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### Public School Usage of Internet Filtering Software: Book Banning Reincarnated

Glenn Kubota

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# COMMENTS

## PUBLIC SCHOOL USAGE OF INTERNET FILTERING SOFTWARE: BOOK BANNING REINCARNATED?

### PROLOGUE

*The woman appeared on the screen, vivid and lifelike. On all fours, her chained but otherwise naked body was bent and arched in a position that left nothing to the imagination. She wanted it. You could tell by the look on her face. . . .*

A few clicks of the mouse, and up it popped.

"It's so easy," thought Glenn, "once you know how." With hands shaking slightly and breathing shallow, he printed the image. His friends just had to see this.

Suddenly, the bell rang. Lunch period was over. Free time in the Computer Lab was always too short. But at least the Internet made school fun. Other than the Computer Lab, junior high school was so boring . . . .<sup>1</sup>

### I. INTRODUCTION

The Internet<sup>2</sup> is a window to a whole new world of information: libraries, Web sites,<sup>3</sup> newsgroups,<sup>4</sup> and chat rooms<sup>5</sup> covering a variety of

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1. This is a hypothetical situation. The author's research of several Los Angeles area schools revealed that at those schools, student Internet access during class hours is generally tightly structured, leaving little time for unsupervised access. Interview with Frances Saito, School Administrator, Revere Middle School, Pacific Palisades, Cal. (Oct. 29, 1996); Telephone Interview with Todd Ullah, Media Center Coordinator, Palisades High School (Oct. 28, 1996); Telephone Interview with Steven Dworetzky, Computer Lab Administrator, King Middle School (Dec. 2, 1996). However, at least one junior high school allowed students to "browse" (freelance exploration of the Internet) during periods of free time such as Nutrition and Lunch. *Id.*

2. "Internet" is used to describe a worldwide network of interconnected computers. Noah Levine, Note, *Establishing Legal Accountability for Anonymous Communication in Cyberspace*, 96 COLUM. L. REV. 1526, 1526 n.3 (1996). "The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of computer networks. It is thus a network of networks." *ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996), *prob. juris. noted*, 117 S. Ct. 554 (1996).

topics that are all available at one's fingertips.<sup>6</sup> Recognizing the educational potential of this resource, parents and schools have eagerly sought on-ramps<sup>7</sup> to the "information superhighway"<sup>8</sup> to provide children with Internet access.<sup>9</sup>

Unfortunately for parents and schools, however, the Internet also provides access to materials that may be unsuitable for children, such as obscenity,<sup>10</sup> pornography,<sup>11</sup> and opportunities for contact with perverse individuals who seek to exploit children.<sup>12</sup> The ability to access both helpful and harmful information and people creates a tension between the desire to provide children with access to the Internet and the need to limit that access to only those resources deemed suitable for children. This tension spurred the development of Internet filtering software, which allows parents to block a child's access to unsuitable material.<sup>13</sup> For example, parents may utilize Internet filtering software to deny their child

3. A "Web site" is a location on the Internet identified by a unique address where files, documents, and graphics are made available to other Internet users. Mitchel L. Winick et al., *Attorney Advertising on the Internet: From Arizona to Texas—Regulating Speech on the Cyber-Frontier*, 27 TEX. TECH L. REV. 1487, 1553 (1996).

4. A "newsgroup" is a discussion group focusing on a particular topic. RICHARD RAYSMAN ET AL., *MULTIMEDIA LAW: FORMS AND ANALYSIS* § 10.01[6] (1996). Newsgroups operate within an Internet-accessible computer known as a server. *Id.* Newsgroup participants can send messages to the server (containing text, video, audio, or photographs), and read messages posted by others. *Id.* The process of sending, reading, and replying to messages often results in ongoing discussions within the newsgroup. *Id.* See also *ACLU v. Reno*, 929 F. Supp. at 834–35.

5. "Chat rooms" allow Internet users to "talk" with one another by exchanging text messages in real time. Amy Knoll, Comment, *Any Which Way But Loose: Nations Regulate the Internet*, 4 TUL. J. INT'L & COMP. L. 275, 277 n.14 (1996). See also *ACLU v. Reno*, 929 F. Supp. at 835.

6. GLEE HARRAH CADY & PAT MCGREGOR, *MASTERING THE INTERNET* 4 (2d ed. 1996).

7. See Ray Duncan, *Electronic Publishing on the World-Wide-Web*, PC MAG., Apr. 11, 1995, at 257 (using the term "on-ramp" to describe companies such as America Online that provide Internet access).

8. See Daniel Pearl, *Colliding Cliches and Other Mishaps on the Term Pike*, WALL ST. J., Feb. 1, 1994, at A1 (noting that Vice-President Al Gore claims to have fathered the term "Information Superhighway").

9. CADY & MCGREGOR, *supra* note 6, at 518.

10. See Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard*, 9 HARV. J.L. & TECH. 87 (1996).

11. See Barbara M. Ryga, Comment, *Cyberporn: Contemplating the First Amendment in Cyberspace*, 6 SETON HALL CONST. L.J. 221 (1995).

12. CADY & MCGREGOR, *supra* note 6, at 569–70. See, e.g., Scott Bowles, *Man Guilty of Rape in Net Case: Computer Contact Led to Sex With Girl*, 12, WASH. POST, Aug. 23, 1995, at D6 (discussing man convicted of having sex with a 12-year-old girl he met in a chat room).

13. CADY & MCGREGOR, *supra* note 6, at 561–62. See also *ACLU v. Reno*, 929 F. Supp. 824, 838 (E.D. Pa. 1996), *prob. juris. noted*, 117 S. Ct. 554 (1996).

access to Internet information containing a certain level of sex, nudity, violence, or offensive language.<sup>14</sup>

Schools, seeking similar control, are also beginning to use Internet filtering software.<sup>15</sup> While ostensibly proper, public school use of filtering software to block purportedly inappropriate Internet material may be dangerously analogous to book banning—the removal of books from a library to eliminate unpopular views.<sup>16</sup> Under certain circumstances, book banning is an unconstitutional violation of the rights to free speech and press guaranteed by the First Amendment.<sup>17</sup>

This Comment discusses the constitutionality of public school use of Internet filtering software as a means to prevent students from accessing or transmitting inappropriate material over the Internet.<sup>18</sup> Part II provides an overview of the Internet and the problems it presents for schools. Part III describes legislative attempts to control Internet content, and the filtering software presently available. Part IV discusses the tension between the indoctrinative nature of education and the First Amendment. Part V analyzes the use of filtering software by public schools from three constitutional perspectives: (1) indoctrination versus the right to receive information; (2) freedom of expression; and (3) overbreadth. Having determined that filtering software is too indiscriminate and overbroad, Part VI proposes a filtering system utilizing increased school involvement that could survive constitutional scrutiny. Part VII concludes that until such systems are developed, schools must rely on policies, education on Internet

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14. Gus Venditto, *Safe Computing*, INTERNET WORLD, Sept. 1996, at 49, 54 (discussing RSACi ratings). For further information on RSACi ratings, see *infra* Part III.B.2.b.

15. See, e.g., Brad Bonhall, *Getting the Dirt Out*, L.A. TIMES, July 30, 1996, at E1 (noting that filtering software called X-stop is being used on a test basis at several Southern California schools); Geeta Anand, *Library OK's limits on 'Net Access*, BOSTON GLOBE, Mar. 22, 1997, at A1 (reporting that Boston schools recently installed filtering software known as Cyber Patrol); see also *Shea v. Reno*, 930 F. Supp. 916, 932 (S.D.N.Y. 1996), *petition for cert. filed*, 65 U.S.L.W. 3323 (U.S. Oct. 15, 1996) (No. 96-565).

16. For example, students at a school using a filtering software product called Cybersitter would find that access to the National Organization for Women's Web site would be blocked due to its links to lesbian Web sites. David Pescovitz, *Site-Filtering Controversy Likely to Heat Up*, L.A. TIMES, Jan. 6, 1997, at D3. Similarly, a school using a filtering software product called Cyberpatrol would deny student access to the Jewish Bulletin of Northern California due to its inclusion of "inappropriate" personal ads. *Id.*

17. *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (holding that a school board's removal of certain books from school libraries was an attempt to enforce a "prescribed orthodoxy" and was therefore unconstitutional).

18. The blocking of unprotected speech (e.g. obscenity) is not at issue. Instead, this Comment focuses on the propriety of the "inappropriateness" determination that occurs when *protected* speech is filtered to shield children from purportedly inappropriate material.

etiquette, and student self-control to limit student exposure to inappropriate Internet material.

## II. THE INTERNET

### A. A Historical Perspective

The power of the computer is unquestioned in today's society.<sup>19</sup> In business, the use of computers is rapidly becoming the rule rather than the exception;<sup>20</sup> schools<sup>21</sup> and homes have likewise experienced a substantial increase in computer usage.<sup>22</sup> While independently operating computers are, by themselves, powerful tools, interconnected computers can substantially increase computing capability.<sup>23</sup> Networks, as they are called, have dramatically extended the power of the computer.<sup>24</sup>

As early as the 1960s, the military sought to take advantage of the power and flexibility of networked computers.<sup>25</sup> The predecessor to the Internet was a single network known as the ARPANET (Advanced Research Project Agency Network), envisioned as a means of networking computers to provide uninterrupted service to the military in times of

19. See Bill Pietrucha, *Survey Finds Computers Becoming Must-Have Technology*, NEWSBYTES NEWS NETWORK, Jan. 24, 1997, available in 1997 WL 7971052 (discussing a nationwide survey finding that 5 out of 10 Americans believe that computers are already "must have" items, while 9 out of 10 believe that computers will be "must have" technology in the future).

20. See M.A. Stapleton, *Companies Don't See, Respond to Technology's Risks: Survey*, CHI. DAILY L. BULL., July 8, 1996, at 1 (describing a nationwide survey of 119 Fortune 1,000 companies revealing that 70% of the corporations polled had more than half of their employees using computers on a regular basis).

21. See Jeff Carmona, *New Products Transform Internet Into Powerful Teaching Tool*, TECHNOLOGICAL HORIZONS IN EDUC. J., Oct. 1, 1996, at 10 (noting U.S. Department of Education survey finding that 50% of the nation's public schools have Internet access (compared to 35% in 1994), and that 75% of the schools without access planned to provide access in the future).

22. See *Home PC Use: Home PC Surge Continues, to 38.5 Percent of U.S. Households in 1995; Used PCs Purchased by 30 Percent of First-Time Buyers, Study Reveals*, EDGE: WORK-GROUP COMPUTING REP., May 27, 1996, available in 1996 WL 7977772 (noting that the 1996 Consumer Technology Index, the largest, most comprehensive survey of personal computer usage in the U.S., found that home PC usage increased 5% to 38.5%, in 1995).

23. Cady & McGregor, *supra* note 6, at 19 (describing benefits achieved by the research community in the 1970's by connecting their research institutions together).

24. A "network" is defined as "a data communications system that interconnects computer systems at various sites." *Id.* at 8. Examples of networks include Local Area Networks (LANs), Metropolitan Area Networks (MANs), Wide Area Networks (WANs), corporate networks, Ethernet clusters, and campus cable networks. *Id.*

25. RAYSMAN ET AL., *supra* note 4, § 10.01[1].

nuclear war.<sup>26</sup> The subsequent development of interconnected networks further increased computing capability.<sup>27</sup> The Internet,<sup>28</sup> the modern-day outgrowth of ARPANET, is the largest such "network of networks,"<sup>29</sup> consisting of a world-wide array of linked networks that allow, at least in theory, each computer in every network to communicate with any other.<sup>30</sup>

Early Internet usage was limited to individuals with access to the mainframe computers at colleges and universities.<sup>31</sup> However, as the Internet expanded, individuals unaffiliated with institutions of higher education began demanding Internet access.<sup>32</sup> In response, commercial Internet Service Providers ("ISPs") such as Prodigy, Compuserve, America Online, Genie, and Delphi sprang up to provide Internet access to the average user.<sup>33</sup> These ISPs provide Internet access at a low cost to the consumer,<sup>34</sup> making the Internet accessible to the general population. By dialing a local telephone number through a modem, users connect to the ISP, which then connects the user to the Internet.<sup>35</sup> The Internet is currently accessed by over forty million users, linking 9.4 million computers around the world.<sup>36</sup> As its popularity continues to rise, 200 million people might be using the Internet by the year 1999.<sup>37</sup>

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26. The Department of Defense created the ARPANET in 1969 as a decentralized communications network capable of routing around damaged locations. *Id.* See also *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *prob. juris. noted*, 117 S. Ct. 554 (1996).

27. Cady & McGREGOR, *supra* note 6, at 19.

28. The word "Internet" is derived, not surprisingly, from the words "interconnected" and "network." *Id.* at 5. The Internet is physically made up of fiber optic cables, phone lines, satellite links, and other media. *Id.* at 4.

29. Philip Elmer-Dewitt, *Battle for the Soul of the Internet*, TIME, July 25, 1994, at 50.

30. Cady & McGREGOR, *supra* note 6, at 9.

31. *Id.* at 19-25.

