

**Print Symposium: Contract Options for Individual Artists: Library Records
Open to Parental Scrutiny: A New Set of Internet Access Controls for
Minors?**

Spring, 2006

Reporter

29 Colum. J.L. & Arts 361 *

Length: 12412 words

Author: Sidne Koenigsberg*

*J.D. Candidate 2006, Columbia University School of Law; B.A., Amherst College, 2003. The author would like to thank June Besek, Daniel Dex and Steven Shapiro for their helpful comments on this Note. The author would also like to acknowledge the support of the Kernochan Center for Law, Media and the Arts and the Robert Blumofe Fellowship which provided funding for a summer internship at the Office of the General Counsel of The New York Public Library, where some of the research for this Note began. The views expressed in this Note, however, are solely the author's and do not represent the views of The New York Public Library.

Text

[*361]

INTRODUCTION

Many parents are nervous about what their children view and discuss via the internet from computers at home, at school and at the local library. ¹ One approach to this problem is to limit the availability of online content ex ante

¹ This paper generally considers the law and policy affecting public libraries, which are used by adults and minors, as opposed to school libraries, which are primarily intended for minors. School libraries may be afforded more discretion to make content-

through filtering programs, and to this end the Supreme Court has approved federal funding conditions that require public libraries to place filtering software on computers that offer internet access to minors and adults.² Another possible approach is to institute programs that help parents monitor and review their children's internet habits ex post - but could parents ask for and expect to receive a report on their children's internet activities from local libraries? A nationwide program to provide parents with access to records of their children's online activity outside the home has not yet been proposed. However, the potential for such a regime is already in place as several states allow parents to access their minor children's library records to see what their children have been reading and, possibly what their children have [*362] been viewing on the internet at a school or public library.

Many computer software companies and internet service providers offer an array of filtering programs and other devices by which parents can limit and monitor their children's internet use at home. In late 2004, internet service provider America On-Line ran a television commercial in which a young mother with a baby in her arms barges into the company's corporate boardroom and requests "a report card of my child's online activities" as an improvement to an already comprehensive "parental controls" software package.³ Although a parent's choice to limit or monitor his or her child's internet use at home may curtail many speech activities for children, it is well within parents' supervisory rights over their children to engage in such private activity. However, if the "report card" of children's online activities is offered by the state through rules imposed on local libraries, minors' First Amendment rights must be taken into account.

In Part I, this Note surveys the state privacy laws that regulate parental access to minors' library records, examines administrative and judicial interpretations of these statutes and reports a current legislative trend of allowing increased parental access to minors' library records. In Part II, this Note questions the constitutionality of granting parental access to minors' library records, weighing parental supervisory interests against minors' free speech and

based restrictions on students' speech and right to receive information than public libraries. See [Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 892, 915 \(1982\)](#) (Burger, C.J. dissenting) (Rehnquist, J., dissenting). For an examination of school monitoring of student internet use, see Aaron H. Caplan, Public School Discipline for Creating Uncensored Anonymous Internet Forums, [39 Willamette L. Rev. 93 \(2003\)](#).

² See [U.S. v. Am. Library Ass'n, 539 U.S. 194 \(2003\)](#). Congress passed the Children's Internet Protection Act (CIPA), in part, "to prevent minors from obtaining access to material that is harmful to them" and also "to address the problems associated with the availability of internet pornography in public libraries." *Id.* at 198-99. The Court also considered the advantages and disadvantages of filtering software as a proposed less discriminatory alternative to the criminal sanctions for communicating harmful internet material to minors contained in the Communications Decency Act (CDA) and the Children's Online Protection Act (COPA), which were both struck down. See [Reno v. Am. Civil Liberties Union, 521 U.S. 844 \(1997\)](#) (striking down provisions of the CDA); [Ashcroft v. Am. Civil Liberties Union, 124 S.Ct. 2783 \(2004\)](#) (striking down COPA).

³ See Seth Stevenson, You've Got Commercials! Bad ones. AOL's new campaign fails in every way., *Slate*, Nov. 8, 2004, <http://www.slate.com/id/2109282/fr/rss/> (describing and criticizing the commercial).

privacy interests, and concludes that parental access to library records poses a serious threat to the right to receive information for older minors.

Although the same policy considerations may be said to apply whether library records reveal information about traditional print materials or information pertaining to internet usage, this Note focuses particularly on minors' internet usage because the advent of library internet access has raised the stakes in the debate over parental access to minors' library records. The perceived risk of minors' exposure to harmful materials is great in the internet setting and has prompted several attempts by Congress to regulate internet speech heavily in the interest of protecting minors.⁴ At the same time, the ease of research and breadth of material on the internet make it a most valuable resource for minors who want to research material that they would otherwise be too intimidated or embarrassed to seek out while under a parent's immediate supervision.

Parental access to library records can discourage minors from investigating all manner of ideas, including unorthodox political ideas or religious beliefs. Teenagers may use the internet to research up-to-date information on issues of sexuality, safe sex and methods of contraception or even abortion. The internet also provides a unique level of interactive exchange and allows its users to reach **[*363]** outside of their local communities to engage in varied research and discourse. Thus a gay teenager living in a homophobic community could use a library internet connection to research and exchange information and ideas about homosexuality in a non-threatening environment.

Parental access provisions that are intended to chill a child's exercise of free intellectual inquiry are arguably viewpoint discriminatory in that they practically reduce a minor's choice of information to ideas that are parentally sanctioned. Library records confidentiality statutes should ideally be narrowly tailored to allow greater intellectual freedom to older minors, especially in light of the fact that minors' access to objectionable internet materials is already limited under the filtering regime imposed by the Children's Internet Protection Act. Asserting mature minors' free speech interests in the confidentiality of library records is important in developing a liberal free speech jurisprudence regarding both mature minors and internet access.

I. APPLYING STATE LIBRARY RECORDS CONFIDENTIALITY LAWS TO MINORS AND THE INTERNET

⁴ See [Am. Library Ass'n, 539 U.S. at 198-99](#) (discussing the reasons why Congress wanted to pass CIPA). Several states also require libraries to implement internet filtering programs. See, e.g., [Mich. Comp. Laws Ann. 397.606](#) (West 2004). For a discussion of more state and local government filtering measures, see Anuj C. Desai, Filters and Federalism: Public Library Internet Access, Local Control, and the Federal Spending Power, 7 U. Pa. J. Const. L. 1, 57-58 (2004).

Public libraries provide their patrons with free access to a wide array of print, multimedia and online materials.⁵ Library records, the internal documents regarding a patron's use of the library, may detail what materials a particular patron has borrowed from the library or researched through the use of electronic databases or the internet.⁶ Libraries and librarians have traditionally advocated strong privacy rights for their patrons and have argued that the First Amendment right to free speech should embrace a "freedom to read" or the right to access information of varied content uninhibited by private or governmental monitoring.⁷ The American Library Association encourages libraries to protect patron privacy and the freedom to read by limiting the use of identifying patron information in their record-keeping procedures and by refusing to disclose to third parties any records that are maintained.⁸ However, electronic record-keeping and increased government surveillance of library records have presented libraries with challenges in their efforts to maintain their patrons' confidentiality.

Every state, either by statute or by administrative decision, prohibits the [*364] disclosure of library records to third parties absent a court order or subpoena.⁹ Many states created a confidentiality privilege for library records by exempting these records from their Freedom of Information Laws, while others enacted free-standing provisions prohibiting the disclosure of library records.¹⁰ The statutes were predominantly passed in the 1980s in response to increasing governmental and private requests for library records that threatened to chill library patrons' exercise of

⁵ I use the term "public library" to refer to those libraries that are open to the general public for use and are supported in part or in whole by federal, state or local government funding, such that they may be subject to state-imposed funding conditions and may, in some cases, be considered state actors for First Amendment purposes.

⁶ Libraries create user records "to enhance service, account for the use of library resources, and control the circulation of a collection," but by keeping these records libraries incidentally and "quite unintentionally" create a record of individuals' reading and research activities. Bruce M. Kennedy, Confidentiality of Library Records: A Survey of Problems, Policies, and Laws, 81 Law Libr. J. 733, 733 (1989).

⁷ See Mary Minow & Tomas A. Lipinski, *The Library's Legal Answer Book* 166 (2003); Office of Intellectual Freedom (ALA), *Intellectual Freedom Manual* 348 (6th ed. 2002). For a discussion of the constitutional right to receive information, see *infra* Part II.A.

⁸ See Office of Intellectual Freedom (ALA), *supra* note 7, at 348-55.

