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ARTICLES

TRY, TRY AGAIN: WILL CONGRESS EVER GET IT RIGHT? A SUMMARY OF INTERNET PORNOGRAPHY LAWS PROTECTING CHILDREN AND POSSIBLE SOLUTIONS

Susan Hanley Kosse *

*"[S]peech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it."*¹

I. INTRODUCTION

In 2002, the Internet was made up of more than 600 million users worldwide.² There are now more than 150 countries linked by the Internet.³ Recent studies indicate in the United States in 2002, 89.5% of children from the ages five to seventeen use computers and 58.5% of them are using the Internet.⁴ This percent-

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1. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252 (2002).

2. Nua, *How Many Online?*, at http://www.nua.ie/surveys/how_many_online/index.html (last visited Mar. 29, 2004).

3. *Cyberspace, Communications, Inc. v. Engler*, 55 F. Supp. 2d 737, 741 (E.D. Mich. 1999).

4. COMM. TO STUDY TOOLS AND STRATEGIES FOR PROTECTING KIDS FROM PORNOGRAPHY AND THEIR APPLICABILITY TO OTHER INAPPROPRIATE INTERNET CONTENT, NATIONAL RESEARCH COUNCIL YOUTH, PORNOGRAPHY, AND THE INTERNET 119-20 (Dick Thornburgh & Herbert S. Lin eds., 2002) [hereinafter NRC Report], available at <http://www.nap.edu/books/0309082749/html> (last visited Mar. 29, 2004).

age increases dramatically with preteens (75.6% of fourteen to seventeen-year-olds and 65.4% of ten to thirteen-year-olds).⁵ This is an increase from 51.2% and 39.2%, respectively, in 1998.⁶

Benefits the Internet provides our children are obvious, yet it has the potential to expose them to sexually explicit material. Unfortunately, sexually explicit or pornographic sites are on the World Wide Web in greater and greater numbers.⁷ Although it would be nearly impossible to determine accurately the number of such sites, there is evidence that they are increasing.⁸ According to a recent law review article, in 1997 there were ten thousand sites containing sexually explicit material on the Internet.⁹ By 1999 this number had grown to between thirty and sixty thousand sites.¹⁰ More than 100,000 pornographic websites now exist that can be accessed for free or without providing registration information.¹¹

The issue for many concerned parents is how to keep children from accessing these inappropriate sites. Unfortunately, many sites can be found inadvertently through what would seem harmless searches. For example, if a child types in "sleeping beauty" or "girls.com," not only would they retrieve some appropriate material, but also sexually explicit material.¹² Girls.com "features '125,000 [sic] hardcore pics' and 'Pam Anderson [and] Tommy Lee uncensored videos.'"¹³ A mistake of typing "whitehouse.com" instead of "whitehouse.gov" would lead children to a site containing pornographic material and claiming to be the number one adult website.¹⁴

And our children are seeing these websites. In a study conducted by the Crimes Against Children Research Center, 25% of

5. *Id.* at 120.

6. *Id.*

7. Heather L. Miller, *Strike Two: An Analysis of the Child Online Protection Act's Constitutional Failures*, 52 FED. COMM. L.J. 155, 159-60 (1999).

8. *Id.*

9. *Id.* at 160.

10. *Id.*

11. *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 406 (E.D. Pa. 2002), *rev'd*, 539 U.S. 194 (2003).

12. Miller, *supra* note 7, at 161.

13. *Id.*

14. *Id.* at 163.

the children interviewed had at least one unwanted exposure to sexual pictures during the year prior to the survey.¹⁵ Other studies have this figure much higher, especially as the age of the child increases.¹⁶ For example, one study showed 45% of those aged fourteen to seventeen had seen such a site, compared with 15% of those aged ten to thirteen.¹⁷

With this in mind, Congress has been attempting for the last few years to pass legislation that will protect children from inappropriate and harmful material found on the Internet.¹⁸ Although that goal is commendable, it has proven difficult to achieve without violating the First Amendment.¹⁹ Activity in Congress and the courts has been at a frantic pace on this issue. The pattern of Congress passing legislation and then it being instantly challenged has been repeated over and over again during the past seven years. This chart provides an overview of the legislation passed on this issue since 1996.

15. NRC Report, *supra* note 4, at 132–33.

16. *See id.*

17. *Id.*

18. *See, e.g.*, Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26 (codified in scattered sections of 18 U.S.C. and 47 U.S.C.); Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

19. *See, e.g.*, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 248 (2002).

Law	Year Passed	Subject Matter	Court Challenge	Result
Communications Decency Act of 1996 ("CDA") ²⁰	1996 ²¹	Made it a crime for any person to post material on the Internet that would be considered <i>indecent</i> or obscene ²²	<i>RENO v. ACLU</i> ²³	Overturned ²⁴
Child Pornography Prevention Act of 1996 ("CPPA") ²⁵	1996 ²⁶	Banned sexually explicit pornographic images of children that "appears to be" or "conveys the impression" that a minor is depicted ²⁷	<i>Ashcroft v. Free Speech Coalition</i> ²⁸	Overturned ²⁹
Child Online Protection Act ("COPA") ³⁰	1998 ³¹	Required commercial web sites to collect a credit card number or other proof of age before allowing Internet users to view material deemed harmful to minors ³²	<i>ACLU v. Ashcroft</i> ³³	Remanded to Third Circuit, which ruled COPA was unconstitutional ³⁴

20. 47 U.S.C. §§ 223, 230, 231, 609 (2000).

21. *Id.* § 609.

22. *Id.* § 223(a)(1)(B)(ii).

23. 521 U.S. 844 (1997).

24. *Id.* at 849, 885.

25. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26 (codified in scattered sections of 18 U.S.C. and 47 U.S.C.).

26. 18 U.S.C. § 2251 (2000).

27. *Id.* §§ 2252A, 2256(8)(B)(D).

28. 535 U.S. 234 (2002).

29. *Id.* at 258.

30. 47 U.S.C. §§ 223, 230, 231, 609 (2000).

31. *Id.* § 609.

32. *Id.* § 223(a), (d), (e)(5)(B).

33. 535 U.S. 564 (2002), *remanded to* 322 F.3d 240 (3d Cir. 2003).

34. *ACLU v. Ashcroft*, 322 F.3d 240, 243 (3d Cir. 2003), *cert. granted*, 124 S. Ct. 399 (2003). Oral arguments were heard by the U.S. Supreme Court on March 2, 2004.

Child Internet Protection Act ("CIPA") ³⁵	2000 ³⁶	Mandated public schools and libraries to install filters ³⁷	<i>Am. Library Ass'n v. United States</i> ³⁸	Ruled constitutional on June 23, 2003 by a plurality ³⁹
Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act) ⁴⁰	2003 ⁴¹	Seeks to correct flaws of the CPPA banning virtual child pornography ⁴²		Passed in Senate and House and signed into law by President Bush on April 30, 2003 ⁴³

Part Two of this article examines recent federal legislation, including the CDA and COPA, both of which tried to keep minors from accessing harmful and inappropriate Internet material.⁴⁴ Part Three of the article examines CIPA with its filtering mandate.⁴⁵ Part Four examines the laws addressing virtual child pornography, including the CPPA and the recently passed PROTECT Act. Finally, Part Five of the article will be devoted to discussing strategies to protect children, including non-legislative solutions.

II. RECENT FEDERAL LEGISLATION

Concerned about the volume of pornography and other inappropriate material available to any Internet user, including minors, Congress attempted to craft laws that would ban such ma-

35. 47 U.S.C. § 254(h)(7)(G) (2000); 20 U.S.C. § 9134(f) (2000).

36. Pub. L. No. 106-554, 114 Stat. 2763 (2000).

37. 47 U.S.C. § 254 (2000); 20 U.S.C. § 9134 (2000).

38. 201 F. Supp. 2d 401 (E.D. Pa. 2002), *rev'd*, 123 S. Ct. 2297 (2003).

39. 123 S. Ct. 2297, 2309 (2003).

40. Pub. L. No. 108-21, 117 Stat. 650-93 (2003).

41. *Id.*

42. Pub. L. No. 108-21, § 502, 117 Stat. 650, 678-80 (2003).

43. Pub. L. No. 108-21, 117 Stat. 650 (2003).

44. *See* 47 U.S.C. §§ 230-31 (2000).

45. *See id.* § 254 (2000).

terial.⁴⁶ Both the CDA and COPA would have greatly reduced material on the Internet that was harmful to minors, but they proved to be too heavy of a burden on adult speech.⁴⁷ Although the statutes did serve the compelling government interest of protecting the physical and psychological well-being of minors, certain provisions were not narrowly tailored to achieve that interest or the least restrictive means of advancing that interest.⁴⁸

A. *The Communications Decency Act ("CDA")*

Passed as part of the Telecommunications Act of 1996, the CDA prohibited Internet users from using the Internet to communicate material that was obscene or indecent to minors under the age of eighteen.⁴⁹ Specifically, § 223(a) provided:

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;

....

(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph

(1) with the intent that it be used for such activity,

46. See, e.g., *id.* § 231 (2000).

47. See *Reno v. ACLU*, 521 U.S. 844, 847 (1997) (finding that the CDA is unconstitutional); *ACLU v. Ashcroft*, 322 F.3d 240, 243 (3d Cir. 2003) (finding that COPA is unconstitutional).

48. See *Reno v. ACLU*, 521 U.S. at 874; *ACLU v. Ashcroft*, 322 F.3d at 251.

49. 47 U.S.C. § 223 (2000).

shall be fined under title 18 or imprisoned not more than two years, or both.⁵⁰

The second provision, § 223(d), prohibited the sending or displaying of messages that would be deemed, under contemporary community standards, patently offensive to a person under eighteen years of age. It provided:

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 or imprisoned not more than two years, or both.⁵¹

These two provisions were limited by two affirmative defenses. One protected individuals from liability if the person had taken “in good faith, reasonable, effective, and appropriate actions under the circumstances” to keep minors from the harmful material.⁵² The other covered individuals who restricted access by requiring certain forms of age proof such as a verified credit card or an adult identification number.⁵³

50. *Id.* § 223(a).

51. *Id.* § 223(d).

52. *Id.* § 223(e)(5)(A).

53. *Id.* § 223(e)(5)(B).

B. *Reno v. American Civil Liberties Union*

Despite these limiting defenses, the Supreme Court struck down the statute on the grounds that it was unconstitutionally vague and overbroad, violating the First Amendment.⁵⁴ Since it involved the First Amendment, the Court used a strict scrutiny standard, which requires the government to show not only a compelling interest for the law, but also that the law is narrowly tailored and the least restrictive means to achieving the goal.⁵⁵ In striking down the CDA, the Court was troubled over undefined key terms such as “indecent” and “patently offensive.”⁵⁶ The failure of Congress to define these, among other, words made the statute unconstitutionally vague because an individual would not have a clear understanding of what material was to be included by those terms.⁵⁷

Maybe even more troubling for the Court was the statute’s “wholly unprecedented” breadth since it was “not limited to commercial speech or commercial entities,” but rather “[i]ts open-ended prohibitions embrace[d] all nonprofit entities and individuals posting indecent messages or displaying them on their own computers”⁵⁸ Although the statute would further the government’s interest in protecting children from harmful Internet material, the CDA would result in the suppression of legitimate material that adults have a constitutional right to send and receive.⁵⁹ Because of this, the Court opined that the government was required to use less restrictive means to achieve its goals of protecting minors.⁶⁰

Moreover, the statute was void of any guidance on which community standards in particular would be applied to determine whether material was harmful to minors.⁶¹ Since the Internet is available to the world, it is conceivable that a community standards criterion under this law could be interpreted to mean the

54. *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

55. *See id.* at 870.

56. *Id.* at 871.

57. *See id.*

58. *Id.* at 877.

59. *See id.* at 874.

60. *See id.*

61. *See id.* at 873.

community that has the most restrictive views about what is offensive.⁶²

Finally, the defenses provided in the statute were unworkable and “[did] not constitute the sort of ‘narrow tailoring’ [necessary to save] an . . . unconstitutional provision.”⁶³ Although the age verification was a legitimate option for commercial sites, the Court found that it was not economically feasible for noncommercial sites.⁶⁴ In addition, the Court was skeptical whether the current technology used by the commercial pornographers actually kept children from gaining access.⁶⁵ In light of the statute’s criminal sanctions, the Court agreed with the district court that the government had failed to prove that the defense would reduce the heavy burden on adult speech.⁶⁶

This decision was hardly a surprise, even from a conservative court. The inclusion of websites other than commercial websites made the law fatally flawed from the beginning.⁶⁷ In addition, the vague terms used by Congress would make it impossible for any ordinary person to know what was and was not prohibited.⁶⁸ Although the intentions of the authors were good, the law could never be seriously considered constitutional by the Court.

