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NLC MEMORANDUM OF LAW
ON LEGAL ISSUES INVOLVING
THE USE OF FILTERING SOFTWARE BY LIBRARIES, SCHOOLS, AND BUSINESSES

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NLC MEMORANDUM OF LAW
On Legal Issues Involving
USE OF FILTERING SOFTWARE BY LIBRARIES, SCHOOLS, AND BUSINESSES TO SCREEN ACQUISITION OF PORNOGRAPHIC MATERIAL FROM THE "INTERNET" IS BOTH LAWFUL AND CONSTITUTIONAL

The National Law Center for Children and Families (NLC) is a non-profit educational organization with attorneys who specialize in assisting and advising prosecutors and law enforcement agents in issues and cases involving the unlawful distribution of pornography and related speech cases. The legal staff has extensive experience in the prosecution of obscenity violations, child sexual abuse, and child pornography in state and federal courts. After reviewing the relevant state and federal statutory and case law, NLC submits that the use of filtering/screening software by public and private libraries and schools is both constitutional and lawful. This NLC Memorandum of Law is being made available to the public to provide the reasons and precedents supporting this position and discuss related issues, including:

There is an absolute and enforceable criminal prohibition under current federal laws against the transmission of obscene material and child pornography over the Internet, Usenet, World Wide Web, Bulletin Board Systems, chat rooms, email, and other online services. *Reno v. ACLU*, 521 U.S. __, 117 S. Ct. 2329 (June 26, 1997). (See Title 18 of the United States (Criminal) Code, Sections 1462 and 1465.) It is unlawful to transmit obscenity and child pornography by computer transmissions and services which use phones lines and common carriers, just as it is by mail or any other method of interstate or foreign commerce. Such illegal acts also constitute racketeering predicates under the RICO Act (18 U.S.C. § 1961, *et seq.*) State laws likewise make it illegal to bring into or distribute obscenity or child pornography within a state.

Obscenity and child pornography are not protected by the First Amendment and are not within the area of Constitutionally protected speech or press. The universal judgment that obscenity and child pornography should be restrained is also reflected in the international Treaty first adopted in 1911 and now administered by the United Nations on behalf of the United States and over 100 nations. *See* Agreement for the Suppression of the Circulation of Obscene Publications, 37 Stat. 1511, Treaties in Force 209 (U.S. Dept. of State). Cited in *Roth v. United States*, 354 U.S. 476, 495 n. 15 (1957).

The dissemination of sexually explicit material legally defined as "harmful to minors" involves the *safety of children* -- a matter of "surpassing" public importance. Most states have enacted "harmful to minors" legislation, patterned after the U.S. Supreme Court case of *Ginsberg v. New York*, 390 U.S. 629 (1968), which upheld controls on the dissemination of harmful matter to minors even though that matter may not be obscene for adults. In *Ginsberg*, the Supreme Court definitively held that protecting children from exposure to obscene and harmful material satisfies a compelling state interest. This was reaffirmed by the Court in *Reno v. ACLU, supra*, which recognized the legitimacy and importance of the goal of protecting children from harmful materials, even though it struck the indecency provisions of the Communications Decency Act. The Court in *Reno* did not deny the States their power to enforce such "harmful to minors" laws, just as the Court reaffirmed the enforcement of obscenity laws in "cyberspace."

The voluntary and discretionary use of filtering/screening software by libraries and schools, both public and private, as well as by private companies and institutions, to assist in preventing the acquisition of illegal and objectionable pornography from the various interactive computer services available through the Internet and other online databases and to restrict access to sexually explicit pornographic material on computer terminals, is lawful and fully consistent with the Constitution. It is constitutionally permissible and appropriate for an administration or governing board to employ a software filtering device for library or school computers that provide access to the Internet, Usenet, or other online services. Even though the use of such filters may or may not be required by law, libraries and schools have the right and the privilege of making voluntary use of software programs and services to avoid public, semi-public, and private property from being used to improperly acquire, select, or access material that is unsuitable, offensive, or otherwise undesirable. Just as a library or school has broad discretion in selecting books, magazines, and videos for their collections, avoiding an inadvertent or involuntary selection or acquisition of pornography by employing a software program or other screening service allows for the screening or filtering of that material which the library or school would not otherwise have chosen for its other collections. Such materials may include, but are not limited to, that which meets the definition of obscenity as expressed in *Miller v. California* and its progeny ("hard-core pornography"); child pornography, as defined in *New York v. Ferber*, and 18 U.S.C. §§ 2252, 2256 (minors engaged in sexually explicit conduct or lewd/lascivious genital exhibitions); material harmful to minors, as defined by the *"Millerized" Ginsberg* test ("soft-core pornography"). Such discretion may also include whatever other material a board, administrator, librarian, or teacher finds to be "educationally unsuitable" for patrons or minor children; or materials which could cause the use of property, facilities, or services to create a hostile work environment or constitute sexual harassment under applicable State or Federal law. Libraries, schools, and businesses making good faith use of such access restriction software to protect children or to avoid illegal materials for adults is protected from liability by the "Good Samaritan" immunity provided by the CDA. *See* 47 U.S.C. § 230 (c)(2), 110 Stat. 139 (1996). Libraries, in particular, should not, need not, and have no legal justification or obligation to provide minor children with access to hard-core or soft-core pornography or to child pornography and have no obligation or justification to obtain or provide adults with access to obscenity or child pornography.

In addition to the above considerations, whether exposure occurs in a public library, school, non-profit group, or a business, workplace pornography and computerized "cyberporn" is a source of potential legal liability for those vested with management or control over the respective work environments. The viewing of pornography in public places creates an offensive, uncomfortable, and humiliating environment for women co-workers (in addition to unlawfully exposing or displaying such "harmful" material to minors). Pornography in the workplace can constitute or be evidence of sexual harassment in violation of state and federal civil rights laws and create or contribute to a hostile environment in violation of Title VII's general prohibition against sexual discrimination in employment practices. *See* 42 U.S.C. § 2000e-2; 29 CFR § 1604.11; 18 U.S.C. § 242; 42 U.S.C. §§ 1981, 1982. *See* "Pornography, Equality, and a Discrimination-Free Workplace: A Comparative Perspective," 106 HARVARD LAW REVIEW pp. 1075-92 (1993); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991).

The proscription against obscenity and child pornography, the regulation of material harmful to minors, and the ban against sexual harassment, are grounded upon the legitimate governmental aim of controlling and regulating "*Public Morality*" (as opposed to "private morality"), involve "public health, safety, and morals," and are directed at "*public conduct*," conduct which affects the people as a whole. The use of filtering software to block or screen illegal and offensive material is a protective measure that can provide the best available defense against criminal liability and the only immunity from civil liability under present law. Regardless of the political debate between advocates on "filterware" and "censorware", use of a technically competent, advocacy neutral, filter program is good public policy, good self defense, and good for children and families. As the Supreme Court said in *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 59 (1973), in holding that obscenity traffic is unlawful even among consenting adults; "***Rights and interests 'other than those of the advocates are involved***'."

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USE OF FILTERING SOFTWARE BY LIBRARIES, SCHOOLS, AND BUSINESSES TO RESTRICT ACCESS TO INTERNET PORNOGRAPHY IS CONSTITUTIONAL

This NLC Memorandum of Law is part of an educational effort concerning law and the Internet, with a focus on the subjects of obscenity and child pornography law, regulation of material harmful to minors, and the Constitutional rights of the individual and the community. NLC welcomes comments and additions for inclusion in subsequent updates to reflect other issues and future developments. This Memorandum may be quoted or copied if NLC credit is given or maintained.

TABLE OF CONTENTS

NOTICE AND DISCLAIMER: The NLC's memorandum attempts to highlight and discuss certain prominent legal issues raised by the use of filtering software by libraries and schools to block access to sexually explicit pornography by computer (i.e. Usenet, World Wide Web, BBS, chat service, etc.). This review is provided as an educational service to the public and is not meant as personal or specific legal advice or analysis. Legal advice must be tailored to the specific facts and circumstances of each case and attorney-client guidance must be obtained from personal counsel.

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NLC MEMORANDUM OF LAW
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USE OF FILTERING SOFTWARE BY LIBRARIES, SCHOOLS, AND BUSINESSES TO BLOCK ACCESS TO SEXUALLY EXPLICIT MATERIAL ON THE INTERNET IS CONSTITUTIONAL

1. Introduction

"A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors must arm themselves with the power which knowledge gives." 9 *Writings of James Madison* 103 (G. Hunt ed.1910). Cited in *Board of Education v. Pico*, 457 U.S. 853, 868 (1982).

The National Law Center for Children and Families (NLC) is a non-profit educational organization which specializes in assisting and advising prosecutors and law enforcement agents in issues and cases involving the unlawful distribution of pornography and related speech cases. The legal staff has extensive experience in the prosecution of laws relating to obscenity, child pornography, materials harmful to minors, indecency, and child sexual abuse, in state and federal courts. After reviewing the relevant state and federal Constitutional, statutory, and case law, we submit that the use of filtering software by public libraries and schools is both constitutional and lawful. This NLC Memorandum of Law, which sets forth the reasons for this opinion and discusses related issues, is being made available to the public as part of NLC's educational function concerning law and the Internet.

DEDICATION

To American Youth: *May they grow up to teach their children that sexual exploitation, whether for commercial or non-commercial purposes, is an abomination which cannot be tolerated in Society.*

To Parents: *May Parents and others who have the primary responsibility for children's well- being receive the support of laws designed to aid them discharge that responsibility and to which they are entitled under the U.S. Constitution and the decisions of the U.S. Supreme Court.*

To the U.S. Constitution: *May the present generation preserve and protect this precious jewel of freedom, by recognizing their rights and responsibilities under our Constitutional form of government, while maintaining the intellectual honesty and courage to directly address the important social issues and problems involved in restricting sexual exploitation in our society.*

To the First Amendment: *May its banner never be wrongly used as an "intellectual straightjacket," to transform "freedom of thought" into "freedom from thought."*

2. Summary of Findings

FINDING 1. The Use of Filtering Software by Libraries, Schools, and Businesses Is Constitutional, Appropriate, and Necessary to Deal with Internet Pornography.

FINDING 2. The Use of Filtering Software Is the Best Defense Against the Illegal: Transmission of Obscenity and Child Pornography to Adults or Children under State and Federal Law, and Access by Minors to Materials Which Are "Harmful to Minors" under State Laws.

After a review of the relevant legal authority, it is the opinion of the NLC legal staff that a Public Library or School, and the Internet Service Providers who service them, in the context of offering Internet access to minors and adults, can legally use filtering software to exclude selection and restrict access to explicit sexual pornography which could be deemed:

> (1) "**Obscene**" (as that term is constitutionally defined by the U.S. Supreme Court for both Federal and State laws: *Miller v. California*, 413 U.S. 15, 24-25 (1973); *Smith v. United States*, 431 U.S. 291, 300-02, 309 (1977); *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987))
>
> **or**
>
> (2) "**Child Pornography**" (as that term is statutorily defined under Federal and State laws and upheld by case law: *New York v. Ferber*, 458 U.S. 747 (1982), *Osborne v. Ohio*, 495 U.S. 103 (1990); *United States v. X-Citement Video, Inc.*, __U.S.__, 115 S.Ct. 464 (1994))
>
> **or**,
>
> (3) "**Harmful to Minors**" (as that term is defined under State statutes and in case law: *Ginsberg v. New York*, 390 U.S. 629 (1968); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 n. 15 (1975); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 394-98 (1988) (on remand, following Va. Sup. Ct. construction, *see* 882 F.2d 125 (4th Cir. 1989))
>
> **or**
>
> (4) "**Sexual Harassment**" (as that term is defined under Federal and State civil rights laws).

Use of filtering software by libraries and schools, public or private, as well as by private companies and institutions, to block selection or access to sexually explicit, pornographic material from the Internet and other online services, is fully consistent with the Constitution. It is constitutionally permissible and appropriate for a governing board of a library, school, or business to require installation of a software filtering device on computers under their control that provide access to the Internet, in order to block public, semi-public, and private property from being used to improperly and unlawfully access material that meets the definition of obscenity as expressed in *Miller* and its progeny ("hard-core pornography"); child pornography, as defined in *Ferber* and 18 U.S.C. §§ 2252, 2251A, and 2256 (minors engaged in sexually explicit conduct or lewd/lascivious genital exhibitions); material harmful to minors, as defined under the *Ginsberg/Miller* test ("soft-core pornography"); and whatever other material which a school or library board or staff finds to be "educationally unsuitable" for minor school children; or where use of property, facilities, or services creates a hostile work environment or constitutes sexual harassment under applicable State or Federal law.

3. Pornography Definitions

A. Child Pornography: An unprotected visual depiction of a minor child (federal age is under 18) engaged in actual or simulated sexual conduct, including a lewd or lascivious exhibition of the genitals. *See New York v. Ferber*, 458 U.S. 747 (1982), *Osborne v. Ohio*, 495 U.S. 103 (1990), *U.S. v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994). *See also U.S. v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987), *cert. denied*, 484 U.S. 856 (1987), *U.S. v. Knox*, 32 F.3d 733 (3rd Cir. 1994), *cert. denied*, 115 S. Ct. 897 (1995). Note: In 1996, 18 U.S.C.§ 2252A was enacted and § 2256 was amended to include child pornography that consists of a visual depiction that is or appears to be of an actual minor engaging in sexually explicit conduct. *See Free Speech Coalition v. Reno*, No. C-97-0281 SC, *judgment for defendants*, Aug. 12, 1997, *unpublished*, 1997 WL 487758 (N.D. Cal 1997).

B. Obscenity (adult): Not protected by the First Amendment. The *Miller* Test applies to actual or simulated sexual materials and lewd genital exhibitions. *See Miller v. California*, 413 U.S. 15, at 24-25 (1973); *Smith v. United States*, 431 U.S. 291, at 300-02, 309 (1977); *Pope v. Illinois*, 481 U.S. 497, at 500-01 (1987), providing the three-prong constitutional criteria for federal and state laws and court adjudications:

(1) whether the average person, applying contemporary adult community standards, would find that the material, taken as a whole, appeals to a prurient interest in sex (*i.e.*, an erotic, lascivious, abnormal, unhealthy, degrading, shameful, or morbid interest in nudity, sex, or excretion); and
(2) whether the average person, applying contemporary adult community standards, would find that the work depicts or describes, in a patently offensive way, sexual conduct (*i.e.*, ultimate sex acts, normal or perverted, actual or simulated; masturbation; excretory functions; lewd exhibition of the genitals; or sadomasochistic sexual abuse); and
(3) whether a reasonable person would find that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

C. Material Harmful To Minors: Known as "variable obscenity" or the *Miller*ized *Ginsberg* Test. *See Ginsberg v. New York*, 390 U.S. 629 (1968); and *Miller, Smith, Pope, supra*. It is illegal to sell, exhibit, or display harmful (soft-core) pornography to minor children, even if the material is not obscene or illegal for adults. *See also Com. v. Am. Booksellers Assn*, 372 S.E.2d 618 (Va. 1988), *followed, American Booksellers Assn v. Com. of Va.*, 882 F.2d 125 (4th Cir. 1989), *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1249 (1997). Harmful to minors" means any written, visual, or audio matter of any kind that:

1) the average person, applying contemporary community standards, would find, taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion, and
(2) the average person, applying contemporary community standards, would find depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, ultimate sexual acts, normal or perverted, actual or simulated, sado-masochistic sexual acts or abuse, or lewd exhibitions of the genitals, pubic area, buttocks, or post-pubertal female breast, and
(3) a reasonable person would find, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

4. *The Social Issues Posed by the Instant and Widespread Availability of Illegal and Harmful Pornography Over the Internet and Online Services to be Addressed by Law Enforcement and the Community*

"The value of a society's goods always derives from the values of its people. A democratic society that is unwilling to bar Hustler on public newsstands or ban billboards from beautiful views cannot justly blame capitalism for these offenses. It is up to the political, judicial, and religious institutions of the society, not other businesses, to eliminate such opportunities for ugly profit. Capitalists perform a vital role in determining what goods and services are initially offered to the public. But the people and their government determine the limits of what can be marketed. Markets provide the ultimate democracy; democracy, though, defines the marketplace." George Gilder, *The Spirit of Enterprise* (Simon and Schuster: New York 1984), at page 91.

Massive amounts of illegal material that is not protected by the First Amendment (consisting of obscenity, child pornography, and material harmful to minors) are instantly available to persons of any age over the Internet, the Usenet, Bulletin Board Systems, and other Online services. Illegal material is easily transmitted and received via computer using various types of phone and telecommunication devices. Internet pornography can invade the library, school and business workplace, creating a hostile environment for women of any age and increasing the likelihood of sexual harassment.

These developments constitute a social problem of unknown magnitude, involving important matters in which there exists a compelling governmental interest, and raises the issue of the role of law enforcement and the community in (1) combating sexual exploitation, (2) the protection of children, and (3) preservation of the workplace.

The United States Supreme Court stated in *Reno v. American Civil Liberties Union,* 521 U.S. __, 117 S. Ct. 2329 (June 26, 1997), *Reno* Slip Opinion at 32, footnote 44:

> **"Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles. See 18 U.S.C. Sections 1464-1465 (criminalizing obscenity); Section 2251 (criminalizing child pornography)."** [Emphasis added.]

Prior to *Reno*, both federal and state law enforcement (perhaps waiting for guidance from the United States Supreme Court) were slow to react to illegal pornographic Internet businesses. After the *Reno* case, federal and state law enforcement officials now have a mandate to enforce federal and state laws against the cyberspace transmission of obscene materials**.**

President Clinton repeated after the *Reno* decision that the Administration would enforce the existing federal prohibitions against the cyberspace transmission of obscenity and child pornography over the Internet and the use of the Internet by pedophiles to entice children to engage in sexual activity (*see* White House press release of June 26, 1997). Federal law enforcement officials are empowered to

comprehensively act on this policy, but are unlikely to publicly disclose their strategies to fulfill the commitment made by the President.

Meanwhile, local communities remain inundated with volumes of illegal "cyberporn" material. Parents of minors justifiably fear the deleterious effect of pornography upon their children, as more public libraries and schools provide children with unsupervised and unrestricted Internet access.

The *Reno* Court reiterated its prior definitive holdings that protecting children from exposure to obscene and harmful material is a matter of "compelling" and "surpassing" state interest. As first enunciated in *Ginsberg v. New York, supra*, a majority of the Court adopted the legal position that societal availability of pornography erodes public standards of morality and this, in turn, affects all members of the community and in particular our children. The Court (at 642, footnote 10) referred with approval to the observations of psychiatrist Dr. Gaylin of the Columbia University Psychoanalytic Clinic, reporting on the views of psychiatrists in 77 YALE LAW JOURNAL at 592-593:

> "'Psychiatrists...made a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, *i.e.* disapproved. it is outside of parental standards and not a part of his identification process. To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval -- another potent influence on the developing ego.'"

This NLC Memorandum seeks to examine these concerns in a legal framework that provides voluntary remedies, protections, and solutions to private and public institutions. Pending a vigorous initiative by law enforcement aimed at abolishing illegal activity, the use of filtering software may provide the least restrictive, most effective, and best immediate defense to a local community against: (1) the illegal transmission to adults or children of both obscenity and child pornography (as those terms are defined by federal and state laws), and (2) the access by minors to pornographic materials which are "harmful to minors" (as defined by state law). It is the only method which protects minors and unconsenting adults from exposure to pornographic materials, while still providing access to the Internet. It is the only method which will eliminate pornography from the library, school and business workplace.

