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CENSORSHIP BY PROXY: THE FIRST AMENDMENT, INTERNET INTERMEDIARIES, AND THE PROBLEM OF THE WEAKEST LINK

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The rise of the Internet has changed the First Amendment drama, for governments confront technical and political obstacles to sanctioning either speakers or listeners in cyberspace. Faced with these challenges, regulators have fallen back on alternatives, predicated on the fact that, in contrast to the usual free expression scenario, the Internet is not dyadic. The Internet's resistance to direct regulation of speakers and listeners rests on a complex chain of connections, and emerging regulatory mechanisms have begun to focus on the weak links in that chain. Rather than attacking speakers or listeners directly, governments have sought to enlist private actors within the chain as proxy censors to control the flow of information.

Some commentators have celebrated such indirect methods of governmental control as salutary responses to threatening cyberanarchy. This Article takes a more jaundiced view of these developments: I begin by mapping the ubiquity of efforts to enlist Internet intermediaries as proxy censors. I emphasize the dangers to free expression that are likely to arise from attempts to target weak links in the chain of Internet communications and cast doubt on the claim that market mechanisms can be relied upon to dispel them. I then proceed to explore the doctrinal resources that can meet those dangers.

The gambit of enlisting the private sector to establish a system to control expression is not new in the United States. I argue that the First Amendment doctrines developed in response to the last such focused effort, during the McCarthy era, provide a series of useful starting points for a First Amendment doctrine to protect the weak links of the Internet.

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INTRODUCTION

The archetypal actors in the First Amendment drama appear on stage in dyads: in free speech narratives, a speaker exhorts a listener; in free press accounts, a publisher distributes literature to readers.[1] In the usual plot, the government seeks to disrupt this dyad (for legitimate or illegitimate reasons) by focusing sanctions on the source of the speech. The government attempts to license her, to tax her enterprise, or to threaten her with civil or criminal penalties; courts respond by evaluating the legality of those attempts. On occasion, the government turns its efforts to the listener, seeking to punish receipt of illicit messages or possession of illicit materials preparatory to reading them, and the courts proceed to evaluate the constitutionality of those proposed sanctions.

The Internet, as a network of networks, alters the drama. When communication utilizes the Internet, government finds it more difficult to sanction either speaker or listener. Speakers can hide their identities, impeding direct coercion; they can extend the reach of their communications into foreign jurisdictions that may face legal or practical impediments to exerting control. Even where speakers are theoretically subject to sanctions, the exponential increase in the number of speakers with potential access to broad audiences multiplies the challenge for censors seeking to suppress a message.[2] On

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[1] First Amendment analysis thus usually involves a speaker, who "expresses" beliefs, information, or insights, and a listener who "considers" and chooses whether to adopt them. Justice Kennedy's formulation captures the tone of this archetype: "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994), *quoted with approval in* Eldred v. Ashcroft, 537 U.S. 186, 220 (2003).

[2] With a constant marginal cost of prosecution, an increase in the number of speakers who must be sanctioned raises the cost of suppression, at least proportionally; given a constant enforcement budget, this increase in speakers decreases the probability of successful suppression. When the U.S. Department of Justice sought to suppress publication of the Pentagon Papers, it was able to direct its attention (albeit ultimately unsuccessfully) at a finite series of major newspapers. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (rebuffing efforts "to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled 'History of U.S. Decision-Making Process on Viet Nam Policy'"); *see also* H. Bruce Franklin, *Pentagon Papers Chase*, THE NATION, July 9, 2001, at 31, 34 (reporting that after the initial, temporary injunction against the *New York Times*' publication of the Pentagon Papers, Daniel Ellsberg "began to deploy the multiple copies he had stashed in secret locations," and that "[a]s soon as one paper was enjoined, another would start publishing until seventeen newspapers got into the action").

the listeners' side, an expanding universe of seekers of forbidden content can obtain access to material in private without leaving their homes, bypassing both formal and informal obstacles, and can pursue alternative pathways when a particular route is blocked. The mantra is that "the Internet interprets censorship as damage, and routes around it."[3]

Faced with these challenges, state actors who seek to control Internet communications have begun to explore strategies that target neither speakers nor listeners. Regulators have fallen back on alternatives predicated on the fact that, in contrast to the usual free expression drama, the Internet is not dyadic. The Internet's resistance to direct regulation of speakers and listeners rests on a complex chain of connections, and emerging regulatory mechanisms have begun to focus on the weak links in that chain. Rather than attacking speakers or listeners directly, governments have sought to enlist private actors within the chain as proxy censors to control the flow of information.

