

Internet Filtering in Public Libraries and Schools

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I. Introduction

New proposed state legislation would require New Jersey public libraries and public school libraries to install filtering software to restrict minors' access to the Internet. Web sites will be prohibited if they advocate "intolerance" or "extreme behavior," include "gross depictions," or depict sexual acts.

The greatest problem with the bill is that it will force public libraries into the impossible position of having to choose between a) violating the First Amendment and b) losing their funding. For students who have no computers at home, filtering is a form of discrimination. With respect to public school libraries, the designation of an administrator to monitor and control access is tantamount to formal, government-controlled censorship.

II. Public Libraries

It is well established that children have a First Amendment right to obtain information at a public library. The United States Supreme Court has explained that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well defined circumstances may government bar public dissemination of protected materials to them." Erznoznik v. City of Jacksonville, 422 U.S. 211, 212-213 (1975).

The parameters of children's rights under the First Amendment may be discerned from Board of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. 853 (1982), in which the United States Supreme Court considered the problems that arose when a local school board removed several books from a high school library. The Supreme

This memorandum sets forth my personal views and is not a legal opinion letter. Accordingly, this memorandum necessarily cannot serve as the basis for any public library's legal judgments. The law, particularly as it relates to Internet use, is changing rapidly, as new legislation is adopted and new court challenges are filed. Libraries seeking legal advice should retain counsel for analyses of their own particular situations and current law.

Court divided sharply on the question of removing offensive books from a school library, but agreed unanimously that if the books were barred from the *school* library, students nevertheless had a constitutional right to read them at the local *public* library. For the plurality, Justice Brennan said “the student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom.” *Id.* at 869. In dissent, Justice Rehnquist similarly emphasized that the students were free to read books at the public library even if those books had been disapproved by the school board and removed from the school library. “The removed books are readily available to students and nonstudents alike at the corner bookstore or the *public library*.” *Id.* at 913 (Rehnquist, J. dissenting) (emphasis added).

The Internet is entitled to the highest level of constitutional protection. *Reno v. ACLU*, 521 U.S. 844 (1997). This protection must attach at the public library. Justice Rehnquist’s dissent in *Pico* treated the public library as a broad and appropriate forum for children to explore materials deemed inappropriate for the school library. “Indeed, following the removal from the school library of the books at issue in this case, the local *public library* put all nine books on display for public inspection. Their contents were fully accessible to any inquisitive student.” *Id.* at 913 (Rehnquist, J. dissenting) (emphasis added). Thus, like books and periodicals in the public library, restrictions on the Internet must be narrowly tailored to serve significant government interests. *See Kreimer v. Morristown*, 958 F.3d 1242 (3d Cir. 1992) (First Amendment right to use library materials).

Accordingly, the constitution clearly protects the First Amendment rights of children in public libraries, and the subject of Internet filtering must be approached with great caution. The problems with filtering systems are well documented. “First, they are wildly overbroad and inaccurate, often blocking unexpected and useful content. Second they face an almost impossible task of keeping up with the tremendous volume and growth of content on the Internet. ... Third, it is very difficult for the user to know what is

being blocked and why....” R. Polk Wagner, *Filters and the First Amendment*, 83 *Minn.L.Rev.* 755, 762-763 (1999).

For example, “Smartfilter” has been known to inadvertently block the Declaration of Independence, the U.S. Constitution, the Bible, the Book of Mormon, the Koran, and a wide variety of literature taught in most public schools. See Sims, “Censored Internet Access in Utah Public Schools and Libraries,” <http://censorware.org//reports/utah/main>. Similarly, CyberPatrol has at various times blocked Planned Parenthood, Envirolink, the AIDS Authority, the MIT Project on Mathematics and Computation, the University of Arizona web site, and the U.S. Army Corps of Engineers Construction Engineering Research Laboratories. Moreover, filtering software is called upon to make the most sensitive of legal judgments. Constitutionally protected expression is often separated from obscenity only by a “dim and uncertain line.” *Bantam Books v. Sullivan*, 372 U.S. 58, 68 (1963). Since there is no bright line between protected speech and obscenity, juries (rather than computers) are asked to apply community standards. *Freedman v. Maryland*, 380 U.S. 51 (1965).

Thus, even if filtering were appropriate in public schools, it would appear inevitably to run afoul of the constitution in a public library.

III. The Bill Will Not Immunize Libraries from Constitutional Violations

If a public library elects to preserve its funding by installing Internet filters as prescribed by the proposed legislation, it will become extremely vulnerable to civil rights actions under 42 U.S.C. §1983. As governmental entities, public libraries can be sued for civil rights violations if they purposely or even inadvertently suppress constitutionally protected speech. See e.g., *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 2 Fed. Supp.2d 783 (“Loudoun I”), 24 Fed. Supp.2d 552 (E.D. Va. 1998) (“Loudoun II”). If a library restricts a patron’s access to material based on the content of the material, its action becomes a form of government censorship, which is not permitted under the First Amendment.

The legislature cannot authorize government agencies to violate the constitution. That is to say, the legislature cannot pass a law that would shield a public library from lawsuits based on First Amendment violations. See City of Boerne v. Flores, 521 U.S. 507 (1997) (legislation does not change the scope of First Amendment rights). Thus, the proposed bill does *not* insulate the library; the library still has to abide by the First Amendment. Loudoun I, 2 F.Supp.2d at 790. Nor does the Communications Decency Act confer immunity for constitutional violations. See 47 U.S.C. §223(f)(2). The federal statute recognizes that librarians should enjoy immunity from defamation actions or criminal prosecutions based on what their patrons do on the Internet. But no public library has immunity as to a violation of a patron's First Amendment rights.