⁹ For a comprehensive list of state library records confidentiality statutes, see Minow & Lipinski, *supra* note 7, at 200-210 (displaying a chart that outlines state provisions as of publication); Paul Neuhaus, *State Laws on the Confidentiality of Library Records*, available at http://www.library.cmu.edu/People/neuhaus/state_laws2.html (last visited Feb. 17, 2006) (listing state provisions and pending amendments). This paper will not address the constitutional issues implicated when the government requests library records for use in criminal investigations. Much has been written on this topic in response to the FBI Library Awareness Program in the 1980s and to the recent USA Patriot Act. See, e.g., Ulrika Ekman Ault, Note, *The FBI's Library Awareness Program: Is Big Brother Reading Over Your Shoulder?*, 65 *N.Y.U. L. Rev.* 1532 (1990); Kathryn Martin, Note, *The USA Patriot Act's Application to Library Patron Records*, 29 *J. Legis.* 283 (2003).

¹⁰ The American Library Association considers a freestanding provision "preferable" because it may create a stronger privacy right than a Freedom of Information Law (FOIL) exception, which may be construed narrowly according to the purposes of FOIL. See Office of Intellectual Freedom (ALA), *supra* note 7, at 352. For an example of how this distinction can affect the interpretation and application of a library records statute as applied to minors, see *Op. Va. Att'y Gen.*, 2002 WL 736040, at 1 (Feb. 25, 2002), discussed *infra* Part I.B.

their First Amendment rights. ¹¹ Thus library record confidentiality laws are based on notions of free speech, including the freedom to access information, intellectual freedom and privacy.

Some states' library confidentiality statutes directly grant parents access to their children's library records. In states without explicit parental access provisions, minors' confidentiality rights are largely determined by library discretion. In a handful of cases the issue of parental access to minors' library records has come under administrative and judicial consideration. Although most state statutes still do not provide for parental access explicitly, amendments allowing parental access have recently been proposed and passed in several states.

A. Parental Access Provisions in State Library Records Confidentiality Statutes

While the American Library Association advocates a policy of equal privacy rights for minor and adult library patrons, several states explicitly distinguish between the privacy rights of minors and adults in their library confidentiality [*365] statutes. ¹² At least six states currently permit parents to access their minor children's library records at any time through explicit exceptions in state library records confidentiality statutes. ¹³ Several other states permit the release of minors' records to parents in certain limited circumstances, such as when records pertain to school libraries or to overdue library materials. ¹⁴ Some state statutes include references to parents and minors that are ambiguous on the issue of disclosure: for example, several state statutes provide that records may

¹¹ Legislative history shows that particularly pernicious requests for patron borrowing information came from a group known as the "Moral Majority." See Bill Jacket to L. 1982, ch. 14 (N.Y.) microformed on Legislative Bill Jackets ZAN-T654 (on file with The New York Public Library's Science, Industry and Business Library) (Memoranda of recommendation from the New York County Lawyer's Association and the New York Civil Liberties Union); Selected 1987 Georgia Legislation, 3 Ga. St. U. L. Rev. 343, 443 (1987). See also Definition of The Moral Majority, The Columbia Encyclopedia (6th ed. 2005), available at <http://www.bartleby.com/65/e-/E-MoralMajo.html> (defining the Moral Majority as a U.S. political action group composed of conservative, fundamentalist Christians).

¹² The American Library Association advocates equal treatment of all library patrons, regardless of age. See Office of Intellectual Freedom (ALA), *supra* note 7, at 57 (Library Bill of Rights Article V: "A person's right to use a library should not be denied or abridged because of origin, age, background or views.").

¹³ [Ala. Code 41-8-10](#), 36-12-40 (2004); [La. Rev. Stat. Ann. 44:13\(A\)](#) (2004); [Ohio Rev. Code Ann. 149.432\(B\)\(1\)](#) (West 2004); [S.D. Codified Laws 14-2-51](#) (2004) (granting access to parents of children age 18 and under); Utah Code Ann. 63-2-302(1)(c), 63-2-202(1)(b) (2004) (permitting disclosure to parent of unemancipated minor); [Wyo. Stat. Ann. 16-4-203\(d\)\(ix\)](#) (2004).

¹⁴ E.g., [Alaska Stat. 40.25.140\(b\)](#) (2004) (permitting parent to access child's records from public elementary or secondary school library); [Fl. Stat. Ann. 257.261\(3\)\(b\)\(2\)](#) (West 2004) (permitting disclosure "only for the purpose of collecting fines or recovering overdue [materials]" to parents of minors under age 16); [N.M. Stat. Ann. 18-9-5](#) (2004) (exempting records pertaining to overdue notices and granting parents access to minor child's school library records). It is important to note, however, that special provisions for overdue materials would not apply to internet usage records.

be released with the written, informed consent of a library patron and that such consent shall be made by a parent where a minor's records are released.¹⁵

In states where the statute governing library records disclosure makes no explicit exception for parental access, the privacy status of minors' library records is unclear. A plain language reading of such a statute would support full confidentiality for minors, affording minors the same privacy rights and rights to free intellectual inquiry as adults. However, an argument can be made that parental access to minors' records, particularly where younger children are concerned, is implicit in parents' constitutional and common law rights to control and oversee their children.¹⁶ There is also a practical argument for allowing parents to access children's library records: parents often bear financial responsibility for overdue library materials checked out by their children and may want to access a list of titles borrowed by their children in order to facilitate the materials' return.¹⁷

Local library boards are accountable to their communities and may be swayed by parents' requests for broader records access. Nevertheless, libraries are also serious about their mission to provide free access to information and their **[*366]** commitment to keep patron borrowing information private. Thus, libraries are likely to take minors' free speech and privacy rights into account when deciding whether to reveal to parents what minors have been reading or viewing on the internet. Ultimately judges, administrative officials and library board members who decide how to apply library records confidentiality laws to minors in states with no explicit parental access provision must weigh the supervisory interests of parents against the free speech and privacy interests of minors.

B. Library Records Confidentiality for Minors in States without Parental Access Provisions: Administrative and Judicial Interpretations

The interpretation of a library records confidentiality statute with no explicit parental access provision varies from state to state. This section discusses administrative opinions from Virginia and Arkansas and one judicial opinion from New York that illustrate different approaches to the question of library records confidentiality for minors.

¹⁵ E.g., Ga. Code Ann. 24-9-46(a)(2) (2004); W. [Va. Code 10-1-22\(a\)\(2\)](#) (2004).

¹⁶ The age of minority, or period of infancy, is technically a legal disability that lasts until the age of legal emancipation or majority. Each statute relating to minors may define the age of majority differently in accordance with its purpose. Until the age of majority, minors are subject to the control and custody of their parents, who have a fundamental right to raise and discipline their children. 42 Am. Jur. 2d Infants 37 (2000); 59 Am. Jur. 2d Parent and Child 17 (2002).

¹⁷ Some states have narrowly tailored their library records statutes to allow for parental access to records pertaining to overdue materials only, see, e.g., [Fl. Stat. Ann. 257.261\(3\)\(b\)\(2\)](#) (West 2004), and some statutes appear to limit parental access to situations where the parent definitively bears financial responsibility for the minor's overdue materials, see, e.g., [Mich. Comp. Laws Ann. 397.603\(2\)](#) (West 2004) (permitting release of records upon "written consent of the person liable for payment for or return of the materials identified in that library record").

Because the New York court focused on First Amendment principles, its opinion showed a stronger belief in minors' confidentiality rights than the Virginia or Arkansas Attorney Generals' opinions.

Most recently, in 2002 the Office of the Attorney General of Virginia was asked to issue an opinion assessing whether, under Virginia's library records law, a library may disclose a minor's library records to a parent "for the purpose of identifying and locating books checked out by the minor that are overdue."¹⁸ Virginia makes library records confidential by excluding them from its Freedom of Information Law (FOIL).¹⁹ The Virginia Attorney General therefore applied principles of statutory construction particular to the FOIL context, according to which provisions granting access to public records are construed liberally and exceptions to mandatory disclosure are construed narrowly.²⁰ Because the state had no other law that affirmatively prohibited the disclosure of library records, the Virginia Attorney General concluded that it was "within the discretion of the records' custodian [librarian] whether to release the library records at issue to the minor's parent."²¹ There is a tension between the Virginia Opinion's conclusion and the Attorney General's method of statutory interpretation: the Virginia opinion ultimately defers to the judgment of library officials, who might be professionally disposed to uphold minors' privacy interests, but the Attorney General's method of statutory interpretation, derived from FOIL, favors disclosure and thus privileges parental supervisory interests.