Some commentators have celebrated such indirect methods as salutary responses to threatening cyberanarchy. Jack Goldsmith opines that local control of service providers could allow governments appropriate leverage over foreign content,[4] while Neal Katyal argues

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By contrast, when Universal Studios sought to suppress copies of the DeCSS program, which allowed users to circumvent DVD encryption, it found itself confronted with an unending series of copies that sprang up hydra-like over Internet mirror sites around the world. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 441 (2d Cir. 2001) (describing "electronic civil disobedience" (quotation marks omitted)); Kristin R. Eschenfelder & Anuj C. Desai, *Software as Protest: The Unexpected Resiliency of U.S.-Based DeCSS Posting and Linking*, 20 INFO. SOC'Y 101 (2004) (demonstrating the proliferation of U.S.-based websites either posting or linking to the DeCSS program over the course of the *Universal Studios* lawsuit); Kristin R. Eschenfelder et al., *The Limits of DeCSS Posting: A Comparison of Internet Posting of DVD Circumvention Devices in the European Union and China*, 31 J. INFO. SCI. 317, 318 (2005) (surveying such posting and linking on a range of non-U.S.-based websites, especially on sites in the Netherlands, Germany, and Great Britain); *cf.* Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1204-05 (N.D. Cal. 2004) (describing efforts by a voting machine manufacturer to end the publication of its internal email records on a series of websites); Why War?, Targeting Diebold with Electronic Civil Disobedience, http://why-war.com/features/2003/10/diebold.html (last visited Oct. 22, 2006) (describing an activist group's tactic of setting up mirror sites to avoid the voting machine manufacturer's efforts to suppress documents); Why War?, Diebold Campaign Analyzed, http://www.why-war.com/features/2003/11/diebold_analyzed.html (last visited Oct. 22, 2006) (same).

[3] Philip Elmer-Dewitt, *First Nation in Cyberspace*, TIME, Dec. 6, 1993, at 62, 64 (quoting "Internet pioneer John Gilmore").

[4] Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1217-22 (1998) (arguing that "a nation can regulate people and equipment in its territory to control the local effects of the extraterritorial activity," in part by imposing obligations regard-

that Internet service providers (ISPs) "will often be essential in preventing cybercrime."[5] Jonathan Zittrain has taken the position that judicious pressure on Internet "points of control" offers an admirable "chance of approximating the legal and practical frameworks by which sovereigns currently sanction illegal content apart from the Internet,"[6] while Joel Reidenberg commends the enlistment of Internet intermediaries as a means of reestablishing the primacy of "democratically chosen law" and the ability of states to protect their citizens.[7] Ronald Mann and Seth Belzley laud the promise of exerting control over payment intermediaries,[8] while Doug Lichtman and Eric Posner have argued strenuously that "ISPs should be called into the service of the law" by imposing vicarious liability.[9]

This Article takes a more jaundiced view of these developments. I begin by mapping the ubiquity of efforts to enlist Internet intermediaries as proxy censors. I emphasize the dangers to free expression that are likely to arise from attempts to target weak links in the chain of Internet communications and cast doubt on the claim that market mechanisms can be relied upon to dispel them. I then proceed to ex-

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ing "the local means through which foreign content is transferred"); *see also* Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Boundaries*, 5 IND. J. GLOBAL LEGAL STUD. 475, 481 (1998) ("In cyberspace, as in real space, offshore regulation evasion does not prevent a nation from indirectly regulating extraterritorial activity that has local effects.").

[5] Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1100 (2001).

[6] Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. REV. 653, 688 (2003). Zittrain has had second thoughts about this strategy, though. *See* Jonathan Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 2028, 2037 (2006) (arguing that the "most important opportunities for . . . creativity ought to be retained as the Internet evolves" and exploring ways to "reduce pressure on institutional and technological gatekeepers").