32. *Id.* at 24.

33. James Coates, *Jumping On-Line: Computer Networks Offer a Wealth of Information, and a Chance to Chat*, ST. LOUIS POST-DISPATCH, Feb. 16, 1994, at C5.

34. Cindy Krushenisky, *What You Need to Connect to the Internet*, PC NOVICE GUIDE TO THE INTERNET, Vol. 4, Issue 12, at 18, 19 (listing prices for several ISPs averaging approximately \$20.00 per month (flat rate), or \$9.95 per month for the first five hours, plus \$2.95 for every additional hour).

35. Sean Adam Shiff, Comment, *The Good, the Bad, and the Ugly: Criminal Liability for Obscene and Indecent Speech on the Internet*, 22 WM. MITCHELL L. REV. 731, 732 (1996).

36. *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *prob. juris. noted*, 117 S. Ct. 554 (1996).

37. *Id.*

### B. Material Available on the Internet

The uses for the Internet vary widely. For example, the Internet can be used to communicate with family and friends around the globe, try out new games, research a thesis or business presentation, conduct a commercial enterprise, participate in support groups, share information among professionals, or access libraries.<sup>38</sup> Four popular reasons for going on-line include: (1) information-gathering; (2) electronic communications; (3) commercial services; and (4) entertainment.<sup>39</sup>

As an information-gathering source, the Internet provides access to libraries, archives, and a multitude of Web sites and newsgroups on a wide variety of topics.<sup>40</sup> However, this wealth of information also includes material that might be unsuitable for children, such as Ku Klux Klan<sup>41</sup> and militia group propaganda,<sup>42</sup> bomb-making information,<sup>43</sup> and the promotion of drug use.<sup>44</sup>

As an electronic communications source, the Internet provides e-mail,<sup>45</sup> chat rooms, and newsgroup discussions.<sup>46</sup> While these services can enable low-cost, long-distance "conversations" with family, friends, colleagues, and strangers with common interests, they can also allow

38. CADY & MCGREGOR, *supra* note 6, at 4.

39. *Internet Access: Hearing on Internet Access Before the Subcomm. on Science of the House Comm. on Sci., Space and Tech.*, 103d Cong. 2 (1994) (statement of Mark Walsh, chairman, Interactive Serv. Ass'n), reprinted in 1994 WL 535149 [hereinafter *Internet Access*].

40. CADY & MCGREGOR, *supra* note 6, at 6; see also Reva Basch, *Internet Research: Above, Beyond & Beneath the Web*, PC NOVICE GUIDE TO THE INTERNET, Vol. 4, Issue 12, at 143 (discussing available reference works, library catalogs, newsgroups, reading lists, bibliographies, source material, libraries, and experts).

41. See, e.g., *Ex-KKK Grand Dragon Using Internet to Take Hate Message Into Cyberspace*, BATON ROUGE SUNDAY ADVOC., Mar. 19, 1995, at 10B.

42. *Militia Groups Patrol Internet*, USA TODAY, Apr. 25, 1995, at 2D.

43. See Eric Lichtblau & Jim Newton, *Internet Cited for Surge in Bomb Reports*, L.A. TIMES, June 27, 1996, at B1.

44. See, e.g., Judy Pasternak, *Despite Crackdown, Drug 'Cat' is Spreading Across Midwest*, L.A. TIMES, Oct. 23, 1994, at 1 (describing how the spread of the drug methcathinone has been fueled by the Internet dissemination of its recipe, hints on where to obtain the necessary ingredients, and tips for those attempting its synthesis).

45. Electronic mail, or "e-mail," is a method of Internet communication similar to sending a letter through the mail. An Internet user can address and send messages to one or more users. *ACLU v. Reno*, 929 F. Supp. 824, 834 (E.D. Pa. 1996), *prob. juris. noted*, 117 S. Ct. 554 (1996).

46. *Id.* at 834. See also Heidi Anderson, *Newsgroups: Can We Talk?*, PC NOVICE GUIDE TO THE INTERNET, Vol. 4, Issue 12, at 69; Tom Mainelli, *E-Mail: The Cyberspace Post Office*, PC NOVICE GUIDE TO THE INTERNET, Vol. 4, Issue 12, at 36; Tom Mainelli, *Life & (Real) Times in the IRC*, PC NOVICE GUIDE TO THE INTERNET, Vol. 4, Issue 12, at 40.

children to come into contact with predatory characters and other undesirable individuals.<sup>47</sup>

As a source for commercial services, the Internet can provide on-line banking, product and grocery shopping, travel arrangements, and computer hardware or software support.<sup>48</sup> As an entertainment source, the Internet provides access to games, art, literary works, and information on travel, sports, and hobbies.<sup>49</sup> For those who enjoy "adult entertainment," the Internet provides sexually explicit material on various themes, including bondage, sado-masochism, and bestiality.<sup>50</sup> In short, almost any type of written or graphical material may be placed on a Web site or posted in a newsgroup, and anyone on the Internet can access these materials, subject to limitations imposed by the ISP.

This virtually unlimited access creates concern in a variety of settings. Businesses are concerned that employees will spend company time browsing through Web sites and newsgroups unrelated to the job.<sup>51</sup> Parents and schools are concerned that children accessing the Internet will be exposed to material containing violence, obscenity, and/or pornography.<sup>52</sup> These concerns spawn both private and governmental attempts to control the content of the Internet.

### III. ATTEMPTS TO CONTROL INTERNET CONTENT

#### A. Legislative Attempts

The Internet operates largely without government intervention.<sup>53</sup> Non-governmental organizations exist to perform housekeeping functions

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47. See Bowles, *supra* note 12, at D6.

48. *Internet Access*, *supra* note 39. See also Diana K. McLean, *How to Do 10 Practical Things on the Internet*, PC NOVICE GUIDE TO THE INTERNET, Vol. 4, Issue 12, at 71.

49. See Jeff Dodd, *PC Novice's Favorite 100 Web Sites*, PC NOVICE GUIDE TO THE INTERNET, Vol. 4, Issue 12, at 136; Cindy Krushenisky, *Checkmate on the 'Net? Taking Your Hobbies Online*, PC NOVICE GUIDE TO THE INTERNET, Vol. 4, Issue 12, at 147.

50. Burke, *supra* note 10, at 93. It is not surprising that sex-related topics are prevalent on the Internet. "Sex, a great and mysterious force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Roth v. United States*, 354 U.S. 476, 487 (1957).

51. Kristina B. Sullivan, *Web Monitoring and Filtering Programs Promote Productivity*, PC WK., Dec. 16, 1996, at N21.

52. Steve Wildstrom & Toddi Gutner, *Cybersmut: How to Lock Out the Kids*, BUS. WK., Feb. 12, 1996, at 98; Mary Anne Mather, *Exploring the Internet Safely—What Schools Can Do*, TECH. & LEARNING, Sept. 1, 1996, at 38.

53. Keth A. Dithavong, *Paving the Way for Women on the Information Superhighway: Curbing Sexism Not Freedoms*, 4 AM. U. J. GENDER & L. 455, 463 (1996).



like the standardization of communications protocols<sup>54</sup> and the registration of domain names.<sup>55</sup> However, there is no centralized authority for the Internet outside of these cooperative efforts.<sup>56</sup> Furthermore, due to the Internet's physical configuration and method of operation, it is not technically feasible for a single organization to electronically regulate the content of Internet communications.<sup>57</sup> Without a regulatory body, the Internet is a place where everything is allowed.<sup>58</sup>

In response to growing concern over the exposure of children to adult Internet material, Senator James Exon (D-Nebraska) introduced an amendment to the Communications Act of 1934.<sup>59</sup> Signed into law on February 6, 1996, "The Communications Decency Act of 1996" ("CDA")<sup>60</sup> imposes criminal penalties on anyone who engages in obscene or indecent telecommunications with minors, or makes patently offensive material available to minors over a computer network.<sup>61</sup>

However, the CDA was on shaky constitutional ground from its inception.<sup>62</sup> Less than five months after its passage, the District Court for

54. CADY & MCGREGOR, *supra* note 6, at 11. Protocols are the rules that the networks must follow so that information from one network may be understood by another. *Id.* at 5.

55. *Id.* at 10. Domain names identify computers on the Internet. *Id.* at 837.

56. ACLU v. Reno, 929 F. Supp. 824, 832 (E.D. Pa. 1996), *prob. juris. noted*, 117 S. Ct. 554 (1996).

57. *Id.*

58. Ryga, *supra* note 11, at 223.

59. Dittthavong, *supra* note 53, at 495.

60. 47 U.S.C. § 223(a)-(h) (1996).

61. *Id.* The CDA states, in pertinent part:

Whoever . . . by means of a telecommunications device knowingly . . . makes, creates, or solicits, and . . . initiates the transmission of, any . . . communication which is obscene or *indecent*, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication; . . . shall be fined . . . , or imprisoned . . . , or both.

*Id.* § 223(a) (emphasis added). The CDA continues:

Whoever . . . uses an interactive computer service to send to a specific person or persons under 18 years of age, or . . . to display in a manner available to a person under 18 years of age, any . . . communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary standards, sexual or excretory activities or organs, . . . shall be fined . . . , or imprisoned . . . , or both.

*Id.* § 223(d). The term "interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the Internet . . . ." *Id.* § 230(e).

62. Previous Court decisions had concluded, in the context of state legislation, that states may not "reduce the adult population . . . to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957); *see also* *Sable Communications v. FCC*, 492 U.S. 115, 131 (1989) ("Because [§ 223(b) of the Communications Act of 1934's] denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to

the Eastern District of Pennsylvania determined, in *ACLU v. Reno*,<sup>63</sup> that the plaintiffs had established a reasonable probability that § 223(d) of the CDA is an unconstitutional ban on indecent speech.<sup>64</sup> Less than two months after *ACLU v. Reno* was decided, the District Court for the Southern District of New York, in *Shea v. Reno*,<sup>65</sup> concluded that the plaintiff had demonstrated a likelihood of success on the merits that § 223(d) of the CDA is an unconstitutionally overbroad ban on protected indecent communication between adults.<sup>66</sup> After the district court decision in *ACLU v. Reno*, an appeal to the Supreme Court was filed and probable jurisdiction noted.<sup>67</sup> Oral arguments were heard on March 19, 1997, and a decision is expected in June.<sup>68</sup> After the *Shea* decision, a petition for certiorari was filed with the Court,<sup>69</sup> but the case may be held for decision until the appeal in *ACLU v. Reno* is resolved.<sup>70</sup>

Unless the Supreme Court reverses the district court decisions, the attempt to control Internet content through legislation will fail. If the CDA is struck down by the Court, parents and schools can continue to use "low-tech" methods of restricting access to unsuitable Web sites and newsgroups by establishing rules and threatening punishment for breaking those rules. For example, the Los Angeles Unified School District ("LAUSD") has established an LAUSD Acceptable Use Policy that students and parents

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limit the access of minors to such messages, we hold that the ban does not survive constitutional scrutiny.").

63. 929 F. Supp. 824 (E.D. Pa. 1996), *prob. juris. noted*, 117 S. Ct. 554 (1996). In *ACLU v. Reno*, plaintiffs, organizations and individuals associated with computer communications and the Internet, sought an injunction prohibiting enforcement of those provisions of the CDA that prohibited certain communications over computer networks. *Id.* at 827.

64. *Id.* at 849.

65. 930 F. Supp. 916 (S.D.N.Y. 1996), *petition for cert. filed*, 65 U.S.L.W. 3323 (U.S. Oct. 15, 1996) (No. 96-595). In *Shea*, the publisher of an electronic newspaper sought an injunction barring the enforcement of § 223(d) of the CDA, which criminalizes the use of interactive computer services to display "patently offensive" sexually explicit material capable of being viewed by persons under the age of eighteen. *Id.* at 922.

66. *Id.* at 950.

67. *Reno v. ACLU*, 117 S. Ct. 554 (1996); see also Stephanie Hinz, *U.S. Supreme Court Agrees to Consider First Challenge to Internet Indecency Law*, WEST'S LEGAL NEWS, Dec. 9, 1996, available in 1996 WL 699295.

68. David G. Savage, *Supreme Court Debates Internet Indecency Law*, L.A. TIMES, Mar. 20, 1997, at A21.

69. *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), *petition for cert. filed*, 65 U.S.L.W. 3323 (U.S. Oct. 15, 1996) (No. 96-595).