The legal positions expressed in this Memorandum are based upon a review of relevant state and federal constitutional, statutory, and case law. See, especially:

*Reno v. ACLU, et al. (*and *Reno v. ALA, et al.)*, 521 U.S. __, 117 S. Ct. 2329 (June 26, 1997) (an NLC attorney co-authored an *amicus* brief in this case on behalf of Members of Congress who sponsored the CDA);

Title 18 of the United States (Criminal) Code, Sections 1462-1465, 1961, *et seq.* 2251-2256, 2423, and related federal and state statutes;

United States v. Alpers, 338 U.S. 680 (1950) (Under 18 U.S.C. Section 1462, there is an absolute comprehensive ban on the traffic of obscenity using common carriers. The Court interpreted the ban on the use of a common carrier to transport obscene materials (18 U.S.C. § 1462), to cover the shipment of the then "new technology" of phonograph records, recognizing that the power and intent of Congress in adopting the federal law had been to legislate comprehensively to prohibit traffic in obscenity, and the section specifically was meant to include all subsequently developed technologies [noting that the specific amendment of that section to include "phonograph records" had been for the purposes of "clarification", to give undeniable notice to all what the law prohibits. The amendment was in a sense "redundant," because the statute already reached all new technologies, including "phonograph records.");

Roth v. United States (and *Alberts v. California)*, 354 U.S. 476 (1957) (From a review of history since the Constitution, the Court held that obscenity is not and never has been protected by the First Amendment.);

Smith v. California, 361 U.S. 147 (1959) (To be convicted for violating obscenity laws, a person must have *scienter* or knowledge/awareness of the general sexual nature of the pornography.);

Ginsberg v. New York, 390 U.S. 629 (1968) (holding that exhibition to minors of materials deemed harmful to minors may Constitutionally be proscribed);

Stanley v. Georgia, 394 U.S. 557, 567 (1969) (cited in *Miller*, 413 U.S. at 18-19, for the proposition that the Supreme Court has always recognized the States' legitimate interest in prohibiting public and commercial dissemination or exhibition of obscene materials, even though government can't criminalize its mere private possession in one's own home, especially when the mode of dissemination carries with it the danger of offending the sensibilities of unwilling recipients or of exposure to juveniles);

U.S. v. Thirty-Seven Photographs, 402 U.S. 363, 376-77 (1971) (holding that Stanley "does not extend to one who is seeking...to distribute obscene material to the public, nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution." and that Congress may declare it "contraband");

Miller v. California, 413 U.S. 15, 24-25 (1973) (announced the Constitutional test and definition for obscenity, further explained in *Smith v. United States* in 1977 and *Pope v. Illinois* in 1987 (discussed *infra*), that considers the three qualities of whether the material appeals to the prurient interest, depicts sexual conduct in a patently offensive way, and lacks serious literary, artistic, political, or scientific value. As the Court stated, at 26, "At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection." The case also categorically reaffirmed that obscene materials are not protected speech, recognized that the States have a legitimate interest in criminalizing the dissemination or exhibition of obscene materials and could use community standards as a measure of the views of the average person for the prurient and patent offensiveness findings of fact.);

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (holding that exhibition of obscene materials in a place of public accommodation is not protected by the First Amendment, even to "consenting adults", and may be subject to criminal prosecution and/or civil injunctions);

Young v. American Mini-Theatres, 427 U.S. 50 (1976) (upholding the regulation of sexually oriented businesses, using the zoning power of the States, and recognizing that legislatures "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems");

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (approved variable "indecency" standard for proper government regulation of broadcasting to protect minor children and unconsenting adults from exposure to patently offensive sex or nudity);

New York v. Ferber., 458 U.S. 747 (1982) (approving proscription against child pornography as absolute felony contraband, not protected by the First Amendment, and without the need for a finding that it is obscene under "*Miller* Test") (an NLC attorney filed an *amicus* brief in this case);

Board of Education v. Pico, 457 U.S. 868 (1982) (power and discretion of school board is broad in selection process, whereas it is limited for removal of materials where improper motivation is to suppress "ideas" rather than justified on basis of whether "educationally suitable" or "pervasively vulgar") (an NLC attorney filed an *amicus* brief in this case);

United States v. 12 200-ft. Reels, 413 U.S. 123 (1973) (importation case) and *United States v. Orito*, 413 U.S. 139 (1973)(interstate commerce case) (limited *Stanley v. Georgia*, 394 U.S. 557 (1969), in which the Court rejected the criminalization of mere possession of obscenity in the privacy of one's own home to the facts of that case. Regarding the dissemination of obscenity to consenting adults, the Court rejected "any correlative right to receive it [obscenity], transport it, or distribute it" since there is no "zone of constitutionally protected privacy [that] follows such material when it is moved outside the home area protected by *Stanley*." *Orito*, 413 U.S. at 141-42. The Court upheld the power of the federal government to completely ban the receipt, transport, and distribution of obscene material, even if for private use or not for commercial or pecuniary gain. *Orito* upheld 18 U.S.C. § 1462's ban on shipment of obscenity from San Francisco to Milwaukee via the airlines, a common carrier. There is no "First Amendment" right to transport obscene material. Section 1462 was not unconstitutionally overbroad on First Amendment grounds in proscribing "non-public" transportation as well as "public" transportation of obscene material. The use of common carriers is banned for the transportation of obscenity, even for private use.);

Heller v. New York, 413 U.S. 483 (1973) (prior adversary hearing on obscenity is not constitutionally required where material is seized by search warrant);

Hamling v. United States, 418 U.S. 87 (1974) (comparable materials are generally not relevant evidence since mere availability of similar materials proves only that others are violating the law. "Community standards" are determined in the community from which the jury pool is

drawn. No expert testimony is needed to establish or prove what constitutes obscenity because each juror is presumed by law to know what the views of the average or reasonable person are (in the same way that jurors in civil cases are held to know what constitutes "reasonable" conduct under the "reasonable person" standard for negligence, *etc.*);

Smith v. United States, 431 U.S. 291 (1977) (community standards are not a separate element of obscenity, but a reference point or measure for what is prurient and patently offensive);

Ward v. Illinois, 431 U.S. 767 (1977) (sado-masochistic sexual acts may be included within *Miller* "examples" of sexual conduct which can be found obscene);

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) (prurience may include unhealthy or abnormally lustful or degrading interests, as well as shameful or morbid interest in nudity, sex, or excretion) (an NLC attorney filed an *amicus* brief in this case);

Pope v. Illinois, 481 U.S. 497 (1986) (applies "reasonable person" standard as reference point for whether material lacks serious value, rather than community standard);

Fort Wayne Books v. Indiana, 489 U.S. 46 (1989). (RICO statutes can be used against enterprise engaging in pattern of obscenity violations) (an NLC attorney filed an *amicus* brief in this case);

Sable Communications v. FCC, 492 U.S. 115 (1989) (obscene Dial-a-Porn can be banned from phone system, 492 U.S. at 124-26, and indecent Dial-a-Porn can be regulated by credit cards, access codes, or subscription so as to avoid access by minors, 492 U.S. at 121-22, 128-31. The Court's approved statutory-FCC scheme was adopted by Congress in 1988-89, and upheld by the courts as a valid means to prohibit the distribution of indecency to minors by these "least restrictive means" that allow adult access while providing adequate safeguards to protect minors, resulting in the present, constitutionally valid version of 47 U.S.C. § 223(b) and (c). *See Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir. 1991); *Dial Information Services v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992).);

Alexander v. United States, 113 S. Ct. 2766 (1993) (asset forfeiture, following RICO-obscenity conviction, of entire enterprise holdings was permissible, including "communicative entities") (NLC filed an *amicus* brief in this case);

United States v. Thomas, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 74 (March 17, 1997) (U.S. Government's first federal obscenity case, under 18 U.S.C. § 1465, against the operators of a computer bulletin board service. Defendants advertised on the Internet for torture, excretory, rape, incest, bestiality, and child pornography, and sold computer GIF pictures from their BBS. The obscenity was transmitted from California to Tennessee via computer-phone modem. (In 1988, Section 1465 had been amended to include new technologies, such as computer &phone modem devices, by adding the words "uses a facility or means of interstate commerce" to the prohibitions on shipments of obscenity across state lines "for sale or distribution". See H.R. 3889, The Child Protection and Obscenity Enforcement Act of 1988,

100th Cong., 2d Sess. By that Act, Congress also criminalized the use of cable, subscription, and satellite TV to distribute obscenity, 18 U.S.C. Section 1468.) (NLC filed an *amicus* brief in this case);

United States v. Kimbrough, 69 F3d 723 (5th 1995) *cert. denied*, 116 S. Ct. 1547 (1996) (American citizen convicted under 18 U.S.C. § 2252 for smuggling/importing contraband child pornography by downloading sexually explicit GIF images of minors by means of computer modem from a foreign BBS and possessing such pictures on his computer in Texas);

Crawford, et al. v. Lungren, et al., 96 F.3d 380 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1249 (March 17, 1997) (upholding the constitutionality of California Penal Code Section 313.1(c)(2), the State's "newsrack" statute, which bans the sale of "harmful matter" in unsupervised sidewalk vending machines) (NLC filed an *amicus* brief in this case);

Playboy Entertainment Group, Inc. v. United States, 945 F. Supp. 772 (D. Del. 1996), *judgment affirmed*, 117 S. Ct. 1309 (March 24, 1997) (Supreme Court upheld refusal of three-judge District Court to enjoin the cable indecency regulations in the CDA, the purpose of which are to protect children from pornographic cable TV signal bleed);

42 U.S.C. § 2000e-2; 29 CFR § 1604.11 (1991), and 18 U.S.C. § 242; 42 U.S.C. § 1981, 1982 (sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, *see R.A.V. v. St. Paul*, 505 U.S. 377, 390; "*Pornography, Equality, and a Discrimination-Free Workplace: A Comparative Perspective*," 106 HARVARD LAW REVIEW (March 1993), n. 5, pp. 1075-1092 (expressing the view that pornography in the workplace should be prohibited under Title VII as creating a hostile environment constituting sexual harassment); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991) (pornography considered as evidence of a hostile working environment, offering an argument for eliminating pornography in the workplace in order to promote gender equality);

Various state statutes (*see*, for example, California Penal Code, Sections 311, *et seq*. (Obscene Matter) and Sections 313, *et seq*. (Harmful Matter), Sections 370-371 (Public Nuisance), and California Code of Civil Procedure, Sections 3479-3480 (Public Nuisance); *Busch v. Projection Room Theater*, 17 Cal.3d 42 (1976) (state case holding that state public nuisance statutes can be used to enjoin and abate exhibition of obscene materials to "consenting adults". Likewise, see chapters 2907 of the Ohio Revised Code on obscenity, child pornography, and material harmful to minors and chapter 3767 on nuisance abatement, as well as chapter 235 of the New York Penal Code and similar statutes of the other States

5. The Entities Involved: Libraries, Schools, and Businesses

"...I know it when I see it...." Justice Potter Stewart Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

Entities Offering Internet Access May Not Arbitrarily Refuse to Install Internet Filters Without Exposing Themselves to Criminal Responsibility and Civil Liability

In reviewing the legal issues involved in the choice, or refusal, to install filtering software, it is important to consider the compelling governmental interests involved, as well as the specific legal powers and authority of the entity providing Internet access, whether it be a public library, school, or business.

There are several compelling governmental interests involved:

(1) The principle that society has a "compelling interest" in protecting minors from sexually explicit material has been consistently recognized by the United States Supreme Court. For example, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), concluded that government may compel broadcasters to refrain from airing indecent sexual material when children are likely to be in the audience or when unconsenting adults may be viewers; and *Ginsberg v. New York*, 390 U.S. 629 (1968), ruled that states may criminalize disseminating harmful "soft-core" pornographic material to minors, even though the material may not be obscene for adults. In addition, the Supreme Court has uniformly ruled that governmental regulations may also act to facilitate parental control over children's access to sexually explicit material. *See Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1282 (1992); and *Sable Communications v. FCC*, 492 US 115 (1989).

(2) The eradication of workplace discrimination is more than simply a legitimate governmental interest, it is a compelling governmental interest. Eliminating discrimination against women is compelling government interest, as is removing barriers to economic advancement and political and social integration that historically hinder women. *See Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991).

Public library or school officials (whether operating at the elementary, secondary, post-secondary or graduate level) are charged with obeying and implementing of the regulatory authority of the state. Public officials may not exercise the discretion vested in them to make public decisions in a narrowly partisan or political manner, *Board of Education v. Pico*, 457 U.S. 853 (1982), or in a purely arbitrary manner without a basis rationally related to a legitimate governmental purpose. *See also American Council of the Blind v. Boorstin*, 644 F. Supp. 811 (D. D.C. 1986).

Businesses and official offices, public and private, are constrained by various federal and state laws, with respect to conduct in the workplace, and the duty to take affirmative steps to eradicate workplace discrimination.

Operational decisions and choices dealing with the formation of public policy in the expenditure of public funds and the discharge of official duties are important. As officials exercise their discretion regarding whether to install filtering software, they must act in the public interest and according to law. Entities offering Internet access may not arbitrarily refuse to install filtering software without exposing themselves to criminal law responsibility and civil liability. Filterware offers the best presently available defense and protection against avoiding the use of Internet computers for

downloading and accessing illegal child pornography, hard-core obscenity, and providing such materials or other harmful matter to juveniles. This is especially true in light of the general *scienter* required for liability under criminal laws and the specific civil immunity available under the CDA's "Good Samaritan" provisions to provide protection for "Blocking and Screening" of such materials.

The power and authority of entities such as libraries or schools to act are, for the most part, controlled by statute. In many states, the selection of books and materials have been delegated by the state legislature to a governing school or library board, as well as to administration and staff. Greater latitude to restrict access to a wider range of material may exist in a public library than it does in the school setting. A school must comply with a stricter governmental justification for restricting speech because of compulsory attendance and captive audience of students and the obligation to control curriculum in a way that provides First Amendment rights beyond those that must be accorded to library patrons or other members of the public. Schools, nevertheless, must comply with state and federal obscenity and child pornography laws and state "harmful to minors" laws. *See* CDA, "Effect on Other Laws", 47 U.S.C. § 230 (d) (1), (3), 110 Stat. 138-39. However, a School or Library official does not have unbridled discretion to make decisions with respect to matters entrusted to their care**.** The exercise of the discretion vested in them as public officials must be constrained by the public interest**,** and their actions must be grounded in some basis rationally related to a legitimate governmental purpose. In this regard, they and their students and patrons are protected against restrictions based on political or philosophical differences of opinion by the principles enunciated in *Board of Education v. Pico*, 457 U.S. 853, 859 (1982).

For libraries, there are internal procedures to handle complaints concerning particular items in the library collection, including ALA guidelines for dispute resolution. For schools, there are administrative procedures available to review the decisions of said governing boards or staff, with any final administrative action subject to court review. *See Presidents Council, Dist. 25 v. Community Sch. Bd. No. 25*, 457 F.2d 289 (2nd Cir. 1972). If any dispute arises over access to materials or sites blocked or restricted by a software program, such disputes could be resolved by staff and access given or denied, or resolved by administrative/court review.

Filtering Software: Removal versus Acquisition

Opponents of filtering software have argued that its utilization by a public library or school is the equivalent of "book removal" as opposed to "acquisition of a product" (they argue that to grant access to the Internet is to acquire access to the entire volume of material posted in cyberspace). Opponents argue that public library and school boards cannot "remove" a book (once acquired), where the stated motivation is concern over the sexually explicit nature of the book's contents. There is no case authority to support this conclusion. In asserting their position, opponents rely on the United States Supreme Court case of *Board of Education v. Pico,* 457 U.S. 868 (1982), but this reliance is misplaced because this case actually supports the power of a school or library board or staff to control selection or even to "remove" any item based upon its "content" (as "vulgar," "educationally unsuitable," "harmful to minors," or otherwise illegal or offensive, as long as the removal action is not primarily motivated by opposition to the item's "viewpoint."). In this regard, filterware can automatically prevent unwanted, unselected materials from entering the library or school in the first place, thus avoiding the question of its "removal" once there, since a computer only downloads from the Internet or online service that which it calls up from a remote server, because there is nothing on the local terminal until then.

Acquisition of new products is a matter entrusted to the discretion of public library and school boards. Public library and school boards have always been in the position of formulating a "selection" or "maintenance" policy with respect to the propriety of materials to be acquired or maintained by the public library or school. This discretion to choose and maintain materials for inclusion within a library or school collection is not unfettered and absolute, but is carefully constrained by the public interest, and should in good faith be exercised to further the express purpose for which the library was established and is maintained at public expense.

Faced with the duty of choosing from an almost infinite selection of materials, public library and school boards have always been faced with the task of acting responsibly. Actions by public officials cannot be exercised in a narrowly partisan or political manner, or in an arbitrary way, and cannot be based upon improper motivations. Neither should those of a librarian or school teacher. A board should give its reasons for acting, or not acting. The ostensible justifications for board action or inaction should not be simply pretexts for opposing "censorship" any more than for the suppression of free speech based on one's personal political persuasions. However, a distinction must be drawn between making reasonable "content" based decisions (which is permissible for libraries and schools) and acting so as to suppress a particular "viewpoint. In this regard, the *Pico* case provides proper guidance to school and library officials and its reasoning and the proscriptions of federal obscenity, child pornography, and state harmful to minors laws provide the proper mandate.

The selection process of software to be acquired or maintained by a library obviously involves a choice of the "content" of the material which would be screened. The process of choosing software, as it is for books or magazines to add or maintain in a library collection, is by definition "content based." A central question should always be whether public funds should be expended to acquire or maintain a certain type of material and should this material be included or excluded from the library's or school's collection?

In ordering the <u>removal</u> of material, some Supreme Court jurists have suggested that a school board (which has broad discretion in the management of school affairs) has the discretion, depending upon the circumstances, to base its actions upon such considerations as "educational value," "education philosophy," or the decision to remove items containing "vulgarities and sexual explicitness." *See Board of Education v. Pico, supra*. Also, *Pico* did not diminish the power over the "acquisition" of material (whether in person or by use of software), but involved concern over the removal of a book from a school library for improper motivational reasons. Nevertheless, its teachings are worthy of merit and provide a reasonable policy for schools as well as public libraries that is consistent with their educational and public mandates, avoids "censorship", sets a measured and identifiable standard, and would allow for a balancing of the interests of adult and juvenile patrons and students alike.

Filter software does not "remove" material from a library -- it is simply a tool for assisting in the selection or acquisition process and can allow restrictions on the type of material which can be brought into the library or school computer and accessed by children and/or adults. A good filter also assists parents exercise control over what their children can obtain, by protecting them in public from materials that no business could sell them, no theater could show them, no pedophile could seduce them with, and no library or school would select for them in their physical collections. This

extended family protection is part of the public interest to be served by publicly funded institutions and services and parents have a right to rely on obedience to law in the dealings that strangers have with their minor children. The use of filtering software is not about "condoning or removing" ideas. It is about protecting the unwilling recipient and the willing criminal from access to illegal and harmful pornographic materials and it effectively empowers parents and society to protect their children. Upon request by an adult, filter software can easily be disabled, allaying any concern that improper "censoring" will occur, or that the use of blocking devices are motivated by "political" or other improper personal "hostility" or "animus."