C. *Child Online Protection Act (“COPA”)*

In 1998, Congress attempted to correct the problems with the earlier CDA, and address the concerns raised by the Supreme Court when it enacted COPA.⁶⁹ Specifically, COPA prohibits an individual or entity from: “knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, mak[ing] any communication for

62. *Id.* at 877–78.

63. *Id.* at 882.

64. *Id.* at 881–82.

65. *Id.* at 882.

66. *Id.*

67. *See* 47 U.S.C. § 223(d) (2000).

68. *See id.* § 223(a), (d).

69. *Id.* § 231 (1998).

commercial purposes that is available to any minor and that includes any material that is harmful to minors."⁷⁰

This second attempt was noticeably narrower than the CDA in three respects. First, COPA only applied to commercial pornographers unlike the CDA, which affected all communications.⁷¹ Second, COPA only applied to Web communications.⁷² Finally, the standard was changed from the ambiguous, indecent, and patently offensive standard to a harmful to minors standard.⁷³

Congress also defined some of the essential key terms including "by means of the World Wide Web," "minor," "commercial purposes," and "engaged in the business."⁷⁴ In addition, to clarify the "harmful to minors" community standard criterion, Congress adopted a slightly modified three prong test, set out first in *Miller v. California*,⁷⁵ which would give guidance in determining what is actually harmful to minors. For liability to attach, it must be proven 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.⁷⁶

D. American Civil Liberties Union v. Reno

The day after COPA became effective, the ACLU filed suit claiming that the statute violated the First and Fifth Amend-

70. *Id.* § 231(a)(1).

71. Compare 47 U.S.C. § 231(a) (1998), with 47 U.S.C. § 223(d) (1996).

72. 47 U.S.C. § 231(a) (1998).

73. Compare 47 U.S.C. § 231(a) (1998), with 47 U.S.C. § 223(d) (1996).

74. 47 U.S.C. § 231(e).

75. 413 U.S. 15, 24 (1973).

76. 47 U.S.C. § 231(e)(6).

ments because it was vague and infringed upon the protected speech of adults.⁷⁷ The United States District Court for the Eastern District of Pennsylvania issued a preliminary injunction preventing COPA's enforcement.⁷⁸ The government appealed to the Third Circuit, which affirmed the district court's order, holding the district court properly exercised its discretion in granting the injunction.⁷⁹ Although the court did not rule on the statute's constitutionality *per se*, its opinion gave a clear indication that this statute also would be found to be overbroad and thus unconstitutional.⁸⁰ Specifically, the court concluded its opinion by stating, "[d]ue to current technological limitations, COPA—Congress' laudatory attempt to achieve its compelling objective of protecting minors from harmful material on the World Wide Web—is more likely than not to be found unconstitutional as overbroad on the merits."⁸¹

1. The Third Circuit Review

To determine whether the preliminary injunction was properly granted, the Third Circuit applied a four-prong test:

"(1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest."⁸²

The most important prong is whether there is a reasonable probability that the party seeking the injunction will succeed on the merits if the case is taken to trial.⁸³ In analyzing this prong,

77. *ACLU v. Reno*, 31 F. Supp. 2d 473, 477 (E.D. Pa. 1999), *aff'd* by 217 F.3d 162 (3d Cir. 2000), *rev'd sub nom.* *ACLU v. Ashcroft*, 535 U.S. 564 (2002), *remanded to* 322 F.3d 240 (3d Cir. 2003).

78. *Id.* at 498–99.

79. *ACLU v. Reno*, 217 F.3d 162, 166 (3d Cir. 2000), *rev'd sub nom.* *ACLU v. Ashcroft*, 535 U.S. 564 (2002), *remanded to* 322 F.3d 240 (3d Cir. 2003).

80. *Id.* at 180.

81. *Id.* at 181.

82. *Id.* at 172 (quoting *Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999)).

83. *Id.* at 173.

the Third Circuit recognized that the government did have a compelling interest in protecting children from harmful material.⁸⁴ This objective, however, must be met in the least restrictive means available.⁸⁵ In surmising that the statute was unconstitutional, the Third Circuit focused on COPA's definition of "harmful to minors" applying a "contemporary community standards" clause.⁸⁶ It did so while recognizing that the district court had identified several other grounds for declaring the statute unconstitutional.⁸⁷ For example, the district court found that the economic costs and burdens of the age verification requirement were too great of a burden on publishers, forcing them to stop publishing or more heavily censor what they published.⁸⁸ The Third Circuit acknowledged that this may be true but opined that the even greater problem with the statute was that the Supreme Court's concern regarding the "community standards" test in the unconstitutional CDA was still not adequately remedied by this new statute.⁸⁹

In response, the government argued that Congress had effectively dealt with this issue by including the *Miller* three-prong test within the statute's text.⁹⁰ The Third Circuit, however, was not persuaded that this cured the problem since the facts in *Miller* differed drastically from the current situation.⁹¹ *Miller* involved the mailing of sexually explicit material that was in violation of California law.⁹² The publisher of the information could control to which geographic locations the material was sent. But because the Internet has no geographic boundaries and publishers have no means of even knowing to what locale their material goes, the Third Circuit reasoned that a community standards test would be particularly troublesome and not appropriate.⁹³ In essence, the publisher would be forced to censor material that may

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 174 n.19.

88. *ACLU v. Reno*, 31 F. Supp. 2d 473, 495 (E.D. Pa. 1999), *vacated by* 535 U.S. 564, *remanded to* 322 F.3d 240 (3d Cir. 2003), *cert. granted*, 124 S. Ct. 399 (2003).

89. *ACLU v. Reno*, 217 F.3d at 174.

90. *Id.*

91. *Id.* at 174-75.

92. *See id.* at 175.

93. *See id.*

be accessed from extremely puritan communities or implement costly age verification systems.⁹⁴ This would effectively block material from all minors, even if it was not deemed harmful in their own communities.⁹⁵ In addition, adults would be unconstitutionally deprived of their rights.⁹⁶

2. The Supreme Court Weighs In

The government appealed the Third Circuit's decision; the Supreme Court heard the case on November 28, 2001.⁹⁷ The Court vacated the Third Circuit's opinion and remanded the case for further proceedings.⁹⁸ The Court's plurality decision only addressed the narrow issue of whether COPA's use of the "community standards" criteria to define what is "harmful to a minor" made the Act unconstitutional by violating the First Amendment.⁹⁹ In response to that question, the Court held that "COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment."¹⁰⁰ The Court did not address, however, whether the statute was unconstitutionally vague or able to survive the strict scrutiny standard.¹⁰¹

In deciding that the use of "community standards" to identify material that is harmful to minors did not necessarily violate the First Amendment, Justice Thomas concluded that "community standards need not be defined by reference to a precise geographic area."¹⁰² Instead jurors could utilize the standards from whatever community they were familiar with and not be limited to the standards of the "most puritan" community.¹⁰³ Although the Supreme Court had previously been troubled by the CDA's

94. *Id.*

95. *Id.*

96. *Id.*

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

98. *Id.* at 586.

99. *Id.* at 566.

100. *Id.* at 585.

101. *Id.*

102. *Id.* at 576.

103. *Id.* at 577.

use of community standards, this was not the case with COPA because the “prurient interest” and “serious value” prongs not found in the CDA narrowed the statute’s coverage.¹⁰⁴ Agreeing with Justice Thomas, Justice O’Connor noted that the respondents failed to give examples of materials that would differ dramatically between communities given the other two prongs of the test.¹⁰⁵

Unlike Justice Thomas, Justice Breyer argued that the legislative history illustrated that Congress meant “community” to refer to the Nation’s adult community taken as a whole, not to geographically separate local areas.¹⁰⁶ This reading would avoid altogether the problem of “the most puritan of communities with a heckler’s Internet veto affecting the rest of the Nation.”¹⁰⁷

Justice Kennedy, joined by Justice Souter and Justice Ginsburg, likewise supported the remand, but only because they were unsure that the statute was “narrow enough to render the national variation in community standards unproblematic.”¹⁰⁸ Noting that the Internet differs dramatically from regular mail or telephones, the Justices were concerned that variations in community standards could be a particular burden for the Internet.¹⁰⁹ A decision whether this violated the First Amendment could not be made, in their opinion, until the Third Circuit completed a comprehensive analysis of the statute’s coverage.¹¹⁰

Justice Stevens, the sole dissenter, voted to affirm the judgment of the Third Circuit, despite the fact that COPA was better than the CDA because it persisted in using the community standards criteria,¹¹¹ which he argued will impose the most conservative communities’ viewpoints on the 176.5 million Americans that

104. *Id.* at 578–80.

105. *Id.* at 586 (O’Connor, J., concurring). Despite this conclusion Justice O’Connor envisioned a time when overbreadth based on varying standards may exist and urged the adoption of a national standard for obscenity to regulate the Internet. *Id.* at 587 (O’Connor, J., concurring).

106. *Id.* at 589 (Breyer, J., concurring).

107. *Id.* at 590 (Breyer, J., concurring).

108. *Id.* at 593 (Kennedy, J., concurring).

109. *Id.* at 597 (Kennedy, J., concurring).

110. *Id.* at 599 (Kennedy, J., concurring).

111. *Id.* at 603 (Stevens, J., dissenting).

have Internet access.¹¹² As a result, certain parts of the nation will be denied access to material that would be acceptable to them.¹¹³ Justice Stevens did not believe that a certain community had a right to “rid[] not only itself, but the entire Internet, of the offending speech.”¹¹⁴

3. Back to the Third Circuit

On remand, the Third Circuit held COPA unconstitutional because it failed the strict scrutiny test and was overbroad.¹¹⁵ Although the court held the statute did serve the “compelling interest in protecting the physical and psychological well-being of minors,”¹¹⁶ certain provisions were not narrowly tailored to achieve that interest or the least restrictive means of advancing that interest.¹¹⁷ Specifically, the court held that the statute’s definitions of prohibited harmful material, protected minors, and regulated commercial publishers all failed to be narrowly tailored.¹¹⁸

The “material harmful to minors” was particularly troubling to the court because the plain meaning of the text required evaluation of a single image or “exhibit on the Internet in isolation, rather than in context.”¹¹⁹ Doing so would endanger a large range of material that otherwise would be protected because a single image taken out of context may be classified as harmful to minors even though it would not be when considering the work as a whole.¹²⁰ In addition, the word “minor” could refer to anyone under eighteen, whether that person is a three-year-old or a seventeen-year-old.¹²¹ What may have “serious literary, artistic, political or scientific value” is different depending on the age of the

112. *Id.* at 606 (Stevens, J., dissenting).

113. *Id.* at 605 (Stevens, J., dissenting).

114. *Id.* at 612 (Stevens, J., dissenting).

115. *ACLU v. Ashcroft*, 322 F.3d 240, 251 (3d Cir. 2003).

116. *Id.* (quoting *Ginsberg v. New York*, 390 U.S. 628, 639–640 (1968)).

117. *Id.*

118. *Id.*

119. *Id.* at 253. The “harmful material” definition describes such material as ‘any communication, picture, image file, article, recording, writing, or other matter of any kind’ that satisfies the three prongs of the ‘material harmful to minors’ test: prurient interest, patently offensive, and serious value.” *Id.* at 252 (quoting 47 U.S.C. § 231(e)(6)).

120. *Id.* at 253.

121. *Id.* at 254.

minor.¹²² Likewise, certain images such as a “post-pubescent female breast” would not necessarily appeal to a young child’s prurient interests.¹²³ As a result, web publishers would have insufficient guidance on what may or may not be acceptable to post on their sites since they would not know to which specific age the “minor” language applies.¹²⁴ Although the government tried to argue the term “minors” should be interpreted as “normal, older adolescents,” the court refused to rewrite the plain language Congress had provided.¹²⁵

Similar problems existed with the phrase “communication ‘for commercial purposes.’”¹²⁶ The phrase was not limited to commercial pornographers, but instead included publishers who “have posted *any* material that is ‘harmful to minors’ on their web sites, even if they do not make a profit from such material itself or do not post such material as the principal part of their business.”¹²⁷ Because this could potentially include non-commercial websites that sell advertising space or publishers that have relatively small amounts of harmful material on their sites, the court held Congress must more narrowly define the phrase.¹²⁸

Finally, COPA’s affirmative defenses would not save the statute because they actually would have the effect of unduly burdening adult speech.¹²⁹ The use of credit cards or verification screens would deter users from accessing these sites and thus affect the economic ability of the publishers to supply such communications.¹³⁰ Because of this economic reality, some web publishers may begin to self-censor and not offer communications that would be deemed harmful to a minor yet would constitute legitimate adult speech.¹³¹ The Third Circuit found the chilling effects of giving identifying information to access the sites was an entirely different burden than any technical difficulties a user may face due

122. *Id.* at 253–54 (quoting 47 U.S.C. § 231(e)(6)(C)).

123. *Id.* at 254.

