanying notes x – y.

<sup>10</sup> See text accompanying notes x – y.

<sup>11</sup> See text accompanying notes x – y.

<sup>12</sup> As described *infra*, it is unclear precisely what type of showing needs to be made by the government in regulating minors' access to sexually-themed expression.

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access to sexually-explicit speech, such speech must be found to satisfy the legal definition of obscenity.<sup>13</sup>

Several principles follow from this basic structure of First Amendment jurisprudence regarding sexually-explicit speech. First, adults have a constitutional right to access obscene-for-minors speech, while minors do not. Second, the *definitions* of “obscene” and “obscene for minors” speech are of critical importance, because they set off First Amendment-protected speech from unprotected speech. Third, because of the differences in their First Amendment rights, it is of critical importance to be able to distinguish between adults and minors. In crafting the Communications Decency Act of 1996, which sought to restrict minors’ access to harmful, sexually-themed expression on the Internet, Congress paid insufficient attention to each of these principles. In purporting to restrict minors’ access to such content, Congress failed to adequately define the unprotected speech -- viz., indecent or obscene-for-minors speech -- in a constitutionally-permissible manner, and failed to adequately protect *adults’* constitutional right to access indecent or obscene-for-minors speech.

First, because the definitions of “obscene” and “obscene-for-minors” speech set off unprotected speech from protected speech, these definitions are of critical constitutional importance. The Supreme Court struggled for decades<sup>14</sup> to articulate a meaningful set of standards to be embodied within such definitions. After struggling to define a meaningful test for distinguishing First Amendment-protected sexually-explicit speech from unprotected obscene

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<sup>13</sup> See text accompanying notes x – y.

<sup>14</sup> See *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1973).

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speech,<sup>15</sup> in 1973 the Supreme Court set forth this test once and for all in the case of *Miller v. California*.<sup>16</sup> In order for sexually-themed speech to fall outside the protection of the First Amendment for adults, the three-pronged *Miller* test requires that:

- (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
- (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable law; and
- (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>17</sup>

Because, in the years following *Miller*, the Supreme Court repeatedly made clear that *Miller* sets forth the definitive standard for regulating obscene speech,<sup>18</sup> it is important for us – and for Congress – to focus carefully on each of the three prongs of this test. Importantly, if sexually-themed expression falls outside of this *Miller*-required definition of obscene speech, adults enjoy a constitutional right to access it,<sup>19</sup> which the government cannot restrict or impair.

First, *Miller* makes clear that obscenity is to be judged by a *local, community standard* -- in particular, by the standard of the average member of the community, applying contemporary *community standards* to assess whether the expression at issue, taken as a whole, appeals to the prurient interest. This prong of the *Miller* test grants local (geographically-defined) communities

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<sup>15</sup> Other categories of unprotected speech include “fighting words” and “defamation.” *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-383 (1992) (confining unprotected speech to limited categories such as fighting words, direct incitement of lawless action, and obscenity).

<sup>16</sup> 413 U.S. 15 (1973).

<sup>17</sup> *Id.* at x.

<sup>18</sup> *See, e.g.*, *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Pope v. Illinois*, 481 U.S. 497 (1987).

<sup>19</sup> This is assuming that the sexually-themed expression also does not fall within a constitutional definition of child pornography. *See* text accompanying note x.



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the autonomy to draw the line between sexually-themed speech that is to be protected by the First Amendment within and for their respective communities, and sexually-themed speech that is to be deemed outside of the First Amendment's protection within and with respect to their community.<sup>20</sup> Thus, although it might reasonably be believed that the First Amendment sets forth a *national* standard of protection for expression, in the context of regulating sexually-themed speech, the Supreme Court's obscenity jurisprudence grants individual local communities the autonomy to determine what subset of such speech (if any) is to be deemed outside the protection of the First Amendment within and with respect to their community.

An inevitable concomitant of such communities' autonomy is the potential geographical variation in the classification of speech as obscene. Accordingly, the community of Salt Lake City may classify as obscene and as unprotected by the First Amendment expression that may be deemed protected and not obscene by the community of New York City. As the Supreme Court explained in *Miller*, recognizing the geographic variability in the definition of obscenity:

Our nation is simply too big and too diverse . . . to expect that . . . fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive' . . . could be articulated for all 50 states in a single formulation. . . . To require a state to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility . . . It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City. . . . People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.<sup>21</sup>

Accordingly, *Miller* expresses the affirmative constitutional value that local communities enjoy the prerogative to determine what sexually-themed expression is to be deemed obscene within

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<sup>20</sup> *But see* *ACLU v. Ashcroft*, 122 S. Ct. 1700 (2002) (O'Connor, J. and Kennedy, J., concurring).

<sup>21</sup> *Miller*, 413 U.S. at x.

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their communities. Conversely, *Miller* also therefore grants local communities the autonomy to determine what sexually-themed expression is to be deemed *non-obscene* and *protected* by the First Amendment within their communities.

Second, *Miller* requires that, in order to regulate obscene content, the regulator (whether the federal, state, or local government) must specifically set forth *a list of sexual acts the descriptions or depictions of which are unprotected if such descriptions or depictions are deemed, applying contemporary community standards, to be patently offensive.*<sup>22</sup> The requirement that regulators set forth this list with specificity helps to reduce the potential for vagueness within obscenity statutes.<sup>23</sup> This specific determination of patent offensiveness, like the determination of appeal to the prurient interest, is also to be made by the average member of the geographical/local community.<sup>24</sup> Thus, both the assessment of appeal to the prurient interest, and the assessment of patent offensiveness, are subject to geographic variability.

Local communities' autonomy under *Miller* to determine which speech appeals to the prurient interest and is patently offensive is not unfettered, however. In assessing local communities' determinations of obscene speech, the third prong of *Miller* requires that *judges* retain the power to determine whether such speech nonetheless has redeeming social value – i.e., literary, artistic, political, scientific value -- and therefore whether such speech is protected by the First Amendment regardless of its assessment by local communities.<sup>25</sup> Because this determination is ultimately to be made by appellate courts and not by jury members, this savings

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<sup>22</sup> *Id.*

<sup>23</sup> *See Reno v. ACLU*, 117 S.Ct. 2329 (1997).

<sup>24</sup> *See ACLU v. Ashcroft*, 122 S. Ct. at x.

<sup>25</sup> *See, e.g., Jenkins v. Georgia*, 418 U.S. 153 (1974).

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clause provides an objective floor on local communities' determination of which sexually-themed expression is unprotected by the First Amendment. As the Supreme Court has explained, "this serious value savings clause allows appellate courts to impose some limitations and regularity on the definition [of obscenity] by setting, as a matter of law, a national floor for socially redeeming value."<sup>26</sup>

In short, *Miller* embodies a principle of geographical variability of obscene expression, under which the determination of whether expression is deemed obscene and therefore unprotected or not obscene and therefore protected may vary from one local community to the next. Under *Miller*, each community enjoys the autonomy to determine whether sexually-themed expression is to be declared obscene and unprotected, or whether such expression is to be declared non-obscene and protected, within the geographical boundaries of its community. All determinations of obscenity made by communities, however, are subject to being checked by an appellate court's determination under the *Miller* savings clause that such content is nonetheless protected because it has serious social value.

Now, back to 1996 and the problem of regulating minors' access to harmful sexually-themed expression on the Internet. Because Congress, in drafting the Communications Decency

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<sup>26</sup> See *ACLU v. Ashcroft*, 122 S. Ct. at x. Thus, even if a less "tolerant" community made the determination that a certain edition of *The Joy of Sex* was obscene and unprotected by the First Amendment, *Miller* requires that such determinations be second-guessed by the judicial branch, which has the responsibility of applying this *Miller* savings clause to declare that the expression at issue nonetheless has serious redeeming social value and is therefore protected by the First Amendment. Accordingly, despite the fact that a local jury in Georgia, applying its state obscenity statute, determined that the Academy Award-winning film *Carnal Knowledge* appealed to the prurient interest and described sexually conduct in a patently offensive manner, the court in that case enjoyed and exercised the power to determine that the work nonetheless enjoyed serious literary value. The court was therefore able to rescue the film from the jury's classification of it as obscene and unprotected by the First Amendment.

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Act, sought to restrict the dissemination of sexually-themed expression to Internet users, it was obliged not to restrict or impair *adults'* constitutional right to access sexually-themed expression that falls outside of the carefully-delineated guidelines for a constitutional definition of obscenity set forth in *Miller*. Furthermore, in drafting the Communications Decency Act, Congress sought to regulate minors' access to sexually-themed content that was unprotected – because indecent or obscene -- *for minors*. Congress was therefore obliged to follow the teachings of the Supreme Court cases that govern the regulation of *minors'* access to obscene-for-minors expression. An analysis of First Amendment jurisprudence in this area makes clear that determinations of obscenity are not only *geographically* variable; such determinations also vary based on the *age* of the individuals who seek access to such expression. The Supreme Court case of *Ginsberg v. New York*,<sup>27</sup> and related cases,<sup>28</sup> make clear that legislators may constitutionally restrict minors' access to speech that they cannot constitutionally restrict adults' access to, if they are careful not to restrict adults' rights (including adults' rights *qua parents*<sup>29</sup>) within such legislation.

In *Ginsberg*, the Supreme Court upheld the seemingly commonsense principle<sup>30</sup> that minors' First Amendment rights to access sexually-explicit content are more limited than adults' rights to access such material. In that case, the Court upheld a New York statute that regulated

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*See, e.g.,* Jenkins v. Georgia, 418 U.S. 153 (1974).

<sup>27</sup> Ginsberg v. New York, 390 U.S. 629 (1968).

<sup>28</sup> *See, e.g.,* FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

<sup>29</sup> *See infra* at text accompanying notes x – y.

<sup>30</sup> This principle was not commonsensical to the plaintiff in that case, who advanced “the broad principle that the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult or a minor.” 390 U.S. at 636.

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minors' access to content that fell within the statute's definition of "obscene for minors."<sup>31</sup> The statute at issue, which was primarily aimed at restricting the sale of "girlie" magazines to minors, prohibited selling to those age 16 and under material that was considered obscene as to that age category even though not obscene as to adults.<sup>32</sup> Following the predecessor decisions to *Miller* in which the Supreme Court required the inclusion of a savings clause in order to uphold the regulation of obscene speech,<sup>33</sup> the statute at issue in *Ginsberg* included within its definition of speech that was obscene for minors a savings clause for speech that had redeeming social importance to minors, as well as a community standards component for determining whether the expression was patently offensive.<sup>34</sup>

In sanctioning a two-tiered, age-dependent approach to regulating obscene content, in which states were granted greater latitude to regulate minors' access than adults' access to sexually-themed expression, the Supreme Court first emphasized its long-established principle respecting "parents' claim to authority in their own household to direct the rearing of their children, [which] is basic in the structure of our society."<sup>35</sup> The Court observed that "parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."<sup>36</sup> Apparently concluding that the prohibitions in the New York statute aided parents (and those standing in loco parentis) in discharging these responsibilities, the Court looked favorably upon the statute

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *See* *Roth v. United States*, 354 U.S. 476 (1957).

<sup>34</sup> 390 U.S. at x.

<sup>35</sup> *Id.* at x.

<sup>36</sup> *Id.* at x.

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on these grounds. The Court also placed emphasis on the fact that the statute's operation did not usurp parental autonomy to determine what material was suitable for their children, in that "the statute's prohibition against sale to minors does not bar parents who so desire from purchasing the magazines for their children."<sup>37</sup> While the statute's prohibition on the dissemination of obscene-for-minors speech might therefore be thought to aid parents in the discharge of their parental duties, had the statute gone as far as to *remove* from parents the authority to determine what material was suitable for their children, it would have been constitutionally infirm in this regard.<sup>38</sup>

The *Ginsberg* Court also recognized that, in addition to *parents'* interest in regulating their children's access to harmful speech, the State enjoyed an "independent interest in the well-being of its youth" that provided a separate justification for regulating minors' access to harmful speech. Toward this end, the Court observed that:

While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided – and society's transcendent interest in protecting the welfare of children -- justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designated to regulate the sale of pornography to children special standards, broader than those embodied in the legislation aimed at controlling dissemination of such material to adults.<sup>39</sup>

*Ginsberg* therefore stands for the principle that minors' access to speech can be regulated under a standard different than the standard by which adults' access to speech is regulated, so long as certain safeguards are included within such regulation. Such safeguards include primarily those definitional safeguards set forth in *Miller* tailored to apply to minors – including

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<sup>37</sup> *Id.* at x.

<sup>38</sup> See text accompanying notes x – y.

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a patently offensive and prurient interest analysis undertaken in light of contemporary community standards and a savings clause for speech that has redeeming social importance for minors. The constitutional requirement of including a savings clause in this context makes clear that any such regulation must preserve minors' access to expression that has serious literary, artistic, scientific, or political value for them.