In 2001, the Attorney General of Arkansas issued an opinion addressing the broader issue of whether parents may receive a list of their child's currently [*367] checked out library materials either through library personnel or through an electronic query.²² The Arkansas Attorney General concluded that the plain language of that state's statute would not allow such parental access to a child's records, unless a library's policy clearly showed that the parent, and not the child, was the library's "patron" for the purposes of the statute.²³ The Arkansas Attorney

¹⁸ Op. Va. Att'y Gen., 2002 WL 736040, at 1 (Feb. 25, 2002).

¹⁹ Id.

²⁰ Id. For this very reason, the ALA prefers freestanding library confidentiality laws to FOIL exceptions.

²¹ Id. The Virginia Attorney General's deference to librarians may extend only to parental requests relating to overdue materials, in which case internet records would not be affected.

²² Op. Ark. Att'y Gen., No. 2001-258 (Nov. 6, 2001), 2001 WL 1555379.

²³ Id. at 1-2. The question of parental access to a list of children's overdue materials was put to the Arkansas Attorney General when the state's library records statute first passed in 1989, and was answered, more briefly, in the same way. Op. Ark. Att'y Gen., No. 89-274 (Jan. 2, 1990), 1990 WL 358642 at 2. The 1990 opinion notes that some libraries may require parents to apply for their children's library cards and consider parents to be in contractual privity with the library on behalf of the child such that disclosure to parents would be mandated under the statute, because the parents are effectively the "patrons" in this situation. However, this interpretation seems strained under the Arkansas statute, which defines "patron" as "any individual who requests, uses, or receives services, books or other materials from a library." [Ark. Code Ann. 13-2-701\(b\)](#) (West 2004). Since the 2001 opinion was filed, Arkansas has amended its statute to allow disclosure to "any person... who has received an automated

General raised the possibility that parents might challenge this statute for violating their constitutional rights to supervise their children, but concluded that the statute, which operated under a presumption of constitutionality, barred parental access to records for children who were considered "patrons."²⁴ This determination, like the Virginia decision, returns the issue to library officials' discretion. It also gives parents a measure of authority to "opt-out" of the statutory confidentiality protection by becoming "patrons" on behalf of their children.²⁵ The Arkansas opinion addressed records of materials that were checked out, and thus did not directly consider whether parents could access records of library internet use.

The Arkansas opinion includes a thoughtful discussion of the various constitutional rights implicated in a parent's request for his child's library records.²⁶ The opinion argues that denying a parent access to his child's library records might abridge his protected interest in his child's upbringing and care, unless the parent's interest can be shown to be adverse to the child's best interest.²⁷ The opinion recognizes that children possess significant constitutional rights but that children's rights are necessarily limited by their status as minors and that "the unique role in our society of the family... requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children."²⁸ The opinion cites two Supreme Court cases on abortion which "appear [*368] to indicate that the courts will override parental rights in favor of a child's constitutional rights only in situations where denying the child's rights would have far-reaching and detrimental effects."²⁹ Thus the opinion suggests that minors' constitutional interests in library records confidentiality may be quite limited.

The Arkansas opinion undervalues minors' constitutional claims and overvalues parents' supervisory interests because it views library records confidentiality as a pure privacy right rather than a free speech right founded in the right to receive information under the First Amendment. The Arkansas opinion fails to consider the impact that records disclosure can have on minors' exercise of free speech rights. The opinion focuses on privacy cases which

telephone notification or other electronic communication for overdue materials or reserve materials if the person making the request can verify the telephone number or e-mail address to which the notice was sent." [Ark. Code Ann. 13-2-704\(4\)](#) (West 2004). Thus, parents in Arkansas may now access their children's library records if they receive a notice about overdue or reserve materials.

²⁴ See Op. Ark. Att'y Gen., No. 2001-258 (Nov. 6, 2001), 2001 WL 1555379 at 5-6.

²⁵ I do not undervalue this result. It may have the salutary effect of allowing parents to formally decide on a family by family basis how much privacy children shall be afforded in their pursuit of information.

²⁷ The parental supervisory interest is a fundamental liberty protected under the Fourteenth Amendment's Due Process Clause, and parents are presumed to act in their children's best interest. *Id.* at 2.

²⁸ *Id.* at 5. For further discussion of the constitutional rights of minors, see *infra* Part II.A.

²⁹ Op. Ark. Att'y Gen., No. 2001-258 (Nov. 6, 2001), 2001 WL 1555379 at 2 (discussing [Bellotti v. Baird](#), 443 U.S. 390 (1923) and [Planned Parenthood of Mo. v. Danforth](#), 482 U.S. 52 (1976)).

largely deal with the controversial question of abortion, where minors', parents' and the state's interests involve complex issues not always raised in the free speech context.³⁰ The only First Amendment case cited in the opinion is *Ginsberg v. New York*, which upheld protective legislation limiting speech available to minors and created the standard of "variable obscenity" to categorically bar minors' First Amendment rights to access speech that a legislature deems "harmful to minors."³¹ However, there have been several significant First Amendment decisions affecting minors, which have ruled that minors have significant rights to freedom of speech.³²

The New York court's opinion illustrates how judges and administrators may take minors' rights more seriously when the focus of library records confidentiality policy is understood in light of First Amendment free speech principles. In New York, another state with no provision for parental access to minors' library records, one trial court judge has indicated in dicta that minors may have a very strong confidentiality right against parental requests for library records documenting their children's internet use.³³ New York Civil Practice Law and Rules section 4509 is a freestanding affirmative protection for library records that does not include any reference to minors.³⁴ Section 4509 reads as follows:

[*369]

Library records, which contain names or other personally identifying details regarding the users of public, free association, school, college and university libraries and library systems of this state, including but not limited to records related to the circulation of library materials, computer database searches, interlibrary loan transactions, reference queries, requests for photocopies of library materials, title reserve requests, or the use of audio-visual materials, films or records, shall be confidential and shall not be disclosed except that such records may be

³⁰ The Third Circuit has distinguished parental notification in the First Amendment context from parental notification in the abortion context and found a state's reliance on abortion case law to defend against a First Amendment challenge to parental notification based on speech activity "fundamentally misplaced." [*Circle Sch. v. Pappert*, 381 F.3d 172, 179 \(3d. Cir. 2004\)](#) (striking down a statute requiring teachers to notify parents of students' refusal to recite the Pledge of Allegiance), for further discussion of this case, see *infra* Part II.A.

³¹ [*Ginsberg v. New York*, 390 U.S. 629 \(1968\)](#).

³² See, e.g., [*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 \(1969\)](#) (prohibiting school from disciplining students for wearing black armbands in protest of Vietnam War); [*Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 \(1982\)](#) (disapproving of school board's removal of library books containing ideas it found objectionable). For a full discussion of a mature minor's constitutional claim to library records confidentiality via the First Amendment, see *infra* Part II.A.

³³ In the [*Matter of Quad/Graphics, Inc. v. S. Adirondack Library Sys.*, 664 N.Y.S.2d 225 \(N.Y. Sup. Ct. 1997\)](#).

³⁴ N.Y. C.P.L.R. 4509 (McKinney 2004). Thus, New York state affords library users a stronger privacy right than states that simply exempt library records from their freedom of information or open records laws. See *Op. Va. Att'y Gen.*, 2002 WL 736040, at 1 (Feb. 25, 2002); Office of Intellectual Freedom (ALA), *supra* note 7, at 352.

disclosed to the extent necessary for the proper operation of such library and shall be disclosed upon request or consent of the user or pursuant to subpoena, court order or where otherwise required by statute.³⁵

The statute was amended in 1988 to clarify that confidentiality extends to all library records containing personal information, particularly to electronic database search records and presumably to records of internet-based searches as well.³⁶

The bill jacket to section 4509, which documents the statute's legislative history, refers frequently to free speech values and makes no mention of minors or parental access to children's library records.³⁷ Memoranda in support of the bill from the New York chapters of the American Civil Liberties Union and the American Library Association explicitly link library records confidentiality with First Amendment principles.³⁸ The law also applies to school libraries and was approved as a bill by the state's Education Department without objection, arguably showing that its protection extends equally to the users of school libraries, namely children.³⁹

In 1997, a trial court judge in New York's Saratoga County refused to grant a court order to a corporate employer who sought pre-litigation disclosure of its employees' library records.⁴⁰ This case, *In the Matter of Quad/Graphics, Inc. v. Southern Adirondack Library System*, appears to be the only reported judicial opinion that considers the issue of library records confidentiality for minors, although its discussion of the issue is brief and contained in dicta.⁴¹ The court interpreted the New York library records statute by looking at its legislative history, which, as stated above, relies on First Amendment principles and does not distinguish minor library users from adult library users. Judging by this opinion's findings on the legislative purpose of New York's library confidentiality statute and its dicta on the subject of parental access (discussed below) a minor's right to privacy in library records is arguably protected from parental intrusion under current New York law.