124. *Id.*

125. *Id.*

126. *Id.* at 256 (quoting 47 U.S.C. § 231(a)(1)).

127. *Id.*

128. *Id.* at 256–57.

129. *See id.* at 260.

130. *Id.* at 258 (quoting *ACLU v. Reno*, 31 F. Supp. 2d 473, 495 (E.D. Pa. 1999)).

131. *Id.*

to slow response times or broken links.¹³² Additionally, the affirmative defenses did not provide publishers any assurances against prosecution since the defense only applied after prosecution had begun.¹³³

In addition to failing the narrowly tailored prong of the strict scrutiny test, COPA also failed to satisfy the least restrictive means prong.¹³⁴ The court noted that children could still get access to harmful material from non-commercial sites and foreign websites.¹³⁵ Minors could also obtain credit cards and view the material.¹³⁶ Finally, less restrictive alternatives—filters, blocking programs, and parental supervision—to achieve the government's goals existed.¹³⁷

The court had similar concerns as to the breadth of the statute, concluding that the terms “material harmful to minors,” “minor,” “commercial purposes,” and “community standards” were all significantly overinclusive, sweeping in speech clearly protected for adults.¹³⁸ The court refused to adopt a narrowing construction that would make the statute constitutional, saying that “[a]ny attempt to resuscitate this statute would constitute a ‘serious invasion of the legislative domain.’”¹³⁹

The Third Circuit's decision is the correct one. As unfortunate as it is, courts should not uphold laws, even if drafted for a laudable purpose, that violate the Constitution.¹⁴⁰ Although COPA is significantly better than the CDA, it needs to be even more fine-tuned. The broadness of the terms “material harmful to minors” and “commercial purposes” makes them capable of being used as a ploy to ban controversial speech on subjects such as homosexu-

132. *Id.* at 259.

133. *Id.* at 260.

134. *Id.* at 261.

135. *Id.*

136. *Id.*

137. *Id.* at 261–65.

138. *Id.* at 267–70.

139. *Id.* at 271 (quoting *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 n.26 (1995)).

140. *See, e.g., Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *ACLU v. Reno*, 31 F. Supp. 2d 473, 493 (E.D. Pa. 1999), *vacated by* 535 U.S. 564, *remanded to* 322 F.3d 240 (3d Cir. 2003), *cert. granted*, 124 S. Ct. 399 (2003).

ality and abortion.¹⁴¹ The definition of “minor” is also extremely bothersome because there is no differentiation for different aged children.¹⁴² A one-size-fits-all approach cannot be adopted to this complex problem. If Congress meant older teenagers, then they should have specifically indicated this.¹⁴³ As written, COPA continues to be too vague to accomplish its commendable purpose without wreaking havoc with the First Amendment.

III. THE CHILDREN’S INTERNET PROTECTION ACT (“CIPA”) AND ITS FILTERING MANDATE

Besides trying to remove the objectionable material altogether or make it available to adults only, Congress tried to block it by passing the Children’s Internet Protection Act.¹⁴⁴ This law required all libraries and schools receiving Internet subsidies to install filters.¹⁴⁵ The ACLU and the American Library Association, among others, immediately filed a suit claiming the new law violated the First Amendment.¹⁴⁶ CIPA did not suffer the same fate as the CDA and COPA and was ruled constitutional by the Supreme Court on June 23, 2003.¹⁴⁷

A. *Filtering Blocking-Software Bills CIPA*

An alternative way to limit minors’ access to harmful Internet material is to use filtering software. Filtering software falls into two general categories: predetermined blocking filters and rating-based filters.¹⁴⁸ The predetermined filters block speech by one of five methods: “blacklists,” “allow lists,” “word-blocking,” “image-

141. See Geraldine P. Rosales, *Mainstream Loudoun and the Future of Internet Filtering for America’s Public Libraries*, 26 RUTGERS COMPUTER & TECH. L.J. 357, 376 (2000).

142. See ACLU v. Ashcroft, 322 F.3d at 253–55 (discussing COPA’s broad definition of “minor”).

143. See *id.* at 254.

144. Pub. L. No. 106-554, 114 Stat. 2763A-335 (2000) (codified as amended in 47 U.S.C. § 254 and scattered sections of 20 U.S.C.).

145. 47 U.S.C. § 254(h)(5)–(6) (2000).

146. *Am. Library Ass’n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002), *rev’d*, 123 S.Ct. 2297 (2003).

147. *United States v. Am. Library Ass’n*, 123 S. Ct. 2297, 2309 (2003).

148. Junichi P. Semitsu, Note, *Burning Cyberbooks in Public Libraries: Internet Filtering Software vs. The First Amendment*, 52 STAN. L. REV. 509, 513 (2000).

blocking,” or the blocking of entire categories.¹⁴⁹ Most common is the use of blacklists, which block sites that have been predetermined to be inappropriate.¹⁵⁰ A recent report testing one software blocking product found that “thousands of unbanned porn sites” were not properly blocked, mainly because it was too difficult for any manufacturer to keep up with all the new material added daily to the Internet.¹⁵¹ In addition, many of the programs use some form of word-blocking that often leads to the overinclusive blocking of constitutionally protected material.¹⁵² For example, certain programs banned the word “breast,” unintentionally blocking all websites dealing with breast cancer.¹⁵³

Critics of filtering software argue that this technology can be underinclusive as well.¹⁵⁴ Rating-based filters (PICS) are more sophisticated, allowing individuals, webmasters, or third party groups to rate sites by creating descriptive labels.¹⁵⁵ The PICS filters “read the labels and use their own filtering criteria to decide whether to block the site.”¹⁵⁶ The design of the technology makes it much easier to individually tailor what will and will not be blocked based on the policies and concerns of the library or school using the filter.¹⁵⁷ Ideally, each community library could create their own criteria for blocking sites. Realistically, however, this can be too burdensome for the libraries, forcing them to adopt criteria designed by third-party organizations.¹⁵⁸ This, the critics argue, will result in these third-party organizations’ subjective value judgments being implemented by the libraries.¹⁵⁹

Despite the debate over the technology, legislation requiring schools and libraries with Internet access to install blocking software on their computers has been on the legislative agenda for

149. *Id.*

150. *Id.*

151. *Id.* at 515–16 (quoting The Censorware Project, *Passing Porn, Banning the Bible: NZHZ's Bess in Public Schools*, at <http://censorware.net/reports/bess> (last visited Mar. 30, 2004)).

152. *Id.* at 514.

153. *Id.*

154. *Id.* at 515.

155. *Id.* at 517.

156. *Id.*

157. *See id.* at 518.

158. *Id.*

159. *Id.*

several years. The first proposed act to address the issue was the Internet School Filtering Act.¹⁶⁰ Senator John S. McCain (R-Az.) introduced the bill to the Senate on February 9, 1998,¹⁶¹ while Representative Bob Franks (R-N.J.) introduced House Bill 3177 on February 11, 1998.¹⁶² Both bills proposed amending 47 U.S.C. § 254 to require elementary and secondary schools and libraries receiving federal Internet access subsidies to install blocking software.¹⁶³ Specifically, the legislation provided that “[n]o services may be provided . . . to any elementary or secondary school, or any library, unless it provides the certification . . . that it has . . . selected a system for computers with Internet access to filter or block matter deemed to be inappropriate for minors.”¹⁶⁴

The Senate version of the bill was referred to the Committee on Commerce, Science, and Transportation, and hearings were held.¹⁶⁵ On June 25, 1998 Senator McCain reported to the Senate, and the bill was placed on the Senate Legislative Calendar.¹⁶⁶ The bill was attached to the 1999 Commerce, Justice, and State, the Judiciary, and related agencies Appropriations Act on July 21, 1998, and passed by the Senate on July 23, 1998.¹⁶⁷ House Bill 3177 was referred to the House Commerce Committee,¹⁶⁸ but was not acted upon.

Not to be discouraged, in January 1999, Senators John S. McCain and Ernest F. “Fritz” Hollings tried again. This time they introduced the Children’s Internet Protection Act.¹⁶⁹ This bill was then reintroduced by McCain as Amendment 3610 to the Labor, Health and Human Services Appropriations Bill (House Bill

160. S. 1619, 105th Cong. (2d Sess. 1998).

161. See 144 CONG. REC. 1054 (1998).

162. See *id.* at 1280.

163. See *id.* at 1055.

164. *Id.*

165. See S. REP. NO. 105-226, at 7–8 (1998).

166. See S. REP. NO. 105-226 (1998).

167. The Internet School Filtering Act was attached to the Appropriations Act as Amendment 3228. See 144 CONG. REC. 58610, S8614 (daily ed. July 21, 1998). The Appropriations Act, as amended, was approved by the Senate. See 144 CONG. REC. 58880 (daily ed. July 23, 1998).

168. See 144 CONG. REC. 1280 (1998).

169. See 145 CONG. REC. S340 (daily ed. Jan. 19, 1999).

4577).¹⁷⁰ This amendment was approved by a vote of 95-3 on June 29, 2000.¹⁷¹

The House passed a similar, but not identical, bill on June 8, 2000. The legislation was referred to a conference committee to reconcile the House and Senate versions.¹⁷² The reconciled version became an amendment to the Department of Health and Human Services Appropriations Bill, which was passed by Congress on Friday, December 15, 2000,¹⁷³ and was signed by President Clinton on December 21, 2000.¹⁷⁴

The American Library Association (ALA) and free speech groups fiercely opposed the bill. The ALA website had multiple entries urging its members to lodge their disapproval with their elected representatives. The ALA advised their members that:

[F]ederal filtering mandates are not the answer to [the] very complex question [of objectionable Internet material] because:

- Federal filtering mandates are unfunded mandates. They will require [the local] library to take on the onerous burden of paying to install and maintain filters or be stripped of key federal funding.
- Federal mandates trample on the decision making responsibilities and capabilities of [the] local library board. Mandates do not allow [local library boards] to articulate . . . community [-specific] values because they force [local library boards] to turn over . . . community decisions to corporate entities.
- Federal filtering mandates are a one-size-fits-all, overly broad solution to a complex and local problem. Around 95% of public libraries already have in place a formal policy to regulate use of the Internet. But the Labor-HHS-Ed

170. See 146 CONG. REC. S5707-09 (daily ed. June 22, 2000).

171. See 146 CONG. REC. S5869 (daily ed. June 27, 2000).

172. See 146 CONG. REC. H6561 (daily ed. July 19, 2000). For the conference report on the bill, see 146 CONG. REC. H12100 (daily ed. Dec. 15, 2000).

173. See 146 CONG. REC. S11885 (daily ed. Dec. 15, 2000) for the Senate's agreement to the conference report and 146 CONG. REC. H12502 (daily ed. Dec. 15, 2000) for the House of Representatives' agreement to the report.

174. See Children's Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763A-335 (2000) (codified as amended in 47 U.S.C. § 254 and scattered sections of 20 U.S.C.).

amendments prescribe broad, unfunded federal government control in [the local] library.

- Federal mandates will have the most profound effect on those libraries which most need E-rate discounts and other funding. Low-income, poverty-stricken libraries will not have the resources to implement filtering and comply with the certification requirement.¹⁷⁵

The New York Times published an editorial urging Congress not to pass the amendment.¹⁷⁶ The writer called federally mandated filters “absurd” and most likely “unconstitutional.”¹⁷⁷ Because filtering software is oftentimes ineffective, the author urged that monitoring students more closely was a better solution.¹⁷⁸

In contrast, parent groups praised Senator McCain’s relentless efforts to protect children from the negative aspects of the Internet. The American Family Association strongly supported the Bill, stating it would “provide a very effective solution to the growing problem of pornography accessible on the Internet by computers in schools and public libraries.”¹⁷⁹

Before the bill was even signed into law, the ACLU announced its plans to sue.¹⁸⁰ Chris Hansen, a lawyer for the ACLU, called the filtering requirement “a mandated censorship system by the federal government.”¹⁸¹ Mr. Hansen took particular offense over the bill’s supporters’ view that even though filters have multiple problems, filters still were better than having nothing at all. Hansen stated that “[t]he First Amendment doesn’t have a ‘good enough’ requirement Suppose we said it would be better than nothing for someone to go into Barnes and Noble and burn

175. AM. LIBRARY ASS’N, FEDERAL FILTERING MANDATES, at <http://www.ala.org/cfapps/archive.cfm?path=washoff/filteringmandate.html> (last visited Mar 30, 2004).

176. *A Misguided Pornography Bill*, N.Y. TIMES, Nov. 12, 2000, at WK 14.

177. *Id.*

178. *Id.*

179. *Senate Approves Amendment Requiring Filters for Web Surfing in Libraries, Schools*, 69 U.S.L.W. 2028 (July 11, 2000).

180. Press Release, American Civil Liberties Union, ACLU Promises Legal Challenge as Congress Adopts Bill Imposing Internet Blocking in Libraries (Dec. 18, 2000), available at <http://www.aclu.org/Privacy/Privacy.cfm?ID=8219&c=252.html> (last visited Mar. 30, 2004).