Use of filtering software by libraries and schools to block access to sexually explicit material on the Internet (and the imposition of an "Internet Use Policy" which incorporates the use of blocking devices) is fully consistent with the Constitution. Public Library and School Boards have been vested with the discretion to make "good faith" purchases of computer software, the object of which is to assist libraries and schools in their public mandate, and their duty under the law, to shield and protect unwilling recipients and children from exposure to pornographic images. In making computer use available to the public, there is no corresponding duty under the Constitution (and no "Constitutional right") to "free Internet access." There are adequate alternative avenues of Internet communication (other than the library or school) which are easily available to the general public. A public library or school is under no obligation to buy pornography for consenting adults or provide them with access to it with public funds and services. It is in the best interest of libraries and schools to maintain their freedom from being "forced" to do so and should not consent to provide free access to any pornography, much less illegal obscenity or child pornography or materials for minors which are harmful to them.

Moreover, absent extraordinary circumstances, the exercise by a library or school board of its discretion to purchase software and implement an "Internet Use Policy":

(1) does not "implicate" the Constitution,
(2) does not represent a "violation" of the Constitution or federal law, and
(3) should not be subject to federal judicial review under 42 U.S.C. § 1983.

Whatever decisions are made in the allocation of scarce governmental resources to school or library acquisitions and actions, they must be made responsibly, and with a focus on the legitimate governmental purposes involved. No school, library, or business official has a right to arbitrarily refuse to install filtering software without considering the compelling governmental interests involved in the protection of children, avoiding criminal violations, and preventing a hostile work environment or condoning sexual harassment.

Responsible offerings and access by ISPs and use of filterware by parents, schools, libraries, and companies can be a reasonable and effective means of regaining control over the truly valuable and educational promise of the Internet. This point is illustrated by a recent newspaper article, which described a situation arising in a Livermore, California, involving a 12-year old boy who gained access and downloaded hard-core "cyberporn" materials at the public library.

These are the reported facts: during a two-week stay with his uncle, the boy visited the library daily to download and print out a stack of pornography that, the paper commented, "would make (Hustler publisher) Larry Flynt proud." When asked how public equipment, property, and facilities could have been so misused, a deputy county librarian used the ALA argument that the library could not

use content-screening software because it would be "censorship" by a "public institution." The devastated mother of the boy was not surprised that the youths were incapable of avoiding the temptation and unable to police themselves. The news article points out that many children are more Internet-savvy than their parents, who have no idea what their children are doing on the Internet.

The boy's mother stated:

> "Any kid can access anything, and it's crazy to think that a kid looking for this material will stop just because (a warning page) states that minors can't access the material. No one is sitting there making sure they comply, and the kids are going to ignore the warning."

The reporter wrote:

> "During a recent visit to the Concord Library, it took this reporter a minute and a half to gain access to a pornographic site. After by-passing a page with the library's Internet policy and the library's home page, and using a search program using the words "sex" and "pictures," 525 links to related sites were available, with titles such as "Amateur Hardcore" and "Porn TV."

No satisfactory answer was provided to the anguished mother, who complained:

> "Nothing or no one can stop kids from accessing this stuff....Kids feel like they can do whatever they want. This certainly wasn't good for his self-esteem, and it certainly wasn't good on his outlook toward women..."

The library and school must remain a safe haven for learning and enjoyment, and should be an environment free from sexual harassment. This raises important psychological and physical safety issues, as well. With respect to school libraries, note that some State Constitutions have elevated a student or teachers right to "safe schools" to the Constitutional level. (*See*, for example, California State Constitution, Art.1, Section 28: "....(c) Right to Safe Schools. All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful.)

Public libraries, schools, and businesses have a duty to take reasonable steps to protect patrons (including the "unwilling" adult or a "willing" juvenile) and its employees from unwanted exposure to pornographic materials. In order to accomplish this, blocking technology should be used on all Internet computers, to avoid access to obscenity and child pornography and prevent sexual harassment, and used on terminals for minors that restricts access to both soft-core and hard-core pornography that would be either obscene or harmful to minors. Specific and knowing parental permission should be required for any minor to access "adult" materials that may be harmful to the minors.

With respect to minors and parents, there is a "fair notice" requirement involved. A blanket "waiver" form would not shield against criminal or civil liability if the type of material that the waiver is seeking relief from is not specified and the waiver is therefore not a "knowing" one or

does not anticipate the true nature of what the institution knows will be made available when the waiver is signed. Waivers seeking to avoid responsibility or liability or pass it to third persons such as parents would be against public policy in most instances, especially since the desire to have a waiver signed shows a knowledge of facts that a library or school is seeking to avoid liability for. Such avoidance of liability when such *scienter* is present would be to no avail and would actually increase the likelihood that "guilty knowledge" could be shown on the part of the person or institution seeking such a waiver.

Where filtering software is used, but will be removed for a minor upon parental request (and because of the liability issues or potential harm), a better policy may be to require the parent to remain with the child during the "unfiltered" computer session.

6. With Respect to the Social Issues Involved, What are the Rights and Responsibilities of Public Libraries and Schools?

> *"Entrepreneurs can gain great individual profit from exploiting the social and sexual constraints of the communitiy: selling violent shocks and pandering to prurient interest. The community as a whole pays in violent crime, illegitimacy, family disorder, and the breakdown of commercial disciplines, but Larry Flynt of Hustler and the producers of The Texas Chainsaw Massacre become millionaires."* George Gilder, *The Spirit of Enterprise* (Simon and Schuster: New York 1984), p. 75

The use of filtering software by a public library to restrict access to sexually explicit pornographic material on computer terminals, is lawful and fully consistent with the Constitution. It is constitutionally permissible and appropriate for the governing board of a public library to employ a software filtering device for library or school computers that provide access to the Internet and World Wide Web, and especially if subscription is made to the Usenet, chat rooms, email, and other commercial online services.

In reaching this conclusion that such actions are constitutionally permissible, consideration must be given to whether library and school computer systems are legal "forums" which could constitutionally be limited against being used to access pornography. There are several different kinds of forums recognized by the law in which the right to free speech may be exercised to varying degrees: a "public forum," a designated "limited" or "unlimited public forum," or a "non-public forum" (which includes all remaining public property). A public forum, which includes public parks and sidewalks, has either been traditionally open to the general public for expressive activity or has been expressly dedicated by a government for expressive activity. *See U.S. v. Kokinda*, 497 U.S. 720 (1990) (citing *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, at 45). A non-public forum, on the other hand, includes private property and restricted government property that has not been dedicated to First Amendment activity. *Id* at 46. A limited public forum is a form of non-public forum which has been opened to certain groups or topics, and is justified in discriminating based on subject or content in order to preserve the purpose of the limited forum. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510, 2516-17 (1995) (citing *Perry* at 46). For example, a public library or school is not a traditional "public forum," in that the legislation which authorizes both can and has restricted their use to certain "speakers" or to "speech of a certain content." A public library or school may restrict the use of its facilities, in terms of the

subject matter of the speech permitted. Even in a "limited public forum," discrimination may be made on the basis of "content," although "viewpoint" neutrality is required.

Public libraries and schools are specifically made subject to federal laws which prohibit the cyberspace distribution of obscene matter over "interactive computer services." As defined under federal law in the CDA, "The term interactive computer service means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, **including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions**." *See* 47 U.S.C. § 230 (e)(2), 110 Stat. 139. *See also* 18 U.S.C. §§ 1462 and 1465.

Libraries and schools making good faith use of selection and access restriction software to protect children or to avoid illegal materials for adults would be protected from civil liability by the "Good Samaritan" immunity, provided by federal law. See 47 U.S.C. Section 230(e)(2), 110 Stat. 133, at 139 (1996). Such filters could also provide a criminal law defense against the "knowing" transmission of illegal pornography inadvertently or deliberately accessed.

In the event that such library or school policy, or use without a policy, is challenged in a lawsuit brought pursuant to 42 U.S.C. § 1983 without the requisite showing which establishes proper federal jurisdiction, such lawsuit is groundless. The threat of such suits can fairly be characterized as an effort at legal extortion. In order to preserve the integrity of the legal system, and prevent the Civil Rights Act from being used for a wrongful collateral purpose, such groundless lawsuits are subject to dismissal, summary judgment, sanctions under Rule 11, and a possible countersuit for malicious prosecution.

The Public Library and the School Library as Limited Public Forums

A review of the nature of libraries and schools, and the purposes for them to provide Internet access, leads to the conclusion that a public library or school is not a public forum. This conclusion is amply supported by Supreme Court precedent. In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 267 (1988), the Supreme Court stated that schools do not possess all the attributes of streets, parks, and other traditional public forums that time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Likewise, a library's purpose is to make available books to lend, research tools, and supplemental educational opportunities to its citizens. It is "a place dedicated to quiet, to knowledge, and to beauty." *Brown v. Louisiana*, 383 U.S. 131, 142, (1966). A school board "possess[es] significant discretion to determine the content of their school libraries." *Pico*, 457 U.S. at 869. This is even more so for a public library. Thus, it is clear that it is not a place where a person is free to make noise, disseminate propaganda, or interfere with the pursuit of knowledge.

Library patrons have no right to demand the placement of books or that the operation of the library be changed to conform with his or her sense of propriety or order. The ALA and other private organizations opposing the use of filters as an "unconstitutional" limitation have not and cannot prove otherwise. In fact, were they to succeed, the ALA position would mean that anyone, at any time, would be permitted to interrupt the use of the library for its intended purposes with few consequences and demand that every patron's demand for specific material be honored. Moreover,

the failure to honor everyone's request would also mean that no one's requests could be fulfilled. In sum, the ALA position would lead to a self-defeating result.

Since a public library or school is not a fully public forum, the next step in the analysis requires consideration of whether a library meets the test of a designated public forum, and if so, whether of a limited or unlimited character. *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 678-79 (1992). Based on a proper understanding of what a library is and for what it is used, it would not be classified as a designated public forum. First, the library is not an open public place which has "immemorially been held in trust for the use of the public and time out of mind, been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id*. at 679 (quoting from *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515, 516 (1939)).

While many netizens like to treat the entire Internet as a giant public forum, the status of individual networks and online services and proprietary databases which are connected to or accessible from the system must independently be considered. Otherwise, private corporations, individuals, or private organizations would immediately lose control over their own systems the moment they were connected to the Internet, a position no reasonable person advocates. Additionally, a fully "public forum" is not created "whenever members of the public are permitted freely to visit a place owned or operated by the Government." *Greer v. Spock*, 424 U.S. 828 (1976). "The decision to create a public forum must instead be made by intentionally opening a nontraditional forum for public discourse." *Ibid*. (quoting from *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc*., 473 U.S. 788, 802 (1985)).

Thus, whatever may be the case regarding whether the public is allowed on the grounds of a library to engage in learning or the use of expressive materials, or whether members of the public sometimes gain access to a school or library for the purpose of listening to a lecture or participating in a governmental event such as a council or other governmental meeting, a library remains a place of learning where actual voices are discouraged to create silence conducive to reading and safe use of the library's materials. Moreover, a library does not become a public forum because it is sometimes used for public speeches or gatherings. A public forum is instead created through an express and intentional action. A review of the claims made by opponents of Internet filters indicates that no such action has been taken.

Finally, the Supreme Court "recognized that the location of property also has a bearing on this question because separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction." *International Society*, at 680 (citing *United States v. Grace*, 461 U.S. 171, 179-180 (1982)). In this case, a library's systems are not generally available to the general public. To borrow most books requires a library card indicating residence in the community served by the library, special collections require additional qualifications or reasons, the ability to show a particularized need, or even written permission which indicates that the materials will be safe in the care of the person requesting access. Likewise, time limits are imposed on use of the materials, from a few minutes or hours of computer time to several weeks for printed materials. Thus, activities within the library and use of its materials are regulated. Finally, patrons are not free to enter every area of the library nor to engage in every activity they might permissibly engage in on the sidewalk outside the library. Loud voices, disruptive behavior, or failure to conform to library rules are all violations which may result in the immediate exclusion

of the violator though such conduct as a loud or disruptive speech would, absent harm or threats to public safety, be permitted in the streets outside. Thus, the fact a library is intentionally sited so as to protect against the distractions of the outside world provides a further basis for the conclusion that a library is not a designated public forum, limited or otherwise.

Under forum analysis, the remaining category is "all remaining public property" or a non-public forum. "Limitations on expressive conduct on this last category of property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *International Society, supra* at 679. Thus, a library can exclude certain subjects from being brought into or accessed through its computer system for purposes in accord with its educational mission, so long as there is no viewpoint discrimination.

Furthermore, the limitations that may be placed on the public *by* a library are far broader than those that could be placed on a library *by* the government. A library does not "censor" or "restrain" materials, it selects and makes them available, or not, in its discretion. For a school, its discretion may not be exercised in a "narrowly partisan or political manner," *Pico* at 869, and a library should do likewise, though it is not bound by the same legal or constitutional restrictions as a school to do so. This principle was expanded upon and reinforced by the Supreme Court's opinion in *Rosenberger*, when the Court stated that, "[v]iewpoint discrimination is ... an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *115 S. Ct.* at 2516 (emphasis added). This principal has also been stated in *Lambs Chapel v. Center Moriches Union Free School District*, which said that, access to a nonpublic forum can be based on a subject matter or speaker identity so long as the distinctions drawn are reasonable and viewpoint neutral. 508 U.S. 384, 392 (1993) (*quoting Cornelius*, 473 U.S. at 806) (*citing Perry* at 49). *Rosenberger* also explained that the necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. 115 S. Ct. 2510, 2516.

Where a library or school has purchased and installed a computer system it has done so to make it available as a non-public forum to its authorized users for academic, research, and learning purposes. Library members or patrons may use it, but only by the rules and regulations set by the library staff or board. It doesn't "belong" to the members or the patrons, it is merely made available for its limited public use. To the extent that it is open to a limited number of additional uses, even these are clearly limited. For example, it is inconceivable that library patrons would be permitted to operate a commercial enterprise on the library Internet computer or to set time limits for themselves. Such limitations are logical and do not conflict with constitutional principles even though the same person would be permitted to use the library's computer to engage in research in support of his commercial or professional endeavors. Such limitation is not inconsistent or constitutionally prohibited. Nor should the ALA argue otherwise.

Therefore, the prerogative held by a library to block receipt or restrict access to hard core sexually explicit materials is within the boundaries it created when it established the limitations of the forum. A filter program, like any other computer software, can be seen as a device to assist the library to exercise its choice to exclude electronic forms of pornography that it would not select in magazine or video form, such as child pornography and hard-core pornographic obscenity.

The determination of whether such a restriction is constitutionally protected *for the library* depends on whether the rule is reasonable "in light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809. Additionally, the rule "need not be the most reasonable or the only reasonable limitation. Nor is there a requirement that [it] be narrowly tailored or that the government's interest be compelling." *Id*. at 808-09. In sum, the rule must comport with common sense. *See Kokinda*, 497 U.S. 734-35 (plurality).

As stated above, a state can operate a library and designate its computer system, including Internet access, for academic and research purposes. It is not a toy meant primarily to amuse and entertain, though clearly such a collateral result is permitted, and perhaps even expected as an incentive to encourage students to use it. Clearly, in light of the designated academic purpose reserved for a library's computer, a decision not to subscribe to the Usenet or chat rooms, or to limit access to certain newsgroups that are obviously not for any "legitimate research, teaching, professional service or other academic endeavors" is a commonsensical rule. The clearly labeled adult or child pornography groups of the "alt.sex" or "alt.binaries.pictures.erotica" Usenet hierarchies, or commercial hard-core pornography merchant websites of the "xxx.com" variety, are commonly known, notorious, easily found with any search engine, and easily excluded and/or restricted with a competent filter.

That a library practice or policy that would exclude or restrict such purely pornographic and illegal material, does not discriminate against a particular subject matter. Legitimate or even controversial sexual or disease information need not and should not be excluded or restricted, at least not because of its subject or viewpoint. A sexual organ in an AIDS prevention pamphlet or website is not obscene or harmful to minors just because it deals with sex or genitals. It is the combination of prurience and offensiveness to the average person and lack of reasonable agreement in serious value that distinguishes commercial pornography that is illegal and sexually graphic information that is protected for adults and minors.

A library patron who seeks access to pornography sites without a legitimate purpose cannot demand that the library buy or get his pornography for him, either in a public library or in school. He can fend for himself in the marketplace, to the extent permitted by law or tolerated by law enforcement. On the other had, a parent, researcher, news reporter, or student with a bona fide need for such access would merely need to obtain assistance from library staff to disable filters or otherwise access the necessary materials, a service which librarians are employed and able to provide. Thus, the viewpoint of the person seeking access is irrelevant. The court has observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, intentional viewpoint discrimination, which is presumably impermissible when directed against speech otherwise within the forum's limitations. *See Rosenberger* at 2517 (citing *Perry* at 46). In this case, the exclusion of hard core sexually explicit materials from Internet access on a library's computer system is not viewpoint discrimination, but content selection, resource management, compliance with the law, and the exercise of reasonable policy and practice rights of the library itself.

Finally, the Supreme Court's decision in *Lambs Chapel, supra*, is instructive of how a library may apply realistic rules. In that case, a school allowed groups to use the school facilities after hours for various social and civic purposes. However, it would not allow a religious group to use the school

to show a film about family issues and child rearing because it was deemed a religious film and the school did not allow the school to be used for religious purposes. This restriction was held to constitute viewpoint discrimination. The Court stated that: "... [the school] discriminates on the basis of viewpoint by permitting school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject from a religious standpoint. Denial on this basis is plainly invalid under the holding in *Cornelius* [citations omitted] ... that the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." 508 U.S. at 392. The topics of child-rearing and family issues were includible subjects for discussion in that forum. Therefore, the school could not exclude discussion of these topics merely because they were from a religious viewpoint. In the case of libraries, limiting the use of their computer systems so that certain commercial pornography websites or designated pornography newsgroups may not be accessed unless there is a legitimate purpose is constitutionally permissible.

No law or case holds that a library must or should provide hard-core pornography or child pornography to its patrons or that a library cannot place restrictions on a minor child's access to pornography that is "harmful" by virtue of its prurience, unsuitability, and lack of value for minors of that age group. Private interest groups may have the right to advocate for the legalization of all forms of adult and child pornography and for the repeal of all federal and state laws on the subject, but library boards and librarians have the right to reject their advice to carry all electronic pornography and make it available to minor children of any age. Not only do libraries have the right, they have the duty to comply with the law and serve the best interests of the public and their patrons. Making hard-core and child pornography available cannot be seriously argued to be a benefit to any juvenile, or to any man, or woman, or family. Using a filter software is protected by law and accomplishes the legal duties and social responsibility that all adults owe to each other and to all our children.

The exclusion of pornography would not prohibit discussions of sex or censorship, dissemination of viewpoints about pornography, or circulation of serious information about sex education or disease or sexual politics. Nor would accessing the otherwise restricted websites or newsgroups be precluded, since a librarian or teacher could disable the filter for a legitimate reason or purpose, regardless of the viewpoints expressed.