[7] Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951, 1952-53 (2005); *see also* Joel R. Reidenberg, *States and Internet Enforcement*, 1 U. OTTAWA L. & TECH. J. 213, 216 (2003) ("For states to meet their responsibilities in the online world, states must find ways to transpose the powers of enforcement to the internet.").

[8] Ronald J. Mann & Seth R. Belzley, *The Promise of Internet Intermediary Liability*, 47 WM. & MARY L. REV. 288-90 (2005); *see also* Ronald J. Mann, *Regulating Internet Payment Intermediaries*, 82 TEX. L. REV. 681 (2004) (advocating regulation of payment intermediaries to control new modes of communication and interaction made possible by the Internet).

[9] Doug Lichtman & Eric Posner, *Holding Internet Service Providers Accountable* 5 (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 217 (2d Series), 2004), *available at* http://ssrn.com/abstract_id=573502; *cf.* Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 711-17 (2003) (arguing that copyright enforcement has always been focused on intermediaries (publishers) rather than end users).

plore the doctrinal resources by which a system of free expression can meet those dangers.

The gambit of enlisting the private sector to establish a system to control expression is not new in the United States. I argue that the First Amendment doctrines developed in response to the last such focused effort, during the McCarthy era, provide a series of useful starting points for a First Amendment doctrine to protect the weak links of the Internet.

I. THE PHENOMENON: PROXY CENSORSHIP AND INTERNET INTERMEDIARIES

The very plurality of private actors who cooperate to achieve Internet communications provides governments seeking to recruit proxy censors with a target-rich environment in three dimensions.[10] First, the networks of the Internet involve a series of electronic links; at each link, from user to originating computer to server to ISP to Internet backbone and back down the chain to the end user, the state may find a potential proxy censor. Each intermediary may interdict communications, or identify speakers, listeners, or other intermediaries against whom sanctions may be directed.[11]

Second, as Herbert Simon pointed out a generation ago, "a wealth of information creates a poverty of attention,"[12] and the wealth of information on the Internet multiplies at an exponential rate. The

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[10] *See* Michael D. Birnhack & Niva Elkin-Koren, *The Invisible Handshake: The Reemergence of the State in the Digital Environment*, 8 VA. J.L. & TECH. 6 (2003) (describing the prospect of recruiting ISPs, search engines, content producers, and online service providers to serve as regulatory proxies, and focusing on surveillance facilitated by data retention, disclosure, and access requirements); Katyal, *supra* note 6, at 1095-1106 (discussing law enforcement strategies to recruit ISPs, credit card companies, and equipment manufacturers as gatekeepers); Zittrain, *The Generative Internet*, *supra* note 6, at 2001 (explaining that a primary focus of Internet regulation has been the imposition of gatekeeping obligations on private intermediaries, such as routers, ISPs, and technology providers); Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J.L. & TECH. 253 (2006) (same).

[11] *See* Steven Cherry, *The Net Effect*, IEEE SPECTRUM, June 2005, at 38, 44, *available at* http://www.spectrum.ieee.org/jun05/1219 (quoting Seth Finkelstein, a Cambridge, Massachusetts programmer, as remarking: "There's a famous saying, 'The Internet considers censorship to be damage, and routes around it.' I say, what if censorship is in the router?").

[12] Herbert Simon, Speech at the Johns Hopkins University and Brookings Institution Symposium: Designing Organizations for an Information-Rich World, *in* COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 37, 40 (Martin Greenberger ed., 1971).

emerging organization of Internet communications relies on search engines, blogrolls, RSS feeds, links, and other directories to allow users to sort through the vast amounts of available information and allocate their limited stock of attention. These actors constitute a second set of potential weak links between speaker and listener. Even where a prospective speaker retains the technical capacity to reach prospective listeners, she must still catch their attention in a communicative universe populated with upwards of 600 billion webpages and 50 million blogs.[13] A government intervention that interferes effectively with the ability of intermediaries (whether search engines or well-attended websites)[14] to direct attention to particular speakers renders those speakers as unable to communicate with mass audiences as if they were silent and invisible.