181. D. Ian Hopper, Associated Press, *ACLU Fighting Internet Filtering* (Dec. 19, 2000), available at <http://www.apfn.net/messageboard/12-27-00/mbs.cgi.3560.html> (last visited Mar. 30, 2004).

every tenth book. That sort of casual insensitivity to censorship is disturbing."¹⁸²

B. *Prior Lawsuits over Filtering Laws*

A lawsuit over the constitutionality of filters is nothing new. In fact, lawsuits have been filed testing the First Amendment's limitations on the use of Internet filtering in public libraries. In 1997, ten individual plaintiffs, all adult patrons of their local library, brought suit to enjoin the library from installing filtering software on the library's computers.¹⁸³ Earlier that year the library board had voted to adopt a policy on Internet sexual harassment.¹⁸⁴ The policy required that "[s]ite-blocking software . . . be installed on all [library] computers' so as to: 'a. block child pornography and obscene material (hard core pornography)'; and 'b. block material deemed Harmful to Juveniles under applicable Virginia statutes and legal precedents (soft core pornography).'"¹⁸⁵ The commercial product "X-Stop" was chosen to limit access to sites that violated the library policy.¹⁸⁶

The plaintiffs alleged a violation of their freedom of speech.¹⁸⁷ Specifically, they argued that the policy impermissibly blocked their access to protected speech and chilled their receipt of constitutionally protected materials.¹⁸⁸ For instance, they could no longer gain access to the Quaker homepage, the Zero Population Growth website, and the site for the American Association of University Women—Maryland because these sites had been blocked.¹⁸⁹ Moreover, they claimed there were no clear criteria for determining which sites would be blocked.¹⁹⁰

182. *Id.*

183. *Mainstream Loudoun v. Bd. of Trs. (Mainstream Loudoun I)*, 2 F. Supp. 2d 783 (E.D. Va. 1998).

184. *Id.* at 787.

185. *Id.* (quoting the Library Board's *Policy on Internet Sexual Harassment*).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

Since the libraries at issue were determined to be limited public forums, any content-based restriction had to be “narrowly drawn to effectuate a compelling state interest.”¹⁹¹ The court accepted the defendant’s assertion that protecting minors from harmful Internet material and avoiding a sexually hostile environment were compelling government objectives.¹⁹² But because the filtering policy was too broad—it was not limited to minors and there were not adequate standards for restricting speech—the policy was not the least restrictive means or reasonably necessary to achieve the government’s goals.¹⁹³ The court noted that less restrictive options were available, including library staff monitoring, filters for minors only, and privacy screens.¹⁹⁴

Just the threat of lawsuits has made some libraries change their plans to install filters.¹⁹⁵ For example, on August 16, 2000, the Nashua Public Library Board of Trustees in Nashua, New Hampshire, voted to reverse their decision to install Surfwatch software on all their computers.¹⁹⁶ This reversal came after local citizens opposed to the policy contacted the People for the American Way Foundation and some New England attorneys.¹⁹⁷ Likewise, the public libraries of Kern County, California changed their policy of requiring filters on their computers when the ACLU threatened legal action.¹⁹⁸

Conversely, there has also been unsuccessful litigation for a library’s failure to restrict children’s access to harmful Internet material. It is not surprising that many libraries choose not to utilize filters, considering the American Library Association’s position that any efforts to block access violate the Library Bill of

191. *Mainstream Loudoun v. Bd. of Trs. (Mainstream Loudoun II)*, 24 F. Supp. 2d 552, 562 (E.D. Va. 1998) (quoting *Perry Local Educators’ Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)).

192. *Id.* at 565.

193. *See id.* at 567–68 (analyzing the constitutionality of the library’s Internet restriction policy).

194. *Id.* at 567.

195. B.A. Robinson, Ontario Consultants on Religious Tolerance, *A Sampling of Internet Censorship Activities in Various Locations*, at <http://www.religioustolerance.org/cyberpat2.htm> (last visited Mar. 30, 2004).

196. *Id.*

197. *Id.*

198. *Id.*

Rights.¹⁹⁹ Perhaps the most publicized suit filed concerning this matter was *Kathleen R. v. City of Livermore*.²⁰⁰ In this case, a mother filed suit hoping to force her local library to install filters.²⁰¹ The impetus for the legal battle came after her 12-year-old son downloaded pornographic pictures off the library's computer.²⁰² The case was dismissed in January 1999 in a one-sentence ruling.²⁰³

This issue has not been limited to just public libraries. In Palm Beach, Florida in 1998, a mother sued the Broward County School Board for, among other things, failing to install filters on public school computers.²⁰⁴ The case was settled on December 16, 1998.²⁰⁵

C. *The CIPA Challenge*—American Library Association v. United States

True to their promise, the American Library Association and the ACLU, along with library patrons and website publishers, filed a lawsuit challenging the constitutionality of CIPA on March 20, 2001, in the United States District Court for the Eastern District of Pennsylvania.²⁰⁶ On May 31, 2002, the three-judge court

199. Karen G. Schneider, Public Library Ass'n, *Plain Facts About Internet Filtering Software*, Tech. Notes, at <http://www.ala.org/ala/pla/plapubs/technotes/internetfiltering.htm> (last visited Mar. 30, 2004).

200. *Kathleen R. v. City of Livermore*, No. V-015266-4 (Cal. App. Pep't Super. Ct. 1998). As no opinion was written at the Superior Court level, see *Kathleen R. v. City of Livermore*, TECH. L.J. at <http://www.techlawjournal.com/courts/Kathleenr/Default.htm> (last visited Mar. 30, 2004), for a summary of the trial court proceedings.

201. *Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772, 776 (Cal. Ct. App. 2001).

202. *Id.* at 775.

203. See *Judge Dismisses Livermore Library Filtering Suite*, TECH. L.J., at <http://www.techlawjournal.com/censor/19990115.htm> (Jan. 15, 1999). Judge George Hernandez dismissed the suit, writing "[t]he Demurrer to Plaintiff's First Amended Complaint for Injunctive Relief is sustained and the First Amended Complaint for Injunctive Relief is dismissed without leave to amend." *Id.*

204. *Hoffman v. Sch. Bd. of Broward County*, No. 98-6290-CIV-HURLEY (S.D. Fla. 1999); see Second Amended Complaint at para. 28, *Hoffman* (No. 98-6290-CIV-HURLEY), available at <http://www.gocin.com/ramp/brwschool/lawsuit2.html> (last visited Mar. 30, 2004).

205. Settlement Agreement, *Hoffman* (No. 98-6290-CIV-HURLEY), available at <http://www.gocin.com/ramp/brwschool/settlement.html> (last visited Mar. 30, 2004).

206. *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002), *rev'd*, 123 S.Ct. 2297 (2003).

unanimously found for the plaintiffs.²⁰⁷ The court relied heavily on an extensive factual record that established filtering products were not effective because of their underinclusive and/or overinclusive nature which blocks constitutionally protected speech.²⁰⁸ As a result, the court concluded the mandatory use of filters was not narrowly tailored to further the government's interest and less restrictive alternatives existed.²⁰⁹ The government's argument that the unblocking features of the programs cured any defects did not persuade the court because having to ask a librarian to unblock a site would have a chilling effect on patrons' speech.²¹⁰

The court acknowledged several reasons why filters are ineffective at keeping harmful material away from minors.²¹¹ First, "no category definition used by filtering software companies is identical to CIPA's definitions of visual depictions that are obscene, child pornography, or harmful to minors."²¹² Automated classification systems thus are subject to overblocking and underblocking.²¹³ In addition, these systems can only search text, not images.²¹⁴ Even if human review is possible, the approximately 1.5 million pages added to the Web each day make it impossible for companies to realistically and accurately categorize pages because of limited staff and human error and misjudgment.²¹⁵ The addition of new pages to a website after it has been originally categorized only exacerbates the problem.²¹⁶

Considering these limitations with filters, the court suggested the existence of less restrictive methods for accomplishing the government's goals.²¹⁷ For example, libraries could adopt Internet use policies and punish violators.²¹⁸ In addition, the libraries could use a "tap-on-the-shoulder" method to discourage minors

207. *Id.* at 495–96.

208. *Id.* at 408.

209. *Id.* at 410.

210. *Id.* at 486–87.

211. *Id.* at 429.

212. *Id.*

213. *Id.* at 430–31. The court spent a major portion of its opinion giving examples of erroneously blocked websites. *Id.* at 446–47.

214. *Id.* at 431.

215. *Id.* at 433.

216. *See id.* at 435.

217. *Id.* at 480–84.

218. *Id.* at 480.

from viewing harmful content.²¹⁹ Privacy screens and terminals outside of patrons' sight lines also are less restrictive methods as compared to filters.²²⁰

Finally, the court held that CIPA's disabling provisions failed to cure the defects.²²¹ The court surmised that patrons would be reluctant to ask librarians to unblock sites containing sensitive information.²²² Moreover, many of these sites may take several days to be unblocked and the delay would place a significant burden on a patron's use of the Internet.²²³

The government appealed the decision, and the Supreme Court of the United States heard arguments on March 5, 2003.²²⁴

D. *Will CIPA Be Constitutional?*

The parties, commentators, and scholars were split on whether Congress had finally drafted a bill regulating the Internet that would adhere to the Constitution.²²⁵ Some surmised that the Supreme Court's decision would most likely depend on whether the Court believed the law was a permissible exercise of Congress' spending power or a regulation chilling protected speech.²²⁶ Along these lines proponents of the law were hopeful that the Court might determine "that government funding of public libraries does not create a forum in which it has an obligation to subsidize the exercise of First Amendment rights."²²⁷ They argued that libraries and the Internet should be classified as nonpublic forums, and the legality of any restrictions should be reviewed using a reasonable basis standard.²²⁸ Others argued that the Court should use a strict scrutiny analysis and find these restrictions to

219. *Id.* at 482.

220. *Id.* at 483–84.

221. *Id.* at 489.

222. *Id.* at 486.

223. *Id.* at 487.

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

225. See Steven D. Hinckley, *Your Money or Your Speech: The Children's Internet Protection Act and the Congressional Assault on the First Amendment in Public Libraries*, 80 WASH. U. L.Q. 1025, 1097–99 (2002) (arguing CIPA is unconstitutional).

226. *Id.* at 1059.

227. *Id.* at 1079.

228. *Id.* at 1086–91.

be a prior restraint.²²⁹ Finally, some thought the Court may find the government's argument persuasive that Internet filtering is analogous to a library's acquisition of books.²³⁰ Each of these arguments will be explored in more detail below.

E. *Are Filters a Permissible Exercise of Congress' Spending Power?*

When passing CIPA, Congress obviously relied on their growing trend to regulate this nation through the power of the purse. In recent years legislation placing restrictions on recipients of federal funds has increased.²³¹ Some view this phenomena skeptically, asserting that this is:

one of the primary tools Congress uses to control the activities of prospective funding recipients in ways that conform to its vision of contemporary federal policy because this frequently avoids many of the troublesome constitutional barriers that would make such control problematic, if not impossible, if they were attempted as direct statutory mandates.²³²

Although the courts have given Congress much more latitude with funding legislation that imposes restrictions than they may have with other laws, restrictions do exist on Congress' spending power.²³³ These limits include using the spending power for the "general welfare"²³⁴ of the United States and "unambiguously"²³⁵ describing the funding conditions that must relate "to the federal interest in particular national projects or programs."²³⁶ In addition, no excessive coercion is permissible, and "other constitutional provisions may provide an independent bar to the conditional grant of federal funds."²³⁷

229. *Id.* at 1091-97.

230. Gregory K. Laughlin, *Sex, Lies, and Library Cards: The First Amendment Implications of the Use of Software Filters To Control Access to Internet Pornography in Public Libraries*, 51 *DRAKE L. REV.* 213, 259-63 (2003).

231. See Hinckley, *supra* note 201, at 1060.

232. *Id.*

233. *Id.* at 1061-64 (discussing *South Dakota v. Dole*, 483 U.S. 203 (1987)).

234. *Id.* at 1062 (quoting *Dole*, 483 U.S. at 207).

235. *Id.* at 1063 (quoting *Dole*, 483 U.S. at 207).

236. *Id.*

237. *Id.* at 1063 (quoting *Dole*, 483 U.S. at 208).

Professor Hinckley, Associate Dean for Library and Information Technology and Professor of Law at the University of South Carolina School of Law, thoroughly traces the Court's decisions regarding conditional funding in the First Amendment context.²³⁸ Ultimately he concludes that the Court can take two approaches when faced with this issue. One approach is to adopt the unconstitutional conditions doctrine to overturn the legislation when the condition is so coercive the recipient has no choice but to forego constitutionally protected activity.²³⁹ The other approach is for the Court to classify the restriction as a mere subsidy which does not prohibit the individual from engaging in the activity on her own time or with her own money.²⁴⁰ Hinckley notes that oftentimes the choice between the two approaches is result driven.²⁴¹ CIPA's survival will depend on which analytical scheme the court adopts.