Now back to Congress's effort to regulate minors' access to harmful speech on the Internet. With *Miller*, *Ginsberg*, and other relevant precedents in hand, in addressing the issue of minors' access to harmful speech on the Internet, Congress in 1996 might have chosen to carefully craft a regulation of minors' access to obscene-for-minors (as well as other unprotected) content on the Internet, while at the same time making sure to preserve adults' right to access content that was protected for adults, including obscene-for-minors content. In its first attempt at doing so, embodied in the Communications Decency Act of 1996, however, Congress was not careful. And the Supreme Court properly took Congress to task for its carelessness.

First, in the CDA Congress failed to align its statutory definitions of unprotected speech with the definitions of obscene and obscene-for-minors speech set forth in *Miller* and *Ginsberg*, rendering the statute's definitions of unprotected speech vague and overbroad.<sup>40</sup> Beyond the

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<sup>39</sup> 390 U.S. at x.

<sup>40</sup> The CDA's efforts to regulate minors' access to harmful Internet content were set forth in two provisions. First, the CDA criminalized the knowing transmission of "obscene or indecent" messages to any recipient under 18 years of age. *Reno v. ACLU*, 117 S.Ct. 2329 (1997). Second, the CDA criminalized the knowing sending or displaying to any person under 18 any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." *Id.* at x. The Act provided certain affirmative defenses to these two criminal prohibitions, including for those who undertook "good faith, . . . effective . . . actions" to restrict access by minors to the prohibited communications and those who restricted such access by

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requiring proof of age, such as a verified credit card or an adult identification number. The two relevant prohibitions from the CDA are set forth in full below:

Section 223(a). Whoever --

(1) in interstate or foreign communications -

(B) by means of a telecommunications device *knowingly* -

(i) makes, creates, or solicits, and

(ii) initiates the *transmission of, any* comment, request, suggestion, proposal, image, or other *communication which is obscene or indecent* knowing that the recipient of the communication is under 18 years of age regardless of whether the maker of such communication placed the call or initiated the communication; shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

Section 223(d). Whoever --

(1) in interstate or foreign communications *knowingly* -

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request suggestion, proposal, image, or other *communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs*, regardless of whether the user of such service placed the call or initiated the communication; or

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18, United States Code, or imprisoned not more than two years, or both. *Id.* at x (emphasis added).

Given the substantial emphasis that the Supreme Court has placed on the careful definition of speech that is obscene and obscene for minors, it is surprising that Congress chose not to adhere to such precise *Miller* and *Ginsberg*-inspired definitions in drafting the CDA. Although the Supreme Court, in reviewing the CDA's provisions, found that the term "obscene" in the statute could be construed to incorporate the *Miller*-inspired and constitutionally-approved definition from the criminal obscenity statute, the Court found that the Congress's failure to precisely define "indecent" in a constitutional manner rendered this provision constitutionally infirm. *Id.* at x. The Supreme Court held that the provision of the CDA restricting the transmission of *obscene* speech was severable from the unconstitutional provisions, and was constitutional: "Because obscene speech may be banned totally . . . and §223(a)'s restriction of "obscene" material enjoys a textual manifestation separate from that for "indecent" material, the Court can sever the term "or indecent" from the statute, leaving the rest of §223(a) standing." *See id.* at x. Because the term "indecent" enjoys no constitutionally-defined meaning, the Court concluded that Section 223(a) was impermissibly vague, in that it failed to define with precision the content to be proscribed, and failed to adhere to the strictures of *Miller*, *Ginsberg*, and related precedent for defining such proscribed content. *Id.* at x.

The Supreme Court also held that Section 223(d) of the Act was constitutionally infirm. Although the drafters of this subsection included a *subset* of the relevant definitional language from *Miller*, they indelicately cobbled together parts of *Miller*'s three constitutionally required prongs, resulting in an unconstitutional amalgam of *Miller*'s carefully-delineated definitional language. In this



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problems of vagueness and imprecision in the definitions Congress adopted to set apart sexually-themed expression that was unprotected for minors from sexually-themed expression that was protected for minors, Congress also failed to adequately protect *adults'* constitutional right to access Internet expression that was unprotected for minors but nonetheless protected for adults. Because of the formidable technological difficulty of ensuring that Internet communications that are unprotected for minors are communicated only to adults and not to minors, the CDA's provisions essentially operated to restrict adults from engaging in and accessing constitutionally-protected expression for them. Because the CDA's provisions operated to restrict adults' access to speech that was constitutionally protected for adults, the CDA operated to "suppress a large amount of speech that adults have a constitutional right to send and receive."<sup>41</sup>

Furthermore, the CDA failed to protect parents' autonomy to determine what material their children should have access to -- even if such determination is contrary to determinations made by the government as to such expression's harmfulness for minors. In contrast to the

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subsection, Congress included a portion of *Miller's* patently offensive prong, coupled with only the contemporary community standards language of the prurient interest prong, while failing to provide any savings clause whatsoever to exempt from the provision's reach content that has serious social value. In chastising Congress for failing to carefully adhere to the required definitional analysis set forth in *Miller*, the Supreme Court explained:

Each of *Miller's* other two prongs [beyond the patently offensive prong] also critically limits the uncertain sweep of the obscenity definition. Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing alone, is not vague. The CDA's vagueness undermines the likelihood that it has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials.

*Id.* at x. While the Supreme Court in *ACLU v. Reno* recognized, following *Ginsberg*, that governments have an interest in protecting children from potentially harmful materials, the Court reiterated that governments must pursue any such content-based restrictions in a manner that avoids unconstitutional vagueness in its definitions and that employs the least restrictive means possible.

<sup>41</sup> *Id.* at x.

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statute upheld in *Ginsberg* -- which permitted parents to override the state's determination of obscenity-for-minors and to purchase "girlie" magazines for their children -- the CDA effected a complete ban on minors' access to statutorily-proscribed materials and effectively usurped parental autonomy in this regard.<sup>42</sup>

In evaluating the CDA's constitutionality under the requisite strict scrutiny analysis, the Supreme Court explained that if there were means available effectively to restrict minors' access to harmful material while imposing fewer restrictions on adults' free speech rights, the CDA would be held to fail the "least restrictive means" component applicable to content-based restrictions.<sup>43</sup> In assessing the CDA's compliance with this least restrictive means component, the Court concluded that indeed other, less restrictive means of restricting minors' access to content that is harmful to minors was or would soon be available. Specifically, the Court noted that "currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing material which the *parents* believe is inappropriate will soon be widely available."<sup>44</sup> Because such filtering software<sup>45</sup> presented a means of restricting minors' access to harmful material that would intrude less severely upon adults' right to access protected material -- and upon the right of minors of "permissive" parents to access such material -- the Supreme Court concluded that the CDA did not embody the least restrictive means of advancing Congress's compelling goal of protecting minors from harmful Internet expression.

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<sup>42</sup> *Id.* at x.

<sup>43</sup> *Id.* at x.

<sup>44</sup> *Id.* at x.

<sup>45</sup> *Id.* at x.

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In short, (1) because Congress's definitions of proscribed expression were impermissibly vague and not as narrowly tailored as the definitions in *Miller* and *Ginsberg*, (2) because these proscriptions burdened adults' right to access protected (for adults) expression, (3) because these proscriptions usurped parental authority to determine what expression their children could access, and (4) because methods of restricting minors' access to harmful Internet speech existed – such as the use of filtering software *by parents*<sup>46</sup> – that would be less speech- restrictive, these provisions of the CDA were held unconstitutional.

B. THE CHILD ONLINE PROTECTION ACT OF 1998

Congress paid closer attention to First Amendment jurisprudence in its two subsequent attempts to regulate minors' access to harmful Internet speech. Shortly after the Supreme Court struck down the relevant provisions of the CDA, Congress went back to the drawing board, this time directing its attention to the applicable Supreme Court obscenity (and obscenity-for-minors) jurisprudence. Legislators focused in particular on *Miller*'s three-prong test, as modified for minors by *Ginsberg* – and put forward a more plausibly constitutional effort at regulating minors' access to harmful Internet speech. In the Child Online Protection Act of 1998, Congress carefully imported the three prongs of the *Miller* test into its regulation, while incorporating an age-dependent standard for determining harmful material, as sanctioned by the Supreme Court in *Ginsberg*.<sup>47</sup>

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<sup>46</sup> The Supreme Court did not comment upon the related issue of the government's requiring the use of filtering software by minors (or adults), which is taken up in *American Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d. 401 (E.D. Pa.) (three-judge court), *prob. jurisd. noted*, 123 S.Ct. 551 (2002).

<sup>47</sup> The relevant provisions of COPA are as follows:

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If one compares the requisite constitutional definition of obscenity set forth in *Miller*, as modified for minors in *Ginsberg*, with the definition of “harmful to minors” set forth in COPA, one might predict that the statute would withstand strict scrutiny applicable to such content-based restrictions on speech. As discussed below, in reviewing the constitutionality of COPA, however, the courts have found substantial constitutional flaws in other aspects of this statute. At each level of review – in the district court, the Third Circuit, the Supreme Court (and the Third Circuit on remand) – different aspects of COPA were found problematic.

The district court, in reviewing COPA, emphasized the burdens that the statute imposed on speakers and publishers of sexually-themed, protected-for-adults expression and found that these burdens were substantial enough to render the statute unconstitutional.<sup>48</sup> Furthermore, the district court held that the government once again had failed to establish that COPA was the least

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Section 231(a). Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes *any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors* shall be fined not more than \$50,000, imprisoned not more than 6 months, or both.

\* \* \*

(e) (6) Material that is harmful to minors.--The term `material that is harmful to minors' means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that--

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Like the CDA, COPA also provides an affirmative defense for defendants who in good faith restrict access by minors to material that is harmful to minors by use of credit cards, adult codes, and other “reasonable measures that are feasible under available technology.” *Id.* at x.

<sup>48</sup> *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999) (hereinafter COPA I)

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restrictive means of regulating minors' access to "harmful to minors" material, because "blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burdens on constitutionally-protected speech that COPA imposes on adult users or web site operators."<sup>49</sup>

On appeal, the Third Circuit focused on a different aspect of the Supreme Court's obscenity jurisprudence – one that goes to the heart of regulating obscene and obscene-for-minors content on the Internet, *viz.*, the autonomy of communities to determine the contours of obscene (and obscene-for-minors) speech within and with respect to their communities.<sup>50</sup> As discussed above, *Miller*'s first prong requires of a constitutional definition of obscenity that there be an inquiry into whether the average member of a community, applying that community's contemporary community standards, would find that the work appeals to the prurient interest.<sup>51</sup> *Miller*'s second prong (implicitly) carries over this communitarian inquiry to the assessment of whether the expression is patently offensive.<sup>52</sup> These required communitarian analyses permit a Salt Lake City jury to classify certain speech (say, a book or a magazine) as obscene and unprotected within their local community, where such speech might very well be deemed protected by and within another local community, say New York City.<sup>53</sup> While this constitutionally-required geography-based determination of obscenity might be workable to separate protected from unprotected expression in real space, where a community's geographic

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<sup>49</sup> *Id.* at x.

<sup>50</sup> *See* *ACLU v. Reno*, 31 F.3d 162 (3d Cir. 2000) (hereinafter *COPA II*)

<sup>51</sup> *See* text accompanying notes x – y.

<sup>52</sup> *See* text accompanying notes x – y.

<sup>53</sup> These communitarian analyses are subject to the judicially determined floor described above. *See* text accompanying notes x – y.

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boundaries are meaningful, this geographic variability becomes more problematic when applied to expression on the Internet. Given the meaningful geographic boundaries in real space, it might be feasible for Salt Lake City to effectively exclude expression contained in books, magazines, videos, and the like that it considers obscene according to its local community standards. It is feasible, although somewhat burdensome, for distributors of pornographic expression contained in books, magazines, videos, mailings, etc., to take steps to restrict the dissemination of such works into communities that consider such works to be obscene, in order to avoid being prosecuted for purveying obscenity within such less “tolerant” communities. And, by exercising its right under *Miller* to determine the contours of obscenity within its local community, Salt Lake City does not (necessarily) thereby restrict the ability of other communities to determine for themselves the contours of obscenity within *their* communities. Put differently, there is not substantial spillover in real space with respect to the rights of local communities to determine the contours of obscene speech within their communities, given the feasibility of restricting the real space dissemination of (potentially obscene) expression to certain geographic communities. For, although a publisher of pornography *might* decide to self-censor any and all expression that *any* community would likely deem obscene so as to avoid the difficulty of limiting dissemination to certain (more tolerant) communities, it might also decide to undertake feasible measures to restrict dissemination to only those communities where its content would likely not be deemed obscene.