In conclusion, a library's or school's actions to limit access to illegal and unwanted pornography, except for legitimate academic or research purpose, is a commonsense approach to assure that their systems are used for the purposes they were purchased. A library and a school, as stewards of public resources, must take their own actions to assure that criminal violations do not occur with their knowledge or concurrence so that limited resources can be enjoyed by all patrons and students, young and old. Such decisions are those of the teachers and staff of a school and the staff of a library, and their boards, not the students or patrons or their parents. A parent should not face keeping a child from a public or school library in order to prevent access to illegal material that the child could not lawfully or practically get anywhere else. The library should not be the only "adult bookstore" open to children. The law protects the use of filterware by a public library, school, or university, and the libraries owe it to the public and their young patrons and students to do so.

School Cases discussing Related Issues

"[A]n unconstitutional motivation would not be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar....And again,...if it were demonstrated that the removal decision was based solely upon the 'educational suitability' of the books in question, then their removal would be 'perfectly permissible....In other words,...such motivations, if decisive of petitioners' actions, would not carry the danger of an official suppression of ideas, and thus would not violate respondents' First Amendment rights." Board of Education v. Pico, 457 U.S. 853 (1982)

1. *Lopez v. Tulare Joint Union High School District Board of Trustees*, 34 Cal. App. 4th 1302 (1995): a California Court of Appeal upheld a school district's right to require profanity to be deleted from a student-produced film on the ground of "educational suitability." "We hold that school authorities may restrain such expression because it violates the 'professional standards of English and journalism' provision of section 48907." The court also held that a later enacted statute, Section 48950 of the Education Code, "does not prohibit the continued suppression of the video."

2. *Mincone v. Nassau County Community College*, 923 F. Supp. 398 (E.D.N.Y. 1996): Plaintiff taxpayers and a student sought declaratory and injunctive relief, challenging a course that was being taught as part of the curriculum at defendant community college alleging violations of religious neutrality and free exercise guarantees of the New York Constitution. The court denied the school's motion to dismiss the complaint and held that, "the first amendment expression rights of public entities and employees are not absolute. [citations omitted.] The Court declines to dismiss the amended complaint based on considerations of academic freedom." *Id.* at 402.

3. *Right To Read Defense Committee of Chelsea, et al. v. School Committee of the City of Chelsea, et al.*, 454 F. Supp. 703 (D. Mass. 1978): (The Massachusetts Library Association was dismissed from the action for lack of standing.) The school committee removed an anthology of writings by adolescents entitled "Male and Female Under 18." The anthology was classified under the Library of Congress Classification System, and under the Dewey Decimal systems. *Id.* at 705, n. 7. The court ordered the anthology returned intact to the library, and made available to students having "written permission of parent or guardian." *Id.* at 705.

The court said that a school committee can determine what books will go into a library, and indeed, if there will be a library at all. But the question presented here is whether a school committee has the same degree of discretion to order a book removed from a library. "It would seem clear to us that books which become obsolete or irrelevant or where improperly selected initially, for whatever reason, can be removed by the same authority which was empowered to make the selection in the first place." (citing *Presidents Council District 25 v. Community School Board No. 25*, 457 F.2d 289 (2d Cir. 1972), *cert. denied*, 409 U.S. 998 (1972))

The court found no evidence that the book was "obsolete," nor "improperly selected," nor such "limitations of resources such as money and shelf space." At 711. The court held: "*City* is not a polite poem. Its language is tough, but not obscene." At 714. The court held: "*Tinker* points the way to the applicable standard to be applied here. When First Amendment values are implicated, the local officials removing the book must demonstrate some substantial and legitimate government interest. Tinker does not require the Committee to demonstrate that the book's presence in the

library was a threat to school discipline, but it does stand for the proposition that an interest comparable to school discipline must be at stake." At 713.

"The defendants acted because they felt *City*'s language and theme might have a damaging impact on the High School students. But the great weight of expert testimony presented at trial left a clear picture that *City* is a work of at least some value that would have no harmful effect on the students." At 713.

"In *Minarcini*, the court commented,

> Neither the State of Ohio nor the Strongsville School Board was under any federal constitutional compulsion to provide a library for the Strongsville High School to choose any particular books. Once having created such a privilege for the benefit of its students, however, neither body could place conditions on the use of the library which were related solely to the social or political tastes of school board members." At 713.

4. *Salvail v. Nashua Bd. of Education*, 469 F. Supp. 1269 (D. N.H. 1979): Students, teachers, and taxpayers challenged the decision of the school board in removing *MS Magazine* from the high school library. (Plaintiff taxpayers were dismissed for lack of standing.) The court found that board did not follow the guidelines provided by the New Hampshire Board of Education for handling a complaint of the public regarding certain material and the procedure for reconsideration of the original selection of the contested material. "The Court finds that despite protestations contained in the testimony of these parties, it is the 'political' content of MS magazine more than its sexual overtones that led to its arbitrary displacement." At 1274. The court found that the magazine was "not obscene within any recognized legal definition." At 1273.

The court considered the holding in *Presidents Council* in light of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and held:

> "Thus in justifying restrictions on students' right to receive information, school authorities must bear the burden of showing a substantial government interest to be served by the restriction. Admittedly, the burden is less stringent than when such restrictions arise in a truly public form, since students' first amendment rights must be limited to some extent due to the special administrative needs of the school environment." At 1274.

5. *Pratt v. Ind. Sch. Dist. No. 831, Forest Lake*, 670 F.2d 771 (8th Cir. 1982): Junior and senior high school students sought to compel the school district to reinstate the film version of a short story which had been removed from the school curriculum. The short story remained available in the library in printed form and in a photographic recording.

> "The Board--not this Court--has the authority to determine that a literary or artistic work's violent content makes it inappropriate for the District's curriculum. But after carefully reviewing the record, we must agree with the district court that the board eliminated the films not because they contain scenes of violence or because they distort the short story, but rather it so acted because the majority of the board agreed with

those citizens who considered the films' ideological and religious themes to be offensive."

6. *Bicknell v. Vergennes Union High School Board of Directors*, 475 F. Supp. 615 (D. Vt. 1979): An action brought against the school board's right to bar certain books from the high school library. The court considered and rejected the holdings and analysis of *Minarcini* and *Right To Read* because they "have not followed and have sought to distinguish the Second Circuit' decision in *President's Council*." The court emphasized that *Presidents Council* had considered and rejected book "tenure." "[T]his concept of a book acquiring tenure by shelving is indeed novel and insupportable under any theory of constitutional law we can discover." [Citation omitted.] The court also rejected plaintiff's assertion "that the underlying premises of *Presidents Council* have been altered by the Supreme Court's recent decisions on the first amendment right to receive information. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*". . . 'Plaintiffs do not contend, nor could they reasonably argue, that the publishers of certain works have a constitutionally protected right to have their works purchased by the Vergennes Union High School Library or retained on the open shelves after purchase. The student's right to review those works through the school library, expressed as the constitutional right to receive information, is not broader."

The court also rejected the students' final claim that the acquisition and removal policies "violate rights guaranteed them by the district's Library/Media Policy 'to freely exercise their right to read and to free access to library materials,' and thus violate the due process clause of the fourteenth amendment." The court ruled that "[t]he protections of the due process clause extend only to bona fide liberty or property interests created by federal or state law.". . . "As stated above, the Policy repeatedly reasserts the primacy of the Board itself in the operation of the school library." . . . "If we were to impute such legal content to the high-minded phrases of the 'library bill of rights,' those general phrases would effectively nullify the specific procedures outline in the same promulgation. Well-developed rules of statutory construction, as well as common sense, require us to read as a whole the Library/Media Policy and its procedures. Viewing it in its entirety, the court does not find that it creates any 'right to read' or 'right of access' to library books apart from those rights secured by statute and constitutional law. The student plaintiffs' due process claim must therefore fail." At 621. Finally, the court rejected the librarians' claim that their constitutional rights and their rights under the Library/Media Policy had been violated. "Nor do we believe that school librarians have an independent first amendment right to control the collection of the school library under the rubric of academic freedom. The selection of works for the library is a curricular rather than a methodological matter..." "Furthermore, the rights of professional personnel under that Policy 'to freely select' materials for the collection are explicitly limited by the phrase 'in accordance with Board policy." At 622.

Impact of Board of Education v. Pico, 457 U.S. 853 (1982)

Opponents of using filtering software in schools or public libraries frequently cite the United States Supreme Court case of *Board of Education, Island Trees Union Free School District No. 26, et al. v. Pico, et al.*, 457 U.S. 853 (1982), as authority supporting their position. Their reliance on *Pico* is misplaced. The *Pico* decision, as well as the CDA's "Good Samaritan" immunity provision, specifically support the use of filtering software by schools and school libraries, as they do for public libraries.

In discussing *Pico,* it should be noted from the beginning, that the issue of installation of software filters on school or library computers, to block access to educationally unsuitable, illegal, and unwanted pornographic sites, is not the same as removing books from a library shelf. Blocking or screening sites from online services and systems does not remove them; they are still available to that and every other computer. Software companies provide necessary information so that the software can be disengaged very easily and quickly to enable access to blocked sites. Access to blocked sites on a school or library computer could be granted based upon credible proof that access is for a legitimate scientific or educational purpose or, in the case of minor children, with informed and written consent from a parent or legal guardian. In addition, sites that are blocked on school or library computers would still be available to individuals through their own personal computer or other computers to which they may have access.

The Court in *Pico* reviewed a ruling by a U.S. District Court in which the lower court had granted summary judgment in favor of the Island Trees School District Board members. Plaintiff Pico and other students alleged that the Board's order to remove certain books from the high school and junior high school libraries was based upon their improper motivation, *i.e.*, that "particular passages in the books offended their social, political and moral tastes and not because the books, taken as a whole, were lacking in educational value." 457 U.S. at 859. The Court of Appeals had reversed the decision and remanded the case to the District Court for a trial on the merits to determine whether the petitioners had denied respondents their rights under the First Amendment. In a plurality opinion, the Supreme Court affirmed the Court of Appeals' decision because the Court agreed that there were genuine issues of fact that made summary judgment an inappropriate disposition of the case. The decision was not a final ruling on the merits, but does provide important guidelines for determining when books may be removed because they lack "educational suitability" or are "pervasively vulgar" though not because of the political or philosophical viewpoints contained in the materials.

Pico is limited to situations where, based upon an improper motivation which is the deciding factor, a school board's discretion to remove books from a school library may violate students' constitutional rights to acquire information that is protected by the First Amendment. "Thus, whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution."

Pico does not allow or require judicial review of the motivation of a school board or a library board decision to remove or limit access to material that is not constitutionally protected (*i.e.* obscene or harmful to minors or child pornography) and it specifically exempted discretionary authority of the schools and school librarians to make choices on the selection of materials. *Pico* dealt only with an arguably improper decision to remove books already selected for student use. Moreover, *Pico* is mandated only on the school setting, where students are legally required to be a captive audience and therefore entitled to certain rights and privileges under the First Amendment. A public library is not required to provide any materials to the public and has no captive audience entitled to demand any particular selection, type, or access to materials. In a school board's removal decision, motivation would not be a relevant factor, even if it could be proved that the officials harbored some

personal animus toward the unprotected material. Furthermore, the Court specifically acknowledged that when even constitutionally protected material is removed from a school library solely because a school board finds the material to be "pervasively vulgar" or lacking "educational suitability," such an action would be constitutionally permissible and would not violate First Amendment rights:

> "[R]espondents implicitly concede that an unconstitutional motivation would not be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar. Tr. of Oral Arg. 36. And again, respondents concede that if it were demonstrated that the removal decision was based solely upon the 'educational suitability' of the books in question, then their removal would be 'perfectly permissible.' Id., at 53. In other words, in respondents' view such motivations, if decisive of petitioners' actions, would not carry the danger of an official suppression of ideas, and thus would not violate respondents' First Amendment rights."

It is without dispute that no one has a First Amendment right to distribute or acquire obscene material, *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973), *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), or child pornography, *New York v. Ferber*, 458 U.S. 747 (1982), and *Osborne v. Ohio*, 495 U.S. 103 (1990). Additionally, minor children have no First Amendment right to acquire pornography defined as "material harmful to minors," and no one (except a parent) has any right to provide such harmful matter to them. *Ginsberg v. New York*, 390 U.S. 629 (1968). In light of these Supreme Court decisions, including the most recent decision in *Reno v. ACLU*, *supra*, *Pico* would in no way hinder the right and the duty of a school or library board to refuse to acquire material, or to remove material, or to deny access to material in a school or library, including computers with access to the Internet, if the material has no First Amendment protection. Indeed, under *Pico*, it is constitutionally valid and appropriate for a school or library board to refuse to acquire material, or to remove material, or deny access to material in a school or library that is illegal, *e.g.*, obscenity, child pornography, or material harmful to minors accessible by minors, or that which constitutes sexual harassment. This would also include material that is otherwise constitutionally protected which the board determines to be "vulgar" or lacking "educational suitability." Public libraries are even more free to install computer software to govern what materials are brought into or made available within the library and they can set policies for the use of their computers by defaulting a screening filter for minors and blocking all child pornography and hard-core obscenity to adults as well as children, just as libraries can and do put restrictions on the use of reference books, rare and valuable collections, and other sensitive or dangerous materials to which the public is not and need not be given unrestricted access.

The *Pico* Court did not hold as a matter of law or fact that Board members' motives or conduct regarding removal of the books was unconstitutional, nor did it hold that their appointment of a Book Review Committee consisting of four Island Trees parents and four members of the Island Trees schools staff to read the listed books and to recommend to the Board whether the books should be retained, taking into account the books' "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level," was unconstitutional. The plurality opinion expressed concern that the school board had not followed the established policy to handle

such problems, and after appointing the Book Review Committee, the board had failed to follow its advice without giving an explanation.

The Supreme Court's decision reaffirmed that "courts should not 'intervene in the resolution of conflicts which arise in the daily operation of school systems' unless 'basic constitutional values' are 'directly and sharply implicate[d]' in those conflicts. *Epperson v. Arkansas*, 393 U.S. at 104." The plurality opinion made clear that it was concerned with "the First Amendment rights of students [that] may be directly and sharply implicated by the removal of books from the shelves of a school library." It can't be forgotten during a consideration of Internet and software policies or practices, that public library patrons enjoy no such enforceable rights. As the *Pico* stated, 457 U.S. at 862:

> "Our adjudication of the present case thus does not intrude into the classroom, or into the compulsory courses taught there. Furthermore, even as to library books, the action before us does not involve the acquisition of books. Respondents have not sought to compel their school Board to add to the school library shelves any books that students desire to read. Rather, the only action challenged in this case is the removal from school libraries of books originally placed there by the school authorities, or without objection from them."

7. With Respect to the Social Problem Involved, What are the Rights and Responsibilities of A Business?

> *"The eradication of workplace discrimination is more than simply a legitimate governmental interest, it is a compelling governmental interest. See Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987). . . (eliminating discrimination against women is compelling government interest. Roberts v. United States Jaycees, 468 U.S. 609 (1984) (compelling governmental interest lies in removing barriers to economic advancement and political and social integration that have historically plagued women)."* Quoted in *Robinson v. Jacksonville Shipyards, Inc*., 760 F. Supp. 1486, at 1535 (M.D. Fla. 1991)

There is a compelling governmental interest in the eradication of workplace discrimination, in the elimination of discrimination against women, and in the removal of barriers to economic advancement and political and social integration that hinder equality for women. *See Robinson v. Jacksonville Shipyards, Inc*., 760 F. Supp. 1486, 1535 (M.D. Fla. 1991), quoting *Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537 (1987), and *Roberts v. United States Jaycees,* 468 U.S. 609 (1984).

Five elements comprise a claim of sexual discrimination based on the existence of a hostile work environment under federal law:

(1) Plaintiff belongs to a protected category. Discrimination based upon gender is prohibited.

(2) Plaintiff was subject to unwelcome sexual harassment. The threshhold for determining this factor is "that the employee did not solicit or incite it, and ... that the employee regarded the conduct as undesirable or offensive."

(3) The harassment complained of was based upon sex. Plaintiff must show that but for the fact of her sex, she would not have been the object of harassment. Sexual behavior directed at women will raise the inference that the harassment is based on their sex. Another category of actionable conduct is behavior that is not directed at a particular individual or group of individuals, but is disproportionately more offensive or demeaning to one sex. This latter category describes behavior that creates a barrier to the progress of women in the workplace because it conveys the message that they do not belong, that they are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment. "That Title VII outlaws such conduct is beyond peradventure." *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 249-51, 109 S. Ct. at 1797-99, 104 L.Ed.2d 2068 (O'Connor, J., concurring in judgment)(use of gender stereotypes to evaluate female employees violates Title VII); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L.Ed.2d 158 (1971) (Title VII was passed to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of impermissible classification.")

(4) The harassment complained of affected a term, condition, or privilege of employment. This element tests the impact of the harassing behavior on the employee and the work environment, separating the mere utterance of a discriminatory epithet which engenders offensive feelings in an employee, and the petty slights suffered by the hypersensitive, from actionable conduct under Title VII. To affect a "term, condition, or privilege" of employment within the meaning of Title VII, the harassment "must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *Vinson*, 477 U.S. at 67, 106 S. Ct. at 2405 (quoting *Henson*, 682 F.2d at 904). This test may be satisfied by a showing that the sexual harassment was sufficiently severe or persistent to affect seriously the victim's psychological well being, and is a question to be determined with regard to the totality of the circumstances. This element must be tested both subjectively and objectively.

(5) *Respondeat superior*, that is, defendants knew or should have known of the harassment and failed to take prompt, effective remedial action. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66-69, 106 S. Ct. 2399, 2405-07, 91 L.Ed.2d 49 (1986); *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991).

Sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, 42 U.S.C. 2000e-2; 29 CFR 1604.11 (1991). *See also* 18 U.S.C. 242; 42 U.S.C. 1981, 1982. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy. *R.A.V. v. St. Paul*, 505 U.S. 377, 390. Commentators have expressed the opinion that pornography in the workplace should be prohibited under Title VII as creating a hostile environment constituting sexual harassment. *See*, for example, "*Pornography, Equality, and a Discrimination-Free Workplace: A Comparative Perspective*," 106 *HARVARD LAW REVIEW* (March 1993), n. 5, pp. 1075-1092.

Court cases have considered pornography as evidence or the subject matter of a hostile working environment, and offer an argument for eliminating pornography in the workplace in order to

promote gender equality. *See Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991)(federal district court found the plaintiff was reasonable to think herself harassed in a workplace plastered with 'sexually frank" images of women. The images included women being abused. One poster was of a frontal view of a nude woman and the imprinted words "USDA choice."). *See also Barbetta v. Chemlawn Services Corp.*, 669 F. Supp. 569, 573 (W.D.N.Y. 1987) (court stated that the proliferation of pornography and demeaning comments, if sufficiently continuous and pervasive "may be found to create an atmosphere in which women are viewed as men's sexual playthings rather than as their equal co-workers."); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3rd Cir. 1990) ("The posting of pornographic pictures in common areas and in the plaintiff's work spaces...may serve as evidence of a hostile environment."); *Waltman v. International Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989) ("Evidence of ongoing sexual graffiti on the walls, and in the elevator and bathroom of the {company} could sustain a hostile environment claim."); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 905 (1st Cir. 1988) (Playboy centerfolds displayed in common areas); *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989) (obscene comic books/cartoons); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316 (8th Cir. 1994) (court found a sufficient connection between company and a pornographic video at party after sales celebration/golf tournament to be probative of a hostile environment).