³⁵ N.Y. C.P.L.R. 4509.

³⁶ N.Y. C.P.L.R. 4509 notes (discussing the historical and statutory background to 4509).

³⁷ Bill Jacket to L.1982, c. 14 microformed on Legislative Bill Jackets ZAN-T654 (on file with The New York Public Library's Science, Industry and Business Library).

³⁸ *Id.*

³⁹ See *id.* (stating a recommendation from Louis H. Welch to Counsel to the Governor).

⁴⁰ In the [*Matter of Quad/Graphics, Inc. v. S. Adirondack Library Sys.*, 664 N.Y.S.2d 225, 228 \(1997\)](#). Under New York law library records may be released pursuant to court order or subpoena. N.Y. C.P.L.R. 4509.

⁴¹ [664 N.Y.S.2d at 228](#).

A summary of the facts of Quad/Graphics is instructive because although the [*370] case did not involve minors, it did involve a library-provided internet access system that raises interesting questions in the debate over parental access to library records. Petitioner Quad/Graphics, Inc. suspected that employees at its Saratoga Springs, New York office had misused the company's computers and long-distance telephone lines during business hours in order to make personal use of the internet through a local library internet access system called "Library Without Walls."⁴² This system allowed patrons of the municipal Southern Adirondack Library System who possessed a valid library card and a personal identification number issued by a participating library to access the internet at no charge for thirty minute periods from either library-based or personally owned computers.⁴³ By investigating its own computer files, Quad/Graphics discovered several of the personal identification numbers associated with its employees' illicit internet use and requested that the library disclose the names of the patrons who had registered to use "Library Without Walls" (LWW) with these personal identification numbers.⁴⁴ The library denied this request "on the basis that such information is confidential and may not be voluntarily disclosed" and the corporation petitioned the court to compel disclosure.⁴⁵

After examining the legislative history of New York's library records confidentiality statute, the court refused to grant Quad/Graphics an order compelling disclosure of the library records.⁴⁶ In determining the statute's legislative purpose, the court quoted directly from the supporting memorandum issued by the New York State Assembly at the law's enactment. The justification for the statute offered by the State Assembly is imbued with liberal First Amendment values:

The New York State Legislature has a strong interest in protecting the right to read and think of the people of this State. The library, as the unique sanctuary of the widest possible spectrum of ideas, must protect the confidentiality of its records in order to insure its readers' right to read anything they wish, free from the fear that someone might

⁴² [Id. at 226.](#)

⁴³ Id. Petitioner's employees in Saratoga Springs accessed the internet by logging onto the company's mainframe computer, which was physically located in Wisconsin, and then having that computer telephone the New York-based "Library Without Walls" computer network. Thus internet access was free for the employees, but costly for the corporate employer in terms of lost "man-hours" and also in terms of expensive long distance telephone bills, which first alerted Quad/Graphics to the problem. (At the time of this litigation, internet access was less commonly provided by employers than it is today, and most internet access was achieved through the use of a costly dial-up modem.)

⁴⁴ Id. In this case, the party seeking disclosure wanted to know only who was using the internet and not what they were reading or viewing while online.

⁴⁵ Id.

⁴⁶ [Id. at 227-28.](#)

see what they read and use this as a way to intimidate them. Records must be protected from the self-appointed guardians of public and private morality and from officials who might overreach their constitutional prerogatives. Without such protection, there would be a chilling effect on our library users as inquiring minds turn away from exploring varied avenues of thought because they fear the [*371] potentiality of others knowing their reading history.⁴⁷

This statement of legislative purpose regards the library as a particularly privileged space of free intellectual inquiry where privacy protections are required to combat the real danger of a "chilling effect" that could curtail free speech. The court in *Quad/Graphics* recognized petitioner's difficult position, but it found that "the Legislature has expressed, in rather direct and unequivocal fashion, a public policy that the confidentiality of a library's records should not be routinely breached and this court, in denying the petitioner's request, is following the clearly expressed legislative purpose of CPLR 4509."⁴⁸

Although the court framed the issue narrowly,⁴⁹ such that its holding was limited to the facts of this case, a statement in dicta suggested that its ruling was based, in part, on the fear that granting *Quad/Graphics*' request might open the floodgates to requests for intra-familial library records disclosure, such as requests by parents to access their children's records of internet usage. The court reasoned,

"Were this application to be granted, the door would be open to other similar requests made, for example, by a parent who wishes to learn what a child is reading or viewing on the 'Internet' via 'LWW' or by a spouse to learn what type of information his or her mate is reviewing at the public library."⁵⁰

⁴⁷ *Id. at 227* (citing Bill Jacket to L.1982, ch. 14 microformed on Legislative Bill Jackets ZAN-T654 (on file with The New York Public Library's Science, Industry and Business Library) (Memorandum of Assemblyman Sanders)). The legislator's reference to "self-appointed guardians of public and private morality" likely refers to conservative groups like the Moral Majority, whose requests for library records first prompted the passage of library confidentiality laws. See Bill Jacket to L. 1982, ch. 14 (N.Y.), *supra* note 11.

⁴⁸ In the *Matter of Quad/Graphics, Inc., 664 N.Y.S.2d at 228*. The court also seems to have based its decision on the preliminary and civil nature of petitioner's complaint. ("[A] criminal complaint is not before this court and apparently has not been made.").

⁴⁹ See *id. at 227*. ("The salient issue is whether or not petitioner's expressed desire to learn the identity of individuals who are alleged to have misused its computer system and misappropriated its property, in order to initiate civil legal proceedings, is a proper basis for release of the library system's records.").

⁵⁰ *Id. at 228*. The New York statutory compiler's practice commentary criticizes the court for comparing petitioner's "prima facie showing of [employee] wrongdoing" to "family nosiness" (and for requiring "nothing short of a grand jury investigation" to order the release of library records). According to the compiler's commentary, the legislative history shows an intent to protect against a "community morality crusade" but not against petitioner's request. It is unclear from this commentary how the compiler thinks a parental access case should be resolved. N.Y. C.P.L.R. 4509 (Supp. 2006) note (Supplementary Practice Commentary). The dicta's example of spousal snooping is likely derived from the "apocryphal scenario of husbands or wives checking on spouses'

Though the above quoted dicta pertaining to parental access is brief, it is significant in several respects to the question of parental access to minors' library records in a state whose statute makes no explicit provision for such access. First, the court's dicta suggests that under New York law parents are not automatically privileged, either by common law or constitutional rights of parental supervision, to [*372] access their minor children's library records. Instead, this statement presumes that parents, like the petitioning corporation in Quad/Graphics, would be required under New York's statute to petition a court to order such disclosure. Second, the facts of this case suggest that minor library patrons might have confidentiality rights against their parents that extend outside of the library and even into the home. Through use of the "Library Without Walls" system at issue in this case, a minor could access the internet from her home and keep private from her parent any records generated by that internet use, including records revealing "what a child is reading or viewing on the "Internet." ⁵¹ Finally, the dicta instinctively anticipates that due to increasing anxiety about minors' internet use, parents may request their children's library records precisely because they would like to monitor their children's online activities. The New York State Legislature apparently has not considered whether to allow parents to access their minor children's library records before or since Quad/Graphics. However, in spite of the protests of many librarians and civil libertarians, there is definitely an increasing demand, if not an increasing trend, to permit parental access to children's library records.

C. Current Legislative Reforms: A Trend of Increased Parental Access

In recent years, several state legislatures have considered and passed amendments that allow parental access to children's library records. ⁵² The stories behind recent state law amendments are strikingly similar from state to state. Legislators responded to relatively isolated complaints from parents, predominantly of younger children, who

reading lists and finding they have borrowed books on divorce." Jim Edwards, Librarians and Their Lawyers Scout Patriot Act's Change of Privacy Rules, N.J. Law Journal, (February 2, 2003), available at <http://www.law.com/jsp/article.jsp?id=1045187905957#>.