Given the absence of meaningful boundaries delimiting one local community from another within cyberspace, however, it becomes far more difficult for individual communities to

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exercise their autonomy in cyberspace with respect to determining the contours of obscenity within their borders without substantial spillover to other communities. Because it is not feasible for an Internet publisher of sexually-themed expression (contra a real-space publisher of such expression) to restrict the dissemination of its expression only to those local communities that would likely not find such expression to be obscene, the Internet publisher has only one realistic alternative to avoid being subject to obscenity prosecution – forgo dissemination of such expression on the Internet altogether.<sup>54</sup> Given the inability of web publishers to restrict the dissemination of expression by geographical location, one community's determination of obscenity spills over to all other communities, thereby impinging upon these other communities' autonomy to determine the contours of obscene and obscene-for-minors expression for their communities.

Addressing this issue, the Third Circuit in assessing the constitutionality of COPA held that the conflict between (1) the prerogative of a community to determine the boundary between obscene-for-minors speech and non-obscene-for-minors speech and (2) the inability to control the geographic dissemination of Internet content, was so severe as to be constitutionally intolerable. In reviewing the definition of harmful to minors material set forth in COPA, which embodied *Miller's* contemporary community standards analysis as modified for minors by *Ginsberg*, the Third Circuit explained:

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<sup>54</sup> For example, it might come to pass that a Salt Lake City jury would find that a particular web site was obscene for minors under a *Miller/Ginsberg* definition of obscenity, such as set forth in COPA. *See, e.g.,* *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996). In that case, the only meaningful option for the Internet publisher of such material would be to take down such expression altogether, for all communities throughout the United States (and indeed the world), even though some other communities, applying *their* contemporary community standards, would conclude that such expression was protected by the First

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Because material posted on the Web is accessible by all Internet users worldwide, and because current technology does not permit a Web publisher to restrict access to its site based on the geographic locale of each particular Internet user, COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability. Thus, because the standard by which COPA gauges whether material is "harmful to minors" is [and, per *Miller* and *Ginsberg*, must be] based on identifying "contemporary community standards," the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech.<sup>55</sup>

Writing for a plurality of the Supreme Court, Justice Thomas rejected the Third Circuit's conclusion that the conflict between *Miller*'s requirement of community-determined standards of obscenity and the inability to limit dissemination geographically on the Internet *alone* sufficed to render COPA unconstitutional on its face.<sup>56</sup> Thomas explained that the Supreme Court has historically held speakers and publishers disseminating their content to nationwide audiences to potentially varying community standards of obscenity, and that "requiring a speaker disseminating material to a national audience to observe varying community standards does not violate the First Amendment."<sup>57</sup> Thomas explained, for example, that those mailing materials to a nationwide audience,<sup>58</sup> as well as those operating commercial dial-a-porn operator services,<sup>59</sup> have been held subject to potentially varying local community standards under the Supreme Court's obscenity jurisprudence. Referring to these earlier obscenity cases, Justice Thomas observed:

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Amendment and that members of their community had a First Amendment right to access such material.

<sup>55</sup> See COPA II, at x.

<sup>56</sup> *Ashcroft v. ACLU*, 122 S. Ct. 1700, x (2002) (hereinafter COPA III).

<sup>57</sup> *Id.* at x.

<sup>58</sup> *Id.* at x.

<sup>59</sup> *Id.*



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There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. [For example, if dial-a-porn operator] Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages.<sup>60</sup>

The Third Circuit had held that these earlier obscenity cases involving different mediums of expression were distinguishable from COPA and its application to Internet dissemination because the defendants in these earlier cases could feasibly control the distribution of their potentially obscene material with respect to the geographic communities into which they released it, whereas Internet publishers have no such comparable control. Justice Thomas rejected this distinction, explaining that in none of these earlier cases was "the speaker's ability to target the release of material into particular geographic areas integral to the legal analysis."<sup>61</sup>

Justices Kennedy, Souter, and Ginsburg, who concurred in the judgment, disagreed with Justice Thomas in their assessment of this issue. They found that the Court of Appeals' emphasis on COPA's incorporation of varying community standards was not misplaced, and were quite concerned about the conflict between geographical variability in the definition of obscene-for-minors speech and the inability of Internet publishers and speakers to control the geographic dissemination of their speech. Their concurrence emphasized that *Miller's* contemporary community standards test grants individual communities the autonomy to determine what speech is protected and what speech is unprotected within their borders, and

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<sup>60</sup> *Id.* at x.

<sup>61</sup> *Id.* at x.

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observed that “the national variation in community standards constitutes a particular burden on Internet speech.”<sup>62</sup>

Yet, because the case involved a facial challenge to COPA – before it had been applied to restrict any speech whatsoever – the concurring justices ultimately concluded that those challenging the statute at this stage had failed to meet their burden of identifying what, if any, speech would be unconstitutionally burdened by the statute.<sup>63</sup> Although observing that the national variation in community standards constitutes a particular burden on Internet speech, absent a comprehensive and careful analysis of the speech that is burdened, the concurring Justices found the Third Circuit’s conclusion to be premature.<sup>64</sup>

On remand, the Third Circuit was charged with expanding the focus of its inquiry into the constitutionality of COPA beyond the effect of the national variation in community standards on sexually-themed Internet expression. In a decision filed March 6, 2003, the Third Circuit, as instructed by the Supreme Court, expanded its analysis of COPA’s constitutionality, but nonetheless reiterated its conclusion that the statute was unconstitutional.<sup>65</sup> While concluding that the statute advanced a compelling government interest, the court held that this interest was not advanced in the least restrictive means possible, that the statute was not narrowly tailored to achieve this interest, and that COPA therefore failed strict scrutiny.<sup>66</sup> Additionally, for good measure, the court also conducted an overbreadth analysis, and concluded that the statute was

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<sup>62</sup> *Id.* at x.

<sup>63</sup> *Id.* at x.

<sup>64</sup> *Id.* at x.

<sup>65</sup> *ACLU v. Ashcroft*, 2003 WL 755083, \_\_\_ F.3d \_\_\_ (2003) (hereinafter COPA IV).

<sup>66</sup> *Id.* at x.

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overbroad.<sup>67</sup> In reaching these conclusions, the court first held that a number of provision of COPA were not narrowly tailored. Of particular interest to the present inquiry is the court's focus on COPA's use of the expression "for minors" in all three of its definitional prongs.<sup>68</sup> The court held that because Congress failed to *further* narrow the age range covered by the term "minors," and because material that, for example, had serious value for sixteen year olds might not have serious value for six year olds:

Web publishers would face great uncertainty in deciding what minors could be exposed to its publication, so that a publisher could predict, and guard against potential liability. Even if the statutory meaning of "minors" were limited to minors between the ages of thirteen and seventeen, web publishers would still face too much uncertainty as to the nature of material that COPA proscribes.<sup>69</sup>

Thus, much as earlier courts were concerned with minor to adult spillover in regulations of speech, the Third Circuit in its latest COPA decision was concerned with the problem of younger minor to older minor spillover. Apparently concluding that older minors enjoyed the First Amendment right to receive a greater breadth of Internet expression than younger minors, the Third Circuit held that COPA's failure to distinguish among minors of different age groups rendered the statute insufficiently narrowly tailored to achieve its ends.

Another aspect of the Third Circuit decision that is relevant for present purposes is its inquiry into whether less restrictive means existed other than COPA's federal criminal prohibition on certain Internet speech to advance the government's compelling interest of protecting the physical and psychological well-being of minors. As had the district court, the Third Circuit on remand concluded that the voluntary use of blocking and filtering software by

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<sup>67</sup> *Id.* at x.

<sup>68</sup> *Id.* at x.

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parents was a less restrictive and more effective means of advancing this end.<sup>70</sup> The court first observed that the use of such software was likely to be more effective than COPA's provisions in blocking harmful speech because, unlike COPA, such software also blocks harmful speech on foreign web sites and noncommercial web sites.<sup>71</sup> Second, the court rejected the government's argument that the voluntary use of such software by parents impermissibly placed the burden of avoiding such harmful speech on the potential victims of such speech. Adverting to the Supreme Court's decision in *United States v. Playboy Entertainment Group*,<sup>72</sup> in which the Supreme Court struck down a mandatory regulatory scheme for blocking sexually-explicit channels in favor of a voluntary scheme by which parents could opt to block such channels, the Third Circuit held that "a court should not presume that parents, given full information, will fail to act."<sup>73</sup> Although the Third Circuit recognized that filtering and blocking software imperfectly achieves its goals in that it both overblocks and underblocks<sup>74</sup> speech deemed harmful, the court found that the *voluntary* use of such software by parents – as compared to the mandatory use by public institutions – would help to ameliorate constitutional problems of under- and over-blocking.<sup>75</sup>

In sum, the Third Circuit found a number of constitutional infirmities in COPA beyond its reliance on community standards to assess whether sexually-themed speech was protected or unprotected for minors – including COPA's inclusion of a non-age-variable definition of

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<sup>69</sup> *Id.* at x.

<sup>70</sup> *Id.* at x.

<sup>71</sup> *Id.* at x.

<sup>72</sup> 529 U.S. 803 (2000).

<sup>73</sup> *Id.* at x.

<sup>74</sup> See text accompanying notes x – y.

<sup>75</sup> COPA IV, at x.

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“minors” and the existence of the less speech restrictive alternative of the voluntary use of filtering software by parents to achieve the statute’s compelling interests.

C. THE CHILDREN’S INTERNET PROTECTION ACT

The Children’s Internet Protection Act represents Congress’s most recent effort to overcome the constitutional hurdles identified in earlier legislative attempts to regulate minors’ access to harmful Internet speech. Instead of outright criminalizing harmful Internet expression as the CDA and COPA before it had done, CIPA operates by conditioning public schools’ and libraries’ eligibility to receive certain federal funds upon their commitment to use filtering software to block access to certain “harmful” Internet materials. Within the regulatory scheme contemplated by CIPA, each community, acting through its community-based institutions, theoretically enjoys a measure of autonomy to determine for its own community – and only its own community – the contours of obscene and obscene-for-minors (or “harmful to minors”) expression. This determination is to be effectuated through the use of filtering software configured to block expression that falls within the definitions of speech that is harmful to minors set forth by the community-based institution itself. In this way, CIPA’s basic regulatory scheme embodies the promise of overcoming the constitutional obstacles<sup>76</sup> to regulating (obscene and) obscene-for-minors speech set forth in COPA, or in any federal law embodying a *Miller*-based standard of geographically-variable obscenity.

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<sup>76</sup> See text accompanying notes x – y.

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Under the CIPA scheme, each public elementary and secondary school and each public library theoretically enjoys the autonomy to determine what type of Internet speech is to be deemed obscene and obscene for minors (subject apparently to the judicially-determined floor for material with serious redeeming social value, for adults and minors, respectively). As a theoretical matter, under CIPA, each community, acting through its public schools and libraries, is permitted to specify the parameters of protected and unprotected speech, for minors and for adults, and to implement these objective parameters by configuring filtering software -- to be used by members of its community only within the community's public libraries and schools -- to effectuate these restrictions. Thus, as a theoretical matter, CIPA's overarching scheme quite nicely resolves the seemingly intractable problems to implementing a *Miller*-based constitutional regulation of minors' access to obscene-for-minors speech, by allowing each community to determine the contours of protected and unprotected speech for its community, thereby protecting community autonomy in this area and substantially limiting community-to-community spillover of such determinations. Although CIPA's basic regulatory scheme embodies great promise for achieving a constitutional regulation of minors' access to harmful Internet speech, the details of this scheme have proven problematic, as discussed below.

CIPA operates by making the use of software filters by a public library or a public school a condition on its receipt of two kinds of federal subsidies: grants under the Library Services and Technology Act (LSTA)<sup>77</sup> and "E-rate" discounts for Internet access and support under the

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<sup>77</sup> See *American Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d. 401, x (E.D. Pa.) (three-judge court), *prob. jurisd. noted*, 123 S.Ct. 551 (2002).

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Telecommunications Act.<sup>78</sup> In order to receive LSTA funds or E-rate discounts, CIPA essentially requires public libraries and schools to certify that they are using “technology protection measures” that prevent patrons from accessing visual depictions that are “obscene,” “child pornography,” or in the case of minors, “harmful to minors.”<sup>79</sup> While CIPA’s scheme allows library officials under certain circumstances to disable software filters for certain patrons engaged in bona fide research or other lawful purposes, the disabling of such filters on computers used by minors is prohibited if the library or school receives E-rate discounts.

1. CIPA’S AMENDMENTS TO THE E-RATE PROGRAM

A. PROVISIONS APPLICABLE TO COMPUTERS USED BY MINORS

First, CIPA modifies the federal E-rate program, under which telecommunications carriers are required to provide high speed Internet access and related services to public schools and libraries at discount rates, as follows. CIPA requires that a library “having one or more computers with Internet access may not receive services at discount rates” unless the library certifies that it is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are (I) obscene; (II) child pornography; or (III) harmful to minors, and that it is enforcing the operation of such technology protection measure *during any use of such computers by minors.*<sup>80</sup> Thus, libraries and schools, in order to receive E-rate discounts, must certify that, during any use of Internet-accessible computers by

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<sup>78</sup> *Id.* at x.