It should be remembered that with respect to the application of federal criminal laws which prohibit the use of a computer in the commission of a crime involving obscenity or child pornography, a business making good faith use of access restriction software to protect itself and its employees or to avoid illegal or offensive materials would find perhaps their best defense in the lack of "knowing" conduct and would have protection from civil liability by the "Good Samaritan" immunity granted by federal law for the use of such blocking and screening software. *See* 47 U.S.C. § 230 (c)(2), 110 Stat. 139 (1996).

8. The Legal Issue Involved: Federal and State Laws Ban the Use of Cyberspace to Accomplish Unlawful Sexual Exploitation

> *"All ideas having even the slightest redeeming importance -- unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion -- have the full protection of the guarantees, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." Roth v. U.S.*, 354 U.S. 476, at 484-85 (1957)

Federal and State Laws Prohibit the Use of Cyberspace to Disseminate Obscenity and Child Pornography among Adults or Minors, and Material to Minors that is Harmful to Minors

Obscenity, child pornography, and "material harmful to minors" (as those terms have been defined by U.S. Supreme Court case law) are not protected by the First Amendment and are not within the area of Constitutionally protected speech or press. This applies to all mediums of expression, whether spoken or exhibited in public places, sold to consenting adults, shown to minors, and includes print, video, audio, broadcast, and electronic means.

As noted by the Court in *Roth*, 354 U.S. at 495 n. 15, the judgment that obscenity [and now child pornography] should be restrained is *universal*, and is reflected in the international Treaty adopted first in 1911 and now administered by the United Nations on behalf of the United States and over 100 nations. *See* Agreement for the Suppression of the Circulation of Obscene Publications, 37 Stat. 1511, Treaties in Force 209 (U.S. Dept. State).

The Supreme Court has held that there is an absolute and enforceable criminal prohibition under current federal laws against the transmission of obscene material and child pornography over the Internet, World Wide Web, Usenet, Bulletin Board Systems, email, chat rooms, *etc. Reno v. ACLU*, 117 S. Ct. 2329 (1997). Federal law bans the cyberspace distribution of obscene matter and child pornography under a number of statutes and similar laws of the states do likewise, all of which are enforceable in the wake of *Reno* and the CDA, as are the state "harmful to minors" statutes.

The Legal Ban against Obscenity

> *"The lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire,* 315 U.S. 568, 172 (1942).

Federal Law

There is an absolute and enforceable criminal prohibition under current federal laws (18 U.S.C.§§ 1462, 1465, *et al.*) against the knowing transmission of obscene material over the Internet, World Wide Web, Usenet, BBS, *etc. Reno v. ACLU*, 117 S. Ct. 2329 (1997). The test for obscenity that controls in all federal and state courts is set forth in *Miller, Smith,* and *Pope, supra,* and was reaffirmed by the *Reno* majority (*see* Slip Opinion at 26):

The "*Miller-Smith-Pope* Test" is applicable to "hard-core pornography" under both State and Federal obscenity laws. The Supreme Court has used its authority to construe federal statutes, *see U.S. v. 37 Photographs*, 402 U.S. 363 (1971), to adopt this test and the "*Miller* Examples" of "hard-core sexual conduct" that are within the scope of the test. The Court's "examples" include patently offensive representations or descriptions of (1) ultimate sexual acts, normal or perverted, actual or simulated, (2) masturbation, (3) excretory functions, (4) lewd exhibition of the genitals, and (5) sado-masochistic sexual abuse. The Court also held that Congress and the states could define other specific "hard-core" conduct. *See Miller v. California*, 413 U.S. at 24-25; *Ward v. Illinois*, 431 U.S. 767 (1977), *U.S. v. 12 200-Ft. Reels*, 413 U.S. 123, 130, n. 7 (1973); and *Hamling v. U.S.*, 418 U.S. 87, 114 (1974).

Congress has specifically included libraries, schools, and businesses within the proscriptions of Federal laws which criminalize the computer distribution of obscene matter and child pornography. As defined in the CDA, 47 U.S.C. § 230(e)(2), "interactive computer service" includes "any information service system or access software provider that provides or enables computer access by multiple users to a computer server, **including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.**" (Emphasis added.) The obscenity provisions of Sections 1462 and 1465 specifically incorporate this definition.

In 1988, Section 1465 was amended to include new technologies, such as computer and phone modem systems, by adding the words "uses a facility or means of interstate or foreign commerce" to the prohibitions on shipments of obscenity for sale or distribution. *See* The Child Protection and Obscenity Enforcement Act of 1988, 100th Cong., 2d Sess., 102 Stat. 4489, 4494. (By that Act, Congress also criminalized the use of cable, subscription, and satellite TV to distribute obscenity under 18 U.S.C. § 1468.) Section 1462 already proscribed any use of a "common carrier" to transport or transmit obscenity, including a telecommunications carrier such as a phone line, whether for public, commercial, or private carriage, just as Section 1461 so prohibits the use of the U.S. Mails. Thus, it is a felony under federal law to knowingly transmit obscenity by computer transmissions and services which use phones lines, common carriers, by mail, or any other means of interstate or foreign commerce. Such illegal acts, when done by a person operating or assisting an enterprise, also constitute racketeering predicates under the RICO Act (18 U.S.C. § 1961, *et seq.*).

Entities making good faith use of access restriction software to protect children or to avoid illegal materials for adults are protected from liability by the "Good Samaritan" immunity, provided by federal law in the CDA. *See* 47 U.S.C. § 230(c)(2), 110 Stat. 139 (1996). Since the only avoidance of these legal consequences is by prosecutorial discretion or compliance with the "Good Samaritan" provisions of the CDA that were enacted for the "Protection for Private Blocking and Screening of Offensive Material," it is necessary, not just prudent and responsible, for libraries, schools, and businesses to employ the best software filter available to block out hard-core obscenity and child pornography. (The "Good Samaritan" immunity also extends to civil protection from suits by those who would try to force an institution to carry its material, even if that material is "protected". The Civil Liability provision of 47 U.S.C. § 230(c)(2) also allows "any action voluntarily taken in good faith to restrict access or availability of material that the provider or user considers to be obscene...excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected" and would protect an ISP, online service, or an institution in filtering out or restricting access to certain "hate speech" or other offensive pornographic or violent materials so as not to assist those speakers, even though their message would be available otherwise on the Web or in newsgroups, *etc.* This is not "censorship" but the unwillingness to cooperate with such unconscionable disseminations.)

Although the ALA's recent statements that use of filter software, or "censorware" as they call it, could result in lawsuits by the ACLU or other groups, this position is not legally defensible and is contrary to the plain wording of federal law. It is also directly contrary to the best interests of libraries and librarians themselves. Since the CDA's immunity is offered to those who take steps to restrict pornography, not to those who do nothing and therefore knowingly take and make illegal and harmful materials available, the ALA's policy in favor of open access to all ages to all the legal and illegal materials on the net is threatening and detrimental to the very membership its purports to serve. Federal law specifically encourages the use of "Blocking and Screening" actions and a filter program accomplishes this task automatically for the institution and the user. The debate over censorship is important, but intimidating a librarian or teacher out of protecting themselves and those they serve is simply irresponsible and must be rejected for what it is.

State Law

Most state laws make it illegal to use computer transmission to disseminate, exhibit, or distribute obscenity within a state. All states criminalize the distribution of child pornography and most prohibit possession, as well. Libraries, Educational Institutions, and Businesses utilizing "interactive computers services" can be subject to the provisions of these state laws. Federal law and cases do not "pre-empt" the enforcement of such state obscenity laws, nor did the CDA do so, even for libraries and schools.

Although many state laws exempt, exclude, or provide libraries and schools with a good faith defense to obscenity and harmful to minors laws**,** not all do so and a library or school could still be subject to civil injunction actions by prosecutors or private citizens and subject to civil liability suits for damage or exposure involving access to obscenity or harmful matter, particularly by minors. The good faith use of a filter program would protect against any such state level civil liability for damages and this is another prudent reason to employ one.

The Legal Ban against Child Pornography

Excerpt from the testimony of Joseph Henry, Convicted Child Molestor, U.S. Congress, Senate, Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, Hearings on Child Pornography and Pedophilia, 99th Cong., 1st Sess., Part 2, 1985, pp. 13-14*:*

Senator Roth: "What role do you think child pornography has played in your life."

Convicted Molestor: "With some pedophiles, it is a stimuli to have other victims. And in some cases, a pedophile will show pornographic pictures to a child. In my case, with still pictures, it helped ease the tension. In my case, with it was a stimulant to seek and reestablish actual relationships with a child."

Senator Roth: "You mentioned that in some cases, pedophiles will show pornography material to children. Is that to help justify the conduct and the actions?"

Convicted Molestor: "No, it is to diminish the child's resistance."

Senator Roth: "To minimize their resistance by showing that this conduct is being done by others; is that what you mean?"

Convicted Molestor: "Other Children."

Senator Roth: "So that it's an acceptable behavior?"

Convicted Molestor: "If a pedophile wants a little girl to do such an act and she says no, he can show, well this little girl is doing it and show her a picture."

Senator Roth: "So there is, in your judgment, a direct link --"

Convicted Molestor: [interposing]. "Definitely."

Senator Roth: "Between child pornography and a pedophile promoting his conduct with a child?"

Convicted Molestor: "Yes, Senator."

Federal Law

There is an absolute and enforceable criminal prohibition under current federal laws against the knowing transmission of child pornography over the Internet, World Wide Web, Usenet, BBS, chat rooms, email, *etc. Reno v. ACLU,* 117 S. Ct. 2329 (1997). The child exploitation and child pornography provisions of Section 2252 and 2252A include all distributions or transmissions "by any means including by computer"and by anyone, with no exceptions. It is also illegal to knowingly possess child pornography, as well as knowingly transport it.

Under federal law, it is a felony to knowingly make, distribute, transport, transmit, or possess child pornography "by any means, including by computer," (mail, common carrier, private vehicle, personal computer, network computer, server, ISP, OSP, *etc.*) whether for yourself or for someone else. Such illegal acts, when done by a person operating or assisting an enterprise, also constitute racketeering predicates under the RICO Act (18 U.S.C. § 1961, *et seq.*).

"**Child Pornography,**" as statutorily defined by federal law, covers sexually explicit pictures of minors and minors shown in "lascivious" genital exhibitions. These laws have been upheld by the Supreme Court. *See New York v. Ferber*, 458 U.S. 747 (1982), *Osborne v. Ohio*, 495 U.S. 103 (1990); *U.S. v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994).

Entities making good faith use of access restriction software to protect children or to avoid illegal materials for adults are protected from liability by the "Good Samaritan" immunity, provided by federal law. *See* 47 U.S.C. § 230(c)(2), 110 Stat. 139 (1996). As discussed above, using a filter program to avoid the acquisition and availability of child pornography is of utmost importance to the safety of children as well as for the personal and institutional protection of libraries, schools, and businesses. The filter may also be the best defense for a claim that the institution or staff was not acting knowingly, by relying in good faith on the blocking of such material by the filter program.

State Law

All state laws make it illegal to disseminate, exhibit, or distribute child pornography within, into, or out of the state. Most state laws also cover the possession and storage of child pornography within their borders. Libraries, Educational Institutions, and Businesses utilizing "interactive computers services" are usually subject to the criminal and civil provisions of these state laws, although some states exempt or provide a good faith defense to the criminal provisions of their laws. Federal law and cases do not "pre-empt" the enforcement of such state child pornography laws, nor did the CDA do so, even for libraries and schools.

Case Law Defining "Child Pornography"

"**Child Pornography,**" as statutorily defined by state laws, cover sexually explicit pictures of minors and minors shown in "lewd" genital exhibitions. These laws have been upheld by the Supreme Court. *See New York v. Ferber*, 458 U.S. 747 (1982), *Osborne v. Ohio,* 495 U.S. 103 (1990); *U.S. v. X-Citement Video, Inc.*, 115 S. Ct. 464 (1994).

The Legal Restriction of Material Harmful to Minors

> "*Books do not corrupt, I was assured, by every category of professional acquaintance except one -- the psychiatrist. Ironically, this group, and particularly the child psychiatrist, were not so sure. Of the half-dozen or so child analysts questioned, all agreed that while the problem was poorly researched and poorly understood, the potential for corruption would certainly seem to be there. It seems psychoanalysts today are the last of the blue-noses."* Willard M. Gaylin, M.D., 77 YALE L.J. at 592 (1968)

Where minor children are involved, there are special governmental interests in restricting the dissemination of sexually explicit material legally defined as "harmful to minors" (these laws are in addition to the complete federal ban against the dissemination of obscenity and child pornography). These state laws have as their primary concern the *safety of children* -- a matter recognized by the Supreme Court to be of surpassing and compelling public importance.

Most states have enacted "harmful to minors" legislation, patterned after the New York statute upheld by the U.S. Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968), which placed controls on the dissemination of "harmful matter" to minors even though that matter may not be obscene for adults. In *Ginsberg*, the Supreme Court definitively held that the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex can be made to depend on whether the citizen is an adult or a minor, that protecting children from exposure to obscene or harmful material satisfies a compelling state interest, and that parents and others who have the primary responsibility for children's well-being are entitled under the U.S. Constitution to receive the support of laws designed to aid discharge of that responsibility.

Although there are very few prosecutions for providing harmful matter to minors, because convenience stores, video stores, theaters, and even "adult" porn shops, comply with state harmful to minors and display laws, there is guidance in the federal cases that have upheld such state laws against constitutional attack and requiring adults to undergo some inconvenience to obtain "adult" materials without exposing such materials to minors. In *Ginsberg*, the Court upheld the New York courts in convicting a merchant for selling "girlie magazines" to minors, 390 U.S. at 631, 634 n. 3. Other federal courts upholding display laws have noted the state laws' applicability to "sexually explicit nudity" which meets the three-prong "harmful to minors" test, though not affecting "classic literature". *See Commonwealth v. American Booksellers Ass'n*, 372 S.E.2d 618, 622-24 (Va. 1988) (on certified questions from the Supreme Court, 484 U.S. 383), Virginia law upheld on remand, *American Booksellers Ass'n v. Com. of Va.*, 882 F.2d 125 (4th Cir. 1989); *M.S. News Co. v. Casado*, 721 F.2d 1281, 1285, 1286 n. 5, 1290 (10th Cir. 1983) (upholding Wichita display ordinance); *Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389, 1393-97 (8th Cir. 1985) (upholding display ordinance); *American Booksellers Ass'n v. Rendell*, 481 A.2d 919 (Pa. 1984) (upholding Pa. display law); *American Booksellers v. Webb*, 919 F.2d 1493, 1502-06, 1505 n. 22 (11th Cir. 1990) (upholding Ga. display statute). It is also interesting to note that certain "men's magazines" have had some issues found to be "obscene" even for adults, which would warn a reasonable person that such magazines would at least be "harmful to minors" in every jurisdiction *See*, for example: *Penthouse v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980) (finding "Penthouse" and "Oui" issues obscene as a matter of law, in declaratory action brought by Penthouse International, Inc.); *Penthouse v. Webb*, 594 F. Supp. 1186 (N.D. Ga. 1984) (finding "Penthouse" issue obscene, in

declaratory action brought by Penthouse International, Inc.). *See also Grosser v. Woollett*, 341 N.E.2d 356 (Ohio C.P. 1974), *aff'd*, 74 Ohio Ops.2d 243 (Ohio App. 1975), appeal dismissed, No. 75-719 (Ohio Sup. Ct. Oct 16, 1975) (finding two books harmful to minors and enjoining the Strongsville High School from using them without knowing consent of a parent).

The legal principle of affording special protection to children was reaffirmed by the Court in *Reno v. ACLU, supra.*, which recognized the legitimacy and importance of the goal of protecting children from harmful and obscene materials. *Reno* left the right of states to enforce such "harmful to minors" laws undisturbed, just as the Court reaffirmed the enforcement of obscenity laws in cyberspace. *See Reno* Slip Opinion at 18, in which the Court reiterated:

"In *Ginsberg*, we upheld the constitutionality of a New York statute that prohibited selling to minors under 17 years of age material that was considered obscene as to them even if not obscene as to adults. We rejected the defendant's broad submission that 'the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend on whether the citizen is an adult or a minor. 390 U.S. at 636."

See also, the *Reno* Concurring and Dissenting opinion, Slip. Op. at 3, n. 2, which lists state statutes which restrict minors' access to speech and materials that are "harmful to minors."

9. Cyberporn Creates an Environment Hostile to Work and Education, and Is Sexual Harassment, and Should Be Banned from the Workplace.

> *"Work environments 'heavily charged' or 'heavily polluted' with racial or sexual abuse are at the core of the hostile environment theory." Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271 at 1275 (5th Cir. 1989)

In addition to the above considerations concerning the illegal nature of cyberporn exhibitions under applicable obscenity, child pornography, or "harmful to minors" laws, workplace "cyberporn" is a source of potential legal liability for those vested with legal control over their respective work environments. This is true, in spite of whether exposure to pornography occurs in a work enviornment located in a public library, school, or business.

The Legal Proscription against Sexual Harassment in the Workplace

Where cyberporn is used to create a learning or work environment which is hostile to women or girls, and where it is used as an instrument of sexual harassment, the exhibition of cyberporn presents a civil rights issue. It has been recognized that the viewing of pornography in public places can create an uncomfortable and humiliating environment for women co-workers, regardless of their age (this liability is in addition to the legal penalties for unlawfully exposing or displaying such "harmful" material to minors). Pornography in the workplace can create a hostile environment constituting sexual, in violation of state and federal civil rights laws. *See "Pornography, Equality,*

and a Discrimination-Free Workplace: A Comparative Perspective," 106 HARVARD LAW REV. pp. 1075-1092 (1993).

Pornography is not protected speech where it acts as "discriminatory conduct" creating a hostile work environment, since there is no right to make use of even protected speech for purposes of sexual or racial harassment or discrimination. *See Roberts v. United States Jaycees,* 468 U.S. 609, 628, 104 S. Ct. 3244, 3255, 82 L.Ed.2d 462 (1984) ("[P]otentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."); *Hishon v. King & Spalding,* 467 U.S. 69, 78, 104 S. Ct. 2229, 2235, 81 L.Ed.2d 59 (1984); Strauss, *Sexist Speech in the Workplace,* 25 HARV.C.R.-C.L.L.REV. 1, 38-41 (1990). The foregoing authorities were relied upon by *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, at 1535 (M.D. Fla. 1991), in which the Court observed:

> "In this respect, the speech at issue is indistinguishable from the speech that comprises a crime, such as threats of violence or blackmail, of which there can be no doubt of the authority of a state to punish. *E.g., Rankin v. McPherson,* 483 U.S. 378, 386-87, 107 S.Ct. 2891, 1897-99, 97 L.Ed.2d 315 (1987) (threat to kill the President is not protected by first amendment); *United v. Shoulberg,* 895 F.2d 882, 886 (2d Cir. 1990) (threats to intimidate witnesses); *see generally* Greenawalt, *Criminal Coercion and Freedom of Speech,* 78 N.W.U.L.REF. 1081 (1983); Greenawalt, *Speech and Crime,* 1980 AM.B.FOUND.RES.J. 645. This treatment is consistent with the holding of *Pittsburgh Press Co. V. Human Relations Comm'n,* 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973), that a ban on discriminatory help-wanted advertisements did not offend the first amendment. *See also* Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech,* 47 WASH. & LEE L.REV. 171, 197 (1990) (transactional setting of sexual harassment opens sexist speech to regulation); *cf. Swank v. Smart,* 898 F.2d 1247, 1251 (7th Cir.) (casual chit-chat while working is not protected speech), *cert. denied,* __U.S.___, 111 S.Ct. 147, 112 L.Ed.2d 113 (1990)."