⁵¹ [664 N.Y.S.2d at 228](#). Parents, legislators and other judges might balk at this apparent undermining of parental authority in the home, but minors could logically expect such strong privacy rights under the judge's reasoning in Quad/Graphics. Of course, no law would prevent a parent from looking over the minor's shoulder while she researched on the internet. This judge's interpretation of the law would only prevent a library from disclosing records pertaining to the minor's internet usage to a parent who wanted to supervise her child's internet use indirectly and ex post. For a discussion of the differences between these types of parental supervision, see *infra* Part I.C.

⁵² Paul Neuhaus, State Laws on the Confidentiality of Library Records, available at http://www.library.cmu.edu/People/neuhaus/state_laws2.html (last visited Feb. 18, 2006) (listing states' statutes and pending amendments). Three states that have most recently considered amendments include New Jersey (bill referred to committee for the second time January 13, 2004), Maine (bill referred to committee February 10, 2005) and Wyoming (bill passed, effective July 1, 2005).

were shocked that local librarians would not inform them of the titles checked out by their children.⁵³ For example, in Massachusetts, a state lawmaker submitted a bill to allow parental access after receiving a telephone call [*373] from an "irate" father who was upset when a local librarian called his home informing him of the overdue library books checked out by his eight-year-old child and told him that it was "against the law" to reveal the names of the books that were overdue.⁵⁴ One can sympathize with the parent who receives such a frustrating phone call, but a rash of legislation mandating that libraries disclose the reading habits of children from ages eight to eighteen hardly seems an appropriate response. Several journalists have compared these proposed state law amendments to the library records surveillance provisions of the USA Patriot Act, citing both reforms as signs of an increasing social acceptance of "protective" surveillance measures to the detriment of free speech values.⁵⁵

Ultimately, the debate over parental access to library records focuses on the questions of what constitutes appropriate, as opposed to overreaching, parental control and whether a policy decision on the extent to which the state should support such parental oversight should be made. Those in favor of parental access to library records portray such access as a salutary and normal parental right. As Wisconsin State Senator Joseph Leibham said, "This bill provides parents the opportunity to be informed and involved in the lives of their teenage children."⁵⁶ Those opposed to parental access argue that parents should exercise the plethora of supervisory rights they already possess by accompanying their children to the library and talking to their children about what they read and think.⁵⁷ One reporter opposed to an amendment allowing parental access to library records in Wisconsin pointed out the ironic partisan dynamics of that state's debate in which state Republicans "who usually oppose the expansion of government, are arguing that they need government's help in parenting."⁵⁸

⁵³ As discussed in Section I.A-I.B, *supra*, in states where no explicit right of parental access is given, the issue of parental access to children's records is largely left to library discretion. Some libraries make it their policy to reveal children's borrowing information to parents only for younger minors or only when a book becomes overdue, while other libraries will not reveal children's borrowing information to parents at all. See, e.g., Policy on the Confidentiality of Library Records, Wayland Free Public Library (MA), <http://www.wayland.ma.us/library/confidentiality.htm> (last visited Feb. 18, 2006) (prohibiting disclosure of library records to parents except in certain limited circumstances such as to facilitate the return of overdue or lost materials) and *infra* note 54 (citing examples where libraries refused to disclose minors' records).

⁵⁴ Brendan McCarthy, Disclosure of Library Choices Sought, *The Boston Globe*, Oct. 4, 2003, at B1 (discussing proposed amendment in Massachusetts, which failed). See also Joel McNally, See Johnny Read, *Newsday*, Jan. 18, 2004, at A28 (discussing proposed amendment in Wisconsin, which passed); Sean Cockerham, What Books Is Junior Checking Out?, *Anchorage Daily News*, Feb. 24, 2004, at B1 (discussing the controversy surrounding a proposed amendment in Alaska).

⁵⁵ E.g., McNally, *supra* note 54, at A28.

⁵⁶ *Id.*

⁵⁷ E.g., Stanford, Now, Tattletale Libraries?, *Milwaukee Journal Sentinel*, Nov. 10, 2003, at 14A ("Moms and dads do have all kinds of ways to keep tabs on what their kids are into. Dialogue is one. Accompanying their children to the library is another.").

⁵⁸ McNally, *supra* note 54, at A28.

Perhaps the push for state-sanctioned parental access to records reflects a social problem of "absentee parenting," whereby parents who are unable to go to the library with their children expect librarians, aided by technology, to provide data on their children's research activities. Parents who are concerned that library internet access provides their children with too many opportunities to elude parental oversight may thus use legally and technologically aided surveillance to regain parental control. Otherwise, under a program like "Library Without Walls," as described in Quad/Graphics, a teenager with her own library card could access the internet autonomously from any location, including her parents' home, and claim a confidentiality privilege in any records of her research - a nice way to elude the "report card" function on AOL or another commercial internet service provider.

[*374] The following section of this Note considers the constitutional interests implicated by parental access to library records and concludes that library records confidentiality statutes with parental access provisions should be more narrowly tailored in order to protect the free speech interests of older minors.

II. A FIRST AMENDMENT-BASED CHALLENGE TO FULL PARENTAL ACCESS TO MINORS' LIBRARY RECORDS

Library records confidentiality laws are intended to protect the right to receive information under the First Amendment by preventing the chilling effect associated with unwanted surveillance of library records. The Library Bill of Rights, a foundational list of ethical principles for library service adopted by the American Library Association, guarantees equal access to information for all library patrons regardless of their age.⁵⁹ The First Amendment, on the other hand, makes no explicit reference to age and has been interpreted by the Supreme Court to apply differently to minors than to adults.⁶⁰ To what extent should the state, in the name of protecting children and supporting parental supervisory rights, open library records to parental scrutiny in order to aid parents in controlling their children's access to information and ideas? Does the First Amendment protect minors from this state-administered parental monitoring? Does it make a difference whether minors are asserting privacy rights in records of their research of traditional print materials or of online materials?

A. The First Amendment and Minors' Right To Receive Information

⁵⁹ Office of Intellectual Freedom (ALA), *supra* note 7, at 57 (Library Bill of Rights Article V states that "[a] person's right to use a library should not be denied or abridged because of origin, age, background or views.").

⁶⁰ *U.S. Const. Amend. I* ("Congress shall make no law... abridging the freedom of speech..."). *Erznoznick v. Jacksonville*, 422 U.S. 205, 214 (1975) ("The First Amendment rights of minors are not "co-extensive with those of adults") (Stewart, J., concurring) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 515 (1969)).

The Supreme Court has said 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."⁶¹ Minors also have a correlative right to receive information and ideas.⁶² However, the First Amendment rights of minors are more limited than those of adults.⁶³ Courts and lawmakers generally assert three main justifications for [*375] limiting the constitutional rights of minors as compared with those of adults: first, minors have diminished capacity as compared to adults; second, the state has a particular interest in protecting such vulnerable minors from harm; third, parents have a special interest in the care and supervision of their minor children and the state supports this parental right of supervision in its promotion of the familial unit.⁶⁴ Despite these limits, the Supreme Court has stated that "[minor] students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."⁶⁵

Parents have a constitutional right to rear their children and concurrently wield a great deal of power over them, including potentially controlling their children's choice of reading material and ability to access the internet.⁶⁶ Because of parents' strong supervisory rights, in many cases children may become "closed-circuit recipients" of messages their parents wish to communicate. If parents are permitted to access their children's library records for the purpose of reviewing their reading or internet research habits, the chilling effect for minors may be even more acute than for adults who fear surveillance by the public at large. While parents are presumed to act in their children's best interests, sometimes a parent's and a child's interests are not aligned.⁶⁷ For example, in response to a proposed amendment to its library records confidentiality law, the State Bar of Wisconsin suggested one rather

⁶¹ [Erznoznick, 422 U.S. at 212-13](#) (holding that a city ordinance banning a film containing nudity was overbroad and not justified by the city's desire to shield children from nudity).

⁶² [Bd. of Ed., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866-67 \(1982\)](#) (citing [Stanley v. Georgia, 394 U.S. 557, 564 \(1969\)](#) regarding the right to receive information and ideas). This right may be especially strong at a public library. See *id.* at 892 (Burger, C.J., dissenting), 915 (Rehnquist, J., dissenting).

⁶³ For example, based on the state's interest in preventing harm to minors, the Supreme Court established the "variable obscenity" standard that defines categorically unprotected speech for minors that is "harmful to minors" more broadly than the analogous category of "obscenity" is defined for adults. See [Ginsberg v. New York, 390 U.S. 629, 636-37 \(1968\)](#).

⁶⁴ I derive these categories from the Court's formulation in [Bellotti v. Baird, 443 U.S. 622, 634 \(1979\)](#) ("the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing.").