<sup>79</sup> *Id.* at x.

<sup>80</sup> *Id.* at x.

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minors (i.e., those 16 and under),<sup>81</sup> filtering technology is being used to block access to obscene, child pornography, and “harmful to minors” material. While the terms “obscene” and “child pornography” are given their (constitutionally acceptable) standard meaning,<sup>82</sup> CIPA defines material that is “harmful to minors” as

any picture, image, graphic image file, or other visual depiction that - (i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion; (ii) 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 (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.<sup>83</sup>

Although the third prong of the harmful to minors definition appears to provide a savings clause for material that appellate courts find has redeeming social value,<sup>84</sup> CIPA prohibits federal interference in local determinations regarding what Internet content is appropriate for minors:

A determination regarding what material is appropriate for minors shall be made by the school board, local educational agency, library or other authority responsible for making the determination. No agency or instrumentality of the United States Government may - (A) establish criteria for making such determination; (B) review the determination made by the certifying [entity] . . . ; or (C) consider the criteria employed by the certifying [entity] . . . in the administration of subsection (h)(1)(B).<sup>85</sup>

B. PROVISIONS APPLICABLE TO ALL COMPUTERS

Additionally, as a further condition on its receipt of E-rate discounts, a library or school must certify that, during *any* use of Internet-accessible computers – *by minors or by adults* -- it is

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<sup>81</sup> *Id.* at x.

<sup>82</sup> *See* text accompanying notes x – y.

<sup>83</sup> CIPA § 1721(c) (codified at 47 U.S.C. § 254(h)(7)(G)).

<sup>84</sup> *See* text accompanying notes x – y.

<sup>85</sup> CIPA § 1732 (codified at 47 U.S.C. § 254(l)(2)).



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“enforcing a policy of Internet safety that includes the operation of a technology protection measures with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are (I) obscene; or (II) child pornography.”<sup>86</sup> Thus, a library or school, in order to receive E-rate discounts, must further certify that it is using filtering technology to block access to obscene and child pornographic materials during *any* use of computers that are Internet accessible.

C. DISABLING PROVISIONS

With respect to *adults'* use of Internet-accessible computers, CIPA provides that a library official is permitted to “disable the technology protection measure concerned, *during use by an adult*, to enable access for bona fide research or other lawful purpose.”<sup>87</sup> However, CIPA’s amendments to the E-rate program do not permit libraries or schools to disable filters to enable bona fide research or other lawful use for *minors*.

In short, CIPA requires that public libraries and schools, as a condition of receiving federal funding under the E-rate program, (1) utilize filtering software to block adults’ access to obscene and child pornographic visual content, and (2) utilize filtering software to block *minors'* Internet access to the above content *as well as* to visual content that is “harmful to minors.” Although the filtering of adults’ Internet access may be disabled for bona fide research or other lawful purposes, such disabling is not permitted for minors.

2. CIPA’S MODIFICATIONS TO THE LSTA PROGRAM

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

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CIPA amends the Library Services and Technology Act to require that the funds made available under the Act will not be available unless the library has in place and is enforcing “a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access” that protects against access through such computers of certain types of content. When such computers are “in use by minors,” the library must protect against access to visual depictions that are “obscene,” “child pornography,” or “harmful to minors.”<sup>88</sup> At all times, the library must use filtering software to protect against access to visual depictions that are “obscene” or “child pornography” in order to receive such funds.<sup>89</sup> The definition of the term “harmful to minors” in CIPA’s amendment to the LSTA program is similar to the definition found in the amendment to the E-rate program.<sup>90</sup> CIPA’s amendment to LSTA, like its amendment of the E-rate program, allows for library officials to disable filtering in order to “enable access for a bona fide research or other lawful purposes.”<sup>91</sup> These disabling provisions, unlike those provided in the amendments to the E-rate program, apparently permit the disabling of filtering during use by adults or minors for bona fide research or other lawful purposes.<sup>92</sup>

By borrowing directly from COPA’s definition of material that is harmful to minors, CIPA’s definition of material that is harmful to minors appears to embody the constitutionally necessary elements set forth by the Supreme Court in *Miller*. And, by enabling local community-based institutions to decide *for their communities* what material is harmful to minors

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

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within their communities, CIPA advances *Miller's* goal of granting local communities the autonomy to determine the scope of protected and unprotected speech within their communities, thus resolving the problem of community-to-community spillover identified by the Third Circuit in the COPA case.

Despite CIPA's marked improvements upon earlier legislative efforts to regulate minors' access to harmful Internet speech, the constitutionality of CIPA as applied to public libraries was challenged by the American Library Association and several affected libraries, in the case of *American Library Association v. United States*.<sup>93</sup> The case was heard by a special three judge panel, and is now on appeal to the Supreme Court. The Supreme Court's decisions will provide meaningful guidance when that decision is handed down in Summer 2003. In the meantime, the three-judge panel's extensive and well-reasoned decision is instructive.

In order to understand the constitutional issues at stake in CIPA, it is important to understand the mechanics of software filtering.<sup>94</sup> Almost all filtering software programs operate by comparing web site addresses that a user wishes to access against a "blacklist." The blacklist may be stored locally on the Internet user's computer (which is termed "client implementation") or may be stored remotely on a proxy server (which is called "server implementation"). Some filtering programs, such as CyberPatrol, offer both client and server-based implementations. Others are either strictly client-side programs or strictly server-side programs. Filtering

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<sup>92</sup> *Id.*

<sup>93</sup> 201 F. Supp. 2d 401 (E.D. Pa.) (three-judge court), *prob. jurisd. noted*, 123 S.Ct. 551 (2002).

<sup>94</sup> My discussion of software filtering follows closely that provided by filtering experts Seth Finkelstein and Lee Tien in their extremely lucid article *Blacklisting Bytes*, in *Filters & Freedom 2.0* (Electronic Privacy Information Center, eds., 2001).

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software programs operate by blocking Internet users' access to certain web sites in the following manner:

When an Internet user types [an Internet address or Uniform Resource Locator (URL)] indicating material he or she wishes to access, the [filtering software] examines various parts of the URL against its internal blacklist to see if the URL is forbidden . . . . If the URL is found on the blacklist . . . , then the program looks to see how extensively it should be banned [i.e., whether to blacklist the whole domain, a directory of the site, or only a particular file on the site]. . . . Blacklists can have multiple categories of banned sites (e.g., one for "Sex," another for "Drugs," perhaps another for "Rock & Roll," and so on). . . . But blacklists are almost always secret, so there's no way to know what sites are actually in the category. . . . The whole list-matching process above may be repeated all over again against exception lists or "whitelists." A few products consist only of whitelists, or can work in whitelist only mode. [Some filtering software] can be set . . . so that everything not prohibited is permitted (blacklist only) or only that which is explicitly allowed is permitted (whitelist only). And of course the whitelist can override the blacklist. In general, such blacklist/whitelist settings are standard in server-level programs, along with the ability to create additional organization-specific blacklists or whitelists.<sup>95</sup>

The default blacklists and whitelists used by filtering software programs are created by the software developers and constitute a substantial portion of the programs' value to consumers. As such, they are typically protected as trade secrets. Thus, a library implementing a filtering software program typically has no way of knowing which web sites will actually be rendered inaccessible by the filtering software program. Although the library may choose to configure the filtering software to filter out certain pre-defined categories of web sites (such as "Adult/Sexually Explicit"), the library has no way of knowing the *criteria* used by the software developers to select which web sites fall into this category, nor which web sites will actually be found to fall within this category.

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<sup>95</sup> *Id.* at x.

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In considering the constitutionality of CIPA, the three-judge panel first found that the use of filtering software program mandated by CIPA “erroneously blocks a huge amount of speech that is protected by the First Amendment,”<sup>96</sup> estimating the number of web pages erroneously blocked to be “at least tens of thousands.”<sup>97</sup> Filtering software programs, the court found, “block many thousands of Web pages that are clearly not harmful to minors, and many thousands more pages that, while possibly harmful to minors, are neither obscene nor child pornography.”<sup>98</sup> The court observed that the government’s expert himself found that popular filtering software packages overblock at rates between nearly 6% and 15% (i.e., between 6% and 15% of blocked web pages contained no content that met even the software’s own definitions of sexually-themed content, let alone the constitutional definitions of obscenity or child pornography). Furthermore, the three-judge panel concluded that software filtering programs inevitably overblock harmless Internet content, which adults and minors have a First Amendment right to access, and underblock obscene and child pornographic content, which neither adults nor minors have a First Amendment right to access. This is because the categories used by such software for filtering purposes are broader than the constitutional categories of unprotected speech defined by CIPA.<sup>99</sup>

Further, the three-judge panel found that the provisions of CIPA permitting libraries to unblock wrongfully blocked sites upon the request of an adult<sup>100</sup> (or in some cases a minor<sup>101</sup>)

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<sup>96</sup> 201 F. Supp. 2d at x.

<sup>97</sup> *Id.* at x.

<sup>98</sup> *Id.* at x.

<sup>99</sup> *Id.* at x.

<sup>100</sup> *Id.* at x.

<sup>101</sup> *Id.* at x.

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who is engaged in bona fide research or other lawful purposes were insufficient to render the statute unconstitutional.<sup>102</sup> In addition to the constitutional infirmities inherent in refusing to permit libraries to unblock wrongly blocked sites for minors,<sup>103</sup> the court found that many *adult* patrons were “reluctant or unwilling to ask librarians to unblock web pages or sites that contain only materials that might be deemed personal or embarrassing, even if they are not sexually explicit or pornographic.”<sup>104</sup> Because libraries were not required under CIPA’s scheme to permit Internet users to make *anonymous* unblocking requests, the vast majority of patrons confronted with wrongfully blocked sites apparently decline to request the unblocking of such sites.<sup>105</sup> Furthermore, the court found that even where unblocking requests were submitted and acted upon, the unblocking process took too long – between 24 hours and one week. The court concluded that:

The content-based burden that the library’s use of software filters places on patrons’ access to speech suffers from the same constitutional deficiencies as a complete ban on patrons’ access to speech that was erroneously blocked by filters, since patrons will often be deterred from asking the library to unblock a site and patron requests cannot be immediately reviewed.<sup>106</sup>

In short, the three-judge panel concluded that “given the substantial amount of constitutionally protected speech blocked by filtering software,” CIPA was not narrowly

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<sup>102</sup> *Id.* at x.

<sup>103</sup> *Id.* at x.

<sup>104</sup> *Id.* at x.

<sup>105</sup> *Id.* at x.

<sup>106</sup> *Id.* at x.

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tailored.<sup>107</sup> And, the ability of patrons falling within certain categories<sup>108</sup> to request unblocking of erroneously blocked sites did not save the statute from being found unconstitutional.

The Supreme Court heard argument in this case on March 5, 2003, and its decision is expected in Summer 2003. Based on their questions, the Justices found several aspects of the CIPA statute constitutionally problematic. The Justices substantially limited their inquiry to the statute's impact on *adults'* free speech rights and did not inquire into the impact the statute had on minors' free speech rights. First, several Justices were concerned about the statute's delegation of the determination of the contours of unprotected (blocked) expression from public libraries to private filtering software vendors. As discussed above, the vast majority of filtering software vendors keep secret both the decision-making algorithms by which their software determines whether a web site will be blocked, as well as the black list of blocked sites itself. Several Justices intimated that such delegation to unaccountable private entities of decisions of such constitutional import was constitutionally intolerable. Second, several Justices focused on the import of the statute's requirement that *all* of a library's Internet-accessible computers – including those used by library officials and staff – be subject to filtered Internet access. Third, several Justices were concerned with the burden the statute imposed on library patrons seeking to request unfiltered Internet access. As discussed above, the statute contemplates that *adult* patrons seeking unfiltered Internet access may request a library official to “disable the technology protection measure concerned . . . to enable access for bona fide research or other

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<sup>107</sup> *Id.* at x.

<sup>108</sup> *Id.* at x.

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lawful purpose.”<sup>109</sup> Several Justices were concerned with the chilling effect this provision would have on adults’ access to sexually-themed, protected expression or to other Internet content wrongfully blocked by the filtering software. As the attorney for the American Library Association put it, many patrons may be chilled in the exercise of their First Amendment rights by the prospect of having to request that a librarian “turn off the smut filter.”

On the other side of the issue, several Justices appeared skeptical as to whether CIPA should even be subject to the demanding standard of strict scrutiny. Justice Scalia intimated that libraries’ decisions prior to the CIPA statute to impose limitations on Internet access meant that libraries were not designated public forums with respect to receiving Internet content and that therefore content-based restrictions of Internet expression (such as those embodied in CIPA) were not subject to strict scrutiny. Rather, Scalia suggested that because many libraries over the past several years have chosen to exclude some categories of Internet expression, libraries’ provision of Internet access constitutes a *non-public forum*, within which content-based restrictions could be imposed without being subject to strict scrutiny as long as such content-based restrictions were reasonable and not based on viewpoint.