70. Linda Greenhouse, *Justices Plunge into the Internet*, L.A. DAILY NEWS, Dec. 8, 1996, at N1.

must read and sign as a prerequisite to Internet access.<sup>71</sup> The LAUSD Acceptable Use Policy requires, among other things, that the student user refrain from (1) using profanity, obscenity, impolite comments, or other offensive language in e-mail, (2) violating other students' right to privacy, and (3) using the Internet for any illegal purpose.<sup>72</sup> Implicit in the LAUSD Acceptable Use Policy is a prohibition against accessing pornographic materials during class.<sup>73</sup> Potential infractions, taken in context, are considered by the school in light of the LAUSD policy. Violations are punished by canceling access privileges.<sup>74</sup> Such "low-tech" methods are effective only if their deterrent effect causes children to keep their promises—hardly a reliable or trustworthy system. Parents and schools are therefore likely to prefer an automated censoring system that continuously monitors student Internet activity.<sup>75</sup>

### B. "High-Tech" Attempts—Filtering Software and Its Methodologies

Fortunately for parents, software companies have developed Internet filtering software in recognition of a child's ability to access inappropriate Internet material.<sup>76</sup> Filtering software is primarily designed to prohibit children from accessing objectionable material.<sup>77</sup> In addition, some filtering software products can also prevent searches for inappropriate material by blocking certain keywords, and prevent the transmission of Internet messages containing personal information such as addresses and telephone numbers.<sup>78</sup> One filtering software product even allows parents to limit a child's Internet access to certain times of day or a certain number of hours each day.<sup>79</sup> Most filtering software is designed for individual computers and is sold independent from other Internet access software, at a

71. Los Angeles Unified Sch. Dist. Info. Tech. Division, Acceptable Use Policy LAUSDnet [hereinafter LAUSD Acceptable Use Policy] (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

72. *Id.*

73. Telephone Interview with Themy Sparangis, Los Angeles Unified School District, Information Technology Division (Dec. 18, 1996). Mr. Sparangis noted that accessing pornography is prohibited by the policy, and described one incident where a student was disciplined for accessing such material. *Id.*

74. See LAUSD Acceptable Use Policy, *supra* note 71.

75. Of course, even if "high-tech" solutions like filtering software are used, policies and education on Internet etiquette cannot be eliminated, for no filtering software is foolproof.

76. Elizabeth Panska, *Patrolling the Internet*, PC NOVICE GUIDE TO THE INTERNET, Vol. 4, Issue 12, at 133, 133.

77. Venditto, *supra* note 14, at 50.

78. *Id.*

79. Panska, *supra* note 76, at 134.

cost ranging from twenty to fifty dollars.<sup>80</sup> Some filtering products reside on a proxy server, a special purpose computer which acts as a gate through which all Internet communications must pass.<sup>81</sup> In addition, ISPs and companies marketing Internet browsers<sup>82</sup> are increasingly providing some form of filtering capability integrated into the browser.<sup>83</sup> When filtering software is used to block inappropriate Internet material, its operation can be classified into two basic methodologies: (1) predetermined blocking and (2) rating-based blocking.

### 1. Predetermined Blocking

Software using the predetermined blocking methodology generally relies on a predetermined database of prohibited Web sites and newsgroups installed in the software program, and blocks access to any site or newsgroup contained within the database.<sup>84</sup> A few companies take the opposite approach, relying on a database of approved Web sites and newsgroups and allowing access only to material contained in the database.<sup>85</sup> The list of Web sites and newsgroups is usually maintained by the filtering software provider, who periodically adds "objectionable" material to the database.<sup>86</sup> The ever-changing nature of the Internet requires regular updating of the installed database, often at a cost to the user.<sup>87</sup> This database may also contain words that are prohibited from use as a search term.<sup>88</sup> By prohibiting the use of certain search terms (such as "sex," "bestiality," etc.), children are less likely to find Web sites and newsgroups containing objectionable material.

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80. Venditto, *supra* note 14, at 58; see also Panska, *supra* note 76, at 135.

81. Mather, *supra* note 52, at 38.

82. A "browser" is software that allows a user to jump from one Internet location to another without needing to know the address of that location. Cady & McGregor, *supra* note 6, at 831.

83. Elizabeth Panska, *Online Services Help Monitor the 'Net*, PC NOVICE GUIDE TO THE INTERNET, Vol. 4, Issue 12, at 131, 131-32 (discussing the built-in filtering capabilities of ISPs CompuServe, America Online, and Prodigy).

84. Venditto, *supra* note 14, at 50.

85. *Id.* at 55.

86. *Id.* at 50. For example, InterGo Communications, Inc. maintains its own list of prohibited sites called KinderGuard for use with its InterGo 2.1 filtering software. *Id.* at 51. In contrast, Net Shepherd, Inc. maintains a database of prohibited sites compiled by users of their filtering software. *Id.* at 53.

87. *Id.* at 58 (showing database updates costing anywhere from "no charge" to \$5.95 a month).

88. *Id.* at 50. "Search terms" are words or phrases used to locate Web sites and newsgroups. *Id.* For example, a person wishing to access Web sites discussing the KKK might enter the search term "Klan" into a "search engine," a software program designed to locate Web sites and newsgroups with site descriptors containing those search terms.

## a. Inadequate Databases

Although filtering software is generally thought to be effective,<sup>89</sup> it is certainly not problem-free. A major drawback to predetermined blocking is its reliance on a database of banned (or approved) material. Because of the large and growing number of Web sites and newsgroups, such databases are often woefully small and out of date, resulting in either too little or too much Internet access.<sup>90</sup> Filtering software utilizing databases of approved material will block access to any Web site or newsgroup not listed in the database, resulting in unduly limited access and underutilization of the Internet.<sup>91</sup> Conversely, filtering software utilizing databases of prohibited material will allow access to all material not listed, resulting in children having inappropriately broad access.<sup>92</sup> Given the rapid and continued growth of the Internet, the problem of inadequate databases is unlikely to be solved.

## b. Third-Party Value Judgments

Another limitation of predetermined blocking is that the databases are often compiled by the software company or its users,<sup>93</sup> forcing users of such filtering software to accept third-party value judgments. For example, N<sub>2</sub>H<sub>2</sub>, Inc. markets Bess, a filtering software product utilizing a database of blocked material.<sup>94</sup> Although N<sub>2</sub>H<sub>2</sub>'s filtering philosophy is well-documented,<sup>95</sup> the application of that philosophy to actual Internet material is performed by N<sub>2</sub>H<sub>2</sub> employees in Seattle, Washington.<sup>96</sup> Because other

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89. *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996), *prob. juris. noted*, 117 S. Ct. 554 (1996).

90. Venditto, *supra* note 14, at 51 (finding that the KinderGuard database to be used with filtering software was too small, and as a result did not adequately block unsavory sites).

91. For example, NewView, Inc.'s filtering software Specs For Kids allows access only to material that has been previously screened, approved, and placed in the company database by NewView's ratings board. *Id.* at 55. However, this database was found to be "relatively small." *Id.*

92. For example, Spyglass Inc.'s filtering software Surfwatch 1.0v.10 allows access to all material not included in its database. *Id.* at 58.

93. *Id.* at 52 (noting that Cyber Patrol has a mature-sites database compiled by Microsystems employees and Cyber Patrol users).

94. N<sub>2</sub>H<sub>2</sub>, INC., BESS: INTERNET RETRIEVER FOR KIDS, FAMILIES AND SCHOOLS [hereinafter N<sub>2</sub>H<sub>2</sub> MARKETING BROCHURE] (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

95. N<sub>2</sub>H<sub>2</sub>, INC., BESS: STATEMENT OF 'FILTERING' PHILOSOPHY [hereinafter N<sub>2</sub>H<sub>2</sub> FILTERING STATEMENT] (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

96. Telephone Interview with Michael Grace, Technical Support Staff, N<sub>2</sub>H<sub>2</sub>, Inc. (Dec. 19, 1996).

communities may interpret N<sub>2</sub>H<sub>2</sub>'s filtering philosophy differently,<sup>97</sup> supervising adults may have to take N<sub>2</sub>H<sub>2</sub>'s "moral pulse" before fully understanding the type of material being blocked.<sup>98</sup>

Even worse is Net Shepherd Inc.'s filtering software, Net Shepherd 1.0, which relies on a database of rated Web sites and newsgroups.<sup>99</sup> These sites are rated by Net Shepherd users, who assign ratings of G, PG, R, and X to Web sites and newsgroups.<sup>100</sup> Supervising adults using the software must rely on the subjective ratings of unknown users confined to extremely broad categories, inspiring neither confidence nor consistency in the filtering.<sup>101</sup>

## 2. Rating-Based Blocking

In contrast to predetermined blocking, software using the rating-based blocking methodology generally avoids databases of Web sites and newsgroups.<sup>102</sup> Instead, such software blocks inappropriate Web sites based on a rating system.<sup>103</sup> Rating-based blocking requires Web site administrators<sup>104</sup> to voluntarily self-rate their Web sites.<sup>105</sup> These "rating

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97. See Mather, *supra* note 52 (noting that "[p]atently unsuitable' material in one community might be educationally valid in another.").

98. Some filtering software allows a supervising adult to compensate for philosophical differences by allowing modification of the list of blocked sites. For example, a supervising adult using the Bess filtering software can maintain a separate database that effectively modifies the blocked-site list to account for variations in community standards. N<sub>2</sub>H<sub>2</sub> MARKETING BROCHURE, *supra* note 94. However, filtering software companies utilizing the predetermined blocking methodology keep their databases proprietary for competitive reasons. Pescovitz, *supra* note 16, at D3. Thus, the content of a blocked-site list can only be inferentially revealed one step at a time, through blocked or successful attempts to access a particular Web site. Only then can a supervising adult make adjustments. This hit-and-miss approach and the inability to peruse the entire blocked-site list makes it difficult for a supervising adult to discern the "moral pulse" of the company or make any meaningful adjustments to the database.

99. Venditto, *supra* note 14, at 53.

100. *Id.*

101. Additionally, inconsistent interpretation of Web site ratings may create a "chilling effect," where Web site creators may overly "sanitize" their material to ensure that their site correctly falls within a desired category. This "chilling effect" currently occurs in the motion picture industry, where movie ratings affect commercial success and create a repressed environment where movie makers choose not to produce tasteful adult subjects "for fear of ratings ostracism." Ditthavong, *supra* note 53, at 507.

102. See Venditto, *supra* note 14, at 50.

103. *Id.*

104. "Website administrators" or "webmasters" denote those individuals responsible for maintaining a particular Web site. Bob Norberg, *Webmasters Lead Colleges into Frontier*, PRESS DEMOCRAT (Santa Rosa, Cal.), Jan. 17, 1996, at B1.

105. Venditto, *supra* note 14, at 50.

labels" then become part of the Web site's "code."<sup>106</sup> To use the filtering software, the supervising adult chooses a level of access for a child by selecting a particular set of ratings.<sup>107</sup> When a child attempts to access a Web site, the filtering software checks the Web site's code.<sup>108</sup> If the Web site meets or exceeds that child's rating, the site is blocked.<sup>109</sup>

#### a. Unrated Websites

As with filtering software utilizing predetermined blocking, rating-based filtering software also has its share of problems. One problem stems from its reliance on voluntary self-rating of Web sites,<sup>110</sup> which has resulted in the rating of fewer than 200,000 Web sites out of more than thirty million.<sup>111</sup> Much like the undersized databases found in predetermined blocking, this small percentage of rated Web sites results in either too little or too much Internet access. Some products using rating-based blocking deny access to all unrated sites, resulting in a large number of desirable but unrated sites being inaccessible to children.<sup>112</sup> Conversely, some products using rating-based blocking allow access to all unrated sites, resulting in a large number of undesirable but unrated sites being made accessible to children.<sup>113</sup>

However, there is increasing incentive for Web site administrators to rate their sites as web browsers begin to incorporate rating-based filtering into their products.<sup>114</sup> For example, Microsoft has added built-in filtering software to its browser, Explorer 3.0.<sup>115</sup> This filtering software, which can be enabled or disabled by the supervising adult, utilizes rating-based blocking and allows the viewing of only rated Web sites.<sup>116</sup> Because browsers are such popular Internet tools, the significant disadvantage of being unrated and inaccessible through browsers utilizing rating-based

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Venditto, *supra* note 14, at 50.

112. *Id.* at 50, 52. For example, Microsystems Software's Cyber Patrol 3.0 software allows a parent to restrict access only to rated sites. *Id.* at 52.

113. *Id.* at 55. For example, Solid Oak Software's Cybersitter 2.1 does not block unrated sites. *Id.*

114. *Id.* at 56.

115. *Id.*

116. *Id.*

filtering may provide the incentive needed to prompt Web site administrators to rate their sites.<sup>117</sup>

### b. Non-Standardized Rating Systems

Another drawback associated with rating-based blocking is the lack of a standardized rating system. Currently, at least two industry organizations, SafeSurf and the Recreational Software Advisory Council ("RSAC"), have defined standards for rating Web sites.<sup>118</sup> Such diversity is problematic because it results in disparate rating standards and marketing problems caused by a lack of product compatibility.<sup>119</sup>

SafeSurf, an organization created in 1995 by concerned parents, has established ten categories of content, each rated on a scale of zero to ten: (1) profanity; (2) heterosexual themes that may include profanity; (3) homosexual themes that may include profanity; (4) nudity and consenting sexual acts; (5) violent themes that may include profanity; (6) combined sexual and violent themes that may include profanity; (7) attacks on religious or racial groups; (8) themes advocating use of illegal drugs; (9) other adult themes; and (10) gambling.<sup>120</sup> As of September 1996, SafeSurf claims to have only 40,000 sites rated.<sup>121</sup>

In contrast, RSAC, formed in 1994 by a group of software publishing companies, has established four major categories of content—violence, sex, nudity, and language—with four sub-levels in each category.<sup>122</sup> As of September 1996, RSACi, the RSAC rating system, has been used to rate 150,000 Web sites.<sup>123</sup>

Aside from the obvious definitional incompatibilities that force a Web site administrator to make a separate rating assessment for each system, technical incompatibility is also a problem. Although both RSACi and SafeSurf follow the Platform for Internet Content Selection ("PICS") technical standard,<sup>124</sup> some filtering software supports both the RSACi and SafeSurf rating systems, some support only one system, and some support

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117. Venditto, *supra* note 14, at 56.