The regulation of discriminatory speech in the workplace constitutes a form of "time, place, and manner regulation of speech." *See* Strauss, *supra* at 46: "[B]anning sexist speech in the workplace does not censor such speech everywhere and for all time," relied on in *Robinson v. Jacksonville Shipyards, Inc., supra.* The standard for this type of regulation requires:

1. A legitimate governmental interest unrelated to the suppression of speech,

2. Content neutrality. [But note, to the extent that the regulation does not seem entirely content neutral, a distiction based on the sexually explicit nature of the pictures and other speech does not offend constitutional principles. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-49, 106 S. Ct. 925, 929-30, 89 L.Ed.2d 29 (1986); *see also* Sustein, "*Pornography and the First Amendment,* 1986 DUKE L.J. 586, 616-17, quoted in *Robinson v. Jacksonville Shipyards, Inc., supra.* at 1535.

3. A tailoring of the means to accomplish this interest.

See United States v. O'Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679, 20 L.Ed.2d 672 (1968), relied upon in *Robinson v. Jacksonville Shipyards, Inc., supra* at 1535.

Female workers are "a captive audience" in relation to the speech that comprises the hostile work environment. The free speech guarantee admits great latitude in protecting captive audiences from offensive speech. *See Frisby v. Schultz*, 487 U.S. 474, 487, 108 S. Ct. 2495, 2503, 101 L.Ed.2d 420 (1988); *FCC v. Pacifica Found.*, 438 U.S. 726, 744-51, 98 S. Ct. 3026, 3037-41, 57 L.Ed.2d 1073 (1978) (plurality opinion); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04, 94 S. Ct. 2714, 2716-18, 41 L.Ed.2d 770 (1974) (plurality opinion) (relied upon in *Robinson v. Jacksonville Shipyards, Inc.*, *supra* at 1536).

Even if the "speech" at issue were to be treated as fully protected under the First Amendment, courts will balance the governmental interest in cleansing the workplace of impediments to the equality of women, a compelling interest that permits the regulation of the former and the regulation is valid, if narrowly drawn to serve this interest. *See also United States v. Paradise*, 480 U.S. 149, 171-85, 107 S. Ct. 1053, 1066-74, 94 L.Ed.2d 203 (1987) (performing similar analysis for race-conscious remedy to race discrimination) (relied upon in *Robinson v. Jacksonville Shipyards, Inc.*, *supra* at 1536), which observed:

> "Other first amendment rights, such as the freedom of association and the free exercise of religion, have bowed to narrowly tailored remedies designed to advance the compelling governmental interest in eradicating employment discrimination. See *e.g., Rotary Int'l*, 481 U.S. at 548-49, 107 S.Ct. At 1947-48; *EEOC v. Pacific Press*, 676 F.2d 1272, 1280-81 (9th Cir. 1982); *EEOC v. Mississippi College*, 626 F.2d 477, 488-89 (5th Cir. 1980), *cert. denied*, 453 U.S. 912, 101 S.Ct. 3143, 69 L.Ed.2d 994 (1981); see also *Ellis v. Brotherhood of Ry. Airline & S.S.Clerks*, 466 U.S. 435, 455-56, 104 S.Ct. 1883, 1895-96, 80 L.Ed.2d 428 (1984) (governmental interest in industrial peace justifies interference with dissenting employees first amendment rights resulting from allowing union shop.)"

In public employee speech cases, the interests of the employee in commenting on protected matters is balanced against the employer's interests in maintaining discipline and order in the workplace. *See Finch v. City of Vernon*, 877 F.2d 1497, 1502 (11th Cir. 1989) (also relied upon in *Robinson v. Jacksonville Shipyards, Inc.*, *supra* at 1536):

> "When an employee's exercise of free expression undermines the morale of the workforce, the employer may discipline ro discharge the employee without violating the first amendment. See, *e.g. Bryson v. City of Waycross*, 888 F.2d 1562, 1564-67 (11th Cir. 1989). Analogously, the Court may, without violating the first amendment, require that a private employer curtail the free expression in the workplace of some employees in order to remedy the demonstrated harm inflicted on other employees. Cf. *McMullen v. Carson*, 568 F.Supp. 937, 943-45 (M.D.Fla. 1983) (finding no first amendment violation in discharge of KKK member from police force because *inter alia* internal discipline and morale were threatened by potential for racial confrontations), eff'd, 754 F.2d 936 (11th Cir. 1985); accord *Rankin*, 483 U.S. at 391 n. 18, 107 S.Ct. at 2901 n. 18."

In *Robinson v. Jacksonville Shipyards, Inc.*, *supra*, the court issued an order that the defendant employer "cease and desist from the maintenance of a work environment that is hostile to women because of their sex and to remedy the hostile work environment through the implementation,

forthwith," of a Sexual Harassment Policy, which consisted of a "Statement of Policy," "Statement of Prohibited Conduct," "Schedule of Penalties for Misconduct," "Procedures for Making, Investigating and Resolving Sexual Harassment and Retaliation Complaints," and "Procedures and Rules for Education and Training." The "Statement of Prohibited Conduct" stated:

> "The management of Jacksonville Shipyards, Inc., considers the following conduct to represent some of the types of acts which violate JSI's Sexual Harassment Policy: . . .
>
> "C. Sexual or discriminatory displays or publications anywhere in JSI's workplace by JSI employees, such as:
>
> (1) displaying pictures, posters, calendars, graffiti, objects, promotional materials, reading materials, or other materials that are sexually suggestive, sexually demeaning, or pornographic, or bringing into the JSI work environment or possessing any such material to read, display, or view at work.
>
> "A picture will be presumed to be sexually suggestive if it depicts a person of either sex who is not fully clothed or in clothes that are not suited to or ordinarily accepted for the accomplishment of routine work in and around the shipyard and who is posed for the obvious purpose of displaying or drawing attention to private portions of his or her body.
>
> (2) reading or otherwise publicizing in the work environment materials that are in any way sexually revealing, sexually suggestive, sexually demeaning or pornographic;..."

Public Libraries, Schools, and Businesses offering Internet access should also have a policy against sexual harassment and inappropriate conduct in their workplaces, including for Internet use on premises. Such entities, in providing on-premise Internet access to others, should clarify and enhance applicable grievance procedures for workers, students, and patrons where said policies are abused by Internet users on the premises. The development of existing law indicates that said entities have a duty to insure that *infra*ctions of Internet use policy on premises within their control do not result in the creation of an environment impermissibly hostile to work or education.

The 1986 *Final Report of the Attorney General's Commission on Pornography* contains reports of sexual harassment which were also submitted to the Commission as forms of social injustice. The witnesses stated the harassment was attributable to the presence of pornographic materials and served to reduce their social status. (*See* p. 220 of the Rutledge Hill Press edition, which sets forth these statements):

> "I was working as a telephone repair woman for Southern Bell in Florida. Porn was everywhere. They use it to intimidate you, to keep women out of their territory. They had pin-ups in the workrooms. Male workers would draw pornographic pictures of women workers in the cross-boxes and write comments about what we would do in bed. One day...[a man] shoved a photograph at me of a woman's rear end with her anus exposed and asked, 'Isn't this you?' I was humiliated and furious.
>
> "I've been a brakewoman for a railroad for almost nine years....I've seen pornographic pictures of a woman with spread thighs raped by a huge dismembered penis.

> "A working woman called the Pornography Resource Center in May 1984 to report that her employer had called her into his office, pushed her down on the floor, ripped her dress, taken a gun out of his pocket, and stuffed it into her vagina. A pornographic picture on the lunchroom wall showed a woman sucking a gun."

An article by Joyce Lain Kennedy, entitled "Workplace Cyberporn May Be Sexual Harassment," in the *Los Angeles Times* (June 8, 1997) states:

> "....workplace cyberporn is a source of potential legal liability because the viewing of X-rated Web sites on the job can create an uncomfortable and humiliating environment for women workers.
>
> "There's a growing legal recognition that pornographic and obscene material in the workplace can constitute sexual harassment and violate state and federal civil rights law, according to the *Employment Litigation Reporter*, a legal newsletter. The courts even have a name for it: E-harassment.
>
> "The publication suggests that business take the workplace cyberporn issue seriously: 'Companies should consider up-dating their harassment policies to prohibit the viewing of sexually explicit sites in the workplace and explore the installation of software to block employee access to adult material.
>
> "Albert Gidari, a communications attorney who specializes in cyberspace law at the firm of Perkins Cole in Seattle, agrees that companies leave themselves open to a claim for maintaining a hostile environment if they do not institute formal corporate guidelines for acceptable use of the Internet and e-mail, and insist that those guidelines be followed."

The article concludes:

> "Many companies are turning to blocking and monitoring software to keep the Net reserved for their business.
>
> "If your company doesn't have an Internet usage policy for workers, it can limit liability by establishing one**.**
>
> "Giving employees access to the Net is not unlike giving them a telephone to dial out and make business calls. Internet usage becomes a business asset that needs to be managed, like a telephone bill. Cyberporn doesn't belong in a business office. A usage policy and blocking software can help keep it out."

10. The Context in Which the Social Problem is Addressed: "Cyberspace"

"Before today, . . .the Court has previously only considered laws that operated in the physical world, a world that with two characteristics that make it possible to create 'adult

zones': geography and identity. . . .The electronic world is fundamentally different. Because it is no more than the interconnection of electronic pathways, cyberspace allows speakers and listeners to mask their identities. Cyberspace undeniably reflects some form of geography; chat rooms and Web sites, for example, exist at fixed 'locations' on the Internet. Since users can transmit and receive messages on the Internet without revealing anything about their identities or ages,. . . however, it is not currently possible to exclude persons from accessing certain messages on the basis of their identity." Reno v. American Civil Liberties Union, 521 U.S. __, 117 S. Ct. 2329 (June 26, 1997)

What Is the Internet?

The following description of the Internet is taken verbatim (footnotes omitted) from *Reno v. ACLU*, 117 S. Ct. 2329 (1997):

"The Internet is an international network of interconnected computers. It is the outgrowth of what began in 1969 as a military program called 'ARPANET,'*[footnote 3: An acronym for the network developed by the Advanced Research Project Agency]* which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. While the ARPANET no longer exists, it provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is "a unique and wholly new medium of worldwide human communication."

"The Internet has experienced 'extraordinary growth.' The number of 'host' computers (those that store information and relay communications) increased from about 300 in 1981 to approximately 9,400,000 by the time of the trial in 1996. Roughly 60% of these hosts are located in the United States. About 40 million people used the Internet at the time of trial, a number that is expected to mushroom to 200 million by 1999.

"Individuals can obtain access to the Internet from many different sources, generally hosts themselves or entities with a host affiliation. Most colleges and universities provide access for their students and faculty; many corporations provide their employees with access through an office network; many communities and local libraries provide free access; and an increasing number of storefront 'computer coffee shops' provide access for a small hourly fee. Several major national 'online services' such as America Online, CompuServe, the Microsoft Network, and Prodigy offer access to their own extensive proprietary networks as well as a link to the much larger resources of the Internet. These commercial online services had almost 12 million individual subscribers at the time of trial.

"Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly

evolving and difficult to categorize precisely. But, as presently constituted, those most relevant to this case are electronic mail ('e-mail'), automatic mailing list services ('mail exploders,' sometimes referred to as 'listservs'), 'newsgroups,' 'chat rooms,' and the 'World Wide Web.' All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium (known to its users as 'cyberspace') located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.

"E-mail enables an individual to send an electronic message (generally akin to a note or letter) to another individual or to a group of addressees. The message is generally stored electronically, sometimes waiting for the recipient to check her 'mailbox' and sometimes making its receipt known through some type of prompt. A mail exploder is a sort of e-mail group. Subscribers can send messages to a common e-mail address, which then forwards the message to the group's other subscribers. Newsgroups also serve groups of regular participants, but these postings may be read by others as well. There are thousands of such groups, each serving to foster an exchange of information or opinion on a particular topic running the gamut from, say, the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls. About 100,000 new messages are posted every day. In most newsgroups, postings are automatically purged at regular intervals. In addition to posting a message that can be read later, two or more individuals wishing to communicate more immediately can enter a chat room to engage in real-time dialogue (in other words, by typing messages to one another that appear almost immediately on the others' computer screens). The District Court found that at any given time 'tens of thousands of users are engaging in conversations on a huge range of subjects.' It is 'no exaggeration to conclude that the content on the Internet is as diverse as human thought.'

The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world. Some of these documents are simply files containing information. However, more elaborate documents, commonly known as Web 'pages,' are also prevalent. Each has its own address ('rather like a telephone number.') Web pages frequently contain information and sometimes allow the viewer to communicate with the page's (or 'site's') author. They generally also contain 'links' to other documents created by that site's author or to other (generally) related sites. Typically, the links are either blue or underlined text; sometimes images.

"Navigating the Web is relatively straightforward. A user may either type the address of a known page or enter one or more keywords into a commercial 'search engine' in an effort to locate sites on a subject of interest. A particular Web page may contain the information sought by the 'surfer,' or, through its links, it may be an avenue to other documents located anywhere on the Internet. Users generally explore a given Web page, or move to another, by clicking a computer 'mouse' on one of the page's icons or links. Access to most Web pages is freely available, but some allow access only to those who have purchased the right from a commercial provider. The Web is

thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.

"From the publishers' point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can 'publish' information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege. 'No single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web.'"

The Significance of the Reno Decision

Reno v. ACLU, supra, is the *first* United States Supreme Court case to discuss the nature and contours of "cyberspace," with respect to the regulation of "obscene" or "indecent" materials**.** Three important concepts emerge from the *Reno* decision:

1. The *Reno* Court's opinion definitively establishes that obscenity and child pornography *remain* banned in cyberspace under the CDA and existing federal law**,** with the Court recognizing its prior acknowledgment of the vitality of state "harmful to minors" laws.

2. The Congressional goal of protecting children from harmful materials is legitimate and important. The Internet can be regulated under rules governing "print" medium (such as books or movies), rather than "broadcast' medium (such as radio, or T.V.).

3. *Reno* is firmly grounded upon the Court's understanding of what was the state of technology which was available as of the date of the U.S. District Court opinion, based upon the District Court's findings of fact. However, there is in the opinion the implicit idea that the boundaries in cyberspace constantly change, and the ability to regulate the "electronic world" of the Internet may change and improve as technology advances.

The "Internet" is a new and emerging medium of communication. Although referred to generically as "the Internet," the various interactive computer services are of many forms and different natures, from the interconnected, freely accessible sites on the Internet and World Wide Web, to the directly accessed information on BBSs, to the subscription access to the commercial service known as the Usenet newsgroups, to the proprietary online services and information of Online Service Providers and Internet Service Providers, including chat rooms and email.

Prior to *Reno*, it was not definitively clear whether the Internet should be treated as though it were a "*broadcast* medium" (such as Radio or T.V.) or a "*print* medium" (such as a book or movie). The legal requirements for laws regulating "broadcast" and "print" mediums are separate and distinct. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (plurality opinion), the Court indicated that the First Amendment did not, in the context of a "broadcasting medium" (such as Radio) protect the dissemination of "indecency" (holding that laws seeking to protect children from "indecency" in broadcasting are valid, the *Pacifica* Court upheld a restriction on the broadcast of specific indecent words).

The CDA sought to restrain "indecency" on the Internet, in a manner which was similar to *Pacifica*, but adapted to the Internet as an intended new form of medium-specific "online indecency" that would consider serious value, as obscenity does but broadcast indecency need not. *See* "Conference Report on the CDA," the *Joint Explanatory Statement of the Committee of Conference*, 1996 U.S.C.C.A.N. Leg. Hist. 200-11. The CDA would have required restriction to minors of "indecent" or "patently offensive" material, using this modified "indecency" standard referred to in the final pages of *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). In light of the District Court's findings that existing Internet technology was incapable of restricting such indecency from minors without banning such protected adult speech from adults as well, the Supreme Court upheld the lower court's conclusions of law that the CDA was overbroad in its reach and incapable of compliance under available means.

The Boundaries in Cyberspace Constantly Change, and the Ability to Manage and Regulate the "Electronic World" of the Internet Improves as Technology Advances.

To understand the "boundaries" of cyberspace, the *Reno* Court heavily relied upon a detailed stipulation of "agreed facts" (ostensibly setting forth the current nature and limits of "Internet technology"), prepared by the parties and submitted to the District Court. However, the Supreme Court in *Reno* also recognized that cyberspace is forever changing. This point was discussed in the Concurring and Dissenting opinion, which observed that cyberspace differs from the "physical world" in that it is "malleable." Technological advances can make it feasible to distinguish (on a widespread basis) between "adult" and "minor" recipients on the Internet, at least by each Internet Service Provider with which an adult subscribes and gains access for his or her minor child. This would remove many of the concerns expressed by the *Reno* Court, and making the creation of "adult zones" possible on the Internet (from which children can be excluded automatically). The Concurring and Dissenting Opinion noted that Internet speakers (users who post material on the Internet) have begun to "zone" cyberspace itself through the use of "gateway" technology. Based upon this, it is or can be technologically possible to create "safe harbors" for children on the Internet. The law regarding the Internet, articulated by the *Reno* Court, however, was applied to the Internet technology as it existed in 1996, and was based entirely upon the specific findings of the District Court. These "findings" may remain static or "fixed in time," but Internet technology certainly didn't and won't. The District Court "findings" describe only what was offered as possible by the parties as of date of the hearings in the spring of 1996. Since Internet technology does not remain "static," Internet law is subject to change. For this reason alone, libraries, schools, and businesses should assume that further legal obligations will be passed and upheld and should not wait to institute voluntary measures under available technology, such as filter software.

The Character and Dimensions of the Internet.

The *Reno* Court noted the "wide variety of communication and information retrieval methods" available to anyone with access to the Internet, such as: electronic mail ("e-mail"), automatic mailing list services ("mail exploders," sometimes referred to as "listservs"), "newsgroups," "chat rooms," and the "World Wide Web," which taken together, constituted a unique medium—known to its users as "cyberspace"—located in multiple geographical locations and available instantly to anyone, anytime, anywhere in the world.

The Availability of Sexually Explicit Pornography in Cyberspace

The *Reno* Court repeated the lower court's findings that:

> "though such material is widely available, users seldom encounter such content accidentally. 'A document's title or a description of the document will usually appear before the document itself...and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content.' For that reason, the 'odds are slim' that a user would enter a sexually explicit site by accident. Unlike communications received by radio or television, 'the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. (Emphasis added.) (*Reno* Slip Opinion at 7).