The ACLU, of course, argued that the Court should adopt the unconstitutional conditions doctrine and overturn the statute.²⁴² Relying on the holding in *Legal Services Corp. v. Velasquez*²⁴³ that prohibited Congress from imposing restrictions which distort the traditional function of the medium, the ACLU urged the Court to find that filters distort "the usual functioning of public libraries as places of freewheeling inquiry."²⁴⁴

The government countered the ACLU position by arguing government entities, such as libraries, do not have Constitutional rights.²⁴⁵ Moreover, since the federal aid goes to the libraries and not the patron, the appellees cannot argue that CIPA imposes an unconstitutional condition on the patron's First Amendment rights.²⁴⁶ Even if the library would have some unconstitutional

238. *Id.* at 1065–72.

239. *Id.* at 1070.

240. *Id.*

241. *Id.* at 1070–71.

242. Brief for Appellees at 45–48, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361) (citing *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 534, 536, 544–45 (2001)).

243. 531 U.S. 533 (2001).

244. Brief for Appellees, *supra* note 218, at 48 (quoting Jurisdictional Statement app. 187a, n.36, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003)).

245. Brief for Appellants at 40, *United States v. Am. Library Ass'n*, 123 S. Ct. 2297 (2003) (No. 02-361).

246. *Id.* at 41.

conditions claim, the claim would lack merit because libraries have traditionally excluded pornography from their collections and CIPA does not prohibit the recipient of federal aid from “engaging in the protected conduct outside the scope of the federally [assisted] program.”²⁴⁷ In addition, the restrictions will not distort the usual functioning of a library because “[p]roviding patrons with illegal or harmful pornography is not ‘inherent’ in the role of public libraries in our society.”²⁴⁸

F. *Is Internet Access at Libraries Similar to Traditional Public Forums?*

How Internet access at libraries is classified is very important because the classification will dictate the level of scrutiny the court uses to analyze the law.²⁴⁹ Traditional and limited public forums are analyzed under a strict scrutiny standard, whereas non-public forums must survive a rational basis review.²⁵⁰

The appellees in *American Library Ass’n* classified libraries not as limited public forums, but as true traditional public forums,²⁵¹ because libraries allow all members of the public to enter and “provide broad access to a wide range of speakers when they offer Internet access.”²⁵² Such Internet service has a “speech-facilitating character,” much like a sidewalk or public park, that makes it “distinctly deserving of First Amendment protection.”²⁵³

The government noted in its brief that the Supreme Court has never “decided what level of scrutiny applies to a public library’s content-based judgments regarding the material it makes available to its patrons.”²⁵⁴ The government argued that neither forum analysis nor strict scrutiny applied because “the Court ha[d] made clear that the government has broad discretion to make

247. *Id.* at 41 (quoting *Rust v. Sullivan*, 500 U.S. 173, 197 (1991)).

248. *Id.* at 44 (quoting *Velasquez*, 531 U.S. at 543).

249. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985).

250. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

251. Brief for Appellees, *supra* note 218, at 24–27.

252. *Id.* at 25.

253. *Id.* at 24 (quoting Jurisdictional Statement app. 129a, *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003)).

254. Brief for Appellants, *supra* note 221, at 20.

content-based judgments in deciding what private speech to make available to the public.²⁵⁵ Libraries, not courts, must have broad discretion to make content-based decisions in fulfilling their mission to facilitate worthwhile and appropriate research, learning, and recreational reading and pursuits.²⁵⁶ Therefore, the government contended that neither forum analysis nor strict scrutiny applied to a public library's collection decisions, but a rational basis review should apply instead.²⁵⁷

The government argued that such restrictions are reasonable, because even if the filters erroneously block some protected speech, this material can be found on other websites.²⁵⁸ Alternatively, the government argued that filters satisfy even the strict scrutiny standard because the government has a compelling interest in protecting children, and the filters are the least restrictive means to accomplish this goal.²⁵⁹

G. Does CIPA Impose a Prior Restraint on Speech?

Prior restraints on speech are presumptively invalid.²⁶⁰ However, the government in *American Library Ass'n* argued that the use of filters by a library is not a prior restraint because "[a]ny material blocked by a filter remains on the Internet and may be obtained from millions of computers throughout the world."²⁶¹ The library classified the "decision not to provide such material through its own computers" as a "collection decision, not a restraint on private speech."²⁶²

255. *Id.*

256. *Id.* at 22.

257. *Id.* at 11, 32. The appellants rely on *National Endowment for the Arts v. Finley*, 524 U.S. 569, 585–86 (1998), and *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 672–73 (1998), to support their argument. These cases held that broad discretion must be given to the National Endowment for the Arts and public television stations to fulfill their mission. See *Finley*, 524 U.S. at 585–86; *Forbes*, 523 U.S. at 673.

258. Brief for Appellants, *supra* note 221, at 35.

259. *Id.* at 39.

260. Brief for Appellees, *supra* note 218, at 43–44 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

261. Brief for Appellants, *supra* note 221, at 45.

262. *Id.*

In contrast, plaintiffs argued that CIPA “block[s] speech that is not even close to the line between protected and unprotected speech” and therefore CIPA is unconstitutional.²⁶³ Filtering programs imposed by libraries function as “automated censors” that block, with no prior judicial review, websites containing protected speech.²⁶⁴ The ACLU would not accept the government’s argument that the use of filters is not a prior restraint because it is much like the “library’s decision not to [order] Playboy.”²⁶⁵ The ACLU, however, distinguished local book selection and a federal mandate for participation in a much-needed funding program.²⁶⁶ Particularly, CIPA cuts the librarians out of the selection process altogether and gives that discretion to third-party, non-governmental actors.²⁶⁷

H. *Is Filtering Analogous to a Library’s Acquisition of Books?*

The government’s argument was essentially that the CIPA filtering requirement is really no different than a library deciding which books to include in their collection.²⁶⁸ Libraries cannot choose to carry every book or even multiple copies of every book.²⁶⁹ As a result, a library has to make discretionary judgments about what to purchase with its finite resources.²⁷⁰ In much the same way, the filtering programs exclude certain parts of the Internet—i.e., pornography—which libraries may not want to offer to their patrons.²⁷¹

In response to the government’s print and Internet collection comparison, the ACLU challenged this argument on six grounds: (1) CIPA actually takes away a library’s discretion because it mandates libraries nationwide to utilize filters even if they have decided against such a policy;²⁷² (2) Fundamental differences exist

263. Brief for Appellees, *supra* note 218, at 43.

264. *Id.*

265. *Id.* at 44.

266. *Id.*

267. *Id.*

268. Brief for Appellants, *supra* note 221, at 11.

269. *See id.* at 18.

270. *Id.*

271. *Id.* at 11, 18, 22–23.

272. Brief for Appellees, *supra* note 218, at 39.

between filters and book selection because book selection involves review, unlike the blocked websites that have never been reviewed;²⁷³ (3) Filters are not like third-party vendors or book reviews because they censor, rather than select, material that will be added to the collection;²⁷⁴ (4) No credible reason exists that prohibits subjecting book collection to rational basis review and Internet access to strict scrutiny;²⁷⁵ (5) Filters “would risk transforming the role of public libraries in our society;”²⁷⁶ and (6) The government’s argument that the blocked sites are reasonable because patrons can get information from other sites is a “twisted rewriting of the First Amendment.”²⁷⁷

I. *The Supreme Court Decision*

The government appealed the lower court decision, and the Supreme Court of the United States heard arguments on March 5, 2003.²⁷⁸ On June 23, 2003, the Supreme Court, in a plurality decision with three separate opinions, upheld CIPA.²⁷⁹ Six Justices ruled that the filter law conditioning library subsidies on Internet filter use did not exceed Congress’s spending clause power, violate the library patron’s First Amendment rights, or impose unconstitutional conditions on the libraries’ receipt of federal aid.²⁸⁰ In reversing the district court’s decision that the law unconstitutionally imposed a content-based restriction on access to a public forum because it was not narrowly tailored to meet the government’s compelling interest, the Court refused to utilize the public forum principles for this case.²⁸¹

Determining that the public forum principles were “out of place” for this case, Chief Justice Rehnquist refused to find Internet access in a public library a public forum because historically

273. *Id.* at 39–40.

274. *Id.* at 40–41.

275. *Id.* at 41.

276. *Id.* (quoting Brief for Appellants, *supra* note 221, at 19).

277. *Id.* at 41–42.

278. *United States v. Am. Library Ass’n*, 123 S. Ct. 2297 (2003).

279. *Id.*

280. *Federal Law Conditioning Library Subsidies on Internet Filter Use is Ruled Constitutional*, 71 U.S.L.W. 1791, 1791 (June 24, 2003).

281. *Am. Library Ass’n*, 123 S. Ct. at 2303–04.

it was not designated as such, and its purpose was not to encourage a diversity of views like traditional public forums.²⁸² Rather, a library provides Internet access only to aid its patrons with their research and information collection.²⁸³ The opinion analogized the public libraries' discretionary judgment about what to make available to patrons to the National Endowment for the Arts' ("NEA") content-based criteria in making funding decisions and a public television station's editorial judgment regarding what its viewers see.²⁸⁴ In both of those prior contexts, the Court refused to become involved in discretionary judgments which necessarily had to be made by the entities themselves.²⁸⁵

The Court found the libraries' argument—that they enjoy less discretion with the Internet compared to book selection because each book is affirmatively chosen to be acquired—of no constitutional significance.²⁸⁶ A library's decision to exclude pornography from its print collection was not subject to strict scrutiny, so neither should its decision to block similar material online.²⁸⁷ Furthermore, due to the ever-changing nature of the Internet, it would be unrealistic to expect a library to review every web page.²⁸⁸ Likewise, the filters' "overblocking" tendencies were not fatal because it was relatively easy for a patron to ask for the site to be unblocked.²⁸⁹

Having dismissed the public forum analysis, the Court next rejected the libraries' argument that CIPA somehow "impose[d] an unconstitutional condition on the receipt of federal assistance."²⁹⁰ Refusing to answer whether the government had First Amendment rights at all, the Court held the question was irrelevant because the "unconstitutional conditions" claim failed on its merits.²⁹¹ Relying on its previous decision in *Rust v. Sullivan*,²⁹² the

282. *Id.* at 2304–05.

283. *Id.*

284. *Id.* at 2304.

285. *Id.*

286. *Id.* at 2306.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 2307.

291. *Id.*

292. 500 U.S. 173 (1991).

Court concluded that Congress, in passing the E-rate and LSTA programs, was not denying a benefit to anyone but merely insisting that these “public funds be spent for the purposes for which they were authorized.”²⁹³ Since libraries are still free to offer unfiltered access and forego the federal assistance, there is no penalty on that activity.²⁹⁴

In his concurrence, Justice Kennedy failed to see any issue in the case since an adult patron could ask for any blocked site to be disabled.²⁹⁵ However, he did acknowledge that there may be “an as-applied challenge” if a library did not have the capacity to unblock the sites or the user’s access is burdened in some way.²⁹⁶

Justice Breyer, although not requiring strict scrutiny, proposed some heightened scrutiny rather than rational basis review when examining the statute.²⁹⁷ In his opinion, the Court should ask “whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives.”²⁹⁸ Taking CIPA through this heightened, yet not strict scrutiny analysis, he was satisfied that the statute was constitutional because the government has a compelling interest and there was presently no better solution or alternative.²⁹⁹ Although he acknowledged the patron may be burdened when asking for a site to be unblocked, Justice Breyer refused to recognize that burden as outweighing the government’s interest in protecting children from pornographic materials.³⁰⁰

Justice Stevens wrote a separate dissent focusing on the filters’ acknowledged flaws of “underblocking” and “overblocking” and the variety of alternative, less restrictive methods available.³⁰¹ He

293. *Am. Library Ass’n*, 123 S. Ct. at 2308 (quoting *Rust*, 500 U.S. at 196). In *Rust*, Congress placed limits on federal funds used for family planning purposes by prohibiting the funds for any programs that included abortion counseling. *Rust*, 500 U.S. at 178–81. The Supreme Court upheld the restriction, holding that the restriction did not deny a benefit to anyone but was necessary to make sure the funds were being spent for the purposes for which they were authorized. *Id.* at 196.

294. *Am. Library Ass’n*, 123 S. Ct. at 2308.

295. *Id.* at 2309 (Kennedy, J., concurring).

296. *Id.* at 2310 (Kennedy, J., concurring).

297. *Id.* at 2310–11 (Breyer, J., concurring).

298. *Id.* at 2311 (Breyer, J., concurring).

299. *Id.* at 2312 (Breyer, J., concurring).

300. *Id.* (Breyer, J., concurring).