118. *Id.* at 50.

119. See *Parents' Group Protesting "Incomplete" Child Protection in Microsoft's Browser*, REP. ON MICROSOFT, Aug. 26, 1996 (reporting on a protest against Microsoft for including RSAC's rating system, but not SafeSurf's, in its filtering software).

120. Venditto, *supra* note 14, at 54.

121. *Id.* at 50.

122. *Id.* at 54.

123. *Id.*

124. PICS is a technical specification for attaching ratings to a Web site in a standardized manner such that filtering software can "read" them. *Id.* at 58.



neither.<sup>125</sup> Until rating systems become uniform, filtering software will not be as effective, inexpensive, or commonplace as it could be.

### c. Self-Rating

A third problem associated with rating-based filtering software is the potential for inaccuracies due to subjective self-rating. The task of rating a particular Web site currently belongs to the Web site administrator.<sup>126</sup> For example, the RSACi rating system requires that the Web site administrator complete an on-line questionnaire accessible at RSAC's home page.<sup>127</sup> This questionnaire asks specific questions about the level of sex, nudity, violence, and offensive language found within the Web site.<sup>128</sup> Once completed, the questionnaire is read, tabulated, and ratings are attached to the Web site.<sup>129</sup> Filtering software configured to read the RSACi rating system may then use these ratings to grant or deny access to that Web site.<sup>130</sup>

However, without a single entity interpreting categories and assigning uniform ratings, Web site administrators may attempt to interpret and assign ratings to their advantage. For example, Web site administrators are sometimes paid by Internet advertisers based on "hits"—the number of times a Web site is accessed.<sup>131</sup> Administrators therefore have an incentive to evaluate their Web sites as wholesomely as possible, utilizing self-serving interpretations of the categories in an effort to minimize the number of times the site is blocked. Nudity, for example, may be considered by an "adult" Web site administrator as constituting nothing less than full frontal views, while an educational Web site administrator may see nudity in as little as a quick flash of exposed buttocks.

Although the problems of inconsistently interpreted and applied ratings could theoretically be solved by a central rating organization, such

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125. *Id.* at 58. See also *PICS Ready to Go Worldwide as Practical Alternative to Global Censorship of 'Net*, EDP WKLY., Mar. 25, 1996, at 1 (listing filtering software utilizing RSACi, and providing a different list of filtering software utilizing SafeSurf).

126. Venditto, *supra* note 14, at 54.

127. *Microsofts Software Plans to Deliver Support for RSACi Internet Rating System on April 15, 1996*, BUS. WIRE, Mar. 6, 1996, available in WESTLAW, database ALLNEWSPLUS, citation 3/6/96 BWIRE 11:29:00.

128. *Id.*

129. *Id.*

130. *Id.*

131. Charles Waltner, *Internet Hits and Errors*, MULTICHANNEL NEWS, Mar. 25, 1996, at 40B. See also Robert Steinberg & Andre Brunel, *Internet Icons: Trademark Iconoclasm*, J. PROPRIETARY RTS., Dec. 1995, at 2, 3.

an organization would likely be ineffective due to the sheer number of Web sites. Over 30 million Web sites are already on-line, and thousands more are being added each day.<sup>132</sup> In addition, multiple pages within a Web site may contain different types of material, each deserving of a separate rating.<sup>133</sup> The overwhelming number of sites and pages to be rated would cause a single central rating organization to be hopelessly backlogged. Furthermore, material within an existing Web site will often change. Thus, a Web site may have an outdated rating and be in need of another review within hours of being rated.

### 3. Blocking the Transmission of Inappropriate Messages

The Internet, like any other public place, has its share of undesirable influences. Perhaps emboldened by the security of being in one's own home and the relative anonymity of the Internet, pedophiles and other predators have used the Internet to prey on children.<sup>134</sup> Some Internet filtering software has attempted to deal with this problem by providing the capability to block the transmission of certain words or phrases in a child's outgoing Internet message.<sup>135</sup> With such a capability, supervising adults can prevent a child's name, address, telephone number, or other personal information from being sent out over the Internet.<sup>136</sup>

Although generally effective, the blocking of certain words in outgoing messages can also be extremely restrictive. For example, Net Nanny for Windows 2.1 can completely shut down a child's access to the active communication application upon the detection of a prohibited word or phrase.<sup>137</sup> Once this shutdown occurs, only the supervising adult can reactivate the program.<sup>138</sup> Furthermore, filtering software used to block the transmission of certain words and phrases will do so regardless of their context, resulting in the blocking of both appropriate and inappropriate communications. For example, a precocious high-school student sending

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132. Venditto, *supra* note 14, at 50.

133. Some filtering software has the capability of recognizing the rating of individual pages and excluding individual pages on that basis. *Id.* at 51.

134. See, e.g., *Oregon Man Gets Jail Term in Computer Rape Case*, L.A. TIMES, Oct. 26, 1995, at A18 (describing sentencing of a 29-year-old man convicted of third-degree rape for having sex with a 14-year-old girl he met over the Internet).

135. Venditto, *supra* note 14, at 50. See also Meredith Leigh Friedman, Note, *Keeping Sex Safe on the Information Superhighway: Computer Pornography and the First Amendment*, 40 N.Y.L. SCH. L. REV. 1025, 1052 (1996) (describing Prodigy's filtering system that sends messages with objectionable words back to the originator).

136. Venditto, *supra* note 14, at 50.

137. See Ryga, *supra* note 11, at 248; see also Venditto, *supra* note 14, at 52.

138. Venditto, *supra* note 14, at 52.

e-mail to a classmate might not be able to properly quote and discuss the legal consequences of George Carlin's *Filthy Words* monologue<sup>139</sup> under the watchful eye of such software.

#### IV. THE TENSION BETWEEN EDUCATION AND THE FIRST AMENDMENT

By its very nature, filtering software limits a person's ability to send and receive information, thereby restricting the rights of free speech and press protected by the First Amendment.<sup>140</sup> Parents may use filtering software without constitutional concern, because the First Amendment prohibits only government from abridging the rights of free speech and press.<sup>141</sup> However, a public school's usage of filtering software constitutes state action, implicating the First Amendment.<sup>142</sup> Because students possess First Amendment rights,<sup>143</sup> a question therefore arises: does a public school's use of Internet filtering software infringe upon a student's right to free speech and press in a manner that violates the First Amendment?<sup>144</sup>

##### *A. The Indoctrinative Nature of Schools*

From the earliest years in our nation's history, public schools have been the primary means of educating young people. The Supreme Court has acknowledged that public schools prepare children for their duties as citizens by teaching democratic principles,<sup>145</sup> and has recognized the

139. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

140. The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

141. *Id.*

142. The First Amendment applies to the states by virtue of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

143. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). "First Amendment rights, applied in light of the special characteristics of the school environment, are available to . . . students. It can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* However, the Court has also recognized that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

144. This question does not appear to be foremost in the minds of educators. In the author's research of several public schools in the Los Angeles area, administrators and teachers expressed no concern over the infringement of a student's First Amendment rights. Rather, the legal issue of concern was possible lawsuits by parents against the school for providing *excessive* student access to pornography and obscenity through the Internet. See Laurent Belsie, *Schools Move to Curb Pornography in Cyberspace*, CHRISTIAN SCI. MONITOR, May 17, 1995, at 1.

145. *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979). Public schools are important "in the preparation of individuals for participation as citizens," and as a means to teach the "fundamental values necessary to the maintenance of a democratic political system." *Id.*

inherently indoctrinative nature of education.<sup>146</sup> It is also well settled that public education is governed by state law,<sup>147</sup> and the Court has traditionally given great deference to the discretion of the states and school boards.<sup>148</sup> However, this discretion is far from unfettered—schools must operate within constitutional limits.<sup>149</sup>

Despite this mandate of constitutional conformity, the inherently indoctrinative nature of education is incompatible with the full extent of First Amendment rights. The vast amount of information and ideas prevents the chosen curriculum from being truly neutral: “Choices of inclusion and, necessarily, exclusion must be made.”<sup>150</sup> Due to time constraints, not all views on a particular subject can be taught, and the necessity of teaching certain views at the expense of others creates an indoctrinative effect on students.<sup>151</sup> However, when schools suppress speech disruptive to, and inconsistent with, their educational mission, the free flow of ideas and information contemplated by the First Amendment is restricted.<sup>152</sup> Thus, a fundamental tension exists between the inculcative goals of education and the First Amendment.

### *B. The Paradox of Personal Autonomy*

Compounding the tension between education and the First Amendment is the societal goal of preparing students for their future exercise of First Amendment rights. A well-known metaphor used in

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146. *James v. Board of Educ.*, 461 F.2d 566, 573 (2d Cir. 1972). “[A] principal function of all elementary and secondary education is indoctrinative—whether it be to teach the ABC’s or multiplication tables or to transmit the basic values of the community.” *Id.* Several characteristics of public schools contribute to this indoctrinative atmosphere. For example, because attendance is mandatory, public schools have a captive audience. Stanley Ingber, *Socialization, Indoctrination, or the “Pall of Orthodoxy”: Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 23 (1987). This captive audience of students lacks the knowledge and mental sophistication to challenge the authority of the teacher and the ideas being presented. *Id.* at 21. In addition, students are induced to accept the ideas presented, since grades are based on the understanding of those ideas. *Id.* at 21–22.

147. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). “[P]ublic education . . . is committed to the control of state and local authorities.” *Id.*

148. *Tinker*, 393 U.S. at 507. “[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools.” *Id.*

149. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). “Boards of Education . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.” *Id.*

150. Ingber, *supra* note 146, at 26.

151. 319 U.S. at 27 (noting that “curriculum choices inevitably lend official support to one value perspective over another”).

152. *Cf. id.* at 25–26.

support of First Amendment rights is that "society benefits in a marketplace of ideas, in which arguments are met with counter-arguments, and there is a free flow of ideas, including the unorthodox and the unpopular."<sup>153</sup> This "marketplace of ideas" contemplates autonomous and free-thinking individuals contributing ideas to the marketplace, with the truth eventually winning out in a free flow of discussion.<sup>154</sup>

However, to develop the informed and free-thinking participants that the marketplace contemplates, childhood education is essential. Children are perceived to be "lack[ing] the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,"<sup>155</sup> and therefore do not naturally possess "that full capacity for individual choice which is the presupposition of First Amendment guarantees."<sup>156</sup>

In our system of compulsory education, schools are therefore called upon to provide children with the knowledge and values necessary for future participation in the marketplace of ideas. However, the necessarily indoctrinative nature of the educational process creates a paradox of personal autonomy: "Society must indoctrinate children so they may be capable of autonomy. They must be socialized to the norms of society while remaining free to modify or even abandon those norms. Paradoxically, education must promote autonomy while simultaneously denying it by shaping and constraining present and future choices."<sup>157</sup> In other words, to fully appreciate and utilize First Amendment rights as an adult, one must first relinquish some of those rights as a student. Faced with such nonintuitive reasoning, courts have struggled with the dilemma presented by the conflict between educational goals and a student's present and future exercise of First Amendment rights.

#### V. THE CONSTITUTIONALITY OF PUBLIC SCHOOL USAGE OF INTERNET FILTERING SOFTWARE

Modern technology brings Internet filtering software into the midst of this constitutional confusion. In either of its two main functions, Internet filtering software is both indoctrinative and contrary to First Amendment principles. In its role as a censor of inappropriate material, Internet filtering software adds to the indoctrinative nature of education by

153. Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 119 (1991).

154. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

155. *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

156. *Ginsberg v. New York*, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring).

157. Ingber, *supra* note 146, at 19.

prohibiting student access to certain Web sites and newsgroups deemed contrary to a school's educational mission. In doing so, filtering software restricts a student's right to receive information. When used to block student participation in chat rooms or block the transmission of improper or dangerous messages, Internet filtering software is both indoctrinative and restrictive of the free expression of students. In addition, because the mindless, comparison-based blocking of information by filtering software takes place without considering context, suitable material may inadvertently be blocked, creating the potential for overly broad protection. Thus, a thorough analysis of the constitutionality of public school usage of Internet filtering software requires consideration of three factors: (1) a student's right to receive information balanced against the permissible extent of school indoctrination; (2) a student's right to free expression; and (3) overbreadth.