The *Reno* Court stated that the "special justifications" for regulation of the broadcast media (*e.g.* the history of extensive government regulation of the broadcast medium, the scarcity of available frequencies at its inception, and its "invasive" nature) were not applicable to the Internet. As a foundation for these remarks, the *Reno* Court relied on the District Court's unprovable finding that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'" (*Reno* Slip Opinion at 22.) This would obviously be an untrue statement today, and suggests that the outcome of the Supreme Court's review of a similar situation could be quite different if a lower court finds as a fact, as it could, that it is exceptionally *easy* to unintentionally access pornographic material in Cyberspace, especially through the use of commercially available "browsers." Using a search engine or browser, it is possible for *any* user to "quite frequently" encounter "such content accidentally." All anyone need do is do a search for "toy" or "pet" or "woman" or "girl" or almost any innocent subject and the amount of pornography sites seeking to show free "teaser" pictures and sell thousands of hard-core images will defy the 1996 "findings" as to inadvertency. In addition, because of a child's lack of sexual sophistication, the pornographers' so-called "warnings" fall on "deaf ears" and actually act as an attractive nuisance that invites an immature youngster to venture further, especially if a boy is actually seeking the forbidden fruit of pornography that he cannot buy at a store or find on a library shelf. Finally, even the *Reno* Court recognized that no amount of "warning" can insulate illegal activity involving obscenity or child pornography, which has flourished unabated on the Internet. Obscenity is unlawful for "consenting adults" and is even more so for a curious child who cannot legally consent. These realities must be taken into account in the "debate" over use of

filterware, in light of the access to which minor children will have on the computers connected to the Internet, or especially if the institution takes the Usenet or chat room services of its ISP.

The Issue of Age Verification for Recipients of Internet Communications.

The *Reno* Court noted that the problem of age verification differed for different uses of the Internet. The District Court categorically determined that there was "no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms." Because of the cost burdens imposed by what had been accepted by the District Court as the state of available technology, the District Court rejected as "effectively unavailable" the use of credit card verification or adult password verification for non-profit Web site content providers. These "problems" will disappear in due time, as new technology becomes available to the public.

11. Aftermath of Reno: Obscenity and Child Pornography Remain Illegal in Cyberspace and State Harmful to Minors Laws Remain Viable

> *"Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles. See 18 U.S.C. Sections 1464-1465 (criminalizing obscenity); Section 2251 (criminalizing child pornography)." Reno v. ACLU (June 26, 1997)*

As previously stated, *Reno v. ACLU*, *supra*, is the first Supreme Court decision to discuss the nature and contours of cyberspace with respect to the regulation of "*obscene*" or "*indecent*" materials. The *Reno* Court's opinion struck only the indecency portions of the CDA, but definitively reaffirmed that obscenity and child pornography are illegal in cyberspace under the CDA and existing federal law. *Reno* also left undisturbed the right of states to enforce their own obscenity, child pornography, and "harmful to minors" laws and affirmed the legitimacy and importance of the Congressional purpose in enacting the CDA, the "goal of protecting children from harmful materials."

What Portions of the CDA were Affected by Reno?

Reno involved challenges to the facial constitutionality of Sections 223(a)(1) and 223(d), enacted under the CDA. These sections proscribed communications which were referred to by statute as either "indecent" or "patently offensive." The Court majority upheld the CDA to the extent it applied to "obscene" material, but struck as "overbroad" only those portions of the CDA which were directed at controlling material referred to as "indecent" or "patently offensive."

Background of Challenged Provisions of CDA

Reno examined the following provisions of the CDA, which sought to protect minors from harmful material on the Internet:

Section 223(a)(1)(B)(ii) criminalized the transmission of "obscene or indecent" messages to any recipient the sender knows is under 18 years of age. (Referred to by the Court as the "*indecency transmission*" provision.)

Section 223(d)(1)(A) made it a crime to knowingly send to a person under 18 any message or image "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." (Referred to by the Concurring and Dissenting Opinion as the "*specific person*" provision.

Section 223(d)(1)(B) made it a crime to knowingly display "in a[ny] manner available" to minors any message or image "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." (Referred to by the Concurring and Dissenting Opinion as the "*display*" provision.)

The CDA provided an *affirmative defense* for those who took "good faith, ... actions" to restrict access by minors to the prohibited communications, Section 223(e)(5)(A), and those who restrict such access by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number, Section 223(e)(5)(B).

The initial challenge to the CDA came before a 3-Judge Court, which held that the portions of the CDA which sought to proscribe "*indecent*" or "*patently offensive*" communications violated both the First Amendment, as "overbroad," and the Fifth Amendment, as "vague." The court entered a preliminary injunction against enforcement of the challenged provisions only as they related to the concept of "*indecent*" or "*patently offensive*" communications or displays. The injunction expressly preserved the Government's right to investigate and prosecute "*obscenity or child pornography activities prohibited therein*."

On direct appeal, the Supreme Court affirmed the judgment (striking the provisions relating to "*Indecent*" or "*patently offensive*" communications or displays on the basis of First Amendment "overbreadth," without reaching the issue of whether the CDA was also "vague" in violation of the Fifth Amendment. The Court stated: "While we discuss the vagueness of the CDA because of its relevance to the First Amendment overbreadth inquiry, we conclude that the judgment should be affirmed without reaching the Fifth Amendment issue."

What was the 9-0 vote?

The majority opinion notes an important concession made by the ACLU plaintiffs and the ALA plaintiffs during the course of the lawsuit. Both the ACLU and ALA acknowledged that obscenity can be totally banned in cyberspace. *See* the *Reno* Slip Opinion at 26, stating "Appellees do not challenge the application of the statute to obscene speech, which, they acknowledge, can be banned totally because it enjoys no First Amendment protection." Building on this concession made by the ACLU and the ALA, the Court stated that "as set forth by the statute, the restriction of 'obscene' material enjoys a textual manifestation separate from that for 'indecent' material, which we have held

unconstitutional. Therefore, we will sever the term 'or indecent' from the statute leaving the rest of Section 223(a) [proscribing obscenity] standing." *See Reno* Slip Opinion at 37-38.

All nine justices agreed that the CDA's "*obscenity transmission*" provision, Section 223(a)(1)(B)(ii), was valid and enforceable and should be left standing. In addition, at footnote 44, the Court majority stated: "Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles. See 18 U.S.C. Sections 1464-1465 (criminalizing obscenity); Section 2251 (criminalizing child pornography)."

All nine justices found that the "*indecency transmission*" provision, Section 223(a)(1)(B)(ii), and the "*indecency display*" provision, Section 223(d)(1)(B), could substantially interfere with the First Amendment rights of adults to receive protected indecent expression, in light of the technological incapacity to restrict **sending or displaying indecency to minors without banning it for adults as well, and were therefore unconstitutionally overbroad and must be struck in their entirety.**

What was the 7-0 vote?

Seven justices ruled that both the "*indecency transmission*" provision of Section 223(a)(1)(B)(ii), and the "*specific person indecency***"** provision of Section 223(d)(1)(A), in the context of a statute carrying criminal penalties, could substantially interfere with the First Amendment rights of adults to protected speech, given the state of 1996 technology, and must be struck as being facially overbroad. Justice O'Connor and Chief Justice Rehnquist disagreed with the majority's conclusion that these provisions should be completely struck, and would have sustained these provisions to the extent they apply to the transmission of Internet communications where the party initiating the communication knows that all of the recipients are minors.

Case Discussion: Vagueness versus Overbreadth

A crucial element of *Reno* is that it involved a federal statutory ban on certain behavior, which imposed criminal penalties. It is in this context that the doctrine of "vagueness" (which was discussed but not relied upon by the *Reno* Court) must be contrasted with the doctrine of "overbreadth" (upon which *Reno* was decided).

The "Void for Vagueness" Doctrine

The *Reno* Court discussed the "vagueness" of certain parts of the CDA because of its relevance to the overbreadth issue. The doctrine of "void for vagueness" frequently arises as a Constitutional law issue with respect to statutory construction. See, for example, *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1471 (C.D. Cal. 1992):

"The Fifth Amendment due process clause requires that a statute be sufficiently clearly defined so as not to cause persons 'of common intelligence – necessarily [to] guess at its meaning and [to] differ as to its application. *Connally v. General Constr. Co.*, 269 U.S. 385, 391,...(1926). In the area of

expressive conduct, vague laws offend several important values: (1) they may trap the innocent by failure to provide fair warning; (2) they may fail to provide explicit and objective standards and therefore permit arbitrary and discriminatory enforcement; and (3) they may inhibit First Amendment freedoms by forcing individuals to 'steer far wider of the unlawful zone...than if the boundaries of the forbidden areas were clearly marked. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09,...(1972) (internal quotation marks omitted); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512-13 (9th Cir. 1988)."

The void for vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972), *Posters 'N' Things, Ltd. v. U.S.*, 511 U.S. 513 (1994).

In imposing a "fair warning" requirement**,** the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal, and involves three elements:

First, the vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *accord Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

Second, as a sort of 'junior version of the vagueness doctrine," H. Packer, *The Limits of the Criminal Sanction* 95 (1968), the canon of strict construction of criminal statutes, or "rule of lenity," ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. See, *e.g.*, *Liparota v. United States*, 471 U.S. 419, 427 (1985); *United States v. Bass*, 404 U.S. 336, 347-348 (1971).

Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, *see, e.g.*, *Kolender*, *supra*, at 355-356; *Lanzetta*, *supra*, at 455- 457; J. Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 207 (1985), due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope, *see, e.g.*, *Marks v. United States*, 430 U.S. 188, 191-192 (1977); *Rabe v. Washington*, 405 U.S. 313 (1972); U. S. Const., Art. I, § 9, cl. 3; *id*., § 10, cl. 1.

The fair warning requirement also reflects the deference due to the legislature, which possesses the power to define crimes and their punishment. *See United States v. Wiltberger*, 5 Wheat. 76, 95 (1820**);** *United States v. Aguilar*, 515 U. S. __ (1995) (slip op., at 5-6). *See generally* H. Packer, *The Limits of the Criminal Sanction* 79-96 (1968) (discussing "principle of legality," "that conduct may not be treated as criminal unless it has been so defined by [a competent] authority . . .before it has taken place," as implementing separation of powers, providing notice, and preventing abuses of official discretion) (quotation at 80); J. Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).

The "Overbreadth" Doctrine

The majority opinion in *Reno* disposed of the case on First Amendment overbreadth grounds. Under First Amendment principles, a law is "overbroad" where it prohibits "too much" speech, that is, where it criminalizes not only unprotected expression, but also restrains expression protected by the First Amendment. A law is overbroad, and thus unconstitutional on its face, where it applies to more speech than is necessary to serve the government's goals. The overbreadth doctrine applies if an enactment "prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. at 114.

Because overbreadth analysis is "strong medicine," it may be invoked to strike an *entire* statute on a facial challenge only when the overbreadth of the statute is not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep," *Broadrick v. Oklahoma*, 413 U. S. 601, 615 (1973), and when the statute is not susceptible to limitation or partial invalidation. *Id.* at 613. *See also Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 485 (1989), *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987). "When a federal court is dealing with a federal statute challenged as overbroad, it should . . . construe the statute to avoid constitutional problems, if the statute is subject to a limiting construction." *Ferber v. New York*, 458 U. S. at 769, n. 24.

A law may be invalid on its face, even though it is aimed at unprotected speech, where it also criminalizes a substantial amount of expression that is shielded by the First Amendment. In this context, "[c]riminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application." *Houston v. Hill*, 482 U.S. 451, 459 (1987).

The *Reno* Court stated: "We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." (*Reno* Slip Opinion at 28).).

According to the arguments of the ACLU/ALA plaintiffs (then relied on by the lower and Supreme courts), the terms "indecent" and "patently offensive" as utilized in the statute could cover large amounts of non-pornographic material with serious educational value. The Court contrasted the CDA with other *existing* laws regulating *non-protected* pornographic speech, noting at footnote 44, that "transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles." The Government was held to have failed to demonstrate why a "less restrictive" provision would not be "as effective" as the indecency restrictions imposed by the CDA. The *Reno* Court concluded: "The breadth of this content based restriction imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA." (*Reno* Slip Opinion at 33)

12. Filtering Software: Good Pros and Bad Cons

> *"Internet users who access information have not attempted to zone cyberspace itself, but have tried to limit their own power to access information in cyberspace, much as a parent controls what her children watch on television by installing a lock box. This user-based zoning is accomplished through the use of screening software (such as Cyber Patrol or SurfWatch) or browsers with screening capabilities, both of which search addresses and text for keywords that are associated with "adult" sites and, if the user wishes, blocks access to such sites. . . . The Platform for Internet Content Selection (PICS) project is designed to facilitate user-based zoning by encouraging Internet speakers to rate the content of their speech using codes recognized by all screening programs." Reno v. ACLU, 117 S. Ct. 2329 (June 26, 1997)*

Filtering Software Can Block Illegal, Inappropriate, and Unwanted Images

Until federal and state law enforcement take the aggressive, public steps that are necessary to protect the local communities from illegal "cyberporn" material, *filtering software* is available as a narrowly drawn remedy to block out a range of material, including obscenity, child pornography, and material defined under state law as "harmful to minors," and which provides an ongoing monitoring control service, and includes library updates on a daily or periodic basis.

Opponents of the use of filtering software (such as the ALA), argue that, in the process of blocking illegal sites, the software may also restrict access to legitimate sites which may discuss sexual topics (such as sex education or sexually transmitted diseases). This argument does not address whether staff or a governing board is constitutionally empowered to decide to utilize filtering software, but whether it should use one particular program or another.

This may have been a valid criticism of some filters, particularly the first generation "word" filters touted to the courts in the CDA cases by the ACLU and ALA plaintiffs as an alternative to the CDA which "empowered" parents to solve the pornography problem on their own without any responsibility by industry, ISPs, online services, or by libraries. However, there are currently software filters on the market that can block *only* sites that provide hard-core and child pornographic material. The software also enables a school or library to block additional sites that they find to be "educationally unsuitable" or harmful to minors, or otherwise inappropriate or unwanted.

Because sites can be blocked by their URL or newsgroup addresses, rather than solely on words used, the problem of blocking educationally suitable or politically controversial materials can be avoided, despite assertions to the contrary. For example, a library could request a customized version of a filter program for library use that can provide server based screening of just commercial hard-core pornography websites and hard-core and child porn newsgroups. Since almost all the searchable pornography is available on these WWW and Usenet sites, such a filter avoids blocking or screening of political, sex education, disease, artistic, or other sexual materials that a library would desire to carry and have available to its patrons. A school could decide to set the filter to screen out certain soft-core pornography that would be "harmful to minors" and a library could also use this setting for an Internet computer for the use of minors. Other filters can block out the most notorious hard-core, soft-core, and child pornographic sites, as well, thereby providing protection from easy access to most or much of the illegal and harmful materials.

Until laws and law enforcement can accomplish compliance by industry and Internet and online services, who are and have profited greatly by the wide and instant availability of pornography to, for the most part, a young and middle-aged audience of male porn-afficionados, then filtering software programs provide the best, current, available, and reasonable protection for children, libraries, schools, businesses, and others who want to use the Internet to learn and enjoy and search the vast reaches of cyberspace for valuable or entertaining information, rather than use it as an electronic porn shop.

Choices must be made, and the First Amendment protects an adult's right to obtain non-obscene and non-child pornographic images, but the law criminalizes hard-core obscenity, all child pornography, the provision of harmful pornography to juveniles, and the use of pornography to harass women in the workplace. A filter program can provide protection from criminal liability and its use will provide civil immunity under the CDA's "Good Samaritan" provisions. There is no legitimate legal argument, nor redeeming social argument, against using filters -- just pick a good one and leave the porn-debate to the advocates.

The National Law Center will debate law and philosophy with the ACLU and ALA and People for the American Way, but schools, libraries, non-profit institutions, and corporations have a duty to act responsibly and in the best interests of the children and families of America. The use of filtering software is one thing that can be done to assist responsible adults to act responsibly about irresponsible access to pornography.

Entities which elect to use filtering software can achieve a factual defense to potential prosecution under federal or state law, since it safeguards the entity using the filter from "knowingly" transmitting obscenity or child pornography to adults or juveniles or from "knowingly" providing or displaying harmful matter to minors. In addition, the civil immunity is specifically provided in the CDA by the new section 47 U.S.C. § 230 (c)(2), for voluntary use of screening or blocking software. The civil immunity is available if you use a filter, it is not available if you do nothing or if you knowingly transmit or allow your facilities to be used for unlawful purposes. The risk, and the choice, should be clear. Congress has done what it could under available technology to protect those who would help protect society and children from pornography.

NLC submits that industry, Internet Service Providers, Online Service Providers, and public institutions can do more to restrict access to pornography than law enforcement can, and this is the reason the NLC supported the CDA and its privileges and immunities for industry and others who develop and make available the "Internet" to the public. It is not that the Internet industry has earned special treatment or trust, it is that society needs them for their technical capability to protect our children and families from the "adverse secondary effects" of sex-exploitation operations and the harmful effects of pornography on victimized women and children, and on the men who victimize.

Installation of this type of software filter would not constitute an improper delegation of discretion and responsibility to the software company because the library or school or business would determine what filter to employ and, thus, what students or patrons or employees would access. The staff or managing board could give additional instructions and approve other definitions to be used in determining what material to block. The software can be set to block, filter, or screen only specifically or narrowly defined material that can be objectively identified. The staff or

administration could also periodically review sample material from blocked sites to make sure that their instructions are being followed. The school, library, or organization staff could also disable a filter or grant specific or unrestricted access for research or special projects or allow a parent to broaden a minor's permissible reach.

The owners or providers of computers to the public, their members, or their employees, can also tailor the services they wish to receive from their Internet Service Provider or Online Service Provider. A library or school can subscribe with an ISP to receive access to the Internet and World Wide Web, and to most but not all of the Usenet, but not to chat rooms. Chat room access is not required and can be left out of the accessed service, as can all or part of the "alt.sex" or "alt.binaries.pictures.erotica" hierarchies of the Usenet. A library can also subscribe to all of the Usenet and World Wide Web and then install a screening filter to block access to some or all of the specifically designated sites for commercial or public postings of pornography, as a way of tailoring the acquisition and dissemination of its "public" collection.

This is no different from a library or school granting special access to a reference collection or to a priceless art piece or a rare book or artifact or to other sensitive material. Libraries and schools are entitled to such control over their collections and have the freedom to chose which items to add to their public and private or restricted collections. A library cannot be forced to buy or take all books printed by a particular publisher, anymore than it can be forced to take all of the "Internet" services, including the non-Internet commercial services offered by Usenet, BBS proprietors, or commercial online services. (There is no constitutional mandate to subscribe to *Hustler* magazine, in order to get *Time* magazine.) Nor must a library or school buy *all* videos. (There is no constitutional mandate to purchase the video movie "Deep Throat" in order to get "The Godfather.") Likewise, one need not take the proprietary Usenet or chat services to gain access to the public Internet and WWW, and no one must or should be made to take or expose children to hard-core porn, or give child porn to pedophiles, in order to carry or access the vast amount of information, games, products, and services available over the Internet, Web, legitimate BBSs, and other online sources.