The technically demanding structure of the Internet offers a third set of potential weak links, in the form of the providers of specialized equipment and services upon which effective Internet access depends. To the extent that potential regulators can induce these providers to disrupt communications, whether by blocking payment to targeted websites, or by embedding obstacles to communication and mechanisms of surveillance in the hardware or software that facilitates communication, they can spawn effective proxy censors.

Government actors have been far from insensitive to these opportunities to develop systems of censorship by proxy. Unable to reach those who originate or receive communications, official actors have sought to exert pressure on intermediaries with authority over what Professor Zittrain characterizes as "points of control,"[15] in order to prevent Internet communications from reaching their intended audience.

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[13] Kevin Kelly, *We Are the Web*, WIRED, Aug. 2005, at 92, 96, 99, *available at* http://www.wired.com/wired/archive/13.08/tech.html.

[14] Blogs seem to have developed a "power law distribution" that focuses a large proportion of blog traffic through a small number of websites. Clay Shirky, Power Laws, Weblogs and Inequality (Feb. 2003), http://www.shirky.com/writings/powerlaw_weblog.html; *see also* David Post, Temple Univ. Law Sch., Liberty! Equality! Diversity! Internet "Intermediaries" and the Nature of the Net, Presentation at Michigan State University (April 2005), http://www.temple.edu/lawschool/dpost/scaling.pdf (observing that the most-visited websites, such as Google, Yahoo!, and eBay, often serve intermediary functions).

[15] *See* Zittrain, *Internet Points of Control*, *supra* note 6, at 656 fig.1 (mapping different points of control).

A. *Proxy Censorship Abroad*

Internationally, China has led the way in targeting ISPs, routers, and search engines as a means of controlling access to Internet content.[16] Famously, Google has recently agreed to mimic the censorship of the Chinese government in its Chinese search engine,[17] and other intermediaries have followed suit.[18] Elsewhere in the world, authoritarian countries are not far behind in seeking to enlist intermediaries, often deploying technology supplied by western firms.[19] In Pakistan,

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[16] *See* Ctr. for Democracy & Tech., Online Briefing Book: Internet Freedom of Expression in China and Other Anti-Democratic Countries, http://www.cdt.org/international/censorship (last visited Oct. 22, 2006) (listing documents that chronicle China's record of Internet censorship); OPENNET INITIATIVE, INTERNET FILTERING IN CHINA IN 2004-2005: A COUNTRY STUDY (2005), http://www.opennetinitiative.net/studies/china/ONI_China_Country_Study.pdf (detailing China's "Internet filtering" practices); *see also, e.g.*, Cherry, *supra* note 11, at 40 (quoting critics of China's Internet censorship); Bridget Johnson, *Bloggers Get No Leeway in China*, L.A. DAILY NEWS, Apr. 25, 2006, *available at* http://www.dailynews.com/bridgetjohnson/ci_3750849 (reporting on the censorship of bloggers in China); Alexa Olesen, *Rights Group Says Yahoo Helped China Jail Journalist*, USA TODAY, Sept. 6, 2005, *available at* http://www.usatoday.com/tech/news/2005-09-06-yahoo-china-journalist_x.htm ("A French media watchdog said . . . that information provided by . . . Yahoo Inc. helped Chinese authorities convict and jail a writer who had penned an e-mail about press restrictions."); Associated Press, *Microsoft Censors Chinese Blogs*, WIRED NEWS, June 13, 2005, http://www.wired.com/news/culture/0,1284,67842,00.html ("Microsoft is cooperating with China's government to censor the company's newly launched Chinese-language web portal . . . ."); Will Knight, *Google Omits Controversial News Stories in China*, NEWSCIENTIST.COM, Sept. 21, 2004, http://www.newscientist.com/article.ns?id=dn6426 ("Google has been accused of supporting Chinese internet controls by omitting contentious news stories from search results in China."); OpenNet Initiative, Bulletin 006: Google Search & Cache Filtering Behind China's Great Firewall (Aug. 30, 2004), http://www.opennetinitiative.net/bulletins/006 (observing that Google yields truncated results when accessed through Chinese websites,); Jonathan Zittrain & Benjamin Edelman, Empirical Analysis of Internet Filtering in China, http://cyber.law.harvard.edu/filtering/china (last updated Mar. 20, 2003) (identifying at least four methods of Internet filtering in China).