#### *A. Indoctrination Versus the Right to Receive Information*

When a school uses Internet filtering software to censor inappropriate Web sites and newsgroups, a student's access to information is restricted. In addition, such action by a school is indoctrinative; by blocking certain types of information, a student's educational perspective is intentionally narrowed in furtherance of the school's educational goals. Both the right of students to receive information and the permissible limits of school indoctrination were at issue in *Board of Education v. Pico*.<sup>158</sup>

##### *1. Board of Education v. Pico*<sup>159</sup>

*Pico* addressed the constitutionality of a school board's removal of certain books deemed offensive from school libraries.<sup>160</sup> The Board of Education of the Island Trees School District No. 26 in New York (the "Board") received a list of books described as "objectionable" and determined that a local high school and junior high school library contained ten books from this list.<sup>161</sup> These books were not part of a regular class

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158. 457 U.S. 853 (1982). *Pico* is the only Supreme Court case to address the permissible discretion of the school in removing books from school libraries. Although it dealt with First Amendment rights, *Pico* did not apply strict scrutiny, but instead reaffirmed the reduced First Amendment rights of children in schools and focused on delineating the permissible limits of school discretion in limiting those rights. *Id.*

159. *Id.*

160. *Id.* at 861.

161. *Id.* at 856. The 10 books were: *Slaughter House Five*, by Kurt Vonnegut, Jr.; *The Naked Ape*, by Desmond Morris; *Down These Mean Streets*, by Piri Thomas; *Best Short Stories*

curriculum; rather, they had been placed in the library for optional, recreational reading.<sup>162</sup> The Board gave "unofficial direction" that the books be removed, justifying the order by characterizing the books as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."<sup>163</sup> The Board concluded that "[i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers."<sup>164</sup> A committee was appointed to read the books and make a recommendation, but the Board ultimately rejected the committee's conclusions and ordered that nine books be removed from the school libraries.<sup>165</sup> Students at the affected schools brought an action against the Board in federal district court, claiming that their rights under the First Amendment had been denied.<sup>166</sup> The district court granted defendant's motion for summary judgment, determining that the students' First Amendment rights were not violated, and approving the Board's action as within the limits of its permissible discretion.<sup>167</sup> The Second Circuit reversed and remanded the action for trial.<sup>168</sup> The Supreme Court granted certiorari.<sup>169</sup>

Three of the four Justices in the Court's plurality opinion<sup>170</sup> recognized that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge,"<sup>171</sup> and that "the Constitution protects the right to receive information and ideas."<sup>172</sup> These three Justices held that the right to receive information and knowledge is an inherent corollary of the rights of free speech and press, because "[t]he dissemination of ideas can accomplish nothing if otherwise

Oliver LaFarge; *Black Boy*, by Richard Wright; *A Hero Ain't Nothin' But a Sandwich*, by Alice Childress; *Soul on Ice*, by Eldridge Cleaver; and *A Reader for Writers*, edited by Jerome Archer. *Id.* at 856 n.3.

162. *Id.* at 862.

163. *Id.* at 857 (quoting *Pico v. Board of Educ.*, 474 F. Supp. 387, 390 (E.D.N.Y. 1979) (alteration in original)).

164. *Pico*, 457 U.S. at 857 (quoting *Pico v. Board of Educ.*, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

165. *Id.* at 857-58.

166. *Id.* at 858-59.

167. *Pico v. Board of Educ.*, 474 F. Supp. at 398.

168. *Pico v. Board of Educ.*, 638 F.2d 404 (2d Cir. 1980).

169. *Board of Educ. v. Pico*, 454 U.S. 891 (1981).

170. The plurality opinion was written by Justice Brennan, and joined by Justice Marshall and Justice Stevens. *Pico*, 457 U.S. at 855. Justice Blackmun also joined in the plurality opinion except for Part II-A(1), which announced a right to receive information as a corollary to First Amendment rights. *Id.* at 855, 867.

171. *Id.* at 866 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

172. *Id.* at 867 (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

willing addressees are not free to receive and consider them.”<sup>173</sup> The three Justices found that the right to receive ideas allows a person to gain the knowledge necessary to fully exercise the personal rights of free speech, press, and political freedom.<sup>174</sup> This right to receive ideas is especially appropriate in the context of school libraries, where “a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum . . . . Th[e] student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom.”<sup>175</sup>

Acknowledging a student’s right to receive information, the three Justices rejected the argument that the Board be given unfettered discretion to transmit community values to students.<sup>176</sup> While recognizing that such discretion might be more appropriate in matters of mandatory classroom curriculum,<sup>177</sup> the three Justices found that absolute discretion was inappropriate when extended “beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.”<sup>178</sup>

Although the three Justices rejected the notion that a school board be given absolute discretion to remove books from school libraries, the full plurality of four Justices acknowledged that school boards did have a role in determining school library content, and attempted to define this role.<sup>179</sup> Focusing on intent, the plurality stated that “discretion may not be exercised in a narrowly partisan or political manner,”<sup>180</sup> and warned that if the Board intended by its removal decisions to block student access to ideas disagreeable to the Board, then it had stepped beyond the bounds of permissible discretion.<sup>181</sup> Thus, the plurality held that “local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’”<sup>182</sup> However, the plurality did seem to agree with the

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173. *Id.* (quoting *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965)).

174. *Id.*

175. *Id.* at 869 (quoting *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 715 (Mass. 1978)).

176. *Pico*, 457 U.S. at 869.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 870.

181. *Id.* at 870–71.

182. *Pico*, 457 U.S. at 872 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).



students' concession that the book removal would be constitutional if it could be shown that the books were removed solely because the Board found them "pervasively vulgar" or lacking "educational suitability."<sup>183</sup>

Applying its holding to the facts, the plurality found a genuine issue of material fact as to whether the intent behind the Board's removal decision was constitutionally valid.<sup>184</sup> The plurality first found substantive evidence of intent, focusing on the Board's assertion that the books were removed because they were "offensive" and "anti-American," and on the Board's own affidavits which supported the conclusion that the books were removed based on "personal values, morals, and tastes."<sup>185</sup>

However, this evidence, taken alone, was not decisive.<sup>186</sup> The plurality also found procedural evidence of the Board's intent, especially the Board's failure to use "established, regular, and facially unbiased procedures for the review of controversial materials."<sup>187</sup> The Board ignored the advice of the students, librarians, teachers, and their own appointed committee, instead relying and focusing on a list of books deemed "objectionable," without reviewing other books in the libraries.<sup>188</sup> Ultimately, the plurality concluded that the Board's substantive statements of intent and its use of ad hoc procedures for book removal did not foreclose the possibility that the Board's decision to remove the books was in support of a "prescribed orthodoxy," and thus affirmed the lower court's reversal of summary judgment in favor of the Board.<sup>189</sup>

## 2. The Applicability of *Pico* to Filtering Software

Three of the four Justices in the *Pico* plurality found that the right to receive information was a corollary to First Amendment rights, and that this right limited a school's inculcative discretion in removing books available for voluntary reading in school libraries.<sup>190</sup> More significantly, the full plurality agreed that a school's intent was crucial in determining the

183. *Id.* at 871. The plurality did not elaborate on these terms, giving no guidance to lower courts as to their meaning. See *The Supreme Court 1981 Term: Removing Books from School Libraries*, 96 HARV. L. REV. 151, 156-57 (1982).

184. *Pico*, 457 U.S. at 875.

185. *Id.* at 872-73.

186. *Id.* at 874.

187. *Id.*

188. *Id.* at 874-75.

189. *Id.* at 875. The Board subsequently returned the books to the libraries, and the case never went to trial. Shawn G. Kennedy, *School Board on L. I. Votes to Restore 9 Banned Books*, N.Y. TIMES, Aug. 13, 1982, at B1.

190. *Pico*, 457 U.S. 867-72.

permissibility of a school's discretion in removing library books.<sup>191</sup> Although a school's use of filtering software implicates both a student's right to receive information and a school's inculcative discretion, the initial inquiry is whether the *Pico* analysis can be properly applied to public school usage of filtering software. *Pico* focused on books in school libraries,<sup>192</sup> while the materials under discussion in this Comment are Web sites and newsgroups on the Internet. *Pico* also limited its holding to library books used for recreational, voluntary reading, and did not address books used as part of mandatory school curriculum.<sup>193</sup> Furthermore, the plurality in *Pico* was careful to limit its holding only to the removal of existing books from school libraries, and did not address a school's refusal to add books to school libraries ("selective acquisition").<sup>194</sup> Thus, if the principles of *Pico* are to be applied to public school use of filtering software, it is necessary to determine: (1) if the Internet and its Web sites and newsgroups are analogous to libraries and library books; (2) if Internet browsing is a voluntary activity or part of mandatory school curriculum; and (3) if filtering software is properly analogized to "book removal" or "selective acquisition."

#### a. The Analogy Between Books and Websites

To determine if the Internet and its Web sites and newsgroups are analogous to libraries and library books, the policy underlying *Pico* is instructive. *Pico* focused on the intent behind the actions of the school board and held that the ad hoc removal of information from students in order to reinforce the political, moral, and social orthodoxy was unconstitutional.<sup>195</sup> Three of the four Justices in the plurality grounded this holding in the right to receive information: "[T]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom."<sup>196</sup> Access to ideas "prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."<sup>197</sup>

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191. *Id.*

192. *Id.* at 868-69.

193. *Id.* at 869.

194. *Id.* at 862. The plurality gave no indication as to how it might rule in situations where books were intentionally withheld from a school library because they contained content in conflict with the prevailing political orthodoxy.

195. *Id.* at 872.

196. *Pico*, 457 U.S. at 867.

197. *Id.* at 868.

Internet Web sites and newsgroups, like library books, also contain ideas and information. A school's use of filtering software is an intentional attempt to restrict a student's access to that information. Thus, although Web sites and newsgroups lack the physical attributes of books, *Pico* is nevertheless applicable to Internet filtering software insofar as it fundamentally focuses on a school's intent in limiting a student's right to receive information.

b. The Voluntary Nature of Library Book Reading  
and Student Browsing of the Internet

The *Pico* plurality found the voluntary nature of recreational reading in the school library critical to its holding.<sup>198</sup> If the removed books had been required reading rather than generally available on library shelves, the inculcative nature of mandatory school curriculum might have justified their removal.<sup>199</sup> Therefore, before *Pico* can be applied, student browsing of Internet Web sites and newsgroups must be shown to be a voluntary activity.

The intent behind a school's use of filtering software suggests the voluntary nature of student Internet browsing. Filtering software blocks student access to inappropriate materials during moments of unsupervised Internet use occurring during periods of permitted browsing or during "stolen" moments of browsing.<sup>200</sup> Its use presumes a student's freedom to access information not specified by the school. By its very nature, browsing is an open-ended quest for information, offering many choices and any number of unpredictable research paths requiring frequent, independent, and spontaneous decisions.<sup>201</sup> The freedom of choice enjoyed by students while browsing the Internet is analogous to students searching the library and voluntarily choosing books of interest. Schools cannot claim to have any real curricular control over such an open-ended, free-wheeling, and unsupervised activity.

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198. *Id.* at 869.

199. *Id.*

200. In contrast, filtering software is less important in the course of a mandatory curriculum, where students are instructed to access a particular Web site or newsgroup.

201. CADY & MCGREGOR, *supra* note 6, at 282.

c. Is the Blocking of Websites Analogous to Book Removal or Selective Acquisition?

*Pico* limited its holding to the removal of books from school libraries, and did not address a school's selective acquisition of library books.<sup>202</sup> Is public school use of Internet filtering software analogous to book removal or selective acquisition? Arguably, both characterizations are possible, depending on the sequence of events surrounding the school's provision of student Internet access.

If filtering software is installed prior to making student Internet access available, student access is immediately limited. No material is ever "pulled back"; from the student's perspective, the blocked material was never available. This setup is analogous to creating a limited library by selectively acquiring only approved books. In this situation there is no "book removal," and *Pico* would not apply. However, if filtering software is installed after making Internet access available to students, inappropriate material originally available to the student will be subsequently "pulled back" when the filtering software is activated. This situation is analogous to the removal of books from an existing library, where *Pico* would apply.

The above interpretations hinge on the sequence of events—which came first, the Internet access or the filtering software? Though technically plausible and logically sound, the two interpretations place form over substance and provide an insufficient basis for determining the applicability of a constitutional analysis. The software installation activity of a school computer lab administrator should not be determinative of whether *Pico* applies.

In addition, the analytical significance of this "chicken-or-the-egg" approach is minimal. *Pico* focused on the intent of the school and attempted to define the permissible extent of a school's indoctrinative removal of information from a school library.<sup>203</sup> However, a school's selective acquisition of library books is also an indoctrinative "removal" of information when one considers the available books not chosen.<sup>204</sup> To use examples cited in *Pico*, if a school board intentionally added only books favored by Democrats, or added only books written by white authors, or failed to add any book favoring racial equality, it is difficult to imagine that the *Pico* plurality would have found such activity acceptable. In such

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202. *Pico*, 457 U.S. at 862.