Although it remains to be seen how the Supreme Court will definitively assess the constitutionality of CIPA, the Justices’ questions during oral argument, as well as the three-judge panel’s assessment of the statute, provide helpful interim guidance for the present inquiry until the Supreme Court hands down its decision in Summer 2003.

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<sup>109</sup> *Id.* at x.



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III. TOWARD A CONSTITUTIONAL REGULATION OF MINORS' ACCESS TO OBSCENE-FOR-MINORS INTERNET EXPRESSION

As explored in Part II, Congress appears to be gradually honing in on a constitutional scheme for regulating minors' access to harmful Internet expression. By carefully attending to the constitutional infirmities of prior legislative attempts and to the requirements set forth in previous obscenity cases – while capitalizing upon the variety of technological features available to fine-tune restrictions on access to Internet expression -- I set forth in this Part practical guidelines for developing a constitutional regulation of minors' access to harmful Internet expression.

A. REDUCING COMMUNITY-TO-COMMUNITY SPILLOVER AND RESPECTING COMMUNITIES' AUTONOMY TO DETERMINE THE CONTOURS OF OBSCENE-FOR-MINORS SPEECH

In order to accord true autonomy<sup>110</sup> to communities to determine the contours of obscene and obscene-for-minors expression, Congress should get out of the business of regulating minors' access to harmful Internet expression altogether – whether directly (through statutes like the CDA or COPA) or indirectly (through statutes like CIPA). In order to render meaningful the commitment in First Amendment jurisprudence to community autonomy in determining the contours of obscene-for-minors speech, Congress should allow each community to determine for itself whether and how<sup>111</sup> to define Internet expression that is unprotected for minors. It has traditionally been the province of the state governments – in their exercise of their general police power to protect the health, safety, and welfare of their community – and not the federal

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<sup>110</sup> See text accompanying notes x – y.

<sup>111</sup> Communities' determinations of speech that is harmful to minors would be subject to the judicially-determined floor for speech with serious social value for minors. See text accompanying notes x – y.

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government – to regulate minors' access to sexually-themed speech.<sup>112</sup> By legislating in this arena either directly or indirectly, Congress fails to accord to local communities the proper respect for their autonomy in matters of obscenity and obscenity-for-minors. Community-based institutions can choose to exercise this autonomy to regulate minors' access to harmful Internet content by implementing acceptable use policies and carefully-designed filtering software systems to regulate the Internet access of minors within public forums within their communities alone. As Professor Etzioni explains,<sup>113</sup> by using such geographically-contained policies and technologies, local communities can regulate for and within their communities without creating problems of community-to-community spillover that are present in regulatory schemes such as the CDA and COPA. Within a constitutional overall scheme of regulating minors' access to harmful Internet speech, each state or community should therefore enjoy the *option* of regulating minors' Internet access in public places such as schools and libraries by implementing constitutional definitions of obscene-for-minors speech. Such constitutional definitions must be carefully crafted to be consistent with the definitional guidelines set forth in *Miller* and *Ginsberg*, and may be implemented through carefully-designed filtering software systems.<sup>114</sup>

B. REGULATING *ONLY MINORS* ACCESS TO OBSCENE-FOR-MINORS EXPRESSION –  
REDUCING MINORS-TO-ADULTS SPILLOVER

As Professor Etzioni explains,<sup>115</sup> one of the primary constitutional problems with Congress's attempts to regulate minors' access to harmful Internet speech has been the spillover

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<sup>112</sup> See, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968).

<sup>113</sup> See Etzioni, *supra* note x, at y.

<sup>114</sup> See text accompanying notes x – y.

<sup>115</sup> See Etzioni, *supra* note x, at y.

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such regulations effect upon adults' constitutional rights.<sup>116</sup> Because adults enjoy the constitutional right to access expression that is deemed obscene for minors,<sup>117</sup> any regulation that in the process of restricting *minors'* access to such expression also impinges upon *adults'* constitutional right to access such expression will likely be found unconstitutional. As the Supreme Court explained in *ACLU v. Reno* in condemning the CDA's restrictions on adults' access to sexually-themed Internet speech, "the government may not reduce the adult population . . . to only what is fit for children."<sup>118</sup> Because of the difficulty and expense of determining an Internet user's age, it has also been difficult to implement regulatory schemes for the Internet restricting only minors' access to obscene-for-minors expression. As discussed above, one of the primary reasons that the CDA was found unconstitutional was that in restricting minors' access to certain sexually-themed Internet expression, it also thereby restricted *adults'* access to such expression.<sup>119</sup> Because it is difficult and expensive to ascertain with certainty the age of the recipients of one's Internet expression, the CDA's restrictions on the communication of indecent expression to minors effectively translated into restrictions on the communication of indecent (but protected for adults) expression altogether. Similarly, the Child Online Protection Act, in regulating minors' access to harmful-to-minors content, also imposed unconstitutional burdens on adults' constitutional right to access harmful-to-minors (but protected for adults) content.<sup>120</sup>

In contrast to these types of criminal bans on Internet speech applied to the nation across the board, restrictions on Internet access imposed by community-based institutions such as

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<sup>116</sup> See text accompanying notes x – y.

<sup>117</sup> See text accompanying notes x – y.

<sup>118</sup> *Reno v. ACLU*, 117 S.Ct. 2329 (1997).

<sup>119</sup> *Id.* at x.

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public schools and libraries through the mechanism of filtering software can be structured to avoid the type of problematic minor-to-adult spillover.<sup>121</sup> (And, as mentioned above, such filtering by community-based institutions also eliminates problematic community-to-community spillover.) As Professor Etzioni explains in his lead article,<sup>122</sup> public schools and libraries within communities that choose to use filtering software to regulate minors' Internet access can implement a technological infrastructure facilitating age identification to key the level of filtered Internet access to the age of the individual accessing the Internet. Through a technologically-feasible system of date-sensitive user IDs, public libraries and schools can require that all individuals below a certain age have filtered access to the Internet. Public libraries and schools either already have or can readily acquire and track the birth date of each young patron and student. Within such a system, each Internet user can be assigned a user ID that embeds within it the birth date of the user. Until an Internet user reaches the designated age (say 13 or 17 years old), the default configuration<sup>123</sup> would be that his or her Internet access would be filtered to screen out expression that is harmful to minors as defined by the relevant community (and, presumably, obscene and child pornographic content as well). Upon reaching the designated age, the user's Internet access would then be unfiltered. By implementing such a system, public schools and libraries would be able to accurately restrict Internet users' (direct) access to harmful material based on the age of the Internet user, thereby substantially reducing the regulatory spillover of such schemes upon adults' constitutional rights.

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<sup>120</sup> See text accompanying notes x – y.

<sup>121</sup> See text accompanying notes x – y.

<sup>122</sup> See Etzioni, *supra* note x, at y.

<sup>123</sup> See text accompanying notes x – y.

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If we assume, pursuant to the above analysis, that community-based institutions' filtering software systems could perfectly correlate the age of the Internet user with the level of filtering to be imposed upon such access, several questions then arise. First, we may ask which age categories correlate to which levels of filtering. Second, and relatedly, we need to inquire into the scope of First Amendment rights enjoyed by individuals of different ages. As I have discussed, the Supreme Court's jurisprudence makes clear that there are at least *two* constitutionally distinct age categories for purposes of the First Amendment – viz., adults and minors. And the Supreme Court, as I discuss below, has provided some guidance on where the line between adults and minors should be drawn. Yet, the Supreme Court's First Amendment jurisprudence does not make clear precisely how limited the First Amendment rights of minors are, nor does it make clear whether further subdivisions within the category of minors would be constitutionally permissible (or indeed required).<sup>124</sup>

In his article, Professor Etzioni suggests a further subdivision within the category of minors, to break out the subcategory of teenagers (those 13 and older) and children (those 12 and under) for purposes of regulating the access of these groups to harmful Internet content.<sup>125</sup> Indeed, the Third Circuit, in its recent decision on remand (once again holding that the Child Online Protection Act was unconstitutional), appeared to approve – and even to require as constitutionally necessary – the subdivision of the category of minors, along the lines that Professor Etzioni has suggested.<sup>126</sup> Professor Etzioni then suggests that while the Supreme Court's jurisprudence according substantial protections for minors' First Amendment rights

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<sup>124</sup> See COPA IV, *supra* note x, at y.

<sup>125</sup> See Etzioni, *supra* note x, at y.

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might reasonably apply to *teenagers*, it does not reasonably apply to *children*.<sup>127</sup> In analyzing whether Professor Etzioni's proposed (at least) *three*-tiered analysis would be constitutional, it will first be helpful to scrutinize the Supreme Court's jurisprudence setting forth a *two*-tiered obscenity analysis.

The Supreme Court's obscenity and obscenity-for-minors jurisprudence clearly demarcates one place to draw a line with respect to free speech rights – viz., in between those *17 and older* and those *16 and younger*. In finding the CDA's indecency and patent offensiveness provisions unconstitutional, one important justification was the fact that the CDA drew the line between those 18 and older and those 17 and younger.<sup>128</sup> In contrast, the regulation of minors' access to expression upheld in *Ginsberg* drew the line between those 17 and older and those 16 and younger. In explaining that the CDA was not narrowly tailored as compared to the statute in *Ginsberg*, the Supreme Court explained that “the New York statute in *Ginsberg* defined a minor as a person under the age of 17, whereas the CDA, in applying to all those under 18 years, includes an additional year of those nearest majority.”<sup>129</sup>

Accordingly, it would seem uncontroversial to maintain that those 16 and under enjoy First Amendment rights that are more limited than those 17 and older. The question remains whether the subcategory of *children* (those 0-12, or for some purposes, those reading age – 12) enjoy more limited First Amendment rights than the subcategory of *teenagers* (those 13 – 16). Most cases and commentators analyzing the free speech rights of minors focus on the First

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<sup>126</sup> See COPA IV, *supra* note x, at y.

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<sup>128</sup> *Reno v. ACLU*, 117 S.Ct. at x.

<sup>129</sup> *Id.* at x.

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Amendment rights of *mature* minors,<sup>130</sup> and very little academic or judicial inquiry has focused on the free speech rights of less mature minors. Arguments in favor of limiting minors' First Amendment rights are certainly less persuasive when applied to minors approaching the age of majority. Thus, the Supreme Court explains, in condemning the CDA, that

Under the CDA, a parent allowing her 17 year old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term. Similarly, a parent who sent his 17 year old college freshman information on birth control via email could be incarcerated even though neither he, his child, nor anyone in their home community, found the material "indecent" or "patently offensive," if the college town's community thought otherwise.<sup>131</sup>

Nonetheless, the Supreme Court also suggests that the government may have a stronger interest in regulating *younger* minors' access to harmful Internet access than in regulating *older* minors' access to such speech. The Court explains that "it is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute [i.e., throughout ages 0 – 17]." Thus, the Court would likely recognize that the government has a stronger interest in regulating younger minors' access to harmful speech than older minors' access. The Third Circuit, in its recent COPA opinion, further suggests that Congress's failure to carve out finer distinctions within the category of minors rendered COPA insufficiently narrowly tailored.<sup>132</sup>

Several Supreme Court cases suggest that minors in *high school* and *junior high school* enjoy robust First Amendment rights (although these rights may be limited when exercised

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<sup>130</sup> See, e.g., Ross, *supra* note x, at y.

<sup>131</sup> Reno v. ACLU, 117 S.Ct. at x.

<sup>132</sup> See COPA IV, *supra* note x, at y.

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within public schools because of concerns for school order).<sup>133</sup> The *Pico*<sup>134</sup> case is particularly instructive for our purposes, as it applies to school libraries' decisions to remove content deemed inappropriate for *junior and senior high school students*. In *Pico*, several school-aged plaintiffs challenged the local school board's decision to remove nine books from the district's high school and junior high school libraries, including Kurt Vonnegut's *Slaughter House Five* and Richard Wright's *Black Boy*, because the school disapproved of the content, ideas, and viewpoints contained within these books. Holding that such removal was unconstitutional, the Supreme Court explained that:

The First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library. Our precedents have focused not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas. [Although] all First Amendment rights accorded to students must be construed in light of the special characteristics of the school environment, . . . the special characteristics of the school *library* make that environment especially appropriate for the recognition of the First Amendment rights of students . . . . [S]tudents must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding. In a school library in particular, a student can liberally explore the unknown and discover areas of interest and thought not covered by the prescribed curriculum. . . . The student learns that the library is a place to test or expand upon ideas presented to him, in or out of the classroom.<sup>135</sup>

The Court's expansive language in *Pico* supports the claim that *junior high school*, as well as senior high school, students enjoy meaningful First Amendment rights that would prohibit their libraries from restricting access to content that school or library officials deemed inappropriate for them, absent the proper showing of constitutionally valid reasons for removal.