IV. Filtering as a Form of Discrimination

The proposed filtering bill would seriously disadvantage students who depend on public schools and libraries for Internet access. For example, an African-American student who wants to write a report on the rhetoric used by militia groups will not be able to do so unless he has a computer at home, because sites advocating "intolerance" will be filtered out at the library. No high school student would be able write a report on the perils of breast implants without petitioning the librarian or school filtering "administrator," or, alternatively, using her computer at home. Presumably the websites of anti-abortion groups will be blocked if they use "gross depictions" of fetuses, as defined in the proposed legislation.

Unwealthy children who depend on their public schools and libraries will not be permitted to investigate controversial subjects. The privilege of grappling with difficult material will be reserved to the impressionable young minds who have Internet resources at home.

V. Appointing the School Censor

The proposed legislation would appoint an "administrator" to determine "which Internet sites or types of sites are inappropriate for use and viewing by students." The bill

invests the administrator with absolute discretion, which is the heart and soul of censorship. Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 757 (1988). It also makes the proposed bill a classic example of a prior restraint of speech. Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992). Accordingly, this provision renders public schools highly susceptible to constitutional violations.

It is well established that high school students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 506 (1969). The right to acquire information is clearly connected to the fundamental rights of political speech and free association in democratic society. Brown v. Bd. of Education, 347 U.S. 483, 493 (1954). As such, it is essential for teenagers. “In our system, students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate.... Just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.” Pico, 457 U.S. at 868.

In New Jersey, as in other states, what is obscene for a minor may not necessarily be obscene by adult standards, N.J.S.A. 2C:34-3, and there is certainly filth to be found on the Internet. But it is clear that, as governmental entities, public libraries and schools must be mindful of children’s First Amendment rights, and must guard against restrictions that sweep too broadly. For example, the Supreme Court has held that the state cannot simply ban minors from exposure to a whole category of expression, such as nudity, when only a subset of that speech can plausibly be deemed “obscene” for them. Erznoznik at 212-214. See also Interstate Circuit v. Dallas, 390 U.S. 676 (1968) (striking ordinance as vague which prohibited showing of films “not suitable for young persons”).

The proposed legislation suffers from a number of weaknesses, not least of which is the state of current Internet technology. Enterprising computer enthusiasts have

infiltrated even the most secure commercial and military systems, and total innocents have inadvertently encountered pornographic websites without in the least intending to do so.

This suggests that even if a school or library tries to control children's Internet use, the censor's best efforts will eventually be thwarted, rendering the school or library vulnerable to significant financial distress, not to mention potential lawsuits for constitutional violations.

Moreover, appointing a school censor, in the form of an "administrator of the program" will not protect a library from civil suit for *failure* to filter material deemed harmful to minors. Thus, if a school or library takes measures to prevent children from viewing inappropriate material, some child will nevertheless eventually be able to circumvent the filtering software, making the school or library vulnerable to a lawsuit for "failing to protect" the child.

Thus, the appointment of an administrator guarantees nothing. Schools and libraries still stand to lose funding, and the proposed legislation makes them extremely susceptible to civil rights actions for constitutional violations.

VI. The Library Censor

The bill would reduce state aid to libraries that do not comply with its requirements. At the very least, it would give a government official the discretionary authority to cut funding to noncompliant libraries. This will force librarians to struggle with statutory definitions like "gross depiction," which includes "grossly deficient in civility" as well as "scatological impropriety," and "militant or extreme behavior." On peril of a budget cut, librarians must block online versions of *The Miller's Tale*, *Common Sense*, *The Autobiography of Malcolm X*, *Soul on Ice*, and the materials deemed to have been appropriate for the public library in the Pico case.¹

¹ Including *Slaughterhouse Five*, by Kurt Vonnegut; *The Naked Ape*, by Desmond Morris; *Best Short Stories of Negro Writers*, edited by Langston Hughes; and *The Fixer*,

The bill is a recipe for First Amendment disaster for public libraries. The bill would force libraries to use unreliable technology in the service of proscribe “categories” of speech that have no stable or coherent content. The United States Supreme Court struck down as unconstitutional portions of the Communications Decency Act for precisely these reasons. Reno v. ACLU, 521 U.S. 844 (1997).

VII. Conclusion

The proposed Internet filtering bill is probably unconstitutional on its face. No one would dispute that “[t]here is a compelling interest in protecting the physical and psychological well being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.” Sable Communications v. FCC, 492 U.S. 115 (1989). The First Amendment would permit restrictions on offensive language and materials that are psychologically or intellectually inappropriate for children. FCC v. Pacifica, 438 U.S. 726, 749 (1978); Ginsberg v. New York, 390 U.S. 629, 639 (1968). “It is evident beyond the need for elaboration that a state’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling’.” New York v. Ferber, 458 U.S. 747, 756-57 (1982) (child porn has no First Amendment protection even if it is not obscene), quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).

But censorship is not the answer, and libraries should not be punished for abiding by the constitution. “Libraries are not in the business of purveying or exhibiting pornographic materials. They are, however, frequent targets of private citizens concerned, sometimes in an ignorant and narrow-minded way, with the exposure of their children to immoral influences. Mindless censorship, flavored with hysteria, of textbooks and of reading lists, of school libraries and of public libraries, is an old story ... but one

by Bernard Malamud. Pico, 457 U.S. at 897-903 (excerpting scandalous passages from each of the offending books).

with plenty of contemporary vitality.” Kucharek v. Hanaway, 902 F.2d 513, 520 (7th Cir. 1990), cert. denied, 498 U.S. 1041 (1991).