203. *Id.* at 867–72.

204. Justice Blackmun, concurring in *Pico*, recognized the parallel, stating, "I also have some doubt that there is a theoretical distinction between removal of a book and failure to acquire a book." *Id.* at 878 n.1.

situations, information is preemptively withheld from students in an indoctrinative manner similar to book removal.<sup>205</sup> Thus, although the issue was not before the Court, *Pico* should also apply to a school's selective acquisition of books for a school library in order to reinforce a political, moral, or social orthodoxy. *Pico* is therefore applicable to filtering software whether the blocking of Web sites and newsgroups is characterized as book removal or selective acquisition.

In summary, public school use of Internet filtering software satisfies the criteria necessary to apply *Pico*: (1) the Internet and its Web sites and newsgroups are analogous to libraries and library books because both contain information and ideas; (2) browsing the Internet is analogous to reading library books because both are voluntary activities; and (3) the blocking of Web sites and newsgroups by Internet filtering software is analogous to book removal and the selective acquisition of books because they both result in the indoctrinative removal of information and ideas. The next task, therefore, is to apply the analysis of *Pico* to the unique circumstances of public school use of Internet filtering software.

### 3. Applying the "Intent" Determination of *Pico* to a School's Usage of Internet Filtering Software

*Pico* featured a two-step analysis to determine if a public school's removal of library books violated the First Amendment. The first step searched for substantive evidence of a school's intent to enforce a "prescribed orthodoxy" in the form of statements or other indicia.<sup>206</sup> The second step searched for procedural evidence of intent in the form of methods used to determine which books to remove.<sup>207</sup>

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205. As one commentator noted:

Distinguishing between acquiring and removing books also seems wholly inconsistent with any notion of a student's right to know. From the vantage point of exposing a student to ideas, the student suffers the same loss of perspectives whether the school removes books or initially rejects them. Either way, selective exposure may shape children's attitudes. The right to know surely does not depend on whether school officials read a book and officially reject its perspectives after, rather than before, its purchase.

Ingber, *supra* note 146, at 58 (footnote omitted).

206. *Pico*, 457 U.S. at 872-73.

207. *Id.* at 874. *Pico* was an appeal from a summary judgment in favor of the defendants, and therefore the Court construed the evidence before it in a manner favorable to the plaintiffs. *Id.* at 875. Thus, while the analytical framework of *Pico* may be applied to a school's use of filtering software, its deferential treatment of the evidence is inappropriate in this Comment.

## a. Substantive Evidence of Intent

Fundamental differences between library book removal and a school's use of Internet filtering software render the determination of the school's intent difficult. Before a school removes a library book, someone personally reviews it and recommends its removal. If the school follows the recommendation, the book is physically pulled from library shelves. This personalized review and removal process helps generate substantive evidence of intent, as demonstrated by the Board's explanations in *Pico* that the removed books were "anti-American"<sup>208</sup> and that "conservative principles [were used in] the decision making process."<sup>209</sup>

However, when a school uses rating-based filtering software, unique and complicating factors come into play. A school will typically not review the ever-changing list of Web sites to be excluded; rather, it will merely select blocking criteria and blindly accept the electronic filtering provided by the software. A school administrator, therefore, will rarely be able to state that a particular Web site or newsgroup was blocked for any reason other than its satisfaction of the selected blocking criteria. This depersonalized, hands-off filtering process is unlikely to generate statements of intent of the type found in *Pico*. Substantive evidence of a school's intent, in the context of rating-based filtering, will typically be found only in a school's selection of blocking criteria. Thus, to properly use the intent-based "prescribed orthodoxy" test of *Pico*, it must be applied to the motivation behind the school's selection of blocking criteria.

Rating-based filtering software, however, does not easily yield to this "prescribed orthodoxy" test. For example, RSACi provides for numerically-weighted levels of sex, nudity, violence, and offensive language.<sup>210</sup> If a school chooses to block student access to Web sites rated at or above "level four" sex, "level three" nudity, "level three" violence, and "level four" offensive language, has the school blocked the sites because they are contrary to a prescribed orthodoxy favored by the school? If so, what prescribed orthodoxy?

At a minimum, the chosen blocking criteria reflects a desire to comport with the school's view of prevailing moral norms. However, given the sparse categories from which a school may choose, no intent other than vague statements of morality and suitability can be reasonably articulated. In other words, absent explicit statements by the school, any

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208. *Id.* at 873.

209. *Id.* at 872 n.24.

210. Venditto, *supra* note 14, at 54.

use of RSACi-based filtering can only reflect one fundamental intent—a desire to comport with perceived prevailing moral norms. Blocking criteria comprising a selection of various levels of sex, nudity, violence, and offensive language cannot be construed as an attempt to shield students from Democratic, Republican, or even Communist beliefs, nor could any categorization be construed to favor one religion over another, one race over another, or pro-life ideology over pro-choice.

Impermissible intent, however, can readily be masked through the use of such generalized categories. Theoretically, a school could block Web sites with a certain level of violence, intentionally censoring a Web site supportive of militia groups, yet articulate the permissible goal of blocking access to violent and educationally unsuitable Web sites. The true intent of the school, hidden behind the proscribed categories, would not be easily determinable.

Rating-based filtering software utilizing more specific categories may reduce, but not solve, the problem of intent determination. SafeSurf, for example, enables a school to block various levels (from zero to ten) of homosexual themes.<sup>211</sup> While such specific categories may allow a school's intent to manifest itself, more often the intent of the school will remain indeterminate. For example, where a school using SafeSurf expresses no tolerance for homosexuality by choosing to block anything above "level zero" homosexuality, its opposition to homosexuality is easily inferred. However, if that school chooses to allow a certain level of homosexual content, it enters a gray area where the intent determination becomes unreliable. Alternatively, the school could hide its intent and yet censor homosexuality by blocking anything above "level zero" sexual themes.

The substantive intent determination is even more difficult when a school utilizes predetermined blocking. Typically, filtering software using this methodology relies on a predetermined database of prohibited material installed in the software program and blocks access to any Web site or newsgroup contained within the database.<sup>212</sup> The database is generally compiled by the software company using its own definition of inappropriateness<sup>213</sup> and is frequently kept secret for competitive reasons.<sup>214</sup> Thus, schools using predetermined blocking may deny its students access to information it has neither selected nor reviewed.

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211. *Id.*

212. *Id.* at 50.

213. *Id.*

214. Pescovitz, *supra* note 16, at D3.

Because predetermined blocking requires so little involvement by the school, it is unlikely to generate expressions or activity revealing intent.

#### b. Procedural Evidence of Intent

In *Pico*, the plurality regarded procedural evidence of intent as a necessary companion to substantive evidence of intent.<sup>215</sup> The plurality found procedural evidence of intent to promote a “prescribed orthodoxy” in the Board’s reliance on a list of “objectionable” books, in its failure to consider the advice of literary experts, and in its failure to use regular, unbiased procedures.<sup>216</sup> The desire of the Board to take matters into their own hands was apparent in this procedural evidence of intent. In significant contrast, schools using filtering software generally take a hands-off approach, relying on the filtering software to block Web sites and newsgroups, many of which are never reviewed by the school. This automated approach to blocking inappropriate material does not create opportunities for procedural evidence of intent.

However, depending on the circumstances, procedural evidence of intent might nevertheless exist. With respect to rating-based blocking, a school might demonstrate some procedural evidence of intent to enforce a “prescribed orthodoxy” by targeting a list of “objectionable” Web sites or newsgroups, ignoring the advice of literary experts, or bypassing regular practices in selecting blocking criteria. Conversely, if the school followed established and unbiased procedures, this might constitute some procedural evidence of intent to block only educationally unsuitable or pervasively vulgar material. With respect to predetermined blocking, a school’s reliance on a database of “objectionable” Web sites and newsgroups might demonstrate some procedural evidence of intent to block only educationally unsuitable or pervasively vulgar materials as defined by the software company’s blocking philosophy.

However, without accompanying substantive manifestations of intent, the credibility of any procedural evidence of intent is weakened. The lack of substantive evidence of intent opens the door for a school to assert, in hindsight, that its intent was to block only pervasively vulgar or educationally unsuitable information, thereby diluting any procedural evidence of intent to enforce a prescribed orthodoxy.

The conclusion that emerges is that filtering software generally does not allow for an accurate determination of the specific intent of the user.

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215. Board of Educ. v. Pico, 457 U.S. 853, 874 (1982).

216. *Id.* at 874–75.



Both the rating-based and predetermined blocking methodologies allow a school to take a hands-off approach where many blocked Web sites and newsgroups are never reviewed by the school. This mechanized, depersonalized process of blocking inappropriate information is not conducive to the generation of either substantive or procedural evidence of a school's intent. Because the intent of the school is difficult to determine, the analysis articulated in *Pico* will generally be inconclusive and insufficient to find an infringement of a student's First Amendment right to receive information.

*B. Does Internet Filtering Software Infringe the Freedom of Expression?*

In addition to blocking inappropriate Web sites and newsgroups, some Internet filtering software is capable of blocking outgoing student Internet messages containing inappropriate content such as addresses, phone numbers, or certain profane, offensive or sexually explicit words.<sup>217</sup> When a school uses Internet filtering software to censor outgoing student messages, a student's freedom of speech is restricted. The issue is whether Internet filtering software, when used to censor student expression, violates a student's First Amendment rights.

1. The Limits on a Student's Freedom of Expression

The Court addressed the permissible extent of a school's authority over student expression in *Tinker v. Des Moines Independent Community School District*.<sup>218</sup> In *Tinker*, students wore black armbands to school in protest of the Vietnam War and were suspended pursuant to a school policy prohibiting such activity.<sup>219</sup> The Court, while not explicitly characterizing the wearing of armbands as public discourse, described the act as akin to "pure speech."<sup>220</sup> The Court reiterated the long-standing view that First Amendment rights are available to students,<sup>221</sup> but also acknowledged that it has repeatedly affirmed the authority of school officials to "prescribe and control conduct in the schools."<sup>222</sup>

In attempting to reconcile these two positions, the Court noted that students cannot be limited to expressing only school-approved

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217. Venditto, *supra* note 14, at 50.

218. 393 U.S. 503 (1969).

219. *Id.* at 504.

220. *Id.* at 505 (implying that "pure speech" was speech divorced from conduct).

221. *Id.* at 506.

222. *Id.* at 507.

viewpoints.<sup>223</sup> Rather, students are entitled to freedom of expression unless constitutionally valid reasons exist for restricting their speech.<sup>224</sup> Student conduct materially disruptive to classwork or to the rights of other students is one such valid reason.<sup>225</sup> Thus, *Tinker* limited a school's authority over student expression to situations where the expression would disrupt school activities or interfere with the right of other students to be left alone.<sup>226</sup> Finding that the armbands created no disruption to school activities or other students, the Court concluded that the school's policy was unconstitutional.<sup>227</sup> *Tinker* is significant for the limitations it places on school discretion when the expressive activity is "pure speech" or voluntary public discourse, as opposed to speech within mandatory school curriculum.

Seventeen years after *Tinker*, the Court decided *Bethel School District No. 403 v. Fraser*.<sup>228</sup> In *Fraser*, a student gave a nominating speech at a school assembly replete with sexual innuendo, and was suspended pursuant to a rule prohibiting obscene language in the school.<sup>229</sup> *Fraser* differed from *Tinker* in two significant respects. First, the expression at issue in *Fraser* was presented in a mandatory student assembly, as part of a "school-sponsored educational program in self-government."<sup>230</sup> Second, the expression was found to be disruptive to school activities.<sup>231</sup>

The *Fraser* Court treated speech in the school assembly and speech in the classroom similarly, distinguishing both from public discourse.<sup>232</sup> Giving greater deference to the school in the classroom environment, the Court found that the inherently inculcative nature of a school's teaching of "fundamental values" dictated that the determination of the appropriateness of the speech properly rests with the school.<sup>233</sup> The Court then reiterated and applied the "disruptiveness" determination of *Tinker*, finding that the student's speech was offensive and disruptive to students.<sup>234</sup> Significantly, the Court also found that the speech undermined the school's basic

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223. *Id.* at 511.

224. *Tinker*, 393 U.S. at 511.

225. *Id.* at 513.

226. *Id.*

227. *Id.* at 514.

228. 478 U.S. 675 (1986).

229. *Id.* at 677-78.

230. *Id.* at 677.

231. *Id.* at 683-84.

232. *Id.* at 682-83.

233. *Id.* at 683.