It is also in the best interest of libraries to oppose the political intimidation sought to be imposed on them by the ALA/ACLU positions. Just because a library or school buys one or more item from any particular supplier and can accept items for acquisition, the general public is not granted unrestricted access or the right to "check out" every single item owned by the library or school (such as a rare book, historical items, art, and even monthly magazines and daily newspapers). This freedom to chose and control the collections is a profound responsibility and is one that the librarians should fight to protect, both for their physical collections and for their computerized selections. A filter merely preserves the librarian's right to choose, whereas unlimited subscription to whatever is available through the Internet would allow the choice of what comes into a library and is available to its patrons to be made by whoever out there wants to sell or post material, legal or not, serious or not, pornographic or legitimately sexual. Unfortunately, the pornography syndicates, many pornography addicts, the "porn pirates", and pedophiles are also choosing content for the Web and Usenet and the library need not select their wares just because they did.

No library or school can or should be forced to have hard-core obscenity or child pornography on its computer by means of Web or Usenet access when it could not be forced to carry such magazines or videos in its selected collections. Any argument, such as that ironically fostered by the ALA against the use of filtering software, advanced simply to avoid use of filtering software, is dangerous to the

legal rights of libraries and could lead to criminal and civil liability for providing illegal or harmful materials by means of their ISP's computer services that no library would want or dare to carry on its shelves in the form of pornographic books or videos. The use of a filter gives the librarian the same protection from liability that refusing to carry obscenity and child pornography provides in the rest of the collection. Just because the U.S. Department of Justice has not yet prosecuted a major corporation, ISP, or online service for violating federal child pornography or obscenity laws does not mean that this "grace period" will last forever. (The German government's action should not be forgotten in this regard, nor should the international Treaty for the Suppression of the Circulation of Obscene Publications.) The growing threat of child pornography and hard-core obscenity by these sources will eventually weigh in favor of selected cases being brought to preserve the Equal Protection Clause principle that violators should be treated and prosecuted equally. The gamble is not a smart one to bet on for the long haul and filterware provides present protection and a responsible policy now before such drastic choices must be made by those sworn to uphold and enforce our laws on the state and federal levels.

The freedom to choose and control a library collection is not one to barter away in the aftermath of the "CDA" battle. This is especially true, since a remaining section of the Communications Decency Act still provides civil immunity for those public, private, and commercial entities and private persons which and who make use of their own discretion or employ screening filters to block acquisition and/or access to illegal and objectionable materials (even if those materials may otherwise be constitutionally protected for some persons or in some settings). *See* 47 U.S.C. § 230 (c)(2), 110 Stat. 139.

Librarians and library boards, school administrators and teachers, as well as corporate managers, should think twice before accepting a politically motivated recommendation or position against filterware, if the price to pay is that the library, school, or business would then be subject to having and giving access to illegal and tortious materials that it would not otherwise carry or to which it would not otherwise give unrestricted access. As stated earlier, use of a program filter may be the best or only way to avoid liability under the federal ban to "knowingly" disseminate or provide illegal obscenity or child pornography to adults or harmful matter to minors.

On what factors should the library, school, or business base its decision regarding the use of filtering software? Even if it were not illegal to provide pornography of any kind to the public or to minor children, eliminating the public traffic in hard-core obscenity, child pornography, and harmful material to juveniles is "the right thing to do." Pornography has no place in the library, school, or workplace environment. Libraries, schools, and legitimate businesses do not carry or provide pornography, and they can use filtering software to ensure that pornography is not carried on their computer terminals.

Moreover, specifying clearly the type of material to be blocked and the reasons such blocking actions were taken (in the furtherance of some compelling state interest) overcomes much of the objections expressed by opponents of filtering software. The definitions of obscenity and child pornography, in the above-cited cases, have been upheld by the Supreme Court against vagueness and over-breadth challenges and, therefore, avoid the problems addressed in such cases as: *MPAA v. Spector*, 315 F. Supp. 824 (E.D. PA. 1970); *Swope v. Lubbe*, 560 F. Supp. 1328 (W.D. Mich. 1983); *Engdahl v. Kenos*, 317 F. Supp. 1133 (E.D. Wis. 1970); and *Interstate Circuit v. Dallas*, 390 U.S. 676 (1968).

In the MPAA cases, the courts struck-down criminal laws that used the MPAA rating scheme to define what motion pictures children should be prohibited from viewing. The MPAA rating scheme was rejected, in part because the MPAA is a private organization and it would constitute an unlawful delegation of governmental law enforcement authority by making the MPAA ratings the basis for a law that would criminalize conduct based on definitions and criteria set by such a private group without legislative or judicial mandate. The courts prohibited use of a private rating scheme to define the elements of a criminal offense, leaving criminality in the hands of the private entity, an unauthorized delegation of governmental and legislative authority. Filterware, and the CDA's immunity for using it, accomplishes just the opposite. The private capacity of a private company to help one avoid unwanted acquisition or access to illegal materials is consistent with properly enacted laws and does not usurp the power of the legislature by allowing citizens to comply with it.

Since a library or school, as well as a private company, has the right to make selection and access decisions, the management and staff can employ private or public means and services to assist in exercising that operational discretion, just as they can hire a book selection service or use the *New York Times* best seller list or hire an outside consultant to help guide the exercise of their buying or acquisition decisions. A legislature or public official may not be able to force a public library, a school, or a business to carry a particular book or video, but the library, school, or entity has the right and can decide what to have and provide.

13. Addressing Concerns Raised by Fear of Censorship

> *"It is important, in applying constitutional principles, to interpret them in light of the fundamental interests of personal liberty they were meant to serve. Respect for these principles is eroded when they leap their proper bounds to interfere with the legitimate interest of society in enforcement of its laws...." Couch v. United States,* 409 U.S. 322 (1973)

Computers are simply machines which can offer access (via an ISP) to the following:

(1) the Internet and the World Wide Web (WWW);
(2) e-mail;
(3) chat rooms;
(4) Usenet news groups;
(5) Information databases and Bulletin Board Systems.

Though federal and state law enforcement officials may discharge their legal obligation to enforce valid laws against illegal "cyber" material, they cannot prosecute all known and unknown offenders of federal, state, and local laws. Parents cannot stop or control the traffic in illegal and harmful materials and cannot reasonably protect even their own children from access to such materials without unfairly denying their children the benefit of school and public library facilities. Keeping children home or out of the library is not an acceptable alternative to socially responsible safeguards and policies. Women (and boys and girls) should not be placed at a disadvantage or endangered in the workplace (whether in a library, school, or business) because of the presence of pornography.

Local communities will be faced with the serious question of how to control the pandemic nature of the problem fostered by unbridled commercial and public postings of violent and hard-core

pornography on the Web and Usenet, primarily. Incomplete or ineffective law enforcement efforts would only compound the problem and even vigorous enforcement cannot prevent the existence of illegal material on these computer services.

It is socially irresponsible and unacceptable (particularly in tax supported institutions such as public libraries or schools) to permit the use of publicly owned and financed computer equipment to access or display: (1) obscene material, (2) child pornography, (3) "harmful" matter to minors, and (4) sexually explicit pornography which creates a hostile work environment and constitutes sexual harassment under either state or federal law. It is a matter of public record that these four categories of material are freely and easily available on the World Wide Web and Usenet (and are virtually unavoidable because of the way browsers, search engines, chat rooms, and unsolicited email services operate). Before "Internet access" is made available to the anyone, reasonable steps should be taken to ensure that public and private property will not be abused, or become a weapon against the unwary.

This is especially true in light of the "compelling interests" involved:

(1) The principle that society has a "compelling interest" in protecting minors from sexually explicit material has been consistently recognized by the United States Supreme Court. *See*, for example, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (concluding that government may compel broadcasters to refrain from airing indecent sexual material when children are likely to be in the audience or when unconsenting adults may be viewers); *Ginsberg v. New York*, 390 U.S. 629 (1968) (ruling that government may criminalize disseminating sexually explicit harmful material to minors, even though the material may not be obscene for adults). In addition, the Supreme Court has uniformly ruled that governmental regulations may also act to facilitate parental control over children's access to sexually explicit material. *See Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1282 (1992); and *Sable Communications v. FCC*, 492 US 115 (1989).

(2) The eradication of workplace discrimination is more than simply a legitimate governmental interest, it is a compelling governmental interest. Eliminating discrimination against women is compelling government interest. A compelling governmental interest lies in removing barriers to economic advancement and political and social integration that have historically plagues and hinders and victimizes women. *See Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991). Pornography is the handbook for male disrespect and discrimination and subjugation of women. Hard-core pornography has no serious value and no "redeeming social importance" and contributes only to perpetuating the problems between the sexes that harassment and civil rights law address.

Courts must balance the compelling governmental interests involved, *i.e.* protecting minors from exposure to harmful material, eradicating employment discrimination by cleansing the workplace of impediments to the equality of women, even where the "speech" at issue is treated as fully protected under the First Amendment, and the avoidance of unlawful traffic in illegal pornography. The existence of the three above-stated compelling governmental interests permit the regulation of even "protected speech." A regulation is valid, if narrowly drawn to serve these interests. *See United*

States v. Paradise, 480 U.S. 149, 171-85, 107 S. Ct. 1053, 1066-74, 94 L.Ed.2d 203 (1987) (performing similar analysis for race-conscious remedy to race discrimination), which observed:

> "Other first amendment rights, such as the freedom of association and the free exercise of religion, have bowed to narrowly tailored remedies designed to advance the compelling governmental interest in eradicating employment discrimination."

Facilitating parental control by providing blocking software on machines used by children, removable only upon express parental consent and supervision, is not "censorship." It is fully consistent with the power that courts have recognized in government, business, and parents to protect minor children. Courts have uniformly ruled that government and parents have the right to have children shielded from graphic depictions of sexual activity. *See Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Dir. 1991), *cert. denied*, 112 S.Ct. 1282 (1992), *Sable Communications v. FCC*, 492 U.S. 115 (1989) (ruling that government may act to facilitate parental control over children's access to sexually explicit broadcasts by banning indecency from broadcast television, radio, and dial-a-porn).

Filtering software functions not as "censorship," since it is not a "governmental" removal or restriction of speech but a private decision not to acquire or provide access to certain materials. It is similar to the concept of a "restricted shelf" in a library (which have been held to be constitutional). In light of the constitutionally sanctioned right of parents to protect their children from harmful, graphic depictions of sex in other contexts, it is not surprising that where the courts have looked at "print mediums" other than the Internet, methods taken to protect children from exposure to certain material have been approved as constitutional. In *Presidents Council, Dist. 25 v. Community School Bd. No. 25*, 457 F.2d 289 (2d Cir. 1972), *cert. denied*, 409 U.S. 998 (1972), for example, the Court upheld a decision which made a sexually explicit book available to children only upon their parents' consent. In fact, another federal court actually created a "restricted shelf" to prohibit children's access to sexually explicit material absent prior, express parental consent. *See Right to Read Defense Committee of Chelsea v. School Committee of Children*, 454 F. Supp. 703 (D. Mass. 1978); *Bicknell v. Vergennes Union High School Board of Directors*, 638 F.2d 438 (2d Cir. 1980) (sanctioning the removal of a book based upon its vulgar and indecent language); *Grosser v. Woollett*, 341 N.E.2d 356 (Ohio C.P. 1974), *aff'd*, 74 Ohio Ops. 2d 243 (Ohio App. 1975), *app. dismissed*, No. 75-719 (Ohio Sup. Ct., Oct. 16, 1975) (enjoining high school from using two books found "harmful to minors" without express parental consent). Cases such as these show that restricting minors' access to sexually explicit material in libraries would not violate the First Amendment, even if the use of filtering software were not specifically authorized and protected by federal law.

The ALA "Library Bill of Rights" Cannot Be Used to Shield Obscenity, Child Pornography, or Material Harmful to Minors from the Application of State or Federal Laws

The American Library Association ("ALA") has promulgated a "*Library Bill of Rights.*" that states, at Section 5: "A person's right to use a library should not be denied or abridged because of origin, age, background, or views."

This provision of the "Library Bill of Rights" has been interpreted by the ALA and some libraries to preclude the use of filtering software, on the insupportable premise that minor children should have a right (under the First Amendment to the U.S. Constitution) to unrestricted use of all library materials and that it "violates the law" to restrict a child's access to any library resource "because of ...age." Until the "Internet" computer brought commercial Web-porn and Usenet-porn into the library, there was no other form of hard-core or child pornography in the public library collections, so the issue was little more than a discussion point when someone complained of a book because of its message or mature treatment. *Pico*'s reasoning could dispose of most such complaints or could be followed by a librarian so as to prevent or cure the complaint. The ALA position is still being maintained, however, now that the computer terminal can and does provide access to hard-core child and adult pornography, including rape, incest, torture, bestiality, excretory, and other extreme forms of obscenity and child exploitation materials, not to mention electronic forms of magazines the libraries don't generally subscribe to or give to children, such as *Hustler* or *Penthouse*. In light of *Ginsberg v. New York* and the *Reno* case, the ALA's open shelf access to the entire online and Internet collection, rather than just to the library's own collection, is not a correct interpretation of the law**.**

In *Ginsberg v. New York*, *supra*, the Court held that it was constitutionally permissible to grant minors more protection from what adults could provide them than other adults could be protected from and to accord minors a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see, and that such restrictions do not invade the area of freedom of expression constitutionally secured to minors. 390 U.S. at 636-37. The First Amendment rights of minors are not "co-extensive with those of adults." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J. , concurring). "[A] child...is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Ginsberg v. New York*, 390 U.S. 629, 649-650 (Stewart, J., concurring.)

Libraries should also be reminded of the concession made by the ALA in *Reno* that obscenity is lawfully and totally "banned" in cyberspace because it is illegal and enjoys no First Amendment protection. *See Reno* Slip Opinion at 26. Consistent with this admission of existing, valid law, the ALA's "censorware" opposition is legally groundless. Therefore, obscene, child exploitation, and harmful to minors materials should not be subject to unrestricted access on library Internet equipment.

Public officials and library/school boards should also be reminded that the ALA is a private trade association, with no legal right or authority to impose policy on a publicly supported institution. The ALA, as a private entity, cannot lawfully be granted "veto power" over the discretion vested in these public officials. In the public debate regarding filtering software, reliance on the "Library Bill of Rights" by public officials to the exclusion of state and federal law proscribing obscenity and child pornography and state laws protecting minors from exposure to material harmful to minors, is the legal equivalent of an unlawful delegation of the lawmaking power to a private association, as condemned in the mandatory MPAA rating cases.

The ALA's "Library Bill of Rights" merely represents the personal opinion and private views of a private entity and/or of its members. It does not constitute "legal authority" upon which public decisions may be legally based. The "Library Bill of Rights" represents a "model code" of the ALA, and must be accorded the same treatment given the self-regulatory "model codes" of any other

private entity, such as a plumbers or electricians union standards, Teamsters Union driving code, Underwriters Laboratory standards, or the Motion Picture Association of America (MPAA) movie rating system, *etc.*

The law cannot be interpreted to give private organizations, such as the ALA, a "veto power" over federal and state law. Concerning the treatment to be accorded a model code of a private trade association, the California Court of Appeal, Third Appellate District, 2d 372 (1949), in *International Association of Plumbing and Mechanical Officials et al. v. California Building Standards Commission*, No. C022340, 97 Daily Journal D.A.R. 6841 (May 23, 1997), recently stated at 6844:

> "'Manifestly, any association may adopt a 'code' but the only code that constitutes the law is a code adopted by the people through the medium of their legislatures. The Plumbing Officials Association is purely private and in no sense represents the people.'"[quoting *Columbia Specialty Co. v. Breman* (1949) 90 Cal.App.2d 372, at 378].

The Court continued:

> "In *Agnew v. City of Culver City, supra*, 147 Cal.App.2d at pages 154 through 157, the court held that ordinances that required electrical equipment to carry a certain private laboratory approval label and to be installed in accordance with the privately formulated National Electrical Code were void**.** The court considered decisional authorities from other states and concluded that '[o]rdinance provisions similar to those challenged are universally condemned." (See also *Brock v. Superior Court* (1937) 9 Cal.2d 291, 297; *Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1, 10-12.) Thus, while the Legislature can provide for and encourage the participation of private associations in the regulatory process, it must stop short of giving such groups the power to initiate or enact rules that acquire the force of law. (*King v. Meese* (1987) 43 Cal.3d 1217, 1234.) And this rule applies equally to any legislation that would abrogate the state's police power by giving a private party or parties a veto over the regulatory function. (*See Bayside Timber Co. v. Board of Supervisors*, *supra*, 20 Cal. App.3d at 10; *Taylor v. Board of Education*, (1939) 31 Cal. App.2d 734, 746)"

14. CONCLUSION: THE USE OF FILTERING SOFTWARE BY LIBRARIES, SCHOOLS, AND BUSINESSES IS CONSTITUTIONAL

> *"Vice is a monster of so vile a mien, As to be hated, needs but to be see. Yet, seen too oft, familiar with her face, We first endure, then pity, then embrace." Alexander Pope, "Quatrain on the Monster Vice" (1707).*

It is lawful and fully consistent with the Constitution for libraries and schools (both public and private), as well as for private companies and institutions, to use filtering or screening software: (1) to prevent the acquisition of illegal and objectionable pornography from the various interactive computer services available through the Internet and other online databases; (2) to restrict access to sexually explicit pornographic material on computer terminals. A school or library is not required to grant unrestricted and unlimited use or access by any and all members of the public to any and all materials potentially available by computer. It is constitutionally permissible and appropriate for the

governing board or staff of a school or public library to employ a software filtering device for library or school computers that provide access to the Internet, Usenet, and other online services.

Libraries, schools, and businesses have the right and the privilege of making use of software programs and services to avoid public, semi-public, and private property from being used to improperly access material which (judged according to its mission statement) is unsuitable, offensive, or otherwise undesirable, including, but not limited to, accessing matter that: (1) meets the definition of "obscenity" as expressed in *Miller v. California* and its progeny (so-called "hard-core pornography"); (2) meets the definition of "child pornography," as defined in *New York v. Ferber,* and 18 U.S.C. §§ 2252, 2256 (minors engaged in sexually explicit conduct or lewd/lascivious genital exhibitions); (3) meets the definition of "harmful to minors," as defined by the "*Millerized" Ginsberg* test (which includes so-called "soft-core pornography"); (4) is found by a governing board or staff (in keeping with its respective mission statement) to be "pervasively vulgar" or lacking "educational unsuitability" for minor school children; or (5) creates a hostile work environment or constitutes sexual harassment under applicable State or Federal law.

The value of the Internet as an educational and business asset can only be realized if it is responsibly managed. Cyberporn doesn't belong in a public library, school, or business. Filtering software can help keep it out. Libraries, in particular, have no legal justification for providing: (1) minor children with access to hard-core or soft-core pornography or to child pornography, or (2) adults with access to obscenity or child pornography. Libraries, schools, and businesses making good faith use of access restriction software to protect children or to avoid illegal or offensive materials for adults are protected from liability by the "Good Samaritan" immunity provided by federal law. *See* 47 U.S.C. § 230 (c)(2), 110 Stat. 139 (1996).

Respectfully submitted, (10-17-97)

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NOTICE AND DISCLAIMER

This NLC memorandum attempts to highlight and discuss certain prominent legal issues raised by the use of filtering software by libraries, schools, and businesses to block access to sexually explicit pornography by computer (*i.e.* Usenet, World Wide Web, BBS, chat service, *etc.*). This review is provided as an educational service to the public and is not meant as personal or specific legal advice or analysis. Legal advice must be tailored to the specific facts and circumstances of each case and attorney-client guidance must be obtained from personal counsel.