[17] *See* Clive Thompson, *Google's China Problem (And China's Google Problem)*, N.Y. TIMES, Apr. 23, 2006, § 6, at 64 ("To obey China's censorship laws [Google] had agreed to purge its search results of any websites disapproved of by the Chinese government . . . ."); Andrew Keen, *Google in the Garden of Good and Evil: How the Search-Engine Giant Moved Beyond Mere Morality*, DAILY STANDARD, May 3, 2006, http://www.weeklystandard.com/Content/Public/Articles/000/000/012/176wtlbv.asp ("Everything that the Chinese government blocks, Google also blocks.").

[18] *See, e.g.*, John Leyden, *Skype Uses Peer Pressure Defense To Explain China Text Censorship*, THE REGISTER, Apr. 20, 2006, http://www.theregister.co.uk/2006/04/20/skype_china_censorship_row ("VoIP firm Skype has admitted that its Chinese partner filters instant messages sent using its software to comply with local censorship laws.").

[19] The OpenNet Initiative has recently published studies of the efforts of Yemen, Saudi Arabia, Burma, Singapore, the United Arab Emirates, Iran, and Bahrain to do

the Supreme Court has ordered that a criminal case be filed against a variety of telecommunications officials and Internet intermediaries for failing to block the showing of Danish newspaper cartoons caricaturing the Prophet Muhammad.[20] In response, several American legislators have introduced the "Global Online Freedom Act," purporting to bar American Internet intermediaries—including search engines and blog hosts—from complying with demands by "Internet-restricting countries."[21]

The gambit of recruiting proxy censors has been attractive as well to countries with somewhat better-rooted rights of free expression. Western European efforts to control Internet access to particular content have begun to target intermediaries. France has sought to impose liability on Yahoo! for making overseas Nazi messages and images available to French citizens and extraterritorially presenting Nazi memorabilia for purchase, while Swiss police have induced ISPs to

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so. OpenNet Initiative, Case Studies, http://www.opennetinitiative.net/index.php (follow "Case Studies" hyperlink) (last visited Oct. 22, 2006). Other sources have tracked the same types of efforts. *See, e.g.*, *Iran Tightens Web Filters*, RED HERRING, Oct. 24, 2005 (available with subscription at http://www.redherring.com and on file with the author) (describing how Iran used a California company's filtering software to further its Internet censorship efforts); OPENNET INITIATIVE, INTERNET FILTERING IN IRAN IN 2004-2005: A COUNTRY STUDY 16-17 (2005), http://www.opennetinitiative.net/studies/iran/ONI_Country_Study_Iran.pdf (reporting that Internet content targeted for filtering in Iran included opposition websites, some lesbian and gay sites, and many blogs, especially those written in Farsi); REPORTERS WITHOUT BORDERS, THE INTERNET "BLACK HOLES": 2006 ANNUAL REPORT: INTERNET (2006), http://www.rsf.org/IMG/pdf/internet_report.pdf (identifying various countries' censorship of the Internet and reporting that western firms have facilitated such censorship); Mahmood Saberi & Mariam Al Serkal, *Isn't It Time To Stop Kidding?*, GULFNEWS.COM, Feb. 12, 2005, http://www.gulfnews.com/articles/05/02/12/151585 (detailing filtering of nude paintings and dating sites by a government-run ISP monopoly in the United Arab Emirates); Kelley Beaucar Vlahos, *U.S. Tech Firms Help Governments Censor the Internet*, FOXNEWS.COM, July 19, 2005, http://www.foxnews.com/story/0,2933,162781,00.html ("Free speech advocates are frustrated with a host of American companies they say have been collaborating with oppressive regimes in countries like China, Iran, and Saudi Arabia, to help them filter and monitor the Internet activity of their citizens.").