234. *Fraser*, 478 U.S. at 683-84. The Court found the speech "acutely insulting to teenage girls," and potentially damaging to younger students. *Id.*

educational mission, therefore making it "perfectly appropriate for the school to *disassociate* itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."<sup>235</sup>

Applying both the "disruptiveness" and "disassociation" analyses, the Court found that the speech was both disruptive to school activities and inconsistent with its fundamental values, and concluded that the school properly sanctioned the student in response to his speech.<sup>236</sup> *Fraser* is significant for the increased discretion it gives to schools to censor student speech in mandatory classroom activities, when the speech is contrary to the school's educational mission of teaching fundamental values.<sup>237</sup>

Less than two years after *Fraser*, the Court again addressed student speech rights in curricular activities in *Hazelwood School District v. Kuhlmeier*.<sup>238</sup> In *Kuhlmeier*, a school principal prohibited two student-written articles, one on student pregnancy and the other on the impact of divorce on students, from being published in a school-sponsored student newspaper.<sup>239</sup> The articles were written and intended for publication as part of the regular curriculum of the school's journalism class.<sup>240</sup> The principal objected to the article on pregnancy because it might have led to the identification of the anonymous persons described in the article, and because it might be inappropriate for younger students.<sup>241</sup> He objected to the divorce article because the parent mentioned in the article had not been given the opportunity to respond to the negative portrayal.<sup>242</sup>

The Court first determined that the student newspaper was not a public forum,<sup>243</sup> reasoning that the school newspaper was not like a street, park, or other traditional venue for public discourse between citizens.<sup>244</sup> The policy of the school reflected an intent for the student newspaper to be part of a "regular classroom activity," with control and authority being

235. *Id.* at 685-86 (emphasis added).

236. *Id.* at 683-86.

237. *Id.* at 685-86.

238. 484 U.S. 260 (1988).

239. *Id.* at 263-64.

240. *Id.* at 268.

241. *Id.* at 263.

242. *Id.*

243. *Id.* at 269-70. This finding was significant. Had the Court found that the student newspaper was a public forum, it may have followed the holding of *Tinker*, which prohibited school officials from censoring student speech except when "necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969).

244. *Kuhlmeier*, 484 U.S. at 267.

exercised by the school.<sup>245</sup> Furthermore, the school did not evince any intent to relinquish this control and make the student newspaper open to indiscriminate use by the student body.<sup>246</sup> Because the student newspaper was not a public forum, the Court distinguished the case from the wearing of armbands in *Tinker*.<sup>247</sup> Instead, because the student newspaper was part of mandatory school curriculum, the Court concluded, in a holding similar to *Fraser*, that school officials were entitled to regulate the content of the school newspaper "in any reasonable manner."<sup>248</sup>

Elaborating on this "reasonable manner" standard, the *Kuhlmeier* Court incorporated elements of *Tinker* and *Fraser* into its rule. The Court held that educators could exert control over student expression in mandatory classroom activities for three broad reasons: (1) to ensure that students learn, without disruptions, the lessons being taught; (2) to ensure that students are not personally disrupted, or their privacy rights disturbed; and (3) to disassociate the school from student expression inconsistent with the school's inculcative mission.<sup>249</sup> Without such control, the Court reasoned, "schools would be unduly constrained from fulfilling their role as 'a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.'"<sup>250</sup>

Collectively, *Tinker*, *Fraser*, and *Kuhlmeier* define the Court's position on permissible school restrictions on student expression.<sup>251</sup> *Tinker* established the extent of school restrictions on voluntary student expression outside of mandatory class curriculum.<sup>252</sup> *Fraser* and *Kuhlmeier* established the extent of school restrictions on student expression in mandatory classroom settings.<sup>253</sup> As the outcomes of these cases suggest, the permissible extent of school restrictions on the transmission of student Internet messages will turn on whether a court classifies student Internet

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245. *Id.* at 268.

246. *Id.* at 270.

247. *Id.*

248. *Id.*

249. *Id.* at 271-72.

250. *Kuhlmeier*, 484 U.S. at 272 (quoting *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)).

251. Like *Pico*, although these cases dealt with First Amendment rights, they did not apply strict scrutiny. Instead, they reaffirmed the reduced First Amendment rights of children in schools and focused on delineating the permissible limits of school discretion in limiting those rights. See *Kuhlmeier*, 484 U.S. at 260; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

252. *Tinker*, 393 U.S. at 509.

253. *Fraser*, 478 U.S. at 685-86; *Kuhlmeier*, 484 U.S. at 271-73.

communication as voluntary student expression or as part of mandatory class curriculum.

## 2. Student Internet Messages: Public Discourse or Mandatory School Curriculum?

In a private setting, sending chat room and e-mail messages over the Internet is undoubtedly voluntary public discourse. In the school setting, however, student Internet messages are arguably similar to the student assembly speech in *Fraser* or the student newspaper articles in *Kuhlmeier*, and could be considered part of a mandatory school curriculum rather than voluntary public discourse. The characterization of student Internet messages is important, for if student expression over the Internet is found to be part of a mandatory school curriculum, the holding of *Kuhlmeier* applies and school officials would be able to regulate the content of student Internet messages "in any reasonable manner."<sup>254</sup> Conversely, if student expression over the Internet is found to be voluntary public discourse or "pure speech," the holding of *Tinker* applies and school officials would be able to regulate the content of student Internet messages only where the expression would disrupt school activities or interfere with the right of other students to be left alone.<sup>255</sup>

Initially, the circumstances surrounding the transmittal of student Internet messages using school facilities may suggest a level of control indicative of mandatory school curriculum. For example, without school-supplied computers and Internet access, student Internet communication would not be possible. Additionally, schools are likely to have rules for Internet communications and adult supervision of computer labs at all times. Student Internet access will generally be limited to certain classes as part of the curriculum, or to specified periods of free time. These factors demonstrate a level of control that the *Kuhlmeier* Court found significant in its determination that articles written for a student newspaper were a mandatory component of the journalism class curriculum.<sup>256</sup>

However, despite the indicia of school control present in a student's transmittal of Internet messages, the control is only procedural in nature and does not affect the substance of the message. The actual transmitted message will not be scrutinized the way the student articles were in *Kuhlmeier*. A school has little practical control of a student hunched over a

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254. *Kuhlmeier*, 484 U.S. at 270.

255. *Tinker*, 393 U.S. at 508-09, 513.

256. *Kuhlmeier*, 484 U.S. at 267-70.

computer screen, typing out messages. This lack of control over the end product suggests that student Internet messages are more closely akin to voluntary public discourse.

Nevertheless, an apparent lack of control over the end product did not deter the Court in *Fraser*, where the school organized and sponsored a school assembly, and allowed students to give uncensored speeches.<sup>257</sup> Despite the apparent lack of control, the Court found the assembly speech to be analogous to classroom speech, justifying tighter restrictions on the speech.<sup>258</sup> Although seemingly at odds with *Kuhlmeier*, the two cases can be reconciled. In *Fraser*, although the content of the speeches was not pre-screened, school counselors were in attendance, listening and scrutinizing.<sup>259</sup> Post-speech control was swiftly exercised by the school in the form of a next-day suspension.<sup>260</sup> Thus, in both *Fraser* and *Kuhlmeier* the school ultimately exercised control over the end product.

In contrast to the student assembly speech in *Fraser* or the student article in *Kuhlmeier*, student transmittal of censored Internet messages must be regarded as an activity unsupervised by the school. That conclusion is self-evident—if the outgoing messages were supervised and scrutinized there would be no need for the filtering software. A school's use of filtering software to censor outgoing messages presumes that students will express themselves in a manner not dictated by the school. By its very nature, student expression over the Internet is open-ended, offering the student an opportunity to communicate with other "netizens"<sup>261</sup> about an infinite variety of topics. Like browsing, schools cannot claim to have any real curricular control over such a free-form, unsupervised activity. Thus, a student's transmittal of Internet messages is properly classified as a voluntary activity and not a part of mandatory school curriculum. As such, the rule of *Tinker*, rather than *Kuhlmeier*, is appropriate.

### 3. Application of the *Tinker* Standard

Because a student's transmittal of messages across the Internet is properly considered voluntary public discourse, *Tinker* is instructive to

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257. *Fraser*, 478 U.S. at 677–78. While it is true that the student in *Fraser* had his speech reviewed prior to delivering it, the Court did not give that fact any weight in its analysis. *Id.* at 678.

258. *Id.* at 685.

259. *Id.* at 678.

260. *Id.*

261. "Netizen" is the term used to denote users of the Internet. Knoll, *supra* note 5, at 280. The word itself is a combination of "Internet" and "citizen." *Word Alert*, CHI. TRIB., Feb. 11, 1996, at 4.

determine if a school's use of filtering software to censor outgoing student Internet messages violates a student's First Amendment right to free speech. In applying *Tinker*, however, the silent, computer-based, non-intrusive nature of Internet communication precludes a finding of disruption to school or student in the traditional sense. A student's transmittal of messages across the Internet involves neither oral nor demonstrative physical activity, the only direct disruption to student activities being the clattering of keyboards. Because student Internet messages are unaccompanied by the influences of voice intonations, posturing, and group assemblies, any disruptiveness in the message must come from its content alone.

The silent and sterile manner in which student Internet messages are delivered reduces, but does not eliminate, their potential for disruptiveness. Student Internet messages may still be disruptive if sufficiently inciteful or offensive. The use of "mailing lists" or "forwarding" for mass transmittal of e-mail can amplify the problem. Even non-offensive e-mail messages can infringe a student's right to be left alone, depending on their frequency. The *Tinker* standard therefore retains applicability in the context of student Internet messages, precluding a public school from using Internet filtering software to censor such messages except where that message is disruptive to school activities or the right of students to be left alone.

### *C. Filtering Overbreadth*

A school's use of Internet filtering software to block Web sites and newsgroups without individual review makes it possible for the school to both intentionally and unintentionally censor constitutionally protected material. First, as previously discussed, the use of filtering software to block inappropriate material makes an accurate assessment of a school's intent difficult.<sup>262</sup> Without this assessment, a school can intentionally censor protected material in an attempt to promote a "prescribed orthodoxy," yet escape detection. Second, the same lack of categorical specificity and individual review that masks a school's intent also makes it likely that constitutionally protected material will be inadvertently blocked along with inappropriate material. The blocking of protected and unprotected speech, whether intentional or not, suggests that public school use of Internet filtering software suffers from unconstitutional overbreadth.

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262. See *supra* Part V.A.3.

Typically, courts apply the overbreadth doctrine to assess the constitutionality of statutes affecting speech.<sup>263</sup> A statute is overbroad if, in addition to proscribing unprotected speech, it also proscribes constitutionally protected speech.<sup>264</sup> *Sable Communications of California, Inc. v. FCC*<sup>265</sup> is illustrative. In that case, Sable Communications offered callers pre-recorded "dial-a-porn" messages<sup>266</sup> in violation of the Communications Act of 1934, which had been amended in 1988 to impose a complete ban on indecent and obscene interstate commercial telephone messages.<sup>267</sup> Sable Communications sought injunctive relief against enforcement of the statute.<sup>268</sup> The Court concluded that the Act, as amended, was unconstitutional because it was broader than necessary to limit the access of minors to the messages.<sup>269</sup> In addition to properly limiting a minor's access to indecent material, it improperly limited an adult's constitutionally protected access to that same material.<sup>270</sup>

Overbreadth analysis has also been applied to non-statutory state action. For example, in the Court of Appeals decision in *Pico v. Board of Education*,<sup>271</sup> the Second Circuit criticized the lack of precision in the school board's explanation that the books were removed because they were "anti-Christian" or "anti-American."<sup>272</sup> The court stated, "[w]hatever may

263. Although this Comment focuses generally on the non-statutory actions of public schools, statutory mandates on the use of filtering software may not be far behind. For example, California State Assembly Bill No. 132, in committee as of March 31, 1997, originally read:

A school district that provides pupils with access to the Internet or an on-line service shall *purchase, install, and maintain a software program to control the access of pupils to Internet and on-line sites and to prohibit access to sites that contain or make reference to any of the following:* (a) [h]armful matter . . . ; (b) [s]exual acts; (c) [d]rugs or the drug culture; (d) [g]ambling; (e) [i]llegal activity; [and] (f) [a]lcoholic beverages and tobacco.

A.B. 132, 1997-98 Leg., Reg. Sess. (Cal. 1997) (as introduced, Jan. 15, 1997) (emphasis added). However, perhaps in recognition of potential constitutional problems, the Bill was amended on February 24, 1997, to read:

A school district that provides pupils with access to the Internet or an on-line service shall *adopt a policy regarding access by pupils to Internet and on-line sites that contain or make reference to any of the following:* (1) [h]armful matter . . . ; (2) [s]exual acts; (3) [d]rugs or the drug culture; (4) [g]ambling; (5) [i]llegal activity; [and] (6) [a]lcoholic beverages and tobacco.

A.B. 132, 1997-98 Leg., Reg. Sess. (Cal. 1997) (as amended, Feb. 24, 1997) (emphasis added).

264. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

265. 492 U.S. 115 (1989).

266. *Id.* at 117-18.

267. *Id.* at 118.

268. *Id.*

269. *Id.* at 131.

270. *Id.*

271. 638 F.2d 404 (2d Cir. 1980).