301. *Id.* at 2312–14 (Stevens, J., dissenting).

refused to find the statute cured by the provision allowing for patrons to ask for sites to be unblocked, because a patron may have no knowledge of those sites.³⁰² He also feared that the libraries' various procedures regarding unblocking would lead to a prior restraint on adult access to protected speech.³⁰³

In addition, Justice Stevens took issue with the plurality's finding that the statute does not impose an unconstitutional condition on public libraries.³⁰⁴ He argued that the plurality improperly relied on *Rust v. Sullivan* because that case only applies to situations of government speech.³⁰⁵ The federal assistance under the E-Rate and LSTA programs was designed to give Internet access to low-income individuals, not to promote or convey any specific government speech.³⁰⁶ Furthermore, even if there was a message of no pornography, the filtering devices would not promote this message because of their flaws of "underblocking" and "overblocking."³⁰⁷

Justice Souter, with Justice Ginsburg joining, wrote another dissent adding that if the libraries had placed filters on the computers on their own, they would have violated the First Amendment.³⁰⁸ Specifically, the Justices were gravely concerned with the permissive statutory language of "may," when referring to the granting of an adult's request to unblock a site.³⁰⁹ Even more objectionable is the discretion given the librarian who only needs to unblock the site for "bona fide research or other lawful purposes."³¹⁰ As a result, adults will be blocked from a substantial amount of protected material.³¹¹ A library cannot do that because blocking protected speech is censorship, not discretionary selection of materials as described by the plurality.³¹² Justices Souter and Ginsburg felt the plurality's comparison to the discretionary

302. *Id.* (Stevens, J., dissenting).

303. *Id.* at 2315 (Stevens, J., dissenting).

304. *Id.* at 2316 (Stevens, J., dissenting).

305. *Id.* at 2317 (Stevens, J., dissenting).

306. *Id.* (Stevens, J., dissenting).

307. *Id.* (Stevens, J., dissenting).

308. *Id.* at 2318 (Souter, J., dissenting).

309. *Id.* at 2319 (Souter, J., dissenting).

310. *Id.* (Souter, J., dissenting) (quoting 20 U.S.C. § 9134(f)(3) (2000)).

311. *Id.* at 2320 (Souter, J., dissenting).

312. *Id.* at 2320–21 (Souter, J., dissenting).

selection of books was flawed because the reasons for the discretion—scarcity of resources and space—are not present with the Internet.³¹³ Moreover, since it is a longstanding policy that a library not deny any adult patron access to a book in its collection, the plurality's characterization of the library's mission to deny adults access to certain books was misplaced.³¹⁴ Finally, Justice Souter and Justice Ginsburg compared site blocking to removing library materials from the shelves and were comfortable with the courts reviewing such decisions.³¹⁵

The Supreme Court incorrectly decided this case. As Professor Hinckley predicted, the Court justified its decision by fantasizing that somehow blocking websites was not a penalty, since the libraries could choose to give patrons unfiltered access and forego the funding.³¹⁶ However, this is hardly a choice at all. With budgets for all governmental entities shrinking, it is safe to assume that these subsidies are a huge part of libraries' technology budgets. The choice for the libraries then is to install the filters and get the subsidies, or have no Internet service at all. Being unable to provide Internet service to aid patrons with their research and informational pursuits, especially their lowest income patrons, flies in the face of a library's very mission.

The plurality's position is even less defensible in light of the uncontradicted evidence that the filters just do not work because of the under-inclusive and over-inclusive nature of the present technology.³¹⁷ To mandate filters is absurd and shortsighted when there are less restrictive methods available for meeting the government's compelling and laudable goal of protecting children from pornography. Equally discouraging is the plurality's glossing over the chilling effect these filters will have. Justice Stevens rightfully points out that many patrons will not request any unblocking because they will not be aware of what sites should be unblocked.³¹⁸ Also, why should the request be limited to "bona

313. *Id.* at 2321 (Souter, J., dissenting).

314. *Id.* at 2322–24 (Souter, J., dissenting).

315. *Id.* at 2324 (Souter, J., dissenting).

316. *Id.* at 2308.

317. *See id.* at 2306.

318. *Id.* at 2315 (Stevens, J., dissenting).

vide research” purposes?³¹⁹ Is there a problem with just wanting access to the material for enjoyment purposes? Finally, the plurality’s analogy with print pornographic materials being excluded because they are deemed inappropriate is weak.³²⁰ Without looking at each website, how will a librarian know if it contains material that is truly inappropriate, and therefore, would not be included in the library’s collection if it were in print? Unfortunately, a librarian will not know—thus the only result will be that protected speech will be censored from adults unnecessarily, and speech that is harmful to neither adults nor minors will be blocked.³²¹ Justice Stevens summed this up best when he stated, “[i]n my judgment, a statutory blunderbuss that mandates this vast amount of ‘overblocking’ abridges the freedom of speech protected by the First Amendment.”³²²

Any critics of the opinion who would like to see it overturned may not have long to wait, because Justice Kennedy’s opinion foreshadowed the next constitutional challenge to the statute.³²³ Although agreeing that on its face CIPA was valid, he left open an “as-applied” challenge if libraries do not have the capacity to disable the filters readily or if the adult patron’s viewing of constitutionally protected material is burdened in some other way.³²⁴ This appears likely, since the statute does not make unblocking mandatory and leaves a great deal of discretion to the librarian whether to unblock the site or not.³²⁵ Both Justices Kennedy and Breyer upheld the statute based on an adult patron’s right to have the site unblocked.³²⁶ If it becomes evident that this is not occurring in practice, the Court, counting Justices Kennedy and Breyer as the swing votes, may revisit the statute, declaring it unconstitutional.

Perhaps the greatest irony of the government’s arguments and the Supreme Court’s decision is that they are both largely premised on the library’s discretionary judgment to decide what to in-

319. *Id.* at 2302 (quoting 20 U.S.C. § 9134(f)(3) (2000)).

320. *Id.* at 2306.

321. *See id.* at 2313 (Stevens, J., dissenting).

322. *Id.* (Stevens, J., dissenting).

323. *Id.* at 2309–10 (Kennedy, J., concurring).

324. *Id.* at 2310 (Kennedy, J., concurring).

325. *See* 20 U.S.C. § 9134(f)(3) (2000); 47 U.S.C. § 254 (h)(6)(D) (2000).

326. *Am. Library Ass’n*, 123 S. Ct. at 2309–12 (Kennedy, J., concurring).

clude in its collection. Specifically, since a library's decision not to include pornography in its collection is not subject to strict scrutiny neither should its decision to block similar material online. Chief Justice Rehnquist argued that the use of a filtering system is a collection decision not a prior restraint on speech.³²⁷ Yet it is *not* the libraries' decision to block the online material. In fact, the libraries vehemently oppose filters, and on July 25, 2003, the American Library Association issued a press release that reiterated its commitment to continue to educate the public about the negative impacts of CIPA and to continue to seek and protect the First Amendment rights of library users.³²⁸ If libraries in a specific community decide filters are the best way to address the pornography problem, then the Court's analysis may be correct. However, this has not yet been the situation. Congress is the body blocking the online material (making the collection decision), not the libraries, so the analogy that the Court uses is misplaced.

IV. ADDITIONAL LEGISLATIVE ACTIVITY: THE CHILD PORNOGRAPHY PREVENTION ACT (CPPA) AND THE PROTECT ACT

Addressing a separate but related problem, Congress passed the CPPA in 1996 to prohibit "virtual" child pornography.³²⁹ Advances in technology have made it possible for individuals to produce computer-generated images of children engaged in sexually explicit conduct. Often these images are impossible to distinguish from real children. Supporters of the law argued it was necessary to prevent the abuse of children. Although once again the drafters had a commendable objective, the law's vagueness and overbreadth resulted in it being overturned by the Supreme Court.³³⁰ In April 2003, Congress tried again with the Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today

327. *Id.* at 2307 n.4.

328. Press Release, Am. Library Ass'n, CIPA Decision Response: A Statement from ALA President Carla D. Hayden and the ALA Executive Board (July 25, 2003) available at <http://www.ala.org/PrinterTemplate.cfm?%20=News&template=/ContentManagement/ContentDisplay.cfm&ContentID=39847> (last visited Mar. 30, 2004).

329. 18 U.S.C. § 2251 (2000).

330. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245–46 (2002).

Act of 2003 ("PROTECT Act"),³³¹ which is sure to be immediately challenged.

A. *The Child Pornography Prevention Act ("CPPA")*

Congress has also tried to regulate "virtual" child pornography with the same outcome to date as with all other Internet laws.³³² In 1996, Congress passed the CPPA—banning the knowing reproduction, distribution, sale, reception, or possession of any visual depiction of what "appears to be . . . a minor" or "conveys the impression . . . of a minor engaging in sexually explicit conduct."³³³ The definition of visual depiction included images generated by computers or the use of youthful looking adults.³³⁴ Under the statute, a first time offender may be imprisoned for up to fifteen years and repeat sexual offenders face a minimum of five years in prison.³³⁵

When the CPPA was constitutionally challenged, the district court granted summary judgment to the government, disallowing plaintiffs' claims that these restrictions would deter them from producing works protected by the First Amendment.³³⁶ On review, the Ninth Circuit reversed, holding portions of the CPPA to be overbroad because the law unconstitutionally banned images that were not obscene or were not made using real children.³³⁷ Four other circuits have upheld the law.³³⁸ The Supreme Court agreed with the Ninth Circuit, ruling that certain provisions of the CPPA were overbroad and in violation of the First Amendment.³³⁹ Spe-

331. Pub. L. No. 108-21, 117 Stat. 650 (2003) (to be codified in scattered sections of 18 U.S.C. § 1) [hereinafter PROTECT Act].

332. See *Ashcroft v. Free Speech Coalition*, 535 U.S. at 234 (finding the CPPA overbroad and unconstitutional).

333. See 18 U.S.C. § 2256(8)(B), (D) (2000).

334. *Id.* § 2256(8).

335. *Id.* § 2252A(b)(1).

336. See *Free Speech Coalition v. Reno*, No. C 97-0281VSC, 1997 WL 487758, at *3 (N.D. Cal. Aug. 12, 1997), *aff'd, rev'd, remanded by* 198 F.3d 1083 (9th Cir. 1999).

337. See *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1086 (9th Cir. 1999), *aff'd*, 533 U.S. 234 (2002).

338. See *United States v. Fox*, 248 F.3d 394, 406 (5th Cir. 2001); *United States v. Mento*, 231 F.3d 912, 923 (4th Cir. 2000); *United States v. Acheson*, 195 F.3d 645, 652 (11th Cir. 1999); *United States v. Hilton*, 167 F.3d 61, 74 (1st Cir. 1999).

339. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 256 (2002).

cifically, the Court ruled that the government could not rely on previous cases, which ban child pornography regardless of whether the images were obscene. Those previous cases required images using actual minors, which would not occur with computer-generated images or the use of young-looking adults.³⁴⁰ Therefore, the pornographic images could only be banned if found to be obscene³⁴¹ because such material is not protected by the First Amendment. Since the CPPA, as written, would prohibit speech that was not obscene, it violated the *Miller* standard.³⁴² The Court rejected the government's arguments that this broad sweep was necessary because virtual child pornography is used to seduce children or whet pedophiles' sexual appetites.³⁴³ Moreover, the Court did not find persuasive the argument that it is too difficult for the government to distinguish between computer imaging and actual child photos.³⁴⁴

In analyzing the statute under the *Miller* standard, Justice Kennedy noted that the CPPA suppresses speech that may not appeal to the prurient interest, is *not* patently offensive in light of community standards, and has *serious* literary, artistic, political, or scientific value.³⁴⁵ In support of his position he argued that the CPPA prohibits "[a]ny depiction of sexually explicit activity, no matter how it is presented . . ." ³⁴⁶ Therefore, the statute would apply to a picture in a psychology manual as well as books, pictures, and movies that have teenage sexual activity as a theme.³⁴⁷ The Supreme Court was not willing to label *Romeo and Juliet*, *American Beauty*, and other movies and novels as obscene.³⁴⁸ In addition, the opinion distinguished *New York v. Ferber*,³⁴⁹ because that case involved actual child participants and the state had a compelling interest in protecting the victims of child pornogra-

340. *Id.* at 256.

341. *See Miller v. California*, 413 U.S. 15, 36–37 (1973).

342. *See Ashcroft v. Free Speech Coalition*, 535 U.S. at 246.

343. *Id.* at 252–53.

344. *Id.* at 249.

345. *See id.* at 246.

346. *Id.*

347. *See id.*

348. *Id.* at 247–48.