[20] *See Pakistan Registers Blasphemy Case Over Prophet's Cartoons*, KHALEEJ TIMES, Apr. 26, 2006, http://www.khalejtimes.com/DisplayArticleNew.asp?section=subcontinent&xfile=data/subcontinent/2006/april/subcontinent_april1001.xml (describing a criminal action lodged against Hotmail, Yahoo!, and Google); *Action Ordered Against Pakistan Telecom Chief*, SOUTHASIANEWS.COM, Apr. 18, 2006, http://www.southasianews.com/64489/Action-ordered-against-Pakistan-telecom-chief.htm (describing an action against telecommunications officials for failing to block cartoons).

[21] Global Online Freedom Act of 2006, H.R. 4780, 109th Cong. § 301 (2006).

"voluntarily" block neo-Nazi sites.[22] German courts have imposed strict liability on ISPs for hosting copyright infringement, one German jurisdiction has sought to require ISPs to block access to extraterritorial neo-Nazi websites, and another has barred news sites from carrying links to the home page of a company that may provide circumvention technology.[23] At least one major search engine has responded to these initiatives by blocking access by French, German, and Swiss users to websites that carry messages that could be regarded by those countries as illegal hate speech.[24] So too, British Telecom has developed a filtering system that blocks access to sites placed on a child pornography blacklist by the Internet Watch Foundation.[25] Increasingly the

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[22] *See* Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisémitisme, 379 F.3d 1120, 1121-22 (9th Cir. 2004) (declining to enjoin the enforcement of a French order because a voluntary change in Yahoo!'s policy cast doubt on the ripeness of the case and because of doubts as to personal jurisdiction), *aff'd en banc*, 433 F.3d 1199 (9th Cir. 2006), *cert. denied*, 126 S. Ct. 2332 (2006); Benoît Frydman & Isabelle Rorive, *Regulating Internet Content Through Intermediaries in Europe and the USA*, 23 ZEITSCHRIFT FUR RECHTSSOZIOLOGIE 41, 45-49, *available at* http://www.isys.ucl.ac.be/etudes/cours/linf2202/Frydman_&_Rorive_2002.pdf (discussing French and Swiss initiatives, and the unsuccessful German prosecution of a CompuServe executive for not blocking access to child pornography); *see also* Eur. Digital Rights Initiative, *French Court Issues Blocking Order to 10 ISPs*, EDRI-GRAM, June 15, 2005, http://www.edri.org/edrigram/number3.12/blocking (reporting a Paris court's order to ten French ISPs to block access to a Holocaust-denial website hosted in the United States); Benoît Frydman & Isabelle Rorive, Racism, Xenophobia and Incitement Online: European Law and Policy, http://www.selfregulation.info/iapcoda/rxio-background-020923.htm (last visited Oct. 22, 2006) (listing and briefly analyzing various examples of European efforts to enlist intermediaries in suppressing online hate speech).

[23] *See* Hit Bit Software GmbH v. AOL Bertelsmann Online GmbH, Munich Oberlandesgericht [OLG] [Court of Appeals] Mar. 8, 2001, 2 European Copyright Design Report [ECDR] 375 (393-94) (F.R.G.), *available at* http://www.juriscom.net/en/txt/jurisde/da/olgmunich20010308.pdf (imposing strict liability on an ISP for copyright violations); Eric T. Eberwine, *Sound and Fury Signifying Nothing? Jürgen Büssow's Battle Against Hate-Speech on the Internet*, 49 N.Y.L. SCH. L. REV. 353, 355-56 (2004) (discussing an order to all ISPs in the German State of Nordrhein-Westfalen (North Rhine-Westphalia) to block user access to U.S.-based neo-Nazi websites); Jan Libbenga, *Heise Ordered to Remove Link to Slysoft.com*, THE REGISTER, Apr. 11, 2005, http://www.theregister.co.uk/2005/04/11/heise_not_allowed_to_mention_slysoft (reporting that a German news site was enjoined from linking to an illegal music copying site).

[24] *See* Josh McHugh, *Google v. Evil*, WIRED, Jan. 2003, at 130, 133, *available at* http://www.wired.com/wired/archive/11.01/google_pr.html (discussing Google's "moral compromise").