272. *Id.* at 416.



be said in favor of the good intentions of the school officials[,] . . . little may be said in support of their sensitivity or precision in dealing with the First Amendment issues in this case . . . . [T]he criteria for removal suggested by the evidence suffer from excessive generality and overbreadth."<sup>273</sup>

Public school use of Internet filtering software to block undesirable Web sites and newsgroups is similarly defective.<sup>274</sup> With respect to rating-based blocking, regardless of how carefully a school selects its filtering criteria, the categorical approach is far too imprecise to accurately block only those Web sites that can legitimately be classified as inappropriate.<sup>275</sup> For example, if a school specifies the blocking of all Web sites rated higher than "level three" offensive language, the filtering software will do so with no regard to the value of the speech contained within. Such filtering will undoubtedly sweep within its net constitutionally protected speech, rendering public school use of rating-based Internet filtering software unconstitutionally overbroad.<sup>276</sup>

In contrast, filtering software using predetermined blocking may theoretically survive an overbreadth analysis. Such software utilizes a database of blocked Web sites and newsgroups, selected in accordance with the software company's filtering philosophy after individual review.<sup>277</sup> If the filtering philosophy accurately distinguishes unprotected material from constitutionally protected material, proper adherence to this philosophy will not render the filtering overbroad. Unfortunately, reality differs from

273. *Id.*

274. In a discussion of possible governmental screening requirements as an alternative to the CDA, one commentator has also determined filtering software to be overbroad. Carlin Meyer, *Reclaiming Sex From the Pornographers: Cybersexual Possibilities*, 83 GEO. L.J. 1969, 1981-82 (1995).

275. The imprecision of a categorical approach was demonstrated when a school board in Bay County, Florida required that its teachers categorize its literary works as: (1) free of vulgar or sexually explicit material; (2) containing a "sprinkling" of such material; or (3) containing "a lot" of such material. *Id.* at 1988 n.104. Material placed in the third category included works such as *Hamlet*, *The Red Badge of Courage*, and *The Scarlet Letter*. *Id.*

276. A parallel can be drawn between the overbreadth of rating-based filtering and the overbreadth of the CDA's proscription of indecent Internet content. In *ACLU v. Reno*, Judges Sloviter, Buckwalter and Dalzell independently concluded that the CDA is overbroad. *ACLU v. Reno*, 929 F. Supp. 824, 855, 858, 867 n.2 (E.D. Pa. 1996), *prob. juris noted*, 117 S. Ct. 554 (1996). In that case, the award-winning Broadway play *Angels in America*, concerning homosexuality and AIDS, was given as an example of a work that might be considered appropriate for minors in some areas, yet would arguably be prohibited by the CDA. *Id.* at 853. By comparison, if the text of that play were available on the Internet, the overbreadth of rating-based filtering software might also result in its blocking.

277. See, e.g., N<sub>2</sub>H<sub>2</sub>, INC., N<sub>2</sub>H<sub>2</sub> CORPORATE FACT SHEET [hereinafter N<sub>2</sub>H<sub>2</sub> FACT SHEET] (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

theory. Schools do not have the funds to actively participate in the creation of a filtering philosophy or the evaluation of Internet material. Schools are likely to simply accept, without review, the filtering standards and product of the filtering software provider. If challenged on overbreadth grounds, this lack of involvement in the filtering process will preclude a school from making a convincing argument that its filtering blocks only constitutionally unprotected material.

Overbreadth analysis also applies to the other major function of filtering software: the censoring of outgoing student messages. When filtering software is used in this capacity, it blocks outgoing Internet messages containing inappropriate content such as addresses, phone numbers, or certain profane, offensive, or sexually explicit words.<sup>278</sup> As previously noted, the *Tinker* standard precludes a public school from using Internet filtering software to censor student Internet messages except where that message is disruptive to school activities or the right of students to be left alone.<sup>279</sup>

Unfortunately, this rule is of little practical use to schools. Filtering software with message blocking capability merely searches for prohibited words or phrases, and does not take into account the context of the word or phrase. Indeed, technological limitations preclude filtering software from making such complex determinations. The inability to consider the message as a whole makes the disruptiveness determination inherently inaccurate. As a result, constitutionally protected speech is likely to be censored along with inappropriate speech.<sup>280</sup> For example, the blocking of messages containing the presumed bestial image descriptors "woman," "horse," and "hot," might also block an e-mail review of the film *National Velvet*.<sup>281</sup> Furthermore, filtering software with message blocking capability does not distinguish between intra-school messages, which may be censored if disruptive, and messages sent to those outside the school, which may not be censored under any circumstances according to the *Tinker* standard. Thus, practically speaking, any use of filtering software to censor outgoing student messages will also censor protected speech, rendering the school's use of filtering software unconstitutionally overbroad.

The recurring message in this overbreadth analysis is that the blocking performed by Internet filtering software is too categorical, hands-off, and bright-line in its methods to distinguish between constitutionally

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278. Venditto, *supra* note 14, at 50.

279. See *supra* Part V.B.3.

280. Meyer, *supra* note 274, at 1984-85.

281. *Id.* at 1984.

protected and unprotected speech. Today's technology is incapable of creating software discriminating enough to make complex assessments like the overall literary merit of a individual work. Without a human mind to consider intangible factors, Internet filtering software can serve neither as a literary critic nor legal analyst. When schools attempt to use filtering software in this capacity, unconstitutional overbreadth is the likely result.

## VI. THE SOLUTION—DIGITAL CHASTITY BELTS

The elimination of student Internet access is an unacceptable solution for public schools faced with the specter of First Amendment violations stemming from their use of filtering software. Arguably, student Internet access is essential in keeping United States educational systems commensurate and competitive with those of other countries. However, schools cannot afford to provide unlimited Internet access, for there is little doubt that the Internet contains material inappropriate for students. The necessity of filtering is clear—the question is how?

Current Internet filtering software is designed to give parents a relatively simple means of limiting a child's access to undesirable material. Parents need not individually review and block Web sites and newsgroups to achieve peace of mind—at most, the selection of a few categories is required. However, the categorical simplicity of filtering software and its broad-brush ability to censor without review results in unconstitutional overbreadth when used by public schools. The very features that make Internet filtering software appealing to parents are fatal to schools. Public schools need a system more primitive and basic, involving the more cumbersome process of individual review. Such a filtering system would be narrowly tailored and closely fitted to shield a student from inappropriate activities, yet allow as much remaining freedom as possible—a kind of digital chastity belt.

### *A. A Public School Solution*

Public schools could survive the *Pico* analysis and overbreadth challenges by utilizing the predetermined blocking methodology to create a database of Web sites and newsgroups that have been personally reviewed and found to be "pervasively vulgar" or lacking "educational suitability."<sup>282</sup> Students would be blocked from accessing the material

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282. The plurality in *Pico* used these terms, but did not elaborate on them. Board of Educ. v. Pico, 457 U.S. 853, 871 (1982). It is beyond the scope of this Comment to suggest a constitutionally proper definition of these terms.

contained in the database. Because indiscriminate methods would not be employed, the school would be able to consider the material as a whole and articulate specific reasons for their selection of inappropriate material. Unfortunately, the requirement of individual review would place a tremendous burden on the school due to the growth and ever-changing nature of the Internet. In essence, a school would be forced to create its own filtering software. Given the limited resources of most individual public schools, such a solution is impractical.

However, the concept of a school-created database of personally reviewed and blocked material may be more economically feasible if the use of such a database is expanded district-wide. A school district is much more likely to have the financial resources necessary to maintain such a database for the benefit of all its schools. Indeed, it may be possible to have a state educational agency create and maintain such a database for use by all schools within the state.<sup>283</sup> As long as the database is limited to individually reviewed material found to be "pervasively vulgar" or lacking "educational suitability," such a state-wide filtering system should survive the *Pico* analysis.<sup>284</sup>

### B. A Cooperative Solution

Private filtering software companies utilizing the predetermined blocking methodology already incorporate many elements of the previously discussed public school solution.<sup>285</sup> Like the public school solution, such companies create databases of blocked sites, selected by individuals in accordance with a filtering philosophy.<sup>286</sup> These procedural similarities suggest a possible cooperative solution to the filtering problem.

As previously discussed, because the software provider, rather than the school, specifies the filtering philosophy and evaluates the material under consideration, the intent of a school cannot be accurately

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283. This Comment does not suggest that the proposed system of databases of blocked material maintained by larger school organizations would be a completely effective solution. The large volume of new and changing Internet Web sites and newsgroups makes it impossible to identify all inappropriate material. See Meyer, *supra* note 274, at 1983. At best, only a fraction of all inappropriate material could be identified and placed in the database—perhaps those that are the most popular or easiest to locate. Strategies for making efficient use of the review process would have to be formulated. While far from completely effective, the proposed solution is offered as one of possibly only a few constitutionally sound methodologies available to schools.

284. Perhaps a restriction on this state-wide filtering concept might exist if the Court decides to insert a "contemporary community standard" requirement similar to that used in *Miller v. California*, 413 U.S. 15, 37 (1973) into the analysis.

285. See *supra* Part VI.A.

286. Venditto, *supra* note 14, at 50.

determined.<sup>287</sup> Furthermore, because schools do not participate in the formulation of the filtering philosophy, they cannot persuasively argue that the filtering philosophy blocks only unprotected material. Imprecision in the software provider's application of the filtering philosophy to material under consideration may also contribute to overbreadth.<sup>288</sup>

However, cooperation between the school and software company may reduce or eliminate these problems. First, the school and software company could work together to create a detailed filtering philosophy that properly rejects pervasively vulgar or educationally unsuitable material. Thereafter, material blocked by the software company in accordance with this filtering philosophy would have the implicit approval of the school.<sup>289</sup> Second, the software company could make the database of blocked material available to the school for optional review and tailoring to satisfy contemporary community standards. Such a cooperative system between the school and software company may inject enough school control into the process to survive the intent analysis of *Pico* and clear the overbreadth hurdle.<sup>290</sup>

## VII. CONCLUSION

Internet filtering software, while a simple and effective tool for parents, is generally unsuitable for public schools in its current form. The hands-off, set-it-and-forget-it approach so appealing to parents is fatal to schools. With respect to the blocking of student access to inappropriate Internet material, the lack of school involvement thwarts the accurate determination of the school's intent, an assessment critical to the constitutionality of the restrictions placed on a student's right to receive information. With respect to the censoring of outgoing student Internet messages, filtering software is incapable of making complex

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287. See *supra* Part V.A.3.

288. See *supra* Part V.C.

289. For purposes of First Amendment applicability, the action of the software company would likely be considered "state action." See *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (holding that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state.").

290. N<sub>2</sub>H<sub>2</sub>, a private Internet filtering company, markets a filtering system called Bess that is representative of the type of filtering system which could be amenable to such a cooperative effort. N<sub>2</sub>H<sub>2</sub> FACT SHEET, *supra* note 277. Bess utilizes the predetermined blocking methodology and maintains a database of blocked material. *Id.* N<sub>2</sub>H<sub>2</sub> publishes a detailed filtering philosophy used by its employees to identify inappropriate material, and allows its database of blocked Web sites to be tailored by individual schools to meet contemporary community standards. *Id.*

determinations like the potential disruptiveness of a literary work, an assessment critical to the constitutionality of the restrictions placed on a student's freedom of expression. Finally, because filtering software uses such a broad-brush approach, constitutionally protected information and student expression will be censored along with inappropriate material, resulting in unconstitutional overbreadth.<sup>291</sup>

Increased school involvement in the filtering process is critical to the constitutionality of future Internet filtering systems. Well-defined, school-maintained or school-influenced filtering systems utilizing the predetermined blocking methodology show the most promise for future implementations. However, until such systems are developed, schools must be satisfied with "low-tech" methods of control: policies, education on Internet etiquette, and student self-control. Although such methods leave much to be desired, they do involve the human element necessary to properly assess expression on the fringes of First Amendment protection. Furthermore, such "low-tech" methods could never be eliminated, for technology is never a substitute for teaching responsible behavior.

Glenn Kubota\*

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291. The constitutional problems afflicting public school use of Internet filtering software may also extend to other government-approved instances of filtering. For example, public libraries are now beginning to offer Internet access. See, e.g., Internet Policy and Use Guidelines (Santa Monica Public Library) (on file with the *Loyola of Los Angeles Entertainment Law Journal*). The Santa Monica Public Library recognizes the problem of inappropriate Internet content, but maintains a policy of uncensored access. *Id.* However, some public libraries filter their Internet access, thereby implicating the First Amendment. See, e.g., Geeta Anand, *Library Internet Censoring Planned*, BOSTON GLOBE, Feb. 13, 1997, at B1. While a detailed analysis is beyond the scope of this Comment, a public library's use of filtering software will be even more problematic than a public school's use of filtering software, because (1) public libraries, maintained for voluntary activities, cannot claim the same inculcative discretion in the selection of material that is given to public schools, and (2) both children and adults may have to share the same filtered access, creating the overbreadth found in *Sable*. "[G]overnment may not 'reduce the adult population . . . to . . . only what is fit for children.'" *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989) (citing *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 73 (1983)).

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