⁶⁵ [Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 \(1969\)](#) (holding that a school could not prohibit students from wearing black armbands in protest of the Vietnam War).

⁶⁶ See Catherine J. Ross, An Emerging Right for Mature Minors to Receive Information, [2 U. Pa. J. Const. L. 223, 243-45 \(1999\)](#) (discussing parental restrictions on the flow of information to minors).

⁶⁷ See discussion of Wisconsin v. Yoder, *infra* Part II.B.

dire scenario in which a parent's interest was clearly adverse to that of his child - when an abused child seeks out information on abuse: "Should a young boy or girl that is being victimized by a parent or guardian now be victimized again by the disclosure of library records that may jeopardize their safety?"⁶⁸

Psychologists believe that the developmental process of adolescence requires access to varied information, as well as experimentation with sources outside of parental approval.⁶⁹ The public library may be the ideal space where minors can access information and ideas of which their parents might not approve because librarians may still guide children to appropriate and instructive materials.⁷⁰ In [*376] Massachusetts, one librarian pointed out that popular young adult fiction books "deal with weighty topics, which sometimes upset parents," and the legislative director for the ACLU of Massachusetts argued, "There's lots of information that kids need to have that their parents might not be terribly happy about."⁷¹ Unfortunately, libraries often come under fire for providing controversial materials.

In her article, *An Emerging Right for Mature Minors to Receive Information*, Catherine J. Ross argues that mature minors can assert a right to receive information adverse to their parents' wishes where certain subjects affecting minors' constitutionally protected rights are involved.⁷² Ross asserts that mature minors have the strongest claim to accessing information of which their parents disapprove when access to such information would aid the exercise of another constitutionally protected right, such as a right to privacy in matters affecting procreation. In certain limited circumstances, namely in matters relating to procreation such as abortion and contraception, the Supreme Court has recognized that older minors may demonstrate a level of maturity entitling them to privacy rights

⁶⁸ Amy Rinard & Richard P. Jones, *Libraries May Have to Tell Parents What Kids Borrow*, *Milwaukee Journal Sentinel*, Nov. 5, 2003, at [12A](#).

⁶⁹ See Emily Buss, *The Speech Enhancing Effect of Internet Regulation*, [79 Chi.-Kent L. Rev. 103, 106-10](#); Ross, *supra* note 66, at 245.

⁷⁰ The dissenters in *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico* made this point. [Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 915 \(1982\)](#) (Burger, C.J., dissenting) (Rehnquist, J., dissenting). See also Ross, *supra* note 66, at 241-43 (discussing a fictional example from the novel *The Romance Reader* by Pearl Abraham about an Orthodox Jewish girl who found refuge from her narrow-minded father at the public library); *A Young Reader's Right*, *The Boston Globe*, Oct. 10, 2003, at A22 ("Adolescents have always used the library to explore topics that may be forbidden from discussion by their parents ... If young adults can't trust a library, where there is safety and supervision to help guide them through the process of self-discovery, where else can they go?"); Rinard & Jones, *supra* note 68, at 1A. ("In the [Wisconsin State] Senate, Sen. Fred Risser (D-Madison) said children should be encouraged to be inquisitive, to use public libraries to learn more about any subject they're interested in, including some issues they may be unable or unwilling to discuss with their parents.").

⁷¹ McCarthy, *supra* note 54, at B3.

⁷² Ross, *supra* note 66, at 243-45.

commensurate with those of adults. ⁷³ According to Ross' theory, a teenage girl who researched abortion or contraception at the public library would have an especially strong claim to privacy in her library records, especially if those records were susceptible to review by her disapproving parents.

The right that Ross advances is doctrinally supported, but also extremely limited. I would argue that older minors are deserving of freedom from state-sanctioned parental surveillance in much more mundane circumstances, i.e. whenever a minor wants to read a book or visit an internet site that advocates ideas not shared by her parents. Because of the variation amongst states regarding parental access to library records, there are various ways to test the constitutionality of parental access provisions. The following sections consider two possible challenges: (1) Can minors win a facial or applied challenge to state statutes containing parental access provisions?; (2) Could a federal funding program, structured similarly to CIPA but mandating parental access to library records survive a constitutional challenge on behalf of minors? ⁷⁴

[*377]

B. Challenging State Statutes that Grant Parental Access to Mature Minors' Library Records

Do state laws granting parents access to minors' library records violate minors' First Amendment rights? Laws granting full parental access to minors' library records could have the effect of content or viewpoint discriminatory regulations of minors' speech that merit strict scrutiny analysis. These statutes have the potential to limit, through government action, the ability of minors to do library research on topics generally disfavored by parents. As children grow older they develop stronger free speech interests in the pursuit of ideas that lack parental approval. The state's interest in granting parents access to library records begins to look suspiciously like an impermissible suppression of ideas that privileges the orthodoxy of an older generation rather than a permissible protective measure or an aid to parental authority. Parental access provisions in library records confidentiality statutes should accordingly be narrowly tailored to maximize the efficient functioning of libraries and the supervisory rights of

⁷³ [*Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 83-84 \(1976\)](#) (extending the right to elect to have an abortion to minors, since mitigated by state parental notification statutes and maturity-determining judicial bypass procedures); [*Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 75 n.30 \(1983\)](#) (asserting minors' right to receive information about contraception in light of minors' "pressing need" for such information).

⁷⁴ A third scenario could arise in states without parental access provisions, where minors might protest a library's disclosure of their records with a judicial challenge that tests their statutory rights and implicates their constitutional rights. The outcomes of such challenges would likely differ from state to state. See *supra* Part I.B, comparing the Arkansas Attorney General's opinion of minors' confidentiality rights with a New York trial court judge's opinion. See also Cockerham, *supra* note 54, at B1 (documenting a librarian's response to Alaska's proposed amendment allowing parental access and reporting that she "doesn't think the proposal would survive a legal challenge under the strong right to privacy guaranteed in the Alaska Constitution.").

parents while minimizing harm to the First Amendment rights of minors, particularly older minors. Thus parental access provisions should be limited to records pertaining to overdue materials or to younger minors.

A First Amendment-based challenge to a statute granting parents access to children's library records raises a novel constitutional question bearing on the presumed cohesiveness of the family.⁷⁵ Parents can assert a constitutional interest in the care and upbringing of their children, but parents and children will sometimes disagree in their ideologies and beliefs. The Supreme Court has been reluctant to presume a conflict of interest between parents and children and will only circumscribe the supervisory rights of parents in very limited cases.

In *Wisconsin v. Yoder*, which held that Amish children could not be required to attend high school in contravention of their religious obligations, a majority of the Supreme Court presumed an identity of interests between the petitioning Amish parents and their children.⁷⁶ Justice Douglas dissented and argued for a remand so that the children's views on their education could be heard, raising the potential conflict between the Court's opinions on parental power and its opinions asserting children's constitutional interests.⁷⁷ Justice Douglas emphasized the significant impact that forgoing a high school education would have on a child's future and concluded, "It is the student's judgment, not his parents', that is essential if we are **[*378]** to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny."⁷⁸ His dissent suggests that courts would face a fundamental conflict between parental supervisory rights and minors' First Amendment rights if minors who wished to access library materials, but feared parent disapproval, challenged parental access to library records.

Parental access provisions may be tested under strict scrutiny analysis if they are viewpoint-discriminatory and may be found invalid if they are designed to discriminate unjustifiably against minors who research unpopular ideas. Courts apply strict scrutiny to speech-restrictive laws that are content-based or viewpoint-discriminatory because "the government must abstain from regulating speech when the specific motivating ideology or the opinion or

⁷⁵ Ross, *supra* note 66, at 239 ("The Supreme Court has never squarely considered the civil liberties of children whose claims conflicted with the beliefs and preferences of their parents.").

⁷⁶ [*Wisconsin v. Yoder*, 406 U.S. 205, 231 \(1972\)](#) ("The State has at no point tried this case on the theory that respondents were preventing their children from attending school against their expressed desires, and indeed the record is to the contrary.").

⁷⁷ [*Id.* at 243-246](#) (Douglas, J., dissenting) ("Our opinions are full of talk about the power of the parents over the child's education ... Recent cases, however, have clearly held that children themselves have constitutionally protected interests.").