349. 458 U.S. 747, 759 (1982).

phy.³⁵⁰ However, no definitive causal link existed between virtual child pornography and child abuse.³⁵¹

None of the government's arguments—including the argument that pedophiles may use these images to seduce children or whet their sexual appetites—were compelling to the Court.³⁵² The Court reminded the government that speech cannot be prohibited just because it may be misused, may encourage unlawful acts, or may fall into the hands of children.³⁵³ Likewise, the restrictions were not justified because of the government's difficulty in identifying which images were actually computer-generated.³⁵⁴ This rationale would turn “the First Amendment upside down.”³⁵⁵ Justice Kennedy wrote that “[t]he Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter.”³⁵⁶ In addition, the affirmative defense did not save the statute, because the defense was incomplete and insufficient.³⁵⁷

The Court also held the CPPA section 2256(8)(D), containing the “conveys the impression” language, unconstitutional.³⁵⁸ This provision was even more objectionable to the Court because it turned on how the speech is presented and not on the context.³⁵⁹ For example, a film that contains no sexually explicit scenes may violate this section if the trailer “conveys the impression” that it contains pornographic material involving minors.³⁶⁰ Particularly disturbing to the Court was that a possessor of such a film may be convicted even if the movie was mislabeled.³⁶¹ The Court held that the First Amendment required a more “precise restriction.”³⁶²

350. *Ashcroft v. Free Speech Coalition*, 535 U.S. at 249–50.

351. *Id.* at 249.

352. *See id.* at 251, 253.

353. *See id.* at 250–52.

354. *Id.* at 249.

355. *Id.* at 255.

356. *Id.*

357. *Id.* at 256.

358. *Id.* at 257; *see* 18 U.S.C. § 2256(8)(D) (2000) (repealed 2001).

359. *Ashcroft v. Free Speech Coalition*, 535 U.S. at 257.

360. *Id.*

361. *Id.* at 258.

362. *Id.*

Justice O'Connor, concurring in part and dissenting in part, allowed the ban on computer-generated images although she agreed with the majority opinion that (1) the CPPA's ban on youthful adult pornography was overbroad and violated the First Amendment; and (2) the pandering provision (18 U.S.C. § 2256(8)(D)) with its "conveys the impression" language should be struck down because it was overbroad and not narrowly tailored.³⁶³ In finding, however, that the "virtual" child pornography prohibition passed strict scrutiny and was not unconstitutionally vague or overly broad, Justice O'Connor utilized a narrowing interpretation to make the "appears to be . . . of a minor" language mean "virtually indistinguishable from."³⁶⁴ This interpretation would allow the language to be narrowly tailored enough to meet the government's interests without violating the First Amendment. Furthermore, Justice O'Connor argued that the plaintiffs failed to show any computer-generated examples that have serious value or do not facilitate child abuse.³⁶⁵ Hence she would uphold the statute's ban on computer-generated pornographic depictions that "appear to be" of minors because there had not been a showing that regulations forbid "a substantial amount of valuable or harmless speech."³⁶⁶

In explaining why she upheld the ban on computer images as long as it is not applied to youthful adult pornography, Justice O'Connor expressed her view that striking a statute down due to overbreadth should be done sparingly.³⁶⁷ As a result, she was only willing to strike the CPPA down in relation to the youthful adult pornography. Holding that this was consistent with Congress' understanding of what material was most dangerous to children, she noted that, at various other places in the statute, Congress had only addressed material made with real or virtual minors and not material involving younger-adult pornography.³⁶⁸

Chief Justice Rehnquist and Justice Scalia also dissented but, unlike Justice O'Connor, would uphold the statute in its entirety.

363. *Id.* at 260–62.

364. *Id.* at 264.

365. *Id.* at 265–66.

366. *Id.* at 265.

367. *Id.* at 266.

368. *Id.*

The Justices asserted that the CPPA can be read narrowly and that Congress' only goal was to extend "the definition of child pornography to reach computer-generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct."³⁶⁹ They agreed that this reading, supported by the CPPA's legislative history, would not violate the First Amendment.³⁷⁰

B. *The Child Obscenity and Pornography Prevention Act of 2002* (*"COPPA"*)

In response to *Ashcroft v. Free Speech Coalition*,³⁷¹ the House proposed the Child Obscenity and Pornography Prevention Act of 2002 (*"COPPA"*).³⁷² This new law attempted to correct the deficiencies of the CPPA by limiting depictions to computer-generated images—not youthful looking adults—and replacing the "appears to be" language with "a computer image or computer-generated image that is, or is indistinguishable . . . from, that of a minor engaging in sexually explicit conduct"³⁷³ COPPA would also create new provisions prohibiting producing, trafficking, and possessing a "depiction that is, or is indistinguishable from, that of a pre-pubescent child engaging in sexually explicit conduct"³⁷⁴ The penalties for violation of the statute were also increased.³⁷⁵ The bill also deletes the overbroad "promotion" language and replaces it with a new section titled "[p]andering and solicitation."³⁷⁶ The House passed COPPA on June 25, 2002.³⁷⁷

Despite Congress' efforts to correct the CPPA's flaws, many thought COPPA would also be ruled unconstitutional. In a letter

369. *Id.* at 273 (Rehnquist, C.J., dissenting).

370. *Id.* at 271 (Rehnquist, C.J., dissenting). Justice Scalia did not join in the portion of the opinion discussing the legislative history. *Id.* at 271 n.2.

371. 535 U.S. 234 (2002).

372. H.R. 4623, 107th Cong. (2d Sess. 2002), available at <http://thomas.loc.gov/bss/d107query.html> (last visited Mar. 30, 2004).

373. *Id.* § 3(a).

374. *Id.* § 5.

375. *Id.* § 8.

376. *Id.* § 4.

377. *Id.* § 11.

to Representatives Lamar Smith (R-Tex-21) and Robert C. Scott (D-Va-3), the ACLU outlined its objections to the bill section by section.³⁷⁸ Basically, the authors argued that COPPA is unconstitutional because, among other reasons, it attempts to outlaw “virtual child pornography,” where no real child was used in the production of the material,” “attempts to create a category of obscenity per se,” “creates an affirmative defense often impossible to meet,” and “invades the privacy of child victims.”³⁷⁹ The ACLU asserted that this bill would repeat the mistakes already ruled upon in *Free Speech Coalition* and also would make new ones.³⁸⁰

Specifically, the ACLU objected to the “virtually indistinguishable” language and modeled their argument on Justice O’Connor’s concurring opinion.³⁸¹ The ACLU noted that a majority of the Court did not agree with Justice O’Connor for the sound reason that this form of speech can only be prohibited if it is obscene or involves an actual child.³⁸² The ACLU’s position is that computer-generated images do not involve a child and therefore must be taken through the three-part test in *Miller*.³⁸³ The CPPA’s problem of criminalizing speech that was neither obscene nor involved a minor is repeated in COPPA and could draw into its net prohibited images that are possessed for legitimate reasons.³⁸⁴

Similarly, the pandering section has also not been adequately corrected.³⁸⁵ Again, it is a crime to “describe” an image containing a “visual depiction of a minor engaging in sexually explicit conduct.”³⁸⁶ Regardless of whether the actual material is not pornographic, a person could go to jail for describing it that way.³⁸⁷

378. Letter from Laura W. Murphy, Director, ACLU, and Marvin J. Johnson, Legislative Counsel, ACLU, to Lamar Smith, Rep., U.S. Congress, and Robert C. Scott, Rep., U.S. Congress (May 8, 2002) [hereinafter ACLU Letter], at <http://www.aclu.org/news/NewsPrint.cfw?Ig=10364fc=252> (last visited Mar. 30, 2004).

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.* (applying the test from *New York v. Ferber*, 458 U.S. 747 (1982)).

383. *Id.*; see *Miller v. California*, 413 U.S. 15, 25 (1973).

384. ACLU Letter, *supra* note 354.

385. See *id.*

386. *Id.* (quoting H.R. 4623 § 3).

387. *Id.*

The Supreme Court found this unconstitutional before and would likely do so again.³⁸⁸

The same is true of the affirmative defense section allowing a person to avoid penalties if they can prove that a real child was not involved in the production of the material.³⁸⁹ Like its predecessor, this bill makes it nearly impossible for anyone charged with distribution or possession to use the defense because they would likely not have access to that information.³⁹⁰

The ACLU attacked brand new sections of COPPA, as well as these revised sections. For example, the section involving the obscene depictions of a prepubescent child, in their view, creates a category of obscenity per se which they argued is unconstitutional.³⁹¹ As with the computer-generated images, the ACLU argued these depictions must be taken through the *Miller* test to determine if they are in fact obscene.³⁹² The ACLU also took issue with a new extraterritoriality provision, which would allow the United States jurisdiction where visual depictions of child pornography are made available in the United States, even if the foreign citizen or business had acted legally in their own countries.³⁹³ Finally, the ACLU challenged other sections that they argued violate the privacy rights of Internet users and the privacy of child victims.³⁹⁴

C. *The Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003 (PROTECT Act)*

Although COPPA died in the Senate Judiciary committee, the Senate passed its own version of a similar bill, known as the PROTECT Act, in the 108th Congress.³⁹⁵ The ACLU characterized this bill as “a dramatic improvement” over COPPA but still

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.* (citing *Miller v. California*, 413 U.S. 15, 24–25 (1973)).

393. *Id.*

394. *Id.*

395. S. 151, 108th Cong. (2003) (enacted).

unconstitutional.³⁹⁶ According to the ACLU, the bill was unacceptable because it: (1) “[I]mposes criminal liability on people who possess or produce material protected by the First Amendment;” (2) “[C]hills protected speech because it places the burden on the defendant to prove the material was produced using an adult or was ‘virtually’ created;” (3) Includes a “pandering” provision which sweeps in non-commercial speech and includes the ambiguous term “purported material;” (4) Restricts the defendant from providing a defense, in that it frees the government from the “burden” of producing the actual minor allegedly involved in the material, and thus “violates the right to confront one’s accusers;” and (5) Contains an extraterritorial jurisdiction provision that may be used by other countries to restrict speech in the United States.³⁹⁷

One major difference between the House bill and the Senate bill is that the Senate bill includes the requirement that the depiction of what appears to be a minor must also be obscene.³⁹⁸ But in defining obscene child pornography, it only relies upon two of the three prongs in *Miller*—the “patently offensive” prong and the “literary, artistic, political, or scientific” prong.³⁹⁹ The ACLU suggests the “prurient interest” prong must be added to cure this defect.⁴⁰⁰

The same problems exist with the affirmative defense section as did with the CPPA’s defenses and the ones in COPPA. This problem is made even worse by the Senate version, because the proposed bill imposes criminal liability on those who created material before the effective date of the statute.⁴⁰¹ As a result, producers who did not keep records would be unable to use the defense, much like distributors and possessors who would have virtually no access to that information.⁴⁰² Although the new pan-

396. See Letter from American Civil Liberties Union, to Patrick J. Leahy, Senator, U.S. Senate (Feb. 5, 2003), at <http://www.aclu.org/Privacy/Privacy.cfm?ID=11806&C=252> (last visited Mar. 30, 2004) [hereinafter ACLU Letter to Senate].

397. *Id.*

398. S. 151 § 6.

399. ACLU Letter to Senate, *supra* note 372.

400. *Id.*

401. *Id.*

402. *Id.*

dering provision is much narrower than in the CPPA, it still sweeps in non-commercial speech and thus is unconstitutional.⁴⁰³

The ACLU objects to the provisions limiting the evidence a defendant may utilize, including the prohibition of the defense from cross-examining the minor.⁴⁰⁴ Finally, the ACLU fears that, like the House bill, this bill's extraterritorial jurisdiction provision will result in other countries imposing liability on United States companies for their speech, even though the speech is protected under the First Amendment.⁴⁰⁵

The Congressional findings accompanying the PROTECT Act articulate the need for such a broad bill.⁴⁰⁶ The *Ashcroft v. Free Speech Coalition*⁴⁰⁷ decision significantly impacted the government's ability to prosecute child pornographers.⁴⁰⁸ In the Ninth Circuit alone, the number of prosecutions dramatically decreased and the only surviving cases were those in which the government could "specifically identify the child in the depiction."⁴⁰⁹ Because this is nearly an insurmountable burden on the government due to technological advances, Congress feared many defendants who possessed images of real children would escape prosecution, and therefore drafted the proposed legislation.⁴¹⁰

The House passed the PROTECT Act, but not before melding it with House Bill 1104, an omnibus child crimes bill.⁴¹¹ On April 3, 2003, the Senate questioned the House Amendments to their bill and agreed to a conference.⁴¹² In a race to finish before a two-week break, Congress passed the PROTECT Act on April 10, 2003.⁴¹³ The media coverage of the bill barely mentioned the revised sections regulating child pornography, if at all, but instead

403. *Id.*

404. *Id.*

405. *Id.*

406. See S. 151 § 2, 108th Cong. (2003) (enacted).

407. 535 U.S. 234 (2002).