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<sup>133</sup> See, e.g., *Board of Education Island Trees v. Pico*, 457 U.S. 853 (1982).

<sup>134</sup> See *id.*

<sup>135</sup> *Id.* at x.



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The Supreme Court's decision in *Tinker* provides further support for the proposition that junior high school (and perhaps even younger) students enjoy meaningful First Amendment rights. In that case, several junior and senior high school students – ages 13 – 16 years old – challenged their suspension from school for wearing black armbands to convey their opposition to the Vietnam War. In finding their suspension to be a violation of the First Amendment rights, the Supreme Court addressed the First Amendment rights of students *generally*:

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of expression at the school-house gate. . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression. . . . The Nation's future depends upon leaders trained through a wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, rather than through any kind of authoritative selection.'<sup>136</sup>

The Court's expansive language in *Tinker* regarding students' First Amendment rights was not limited to the rights of junior and senior high school students. Rather, the Supreme Court's pronouncements apparently applied to students of all ages in public schools. Indeed, the Court heard the *Tinker* case on petition for certiorari regarding the First Amendment's protections for the right of students "from kindergarten to high school."<sup>137</sup> The *Tinker* and *Pico* cases therefore suggest that the Supreme Court would be unprepared to recognize reduced First Amendment rights for the category of younger minors.<sup>138</sup>

Several Supreme Court decisions nonetheless suggest that the requisite characteristics that render freedom of expression meaningful to individuals – namely the full capacity for

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<sup>136</sup> *Id.* at x.

<sup>137</sup> *Id.* at x.

<sup>138</sup> See text accompanying notes x – y.

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meaningful independent choice and the ability to define and redefine oneself as a result of exposure to different views and types of expression – do not obtain with respect to younger minors. (And indeed Professor Etzioni appears to be in full accord with such reasoning on the part of the Supreme Court.<sup>139</sup>) For example, in his concurring opinion in *Ginsberg*, Justice Stewart contended that “a state may permissibly determine that, at least in some precisely delineated areas, a child is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.”<sup>140</sup> Further, the majority in *Ginsberg* approvingly cited First Amendment scholar Professor Thomas Emerson in support of the proposition that children do not possess the requisite faculties that would render full First Amendment rights meaningful to them:

Different factors come into play . . . where the interest at stake is the effect of erotic expression upon children. The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules.<sup>141</sup>

In a subsequent related article, Professor Emerson expounded upon this argument and upon the reasoning articulated in *Ginsberg* for limiting the First Amendment rights of children:

A system of freedom of expression . . . cannot and does not treat children on the same basis as adults. The world of children is not the same as the world of adults, so far as a guarantee of untrammelled freedom of the mind is concerned. The reason for this is, as Justice Stewart said in *Ginsberg*, that a child “is not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees.” He is not permitted that measure of independence, or able to exercise that maturity of judgment, which a system of free expression rests upon. This does not mean that the First Amendment extends no protection to children; it does mean that children are governed by different rules.<sup>142</sup>

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<sup>139</sup> See Etzioni, *supra* note x, at y.

<sup>140</sup> *Ginsberg v. New York*, 390 U.S. at x.

<sup>141</sup> *Id.* at x.

<sup>142</sup>

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Along these lines, Professor Etzioni contends that children “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 information needed for sound judgments, and are subject to ready manipulation by others. . . .”<sup>143</sup> Professor Etzioni also approvingly cites Colin McLeod and David Archard for the proposition that “children are seen as ‘becoming’ rather than ‘being’” and “the basic idea that children must be viewed as developing beings whose moral status gradually changes now enjoys near universal acceptance.”<sup>144</sup> Yet, the fact that an individual is in the process of *becoming* and is open to having her ideas reshaped and redefined in response to expression to which she is exposed is a justification for, not against, according meaningful access to a broad range of expression to that individual. As the Court held in *Pico*, “students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding. In a school library in particular, a student can liberally explore the unknown and discover areas of interest and thought not covered by the prescribed curriculum. . . . The student learns that the library is a place to test or expand upon ideas presented to him, in or out of the classroom.”<sup>145</sup> Along these lines, other commentators have rejected the claim that children or younger minors do not possess the faculties necessary for the enjoyment of the rights of freedom of expression:

[Emerson’s and similar theories of the First Amendment] assume that the average citizen is qualified to sort out and evaluate the ideas presented to him, but do not assume that he can do so whatever his age. [Such theories] rather assume that a child cannot sort and evaluate, but will accept uncritically what he reads and hears. This theory of the First

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<sup>143</sup> See Etzioni, *supra* note x, at y.

<sup>144</sup> See Etzioni, *supra* note x, at y.

<sup>145</sup> *Id.* at x.

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Amendment is too narrow. It overlooks the obvious: that today's children are tomorrow's adults. Because a child will accept uncritically what he hears, he is to hear nothing but what the majority wants him to hear. Having heard, and by hypothesis accepted, nothing but orthodoxy all his life, he is to be suddenly transformed into a rational adult who will choose impartially in the marketplace of ideas. Surely this is too much to expect. Surely if we let any orthodoxy monopolize the minds of our children we risk letting it control the future of our society. The First Amendment, then, if its purpose is to preserve an authentic competition among opinions must protect expression to children as well as to adults. It may be that children are so immature and unsophisticated that they can easily be led into confusion and error. But some risk of confusion and error is preferable to the risk of a deadening conformity of thought.<sup>146</sup>

In working through the contours of children's free speech rights, it is helpful to revisit the philosophical underpinnings of and justifications for free speech rights in general, and to consider how these are translated in the context of minors' interests in free expression. One of the most important justifications for protecting freedom of expression is the integral role freedom of expression plays within democratic self-government.<sup>147</sup> Yet, this justification applies directly only to those who are capable of self-government. Because minors are not able to participate formally in our system of democratic self-government, this justification for free speech does not apply to them fully and directly. However, during their minority, individuals are and should be engaged in the process of acquiring the tools they need to engage in self-government when they do reach the age of majority. For these reasons, minors should be granted broad access to a wide variety of content to enable them to practice formulating the opinions and beliefs necessary eventually to engage in meaningful self-government. As Judge Richard Posner explains in *American Amusement Machine Ass'n v. Kendrick*,<sup>148</sup>

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<sup>147</sup> See A. Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948).

<sup>148</sup> 244 F.3d 572 (7<sup>th</sup> Cir. 2001)

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Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise. . . . People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.

As the Supreme Court explained further in *West Virginia State Board of Education v. Barnette*,<sup>149</sup> “That we are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individuals, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” In short, for adults, protecting freedom of expression is instrumental to achieving meaningful democratic self-government, while for minors, protecting freedom of expression is necessary in order to allow individuals to experience the freedoms they will need so as to eventually exercise meaningful rights of self-government. Accordingly, the closer an individual is to the age of majority – to the age in which she will formally participate in democratic self-government – the more extensive her free speech rights should be. Adolescence marks off a transitional period, in which individuals should enjoy and experience many of the freedoms that they will come to enjoy in adulthood, so that they will be better able to meaningfully enjoy those freedoms in adulthood. Furthermore, our system of freedom of expression should ensure that adolescents are able to inform themselves and contribute to discussions on social and political matters even though they cannot participate in public elections, as did the minors involved in the *Tinker* case. As the Supreme Court stated in *Keyishian v. Board of Regents*,<sup>150</sup> “The Nation’s future depends upon leaders trained through wide exposure to robust exchange of [ideas and information].”

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<sup>149</sup> 319 U.S. 624 (1943).

<sup>150</sup> 385 U.S. 589 (1967).

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The second important justification for protecting freedom of expression grounds such protection on the integral role such protection plays in individual self-exploration, self-expression, and self-definition. As First Amendment scholar Thomas Emerson articulates this second justification for protecting freedom of expression, individual self-fulfillment depends upon the development of an individual's capacity for reasoning and emotions, and self-exploration, self-expression, and self-definition form "an integral part of the development of ideas, of mental exploration, and of the affirmation of self."<sup>151</sup> This justification – which is generally applied to *adults'* right to free speech – presumes that adults are engaged in the active process of self-definition and re-definition, which is facilitated through their enjoyment of First Amendment freedoms. But minors, if anything, are even more deeply entrenched in the process of self-exploration, self-expression, and self-definition than are adults. Thus, on this justification for First Amendment freedoms, it is important to protect minors' right to access a wide range of content in order to facilitate their process of self-exploration, self-expression, and self-definition.

Accordingly, the traditional justifications for protecting freedom of expression – based on its role in democratic self-government and in self-expression, self-exploration, and self-definition – apply to minors as well as to adults, and apply particularly strongly to minors in the transitional period to adulthood. Although the Supreme Court has not had much of an occasion to consider or articulate the contours of First Amendment protection for different subcategories within the category of minors, strong justifications exist for providing robust First Amendment rights to adolescents, whereas these justifications are weaker when applied to free speech

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<sup>151</sup> See Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 *Yale L.J.* 877, 879 (1963).

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protections for pre-adolescents and younger minors. Along these lines, the creation of a three-tiered approach, as suggested by Dr. Etzioni, would provide for an appropriate period of transition for individuals from childhood (in which the justifications for protecting freedom of expression do not apply in full force) to adulthood (in which they do).

In light of the above, the question remains whether a community-based institution could constitutionally create a trifurcated system for the filtering of Internet speech along the lines of the three-tiered approach suggested by Professor Etzioni: one (heavily regulated) category for those 12 and under (“children”); one (less regulated) category for those ages 13-16<sup>152</sup> (“teenagers”); and the third (much less regulated) category for adults. Given the possibility of precisely correlating an Internet user’s age with a set of filtering software settings, a library or school, as a technical matter, could readily define and impose one set of filtering software settings for those 12 and under; another set for those 13-16; and another set (or no set) for those 17 and older. If such a three-tiered approach were adopted, the category of unprotected expression for older minors should correlate as precisely as possible<sup>153</sup> with the definitions of unprotected material set forth in the statute in *Ginsberg* and mirrored in COPA. However, the definition of unprotected expression should substitute the expression “minors ages 13 to 16” for the term “minors.”<sup>154</sup> For younger minors, it is unclear whether the category of excluded

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<sup>152</sup> Consistent with the Supreme Court’s analysis in *ACLU v. Reno* and *Ginsberg*, it is reasonable to categorize 17 year olds as adults for purposes of obscenity regulation.

<sup>153</sup> See text accompanying notes x – y.

<sup>154</sup> The definition of content that was obscene or harmful to older minors accordingly would be along the following lines:

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material would need to track the *Ginsberg* language, modified to apply to “minors ages 12 and under.” It is unclear whether children of this age can even form prurient interests.<sup>155</sup> However, it is clear that content can possess (or fail to possess) serious literary, artistic, political, or scientific value for minors ages 12 and under. Therefore, any such definition of content prohibited for younger minors should contain such a savings clause, so that material that has serious social value for (the appropriate age category of) minors would be deemed protected and either unfiltered as an initial matter or unfiltered as a result of an unblocking request.<sup>156</sup>

C. PRESERVING PARENTAL AUTONOMY BY PERMITTING PARENTS TO SECURE UNFILTERED  
INTERNET ACCESS FOR THEIR CHILDREN

Regardless of whether community-based institutions choose to adopt a two- or three-tiered approach to regulating minors' access to harmful Internet speech, certain other protections need to be built in to any such regulations in order to render them constitutional. The Supreme Court has recognized that parents, in the exercise of their constitutional prerogative how to educate and raise their children, enjoy the right, within limits, to determine the materials to which their children have access. The Supreme Court has sought to protect this aspect of

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Material that is harmful to minors ages 13 to 16.--The term 'material that is harmful to minors ages 13 to 16' means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that --

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors ages 13 to 16, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors ages 13 to 16, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors ages 13 to 16.

<sup>155</sup> See COPA IV, *supra* note x, at y.



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parental autonomy specifically in the context of regulations restricting minors' access to expression that the government deems harmful to minors.<sup>157</sup>

Accordingly, in crafting a constitutional regulation of minors' access to harmful Internet content, such regulation should preserve parents' right to override any (default) determinations by the public institutions of what material is harmful for children.<sup>158</sup> Toward this end, filtered Internet access for students and library patrons under a certain age should merely be the default configuration, and parents should enjoy the meaningful opportunity to reverse this default and allow their children unfiltered Internet access. This parental determination could be readily implemented as a technical matter by keying this determination to each minor's user ID.

D. REDUCING SURFER-TO-SURFER SPILLOVER

Libraries' experience in providing Internet access to patrons has also demonstrated another type of spillover that institutions should attempt to minimize – namely, the harm or offense caused by viewing content on the screen of another Internet user.<sup>159</sup> For example, an adult (or minor of tolerant parents<sup>160</sup>) may be viewing content that is protected for adults but obscene for minors on his screen, and such screen may be in plain view of minors (or of individuals who would be offended by such content). To avoid such harm or offense, libraries

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<sup>156</sup> For a discussion of free speech friendly unblocking requests, see text accompanying notes x – y.