⁷⁸ [*Id.* at 245.](#)

perspective of the speaker is the rationale for the restriction." ⁷⁹ In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, a plurality of the Court remanded a challenge to a school board's decision to remove certain books from a school's library for a hearing on the school board's motivation for doing so. ⁸⁰ Although schools serve an inculcative function, they cannot promulgate speech regulations that seek to impose the mores of the majority on a dissenting minority. ⁸¹ According to *Pico*, the validity of a school board's regulation of student's access to library materials largely depends on the school board's motives or intent. If the school board's motives were shown to be rationally related to legitimate pedagogical concerns, such as a book's lack of educational value or pervasive vulgarity, the restriction on speech would be permissible. ⁸² However, a school board could not remove a book merely in order to suppress ideas that it found undesirable so as to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." ⁸³

Parents are entitled to even more deference than schools when administering guidance, restrictions and discipline in rearing their children, but the First Amendment limits the government's ability to use parental discipline to discourage children from expressing ideas or pursuing beliefs that deviate from parental or state-sanctioned norms. For example, in Pennsylvania, a district court held that a statute requiring teachers to notify parents when their children refused to join in the Pledge of Allegiance interfered with children's First Amendment rights because it "offers a disincentive for students to opt out of reciting the Pledge or the Anthem [***379**] and... coerces students into reciting a state sponsored message." ⁸⁴ The district court applied strict scrutiny and found that the parental

⁷⁹ [Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 829 \(1995\)](#).

⁸⁰ [Pico, 457 U.S. 853, 875 \(1982\)](#).

⁸¹ See [Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511](#) ("[Students] may not be confined to the expression of those sentiments that are officially approved.").

⁸² [Pico, 457 U.S. at 872](#).

⁸³ *Id.* (citing [West Va. State Bd. of Educ. v. Barnette, 319 U.S. 642 \(1943\)](#)). The dissenters in *Pico* argued that the court should be more deferential to the school board's authority over the school library, but they might have maintained a heightened standard of review for a public library. *Id.* at 892 (Burger, C.J., dissenting). *Id.* at 915 (Rehnquist, J., dissenting) ("Unlike university or public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas."). For an example of speech restrictions that serve legitimate pedagogical concerns (mainly prohibiting vulgarity), see [Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684-85 \(1986\)](#) (holding that school did not violate the First Amendment when it punished a student for delivering a sexually explicit speech at a school assembly).

⁸⁴ [Circle Sch. v. Phillips, 270 F. Supp. 2d 616, 625-26 \(E.D. Pa. 2003\)](#), *aff'd*, [Circle Sch. v. Pappert, 381 F.3d 172, 177-81 \(3d Cir. 2004\)](#). The Supreme Court has recognized a student's right not to recite the Pledge of Allegiance based on personal beliefs. [W. Va. Bd. Of Educ. V. Barnette, 319 U.S. 624 \(1943\)](#).

notification provision failed to serve a compelling state interest sufficient to justify the burden on minors' free speech rights.⁸⁵

In Arkansas, a district court similarly held that a school library could not take Harry Potter books out of circulation and require children to show written parental consent in order to access them simply because the school board found the series ideologically, rather than pedagogically, objectionable.⁸⁶ The district court applied strict scrutiny and rejected the parental consent procedure as an unjustified content-based limitation on children's access to information.⁸⁷ It stated that the parental consent requirement attached a stigma to the pursuit of certain ideas.⁸⁸ The district court also found that the plaintiff child, represented by her parents, had standing even though her parents had actually consented to her reading the books and she owned the books at home.⁸⁹ In asserting her rights, the plaintiff protected the rights of other children whose parents would not grant consent.⁹⁰

If a child wishes to use the library to check out a book or visit an internet site that he knows his parent disapproves of, the possibility of parental access to library records will likely chill that child's exercise of his right to receive information and ideas. Although parental access to library records does not stigmatize minors' access to one work in particular, as in the case of the Harry Potter example above, the lack of full confidentiality for minors' library records could have a larger chilling effect in the aggregate. This chilling effect is of less concern for younger minors who have less capacity for intellectual inquiry and less autonomy vis-a-vis their parents. But for older minors, full parental access to library records has the potential to stifle and stigmatize research into unpopular ideas.

⁸⁵ [Phillips, 270 F. Supp. 2d at 623](#). The court found the regulation so overly restrictive of students' speech that it would not have passed constitutional muster even if strict scrutiny were not applied. See also [id. at 623 n.1](#) ("Even if the provision was content-neutral so that strict scrutiny did not apply, and even if I was to assume that providing for efficient notification of the administration of the Act [the state's purported interest] was an important interest [the statute] burdens substantially more speech than necessary to further that interest.").

⁸⁶ [Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996 \(W.D. Ark. 2003\)](#). In *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, the school board had proposed allowing students to borrow certain removed books with parental consent, but the Supreme Court did not pass upon the constitutionality of a parental consent scheme. See [Pico, 457 U.S. 853, 858 \(1982\)](#).

⁸⁷ [Counts, 295 F. Supp. 2d at 1002](#).

⁸⁸ *Id.*

⁸⁹ [Id. at 999-1000](#).

⁹⁰ [Id. at 999 n.2](#) ("Those children whose parents do not want them to check out the Harry Potter books could hardly be expected to protect their own First Amendment rights, since they would almost certainly be minors who could not sue in their own right and it is unlikely that their parents would go to court to establish their child's legal right to do that which they did not want the child to be able to do in the first place.").

In the case of older minors, parental access to library records is less easily [*380] premised on the minors' limited capacity and instead is largely based upon parental supervisory rights. It is sometimes argued that younger minors cannot claim the same rights to free intellectual inquiry as adults.⁹¹ However, as minors grow older, their capacity to reason increases and their free speech claims grow more weighty in relation to their parents' claim to a right of supervision.⁹² Most of the recent state law reforms allowing for parental access were first proposed by parents who were shocked to be denied access to their very young child's records and who were concerned about finding overdue materials for which they would be fined.⁹³ Opponents of these recent legislative reforms have pointed out that proposals granting parental access for minors up to age eighteen are too broadly drawn in relation to the problems precipitating their proposals.⁹⁴

Because each child matures at a different rate based on personal and cultural circumstances, any age limit for the exercise of intellectual freedom will necessarily be under-and over-inclusive of individuals who actually possess the desired maturity level.

In his dissent from *Wisconsin v. Yoder*, Justice Douglas felt that at the age of fourteen Amish children possessed sufficient First Amendment rights to determine "their own destiny."⁹⁵ State statutes that grant parental access

⁹¹ Theoretically, the state of infancy may be considered incompatible with a right to free speech. Justice Stewart, concurring in the creation of a variable obscenity standard for minors in *Ginsberg v. New York*, said, "I think a State may permissibly determine that ... a child - like someone in a captive audience - is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." [Ginsberg, 390 U.S. 629, 649-50 \(1968\)](#) (Stewart, J., concurring). See also [Erznoznik v. City of Jacksonville, 422 U.S. 205, 214, n. 11 \(1975\)](#) (Brennan, J., concurring) ("In assessing whether a minor has the requisite capacity for individual choice the age of the minor is a significant factor." (citing [Rowan v. Post Office Dept., 397 U.S. 728, 741 \(1970\)](#)). Even scholars who advocate strong First Amendment rights for minors recognize that it may not be meaningful to assert First Amendment rights for children who are too young to maturely think and express themselves. Marjorie Heins, On Protecting Children - From Censorship: A Reply to Amitai Etzioni, [79 Chi.-Kent L. Rev. 229, 252 \(2004\)](#) ("for the purposes of preserving and enhancing intellectual freedom, the usual 'age of reason' (about age seven) seems a good place to start.").

⁹² Even though the law generally regards all minors as equally incapacitated and states are allowed to set the age of majority differently depending on legislative purposes, the Court has recognized that in the constitutional arena "rights do not mature and come into being magically only when one attains the state-defined age of majority." [Planned Parenthood of Mo. v. Danforth, 482 U.S. 52, 74 \(1976\)](#).

⁹³ See supra Part I.C.

⁹⁴ This opposition comes in part from an intuition that older minors are more entitled to rights of free speech than younger minors. E.g., Minor Question, What's Your Kid Reading?, Anchorage Daily News, Mar. 2, 2004, at B4 (commenting on Alaska's proposed parental access amendment, "Common sense says that rights to privacy and intellectual freedom aren't and shouldn't be the same for an 8-year-old as for an 18-year-old... Lawmakers should consider... whether this legislation is a broad solution to a narrow problem.").