408. See S. 151 § 2.

409. *Id.*

410. *Id.*

411. H.R. 1104, 108th Cong. (2003) (enacted).

412. H.R. CONF. REP. NO. 108-66 (2003). The conference report was released to the House of Representatives on April 19, 2003.

413. See 149 CONG. REC. S5,156 (daily ed. Apr. 10, 2003) (recording Senate passage of the bill); PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) (to be codified at 18 U.S.C. § 1 et seq.).

focused on the Amber Alert network and changes to sentencing guidelines.⁴¹⁴

Unfortunately, the part of the PROTECT Act dealing with child pornography is likely to be overturned again. Only Chief Justice Rehnquist and Justices Scalia and O'Connor voted to uphold the provision in the CPPA that criminalized computer-generated images.⁴¹⁵ Two more votes would be necessary to uphold the newest attempt by Congress to ban virtual pornography. Because virtual child pornography involves no actual children it must be obscene to be prohibited. Unless all three prongs of the *Miller* obscenity test are woven in the statute, Justices Kennedy, Stevens, Souter, Ginsburg, and Breyer are unlikely to change their votes. The absence of the prurient interest prong makes it dead upon arrival at the Supreme Court. Furthermore, the problems with the affirmative defenses and the pandering provisions outlined above give those five Justices even more reason to reject the law.

V. NON-LEGISLATIVE SOLUTIONS

If, as suspected, the newest law banning virtual child pornography gets rejected by the Supreme Court, what else can this nation do to keep children safe from pornography on the Internet? In November 1998, Congress ordered the National Research Council ("NRC") to conduct a study to address just that.⁴¹⁶ In response, the Computer Science and Telecommunications Board ("CSTB") of the National Academies asked the NRC's Board on Children, Youth, and Families ("BOCYF") to form a committee with "expertise diverse enough to address this topic."⁴¹⁷ The committee published a comprehensive report that placed the issue of child pornography in context and gave a wide range of alternatives for the nation to consider in dealing with this problem.⁴¹⁸ In the report, the committee evaluated several approaches to pro-

414. See Carl Hulse, *Bill To Create Alert System on Abduction Is Approved*, N.Y. TIMES, Apr. 11, 2003, at A22.

415. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 273 (2002) (Rehnquist, C.J., dissenting).

416. NRC Report, *supra* note 4, at viii.

417. *Id.*

418. See *id.* at 11-13.

tecting children including the use of public policy, social and educational strategies, and technology-based tools.⁴¹⁹ The committee ultimately concluded that no solitary approach would fully address the problem and that all of the proposed strategies must mutually reinforce each other to keep children safe.⁴²⁰ Part four of this article discusses each of these approaches in greater detail.

A. *Public Policy*

As discussed previously, the regulatory approach has not been very successful due to various constitutional restrictions.⁴²¹ Congress should continue to try to craft laws that will withstand the strict scrutiny test. Congress has been given very specific guidance from the courts on trying to draft such laws. First, if the image does not involve the use of an actual child, the material must meet all three prongs of the *Miller* obscenity test.⁴²² Second, all defendants must be able to avail themselves of any affirmative defense in COPA.⁴²³ Third, the government must make a credible case that the solution is the least restrictive means to accomplish the objective.⁴²⁴ Fourth, any regulation must be narrowly tailored to this objective. Congress needs to be particularly mindful that any phrases and terms used must be specific and limited so as not to be too broad or unconstitutionally vague.⁴²⁵

If such a hypothetical law could ever be constitutionally drafted, the regulations may ultimately prove ineffective in shielding our children from harmful Internet content if the international community does not adopt similar laws.⁴²⁶ While Internet child protection laws will have an impact on both the suppli-

419. *See id.* at 8–11.

420. *See id.* at 12.

421. *See supra* discussion Parts I–III.

422. NRC Report, *supra* note 4, at 93–94 (discussing *New York v. Ferber*, 458 U.S. 747 (1982)).

423. *See id.* at 102.

424. *See id.* at 91.

425. *See id.* at 100.

426. *See id.* at 12.

ers and potential consumers of material harmful to minors; this impact will primarily be in the United States and not abroad.⁴²⁷

However, the NRC report indicated that public policy does not need to be limited to laws that are penal in nature.⁴²⁸ Public policy could also be used “to reduce uncertainty in the regulatory environment; promote media literacy and Internet safety education . . . ; support development of and access to high-quality Internet material that is educational and attractive to children in an age-appropriate manner; and support self-regulatory efforts by private parties.”⁴²⁹

B. *Social and Educational Strategies*

As the case law makes clear, the Internet’s very nature makes it nearly impossible to regulate. The Internet has no boundaries. No matter what sites the United States prohibits, Internet users will still be able to access foreign sites. This lack of boundaries also makes it very difficult to use any type of community standards test. Communities will differ on what material they find harmful to minors and these discrepancies will prohibit any software program from adequately filtering or blocking potentially harmful material.⁴³⁰ Yet valid, sexually oriented expression must not be “silenced completely in an attempt to shield children from it.”⁴³¹ Therefore, teachers, parents, and communities are ultimately responsible for their children’s education and safety while using the Internet. Because of this, the NRC report noted that “[t]he most important social and educational strategy is *responsible adult involvement and supervision*.”⁴³²

1. Parental Supervision

Parents must educate their children about what is and is not appropriate. But even the best parents will not be able to monitor

427. *Id.* at 359.

428. *See id.* at 8.

429. *Id.*

430. *Id.* at 12.

431. *Ashcroft v. Free Speech Coalition*, 535 U.S. 235, 251 (2002).

432. NRC Report, *supra* note 4, at 9.

their children—especially teenagers—all the time. Parents must provide their children with the tools to make responsible and safe choices while using the Internet, including knowing how to access valuable and appropriate materials on the Internet and also knowing what to do if they accidentally come across inappropriate materials or activities. Although technology may help parents in their endeavor to keep pornography from their children, its imperfections make it impossible to be the only tool used in this battle. In fact, one of the best tools, as recognized by the NRC committee, is for parents to become familiar with the Internet themselves.⁴³³ In addition, peers and siblings can help parents educate younger children.⁴³⁴

2. Acceptable Use Policies

Another suggestion of the NRC committee is to encourage families, schools, and libraries to adopt and enforce an “Acceptable Use Policy” (“AUP”).⁴³⁵ An AUP is “a written agreement, signed by students, their parents, and their teachers, outlining the terms and conditions of Internet use for the safety and educational benefit of the students.”⁴³⁶ These agreements not only deal with the issues of pornography and obscenity, but also such matters as copyright and intellectual property laws, defamation, and commercial use of the school provided Internet access.

When designing AUPs, the school or library should remember that the AUP is a legal document and should be reviewed by an attorney.⁴³⁷ A good AUP should contain: (1) An overview of what the Internet is, how it will be used in the institution, and why access to it is beneficial to the educational process;⁴³⁸ (2) Usage policies and guidelines, including what constitutes acceptable and unacceptable uses of the Internet;⁴³⁹ (3) Penalties for violating the

433. *See id.* at 9.

434. *See id.* at 8.

435. *See id.*

436. *Internet 101: The Internet Guide for Teachers & Parents: Acceptable Use Policies (AUPs)*, at <http://www.horizon.nmsu.edu/101/html> (last visited Feb. 19, 2004).

437. *See id.*

438. *See id.*

439. *See id.*

policies and guidelines of the AUP;⁴⁴⁰ (4) A description of the rights of individuals using the networks in the school or district;⁴⁴¹ (5) A disclaimer absolving the institution, under specific circumstances, from responsibility;⁴⁴² and (6) Language clearly indicating Internet access is a privilege, not a right, and may be withdrawn.⁴⁴³

There are many web resources that can aid an institution in drafting an AUP.⁴⁴⁴ Taking advantage of the various templates and suggestions listed on the web is most helpful; however, they should not be adopted without sufficiently tailoring them to the needs and philosophies of each individual institution.

Although designing an AUP would appear to be fairly easy and straightforward, there are many issues institutions should consider before attempting to draft one. If these concerns are ignored, the AUP may be challenged in court—much like the federal statutes discussed previously.⁴⁴⁵ Perhaps the biggest challenge could be based upon AUP's vagueness. In other words, does the AUP clearly illustrate to students the difference between what is considered appropriate and inappropriate behavior and how such inappropriate behavior could possibly lead to discipline? If a court determines it does not, the AUP could be ruled unconstitutional.

Many common phrases found in AUPs regarding inappropriate actions may in fact be vague and subject to court challenges. For example, phrases such as “[s]tudents shall not access any objectionable material or inappropriate material”⁴⁴⁶ or “[s]tudents shall not post defamatory, inaccurate, abusive, obscene, profane, sexu-

440. *See id.*

441. *See id.*

442. *See id.*

443. *See id.*

444. Two such resources are: *Acceptable Use Policies—A Handbook*, at <http://www.pen.k12.va.us/go/VDOE/Technology/AUP/home.shtml> (last visited Mar. 30, 2004) and *Critiquing Acceptable Use Policies*, at <http://www.io.com/~kinnaman/aupesay.html> (last visited Mar. 30, 2004).

445. *See supra* discussion Parts I–III.

446. *See* The Learning Technologies Group, *Acceptable Use of Internet and Network Service Policies (Draft)*, at <http://itec.parra.catholic.edu.au/itiswa/PM%20intro/Support.pdf> (last visited Mar. 30, 2004).

ally-oriented, threatening, offensive, or illegal material”⁴⁴⁷ do not clearly indicate to a student what they can and cannot access or post.⁴⁴⁸ Not only are the phrases vague, but they are also probably too broad, sweeping some protected speech within their coverage. Such vague speech likely has First Amendment ramifications because a court could find it chills students’ free speech. Students must fully understand what they can and cannot do.⁴⁴⁹

Despite these problems, AUPs may go a long way in helping provide a framework for children to start making good choices about their Internet use.

3. Internet Safety Education

Just as we teach children about safety with strangers, as communities we should be teaching them about Internet safety. Information and media literacy will help in that regard.⁴⁵⁰ Children who are trained with these skills will be less likely to access inappropriate material and will be better prepared to handle the situation when they do.⁴⁵¹

The NRC committee recommended that Internet education should not be limited to children but through public service announcements and media campaigns should also educate adults about the nature and extent of the dangers of the Internet.⁴⁵² Adults should urge the development of more websites that are “*compelling, safe, and educational.*”⁴⁵³ Greater availability of these preferred sites will make it less desirable for children to seek out inappropriate sites.⁴⁵⁴ In addition, schools and libraries should compile lists of these preferred sites to make available to parents and children.⁴⁵⁵

447. *See id.*

448. Nancy Willard, *A Legal Educational Analysis of K-12 Internet Acceptable Use Policies* 8 (1997). A copy of this article is on file with the author.

449. *Id.* at 9.

450. NRC Report, *supra* note 4, at 9.

451. *See id.*

452. *See id.*

453. *Id.* at 9.

454. *See id.*

455. *See id.* at 250.

C. Technology-Based Tools

Although this article outlined the deficiencies of current technological tools, this is not to say that filters and other technological tools have no use. In the home setting, filters can be the first line of defense for parents. Parents must be aware, however, that filters will not only block inappropriate material but also a large volume of legitimate material.⁴⁵⁶ In addition, some inappropriate material will escape the filter, so parents must not rely exclusively on technology to protect their children.⁴⁵⁷ Parents may also want to monitor the websites their children visit, but they should be aware that this may have an effect “on the basic trust that is a foundation of a healthy parent-child relationship.”⁴⁵⁸ Explaining this practice to the child before monitoring may help maintain that trust.

Besides filters and monitoring, the NRC report lists several other tools including content-limited access, labeling of content, and spam-controlling tools.⁴⁵⁹ Similar to the filters, these tools all have disadvantages associated with them. Again, that is not to say they have no use, but just that parents must weigh the benefits and the detriments before utilizing these tools.

VI. CONCLUSION

In this unsettled area of law, the goal of keeping children protected from indecent and sexually explicit material on the Internet is shared by virtually all those concerned. How to achieve the universal goal is subject to intense debate. Legislation to this point has failed based on “vagueness” and “overbreadth” challenges. Federal courts have agreed that the laws violated the First Amendment since they chilled protected speech.

Perhaps the only way to protect children is to take a multifaceted approach, including public policy, social and educational strategies, and the use of technological tools. Each of these approaches has associated benefits and costs. Of all the strategies available, supervision by parents, teachers, and librarians is most

456. *See id.* at 58.

457. *See id.*

458. *Id.* at 11.

459. *See id.* at 268.

important to ensure that children are not viewing improper material on the Internet. Such supervision can become somewhat of a burden on a teacher or librarian who deals with many children daily, or a parent who is balancing work and demands at home. Therefore, it is crucial that we educate our children so that they can ultimately make their own responsible and safe decisions when using the Internet. Until the day arrives that technology advances to cure the defects that currently exist in the filtering software programs, this debate over how to best protect our children without violating the First Amendment will continue.