<sup>157</sup> As discussed above, in *Ginsberg*, the Supreme Court looked favorably upon the fact that the statutory prohibition at issue preserved parents' right in the exercise of their parental discretion to grant their children access to the statutorily-proscribed materials. See text accompanying notes x – y. In *ACLU v. Reno*, the Supreme Court condemned the CDA's criminal provisions, in part because they effected a complete prohibition on minors' access to the statutorily-proscribed materials and usurped parents' autonomy to override this governmental determination of harmfulness to minors for their own children.

<sup>158</sup> See text accompanying notes x – y.

<sup>159</sup> See, e.g., *Mainstream Loudoun v. Board of Trustees of Loudoun County Library*, 24 F.Supp.2d 552, x (E.D.Va. 1998).

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(and if applicable, schools) should undertake measures to reduce the viewing of computer screens by those not using them. Such measures include separating minors' Internet accessible computers from adults' computers; using technological means to restrict adults' Internet access to computers in the adult section and to restrict minors' Internet access to computers in the minors' section; and positioning computer screens and/or using privacy screens so that a computer screen can only be viewed by the individual who is using the computer.<sup>161</sup>

E. REDUCING THE OVERBLOCKING INHERENT IN FILTERING SOFTWARE

I have suggested that community-based institutions could employ carefully-designed filtering software systems to implement their definitions of content that is obscene for minors (or for different categories of minors). But because of the technological infirmities in filtering software, community-based institutions and developers of filtering software would need to undertake several substantial measures to give these systems even a passing chance of being found constitutional.<sup>162</sup> Although they may be inclined at first to resist undertaking such measures, libraries and schools will ultimately realize that, without undertaking such measures, their use of filtering software systems will likely violate minor patrons' and students' constitutional rights. Similarly, filtering software companies will have the incentive to undertake the measures described below, because without them, a substantial portion of their client base – public community-based institutions – will be unable to constitutionally utilize such software.

1. MAKING TRANSPARENT HOW BLOCKING DETERMINATIONS ARE MADE AND WHICH SITES ARE BLOCKED

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<sup>160</sup> See text accompanying notes x – y.

<sup>161</sup> See, e.g., *Mainstream Loudoun v. Board of Trustees of Loudoun County Library*, 24 F.Supp.2d 552, x (E.D.Va. 1998).

<sup>162</sup> See text accompanying notes x – y.

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In order for libraries and schools meaningfully to utilize filtering software to implement their community's definition of content that is obscene for minors, such institutions need to be able to understand and to direct how such filtering software will operate within their institutions. At a minimum, such institutions need to be able to access and understand the set of criteria used by filtering software programs to block access. As discussed above, most filtering software programs operate in a secret fashion and refuse to disclose to their users the algorithms by which they restrict access to certain categories of Internet content.

Several commentators and courts<sup>163</sup> have criticized the use of filtering software by libraries and schools as an unconstitutional delegation of authority over content selection and screening to private, secretive, unaccountable companies. These criticisms are not without merit, and point up the importance of transparency in the operation of filtering software programs, as an absolute minimum pre-requisite for a finding that their use is constitutional. If community-based institutions are to utilize filtering software constitutionally, they must have meaningful access to and control over the ways in which such software operates to implement the community's definition of content that is harmful to minors. In holding that a public library's mandatory filtering of all Internet access was unconstitutional, for example, the court in *Mainstream Loudoun*<sup>164</sup> condemned the library's "willingness to entrust all preliminary blocking

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<sup>163</sup> See, e.g., *Mainstream Loudoun v. Board of Trustees of Loudoun County Library*, 24 F.Supp.2d 552, x (E.D.Va. 1998).

<sup>164</sup> See *Mainstream Loudoun v. Board of Trustees of Loudoun County Library*, 24 F.Supp.2d 552, x (E.D.Va. 1998); Richard J. Peltz, *Use the Filter You Were Born With: The Unconstitutionality of Mandatory Internet Filtering for the Adult Patrons of Public Libraries*, 77 WASH. L. REV. 397 (2002).

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decisions —and by default, the overwhelming majority of final decisions – to a private vendor . . . . Such abdication . . . is made worse by the fact that defendant concededly does not know by what criteria [the software vendor] makes its blocking decision.”<sup>165</sup>

In order for community-based institutions legitimately and constitutionally to make use of filtering software, at a minimum they must understand and have some control over how the programs they use perform their filtering function. As discussed above,<sup>166</sup> many filtering software companies treat both the algorithms by which they filter categories of Internet content and their blacklist of blocked sites as confidential and proprietary trade secrets, thereby rendering this information inaccessible to their clients. If a library or school implementing a filtering software system has no knowledge *ex ante* of which sites are blocked and on what basis they are blocked, their use of such software will likely be found unconstitutional. Such ignorance on the part of the public institution constitutes an unacceptable and unconstitutional delegation of authority over content selection and screening to an unaccountable private company.<sup>167</sup> If the use of such filtering software is to be given a chance of being found constitutional, the public institutions using such software must have access to and control over the algorithms by which blocked material is selected *and* the ultimate list of blocked sites. Filtering software companies will balk at this requirement, but there are other means at their disposal to protect their interests while not compromising the public’s First Amendment rights.

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<sup>165</sup> See *Mainstream Loudoun v. Board of Trustees of Loudoun County Library*, 24 F.Supp.2d 552, x (E.D.Va. 1998).

<sup>166</sup> See text accompanying notes x – y.

<sup>167</sup> On this score, filtering proponents will point out that libraries indeed delegate content-related decisions to third party vendors or rely upon third parties in making content-based decisions in a variety of circumstances. In such circumstances, however, the libraries retain ultimate control over their collection

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In order to protect filtering software companies' trade secrets in their software and databases, these companies can rely upon the use of non-disclosure and confidentiality agreements with their prospective and current clients in software licensees to protect their interests in such information while rendering critical information about the operation of their software available to their clients.

Community-based institutions using filtering software programs should be able to access and modify their "whitelists" – i.e., their list of never-blocked web sites/pages. They should also be able to access and modify their "blacklists" – i.e., their list of blocked web pages/sites – used by such programs. Both of these goals can be accomplished through the use of client-side implementation of the filtering software.<sup>168</sup> First, these institutions should develop and maintain a comprehensive directory of recommended and approved web sites for Internet users. These web sites should be included in the software's whitelist to ensure that such sites are never blocked by the software. Second, these community-based institutions should be able to access and modify the blacklists maintained by the filtering software so as to ensure that erroneously blocked sites can be expeditiously unblocked.

F. SPEECH-FRIENDLY UNBLOCKING PROCESSES

As we have seen, among the most significant constitutional hurdles to the use of filtering software by public libraries and schools is overblocking – i.e., the software's erroneously blocking access to expression that minors (and adults) have a constitutional right to access. Because the system herein contemplated would filter only minors' Internet access, I focus on the

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development.

<sup>168</sup> See text accompanying notes x – y.

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effect that filtering software's overblocking has on minors' First Amendment rights. Many studies have shown that even the most sophisticated filtering software programs block a substantial amount of expression that is not only *not* harmful to minors under any conceivable definition but that is expressly suited to minors.<sup>169</sup> Opponents of filtering advert to these studies in contending that because all filtering software is overbroad<sup>170</sup> and not narrowly tailored to restrict access to all and only those sites that are obscene for minors, the use of filtering software fails strict scrutiny and is unconstitutional.

The response to charges of such unconstitutional overbreadth and overblocking by proponents of filtering software is typically to analogize the use of such software to a library's decision whether to *acquire* a particular item for the library's collection in the first place. Filtering proponents contend that the use of filtering software to select which web sites to grant access to is analogous to libraries' decisions regarding which books, periodicals, videos, etc., to acquire for its collection. Because the Supreme Court has held that such acquisition decisions – albeit content-based – are subject to mere rational basis scrutiny, proponents of filtering contend that libraries' (and other institutions') use of filtering software should also be subject to mere rational basis scrutiny,<sup>171</sup> under which a court is required to uphold such decisions so long as they are rationally related to a legitimate government purpose. Filtering opponents contend that the use of filtering software, which operates by blocking access to a subset of the websites available on the whole, is more properly analogized to a library's content-based or viewpoint-based decision to *remove* material from its shelves. The Supreme Court has held that such

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<sup>169</sup> See, e.g., FILTERS & FREEDOM 2.0 (Electronic Privacy Information Center, eds., 2001).

<sup>170</sup> See, e.g., *id.* at x.

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removal decisions are subject to strict scrutiny (as well as the strictures of the prior restraint doctrine).<sup>172</sup> Filtering opponents contend that there are other, less speech-restrictive means of regulating minors' access to obscene-for-minors content (such as through acceptable use policies enforced by library and school officials or the voluntary use by *parents* of filtering software). Therefore, filtering opponents contend, the use of filtering software fails the second prong of the strict scrutiny analysis and should be found unconstitutional. Filtering opponents claim that a filtered Internet user's ability to request and secure the unblocking of a particular web site does not suffice to render the use of filtering software narrowly tailored sufficient to satisfy strict scrutiny, and imposes an unacceptable and unconstitutional delay and concomitant burden on the user's First Amendment rights.

My analysis pursues something of a middle way. First, I concur with filtering opponents that the decision to use filtering software is properly analogized to a content-based removal decision within a designated public forum<sup>173</sup> that is subject to strict scrutiny (and one subject to the strictures of the prior restraint doctrine as well), rather than an acquisition decision subject to rational basis scrutiny. Yet I do not necessarily conclude that the use of filtering software must fail such strict scrutiny. Filtering software systems can be designed to advance the governmental interests of restricting minors' access to harmful Internet content in a manner that is less speech restrictive than any other *comparably effective* means of advancing that goal. First, as we have

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<sup>171</sup> *See Pico*, 457 U.S. 853 (1982).

<sup>172</sup> *See id.*

<sup>173</sup> Libraries are properly considered designated public forums. *See Brown v. Louisiana*, \_\_\_ U.S. \_\_\_ (1966) (holding that Five African American males enjoyed the right to engage in a silent vigil in the public library, because the library was a limited public forum); *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992) (libraries are limited public forums).

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seen, a community's decision to use filtering software within and with respect to its minors' Internet access in public places is a far less restrictive alternative than Congress's decision to criminalize all obscene-for-minors Internet content that is accessible or communicated to minors.<sup>174</sup> Second, although acceptable use policies may indeed be a less speech restrictive means for public libraries and schools to regulate minors' access to obscene-for-minors speech,<sup>175</sup> such policies are unlikely to be anywhere near as *effective* in advancing the desired governmental interest. The proper inquiry into the second prong of the strict scrutiny analysis considers whether any less restrictive *and comparably effective* means exist to advance the subject government interests. Accordingly, the possibility of using (comparably ineffective) acceptable use policies should not by itself render the use of filtering software unconstitutional.

Yet filtering software systems, as currently configured and used by most schools and libraries, are nonetheless substantially overbroad in their reach because they operate to (initially) restrict users' access to a substantial amount of expression that is protected by the First Amendment, and because most unblocking procedures impose substantial burdens on users' First Amendment rights.<sup>176</sup> The denial of minor Internet users' right to access Internet expression that is protected for minors is a serious problem with filtering software, and one that institutions must take steps to remedy if they are to utilize filtering software in a constitutional manner. Libraries and schools cannot plausibly defend such denials on the grounds that they are not

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<sup>174</sup> See text accompanying notes x – y. As the Supreme Court recognized in *ACLU v. Reno*, a system of user-based filtering software, appropriately limited to restricting minors' access to harmful speech, is less speech restrictive than a nationwide criminal ban on such expression.

<sup>175</sup> See *Mainstream Loudoun*

<sup>176</sup> See *American Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401 (E.D. Pa.) (three-judge court), *prob. jurisd. noted*, 123 S.Ct. 551 (2002).



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constitutionally obligated to provide *any* Internet access and that therefore any Internet access they provide is constitutional.<sup>177</sup> Nor, as suggested above, can they defend such denials by analogizing them to limitations imposed on libraries' acquisitions of hard copy works, limitations that are primarily necessitated by financial and space constraints.<sup>178</sup> Nor can they defend them by adverting to general limitations on minors' First Amendment rights.<sup>179</sup> The Supreme Court's repeated emphasis on the importance of maintaining minors' access to expression that has redeeming literary, artistic, political or scientific value for them suggests that the denial of minors' access to such expression is a matter of constitutional concern. Libraries and schools seeking to use filtering software in a constitutional manner therefore need to undertake substantial measures to remedy the serious constitutional problem of overblocking inherent in the use of filtering software. In order to render the use of filtering software even potentially constitutional, the institutions that use such software programs must take measures to substantially limit their overbreadth. First, as mentioned above, only minors' Internet access should be made subject to filtering, and this only as a default configuration, which may be opted out of by parents for their children. Second, institutional users must have access to and control over the criteria used by such software to block sites, and to the blacklists and whitelists maintained by such software. Third, as discussed below, Internet users must be able to submit – and institutions must be able to act upon – unblocking requests in a manner that does not unconstitutionally burden users' First Amendment rights.