⁹⁵ [Wisconsin v. Yoder, 406 U.S. 205, 245 \(1972\)](#) (Douglas, J., dissenting).

usually go above this age to sixteen or even eighteen. Mary Minow, co-author of *The Library's Legal Answer Book*, suggests that library policies should return this determination to parents:

A workaround for parents who are not allowed by law or policy to see what's on their [*381] child's records today is to look it up themselves. If they have the child's card in hand, and the PIN - many libraries let you "see your own record." I think this is a good workaround. Parents of young children get to see what's out to help them find the books to return (the parents probably picked out the books anyway). Parents of older children do not have the card and PIN. Instead of an arbitrary age limit, it depends on the family's own dynamic as to who is the parent and when custody of a library card moves from parent to child.⁹⁶

In states that do not yet grant parental access to minors' library records, this "workaround" could be a better compromise between parental supervisory rights and minors' free speech interests than amendments that subject all minors' records to parental surveillance.

C. Challenging a Hypothetical Federal Funding Condition Mandating Parental Access to Minors' Library Records

If parents continue to be concerned about what their children are accessing via the internet at the library and would like to monitor this activity through library records access, national legislation aiding parents to control their children's internet access outside of the home might be proposed. Congress has repeatedly attempted to limit minors' access to harmful or objectionable material on the internet. Two efforts to criminalize the transmission of such material failed, but with the Children's Internet Protection Act (CIPA) Congress succeeded in regulating minors' (and adults') access to objectionable material through federal funding conditions that regulate library internet access.⁹⁷ Could Congress, under its Spending Clause power, pass legislation requiring libraries to make children's records accessible to parents as condition for receiving federal funding?

In a post-CIPA world, advocates of minors' First Amendment rights could propose filtering as a less discriminatory alternative to granting parents complete access to library records. In *United States v. American Library Association*, a plurality of the Court accepted CIPA's funding conditions as reasonably related to the state's interest in protecting

⁹⁶ Mary Minow, Paul Neuhaus' State Laws on the Confidentiality of Library Records, LibraryLaw Blog, May 18, 2004, http://blog.librarylaw.com/librarylaw/2004/05/state_laws_on_t.html#comments.

⁹⁷ *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) (striking down provisions of the CDA); *Ashcroft v. Am. Civil Liberties Union*, 124 S.Ct. 2783 (2004) (striking down COPA); *U.S. v. Am. Library Ass'n*, 539 U.S. 194 (2003) (upholding CIPA, which requires libraries accepting federal funding to place filtering software on computers that access the internet).

children and preventing the problems associated with the availability of online pornography in public libraries.⁹⁸ Justice Rehnquist, writing for a plurality of the Court, employed a lenient standard of review. Justice Breyer, concurring in the result, argued for a heightened standard of review but did not consider the statute's possible effects on minors' speech rights.⁹⁹ In dissent, Justice Stevens raised the possibility of parental consent and supervision [*382] requirements for internet use as less discriminatory alternatives to filtering software.¹⁰⁰ The parental consent suggestion is less discriminatory to adult patrons but not necessarily to minor library patrons.

The interaction of CIPA and parental supervision provides the foundation for a novel argument for filtering. In her article, *The Speech-Enhancing Effect of Internet Regulation*, Emily Buss eschews the rhetoric of protecting children from harm in favor of the view that "some state-imposed speech regulation may have a speech-enhancing, rather than curtailing, effect for children."¹⁰¹ Because the state allows parents "near absolute censoring authority over their children" free speech advocates may favor regulations that "inspire parents to relax their grip on their children's exploration of ideas" in order to allow children greater speech possibilities in the aggregate.¹⁰² Thus the implementation of CIPA can be seen as a bargain between parents, children and the state. In exchange for state-imposed access control through filtering, parents should allow their children more freedom to research independently free of surveillance.

Of course, some parents will still assert that their supervisory rights over their children are too strong to be "bargained" away in this manner, and that the state must support their right to oversee their children's library borrowing and internet-viewing habits so that they may parent as they see fit. In the case of younger minors, parental supervisory rights generally trump minors' claims of privacy or free intellectual inquiry because younger minors' capacity is diminished and their vulnerability to harm is greater. The balancing of interests between parents and older minors is more difficult because the interests are stronger on both sides: older minors can assert a stronger claim to freedom of intellectual inquiry while parents maintain serious concerns about their adolescent

⁹⁸ [Am. Library Ass'n, 539 U.S. at 198-99.](#)

⁹⁹ [Id. at 206 n.3](#) (showing how the plurality did not apply strict scrutiny); [id. at 216-18](#) (Breyer, J., concurring in the result, but applying heightened scrutiny).

¹⁰⁰ [Id. at 223](#) (Stevens, J., dissenting) ("Less restrictive alternatives to filtering that further libraries' interest in preventing minors from exposure to visual depictions that are harmful to minors include requiring parental consent to or presence during unfiltered access, or restricting minors' unfiltered access to terminals within view of library staff." (citing district court decision, [Am. Library Ass'n v. U.S., 201 F. Supp. 2d 401, 410 \(E.D. Pa. 2002\)](#))).

¹⁰¹ Buss, *supra* note 69.

¹⁰² *Id.* at 103. Buss points out that this "speech-enhancing" approach would alleviate the legislator's difficult task of proving harm by basing filtering regimes on parents' concerns rather than on debatable experts' studies of harm to children.

children's activities. From a First Amendment perspective, it is important to consider whether minors' speech interests will ultimately benefit most from state-aided parental monitoring regimes or from uniform content-based restrictions such as filtering. If the filtering software functions well and is truly viewpoint-neutral, the answer might be the latter.

The "harm argument" for a parental monitoring regime regulating minors' library internet access could be rendered moot if the filtering regime under CIPA is successful because CIPA's filtering is arguably more responsive to these concerns than a parental monitoring scheme. Although materials in a public library's traditional print collection are unlikely to meet the state's definition of constitutionally proscribed material that is "harmful to minors," the state, on its [*383] own account and on behalf of parents, may assert a stronger interest in protecting minors from material found on the internet, which is not edited for content by librarians.¹⁰³ If CIPA's filtering scheme functions correctly and parents, on the whole, agree with the filtering protocols used by libraries, then parents should not need to use library records to verify that their children are not viewing potentially harmful material on the internet. State-sanctioned parental access to library records essentially allows parents to control a child's intellectual inquiry at the library indirectly through the review of the child's reading habits ex post and imposing discipline accordingly. The "harm argument" for allowing parental access to library records makes sense to an advocate of strong parental supervisory rights, but from the standpoint of a free speech advocate the parental monitoring method just described seems perverse because it relies on a chilling effect. Again, a good filtering program could be more viewpoint-neutral and speech-enhancing for minors than a scheme based on parental monitoring and discipline.

///. CONCLUSION

With internet access added to the vast array of materials already available at the public library, a library card becomes an even more valuable tool for intellectual inquiry. The perceived harms of the internet have made parents more keenly aware of the freedoms their children enjoy at the public library, and unfortunately in many cases, more willing to curtail those freedoms. Parental access to library records can be characterized as appropriate or overreaching parental supervisory activity, depending on which side of the debate one takes. Whereas the author of

¹⁰³ State statutes must define proscribed "harmful to minors" material based on the three-pronged obscenity test from [Miller v. California, 413 U.S. 15 \(1973\)](#). The Court allowed that CIPA filtering could "prevent minors from obtaining access to material that is harmful to them" even though this material did not necessarily meet the statutory definition of "harmful to minors." [Am. Library Ass'n, 539 U.S. at 199](#).

a parental access bill in Wisconsin called such access "a parental right," an opposing State Senator said "I don't know why we should have the public libraries be an investigative arm for parents." ¹⁰⁴

While parental supervisory rights are likely to trump the right to access information for younger minors who have diminished capacity and an increased vulnerability to harm, the same right to access information becomes more robust as minors mature into young adults. Older minors have a strong claim to a First Amendment-based right to receive information, and their rights should be taken into account when drafting state laws allowing parents to access their children's library records. Laws granting parental access to older minors' library records should be strictly reviewed and narrowly tailored in order to preserve and expand the free speech rights of mature minors. When considered as an alternative to a federally-mandated parental monitoring scheme, the filtering programs mandated under CIPA appear potentially "speech-enhancing" because they may encourage parents to trust the safety of library materials and to curtail their requests for [*384] children's borrowing information. Although parental disclosure of library records might seem to affect minors' First Amendment rights in a relatively small number of circumstances, in the aggregate these laws erode a potentially robust protection of intellectual inquiry for the nation's younger and perhaps most inquiring minds.

The Columbia Journal of Law & the Arts

Copyright (c) 2006 The Trustees of Columbia University in the City of New York

End of Document

¹⁰⁴ Rinard & Jones, *supra* note 68.