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<sup>177</sup> *Id.*

<sup>178</sup> *See Pico, supra.*

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G. ANONYMOUS REQUESTS TO UNBLOCK AND INFORMATION NECESSARY TO FACILITATE  
UNBLOCKING REQUESTS

Within a constitutional filtering software system implemented by public schools and libraries, minors should enjoy the right and the ability to submit requests to unblock a particular web page or site.<sup>180</sup> If a minor is wrongfully denied access to the National Zoo's or the National Geographic's web sites, she should be able to discern that this is the case and to submit, and have expeditiously acted upon, an unblocking request with respect to such site. In order to do so, the filtering software implemented by such community-based institutions must operate sufficiently transparently, so as to convey to the Internet user information as to which web pages that otherwise satisfied her search criteria were blocked, as well as the reason the software blocked them. The filtering software, acting upon a user's search query, must therefore return a list of the URLs of blocked sites accompanied by the reason each such site was blocked. This information is the minimum necessary for a user to be able meaningfully to submit an unblocking request with respect to a blocked web site.<sup>181</sup>

Users should also be able to submit and to have unblocking requests acted upon (relatively) anonymously. Accordingly, unblocking requests should be identified with a particular user ID, which should not be (easily) correlated to the user's actual identity.<sup>182</sup> Unblocking requests should be acted upon expeditiously by designated staff members of the library or school who are familiar with the community's articulated and clear definitions of

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<sup>180</sup> Contra CIPA e-rate scheme

<sup>181</sup> See, e.g., Lawrence Lessig, *Code and Other Laws of Cyberspace* 176-82 (1999) (criticizing filtering systems on the ground that such systems could operate in such a way as to leave users ignorant of what content is blocked and for what reason).

<sup>182</sup> Some libraries do this already. See CIPA three-judge panel decision.

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material that is obscene for minors.<sup>183</sup> Users should then be expeditiously notified of the result of the unblocking request in a manner that protects their anonymity.

H. THE PRIOR RESTRAINT DOCTRINE, THE OPERATION OF FILTERING SOFTWARE, AND THE  
PROCESSING OF UNBLOCKING REQUESTS

Several commentators,<sup>184</sup> and at least one court,<sup>185</sup> have concluded that the use of filtering software by public institutions effects an unconstitutional prior restraint on protected expression.<sup>186</sup> These conclusions are not without merit. As I explain, prior restraints, including those effected via filtering software, indeed should be viewed as presumptively unconstitutional.<sup>187</sup> Public institutions using filtering software may, however, be able to build certain protections and safeguards into their filtering software systems to mitigate the harms to free speech effected by them and to increase the likelihood that the use of such software will be found constitutional.

Prior restraints are speech regulations that operate to restrict speech by restraining speech prior to its dissemination – such as those embodied in pre-publication licensing schemes and censorship film boards. Systems of prior restraints operate in contrast to systems of subsequent punishment, which penalize the dissemination of prohibited expression *after* its dissemination. In contrast to the methods of speech regulation embodied in the CDA and COPA -- which effect subsequent punishment by criminally penalizing the communication of prohibited expression *after* its dissemination -- filtering software operates to restrict the expression of such speech and

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<sup>183</sup> But CIPA court is wrong to conclude that a 24 hour delay is unacceptable.

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<sup>186</sup>

<sup>187</sup> *infra*

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to prevent it from being communicated in the first place, prior to any judicial determination that such speech is protected by the First Amendment. Because prior restraints, like those embodied in filtering software, operate to censor speech prior to its dissemination, they have historically been viewed as far more pernicious and dangerous to freedom of expression than methods of subsequent punishment. As such, prior restraints are constitutionally suspect and indeed are viewed as presumptively unconstitutional<sup>188</sup> As the Supreme Court explained in *Bantam Books*,<sup>189</sup> “any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”<sup>190</sup>

Despite their presumptive unconstitutionality, the Supreme Court has held that the implementation of certain safeguards can render prior restraints of expression constitutional.<sup>191</sup> In order for prior restraints, such as those effected by filtering software systems, to be found constitutional, they must embody certain *substantive* and *procedural* safeguards. First, systems of prior restraint must not vest unbridled discretion in the decision-maker (such as by enabling the decision-maker to grant or deny permission to speak based on whether such speech would “advance the public interest” or serve “national security interests” or other such broad, manipulable standards). Vesting such substantive discretion in the decision-maker is pernicious because it enables the decision-maker to restrict expression because of disagreement with its message<sup>192</sup> (such as by denying a parade permit for an anti-war rally on the pretextual grounds

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<sup>188</sup> See *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (explaining that “the chief purpose of the First Amendment is to prevent previous restraints upon publication.”)

<sup>189</sup> *Bantam Books*, 372 U.S. at 70.

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<sup>191</sup> See *Freedman v. Maryland*, [cite].

<sup>192</sup>

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that such a rally was inimical to public safety, when the real reason for denial was disagreement with the message to be conveyed).<sup>193</sup> Although the decision-making mechanics of software filtering programs arguably embody many evils, one such evil is *not* unbridled or boundless substantive “discretion” in the “decision-maker” that would be conducive to the types of evils contemplated by the Supreme Court in its prior restraint jurisprudence. On the contrary, the algorithms implementing these content-based decision-making criteria are devoid of any discretion (in the usual sense of the term) whatsoever. Put differently, computers implementing such algorithms are not subject to the danger of making pretextual determinations disfavoring certain types of expression because of disagreement with the message being conveyed.

Nonetheless, filtering programs may be held to embody standardless decision-making if they embody too much “discretion” relative to the constitutional definitions of material that is obscene for minors. That is, if the delta between (1) the constitutional definition of obscenity for minors and (2) the definitions used by the filtering software to block content, is too great, the filtering software system may be found to vest unbridled discretion in the “decision-maker,” and to constitute an unconstitutional prior restraint lacking the requisite substantive safeguards.

The one court to have reached the issue of whether a public library’s imposition of mandatory filters upon its patrons’ Internet access effectuated an unconstitutional prior restraint concluded in the affirmative. In *Mainstream Loudoun*, the court concluded that the mandatory filtering software imposed by the library failed to embody the substantial safeguards necessary to render it a constitutional prior restraint for various reasons: (1) because the library had abdicated

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<sup>193</sup> See *Shuttlesworth v. Birmingham*, [cite].

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the decision-making authority regarding which Internet content to block to a private vendor; (2) because the library did not even know the criteria used by the vendor to make its blocking determinations; and (3) because the filtering software did not in any case base its blocking decisions on any legal definitions of constitutionally unprotected speech. Because of the gap between the constitutionally-accepted definitions of unprotected speech and the definitions of unprotected speech implemented by the filtering software, the court found that the substantive discretion of the relevant “decision-maker” was inadequately held in check.

The substantive discretion vested in filtering software’s algorithms, however, could be substantially held in check in several ways. First, such discretion could be checked by ensuring that library officials have access to, and the ability to modify, the criteria used by filtering software in its blocking definitions, and by ensuring that library officials have the power to override blocking determinations made by filtering software in response to unblocking requests,<sup>194</sup> where such overrides are made consistent with a clear and constitutional definition of obscenity-for-minors adopted by the relevant community.

Systems of prior restraint, to be constitutional, must also embody (at least) two *procedural* safeguards.<sup>195</sup> First, any restraint must be imposed only for a specified brief time period, and must be reviewable by a designated institutional decision-maker (and reversed if wrongfully imposed) within this specified brief time period.<sup>196</sup> For example, a prior restraint scheme in which U.S. officials were charged with reviewing books for obscene content and were required to make a determination within two to three days was held to satisfy this first procedural

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<sup>194</sup> *supra*

<sup>195</sup> Freedman, FW/PBS

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safeguard on prior restraints.<sup>197</sup> In contrast, in the system of filtering in place in *Mainstream Loudoun*, because patrons' requests to unblock particular web sites were not required to be acted upon within any given time period (and because there was no provision for notifying the requesting patron if and when the site was unblocked<sup>198</sup>), this filtering scheme was found constitutionally infirm because it did not embody this requisite procedural safeguard for prior restraint.<sup>199</sup> Relevant prior restraint precedent suggests that if public library and school officials acted upon unblocking decisions they received within a maximum window of 24 to 48 hours, such prior restraints would likely be deemed constitutional as regards the "specified brief time period" prong. Although it is certainly undesirable for an Internet user to be made to wait 24 to 48 hours before being granted access to a web site that she has a constitutional right to access (and which she would be able to access instantly were it not for the filtering software), such a waiting period is probably within the bounds of constitutionality. Thus, despite the CIPA court's holding that *any* amount of time that a patron has to wait while an unblocking decision is pending would be unconstitutional,<sup>200</sup> prior restraint jurisprudence suggests that a brief, limited delay would be constitutional.<sup>201</sup>

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<sup>199</sup> See *Mainstream Loudoun v. Board of Trustees of Loudoun County Library*, 24 F.Supp.2d 552, x (E.D.Va. 1998).

<sup>200</sup> See *American Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d. 401, x (E.D. Pa. 2002).

<sup>201</sup> It might be suggested that the Supreme Court's medium-specific approach to freedom of expression should apply in this context to further limit the specified, brief time during which an unblocking decision can constitutionally be pending because Internet access (contra e.g., interlibrary loans) is reasonably expected to be near-instantaneous. However, unblocking decisions necessarily entail human review, which review still takes a certain measure of time, regardless of the fast-paced nature of the Internet medium.

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Second, systems of prior restraint such as those implemented via filtering software must provide for expeditious *judicial* review of the relevant institutional or administrative decision. The courts have repeatedly emphasized the importance of the availability of expeditious judicial review of censorship determinations in the prior restraint context.<sup>202</sup> As one appellate court explained, “because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final [prior] restraint.”<sup>203</sup> Thus, in order for a filtering software system to effectuate a constitutional prior restraint, such a system would need to provide for the expeditious review of adverse unblocking determination made by school or library officials. That is to say, a patron or student who submitted an unblocking request and whose unblocking request was denied by the relevant library or school official would need to be able to secure expeditious judicial review of this adverse unblocking determination in order for the prior restraint effected by the filtering software system to be deemed constitutional. In the *Mainstream Loudoun* case, because there was no provision for judicial review of any unblocking determinations, the scheme was held to constitute an unconstitutional prior restraint lacking this second procedural safeguard.<sup>204</sup> Relevant Supreme Court precedent dictates that the availability

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<sup>202</sup> See *Thirty-Seven Photographs*, 402 U.S. at 372-74; *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

<sup>203</sup> See *United States v. Pryba*, 502 F.2d 391, 405 (D.C. Cir. 1974).



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of a judicial determination within sixty days of the unblocking determination would suffice to meet the expeditiousness requirement.<sup>205</sup>

In short, in order to design a filtering software system imposed by public libraries and schools that effected a *constitutional* prior restraint, such a filtering software system would need to embody both the requisite substantive and procedural safeguards specified by the Supreme Court's prior restraint jurisprudence.

#### IV. CONCLUSION

Although the obstacles to designing a constitutional regulation of minors' access to harmful Internet content are indeed manifold, they are not insurmountable. A carefully-designed filtering software-based system for restricting minors' access to such speech can be implemented by public libraries and schools so as to avoid the constitutional roadblocks identified by the courts in Congress's previous efforts to regulate minors' access to harmful Internet speech.

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<sup>205</sup> See *Thirty-Seven Photographs*, 402 U.S. at 372-74 (delays in judicial determination as long as three months could not be sanctioned; accordingly, federal statute imposing prior restraint must be construed to require a judicial decision within 60 days to uphold the constitutionality of the statute); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957) (requiring a trial one day after the joinder of issues and a resolution within two days after the trial); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690 n. 22, 88 S.Ct. at 1306 n. 22 (1968) (holding prompt judicial review was assured by provision requiring a judicial determination within nine days of the decision of the administrative body); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963) (noting that prior restraint on speech "tolerated . . . only where it . . . assured an almost immediate judicial determination of the validity of the restraint"); *Redner v. Dean*, 29 F.3d 1495, 1501-02 (11th Cir.1994) (holding that prompt judicial review is never available when judicial review may not be sought until exhaustion of administrative remedies under a scheme that fails to provide adequate time restraints for administrative decision), *cert. denied*, 514 U.S. 1066, 115 S.Ct. 1697, 131 L.Ed.2d 560 (1995); *cf.* *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 225 (6th Cir.1995) (indicating that potential delay of five months from application to judicial hearing is impermissible).