[25] *See* Richard Clayton, Failures in a Hybrid Content Blocking System, http://www.cl.cam.ac.uk/~rnc1/cleanfeed.pdf (last visited Oct. 22, 2006) (discussing the British Telecom filter); *cf.* John Tilak, *TDC Activates Child Porn Filter*, DIGITAL MEDIA NEWS FOR EUR., Oct. 24, 2005, http://www.dmeurope.com/

European Union has advanced "co-regulation" initiatives, seeking to enlist intermediaries in the effort to suppress particular types of content,[26] as well as "data retention" initiatives seeking to require intermediaries to keep records that will be available to law enforcement.[27] In antipodal counterpoint, the Australian government has established a regime entitling censors and "co-regulatory" bodies to direct ISPs to take down "objectionable" content from their servers, and opposition parties continue to advocate for mandatory filtering by ISPs.[28]

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default.asp?ArticleID=10886 (reporting on Danish ISP filtering "in cooperation with the national police").

[26] *See, e.g.*, Michael D. Birnhack & Jacob H. Rowbottom, *Shielding Children: The European Way*, 79 CHI.-KENT L. REV. 175, 177 (2004) (describing a combination of co-regulation and "hotlines"); Matthew Schruers, Note, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205, 226-30 (2002) (discussing European approaches); Christopher T. Marsden, *Co- and Self-Regulation in European Media and Internet Sectors: The Results of Oxford University's Study*, *in* ORG. FOR SEC. & CO-OPERATION IN EUR., THE MEDIA FREEDOM INTERNET COOKBOOK 76, 80 (Christian Möller & Arnaud Amouroux eds., 2004), *available at* http://www.osce.org/publications/rfm/2004/12/12239_89_en.pdf (noting the study's recommendation of co-regulation); Council of Eur., 7th European Ministerial Conference on Mass Media Policy, http://www.coe.int/T/E/Com/Files/Ministerial-Conferences/2005-kiev (last visited Oct. 22, 2006) (recording the conference at which these co-regulation measures were discussed and adopted); PROGRAMME IN COMPARATIVE MEDIA LAW & POLICY, OXFORD UNIV. CTR. FOR SOCIO-LEGAL STUDIES, SELF-REGULATION OF DIGITAL MEDIA CONVERGING ON THE INTERNET: INDUSTRY CODES OF CONDUCT IN SECTORAL ANALYSIS 4 (2004), http://pcmlp.socleg.ox.ac.uk/text/IAPCODEfinal.pdf ("This report examines the regulation of harmful or otherwise inappropriate content . . . and the regulation of content by self-regulatory means by the media industry."); *see also* Francoise Massit-Follea, *Internet Regulation and Governance*, *in* VOX INTERNET SCIENTIFIC REPORT (2005), http://www.voxinternet.org/article.php3?id_article=24 (discussing international approaches to Internet governance).

[27] *See* Elec. Privacy Info. Ctr., Data Retention Page, http://www.epic.org/privacy/intl/data_retention.html (discussing various European data-retention efforts).

[28] *See* DEP'T OF COMMC'NS, INFO. TECH. & THE ARTS, AUSTRALIAN GOVERNMENT REVIEW OF THE OPERATION OF SCHEDULE 5 TO THE BROADCASTING SERVICES ACT OF 1992 (2004), http://www.dcita.gov.au/__data/assets/pdf_file/10920/Online_Content_Review_Report.pdf (assessing the current state of Australia's co-regulatory scheme for Internet censorship); Elec. Frontiers Austl., Internet Censorship Laws in Australia, http://www.efa.org.au/Issues/Censor/cens1.html (last visited Oct. 22, 2006) (providing "information about on-line censorship legislation in Australia"); Elec. Frontiers Austl., Labor's Mandatory ISP Internet Blocking Plan, http://www.efa.org.au/Issues/Censor/mandatoryblocking.html (last visited Oct. 22, 2006) (concluding that "mandatory ISP filtering would not be effective in protecting children, whether or not it is, or becomes, both technically feasible and technically practical").

B. *Proxy Censorship in the United States*

Domestic efforts to suppress disfavored content on the Internet have begun to follow a similar course. Congress has successfully required schools and libraries to install filtering software on their computers to bar users' access to material that is obscene as to minors, though constitutionally protected as to adults.[29] Pending legislation proposes expanding this bar to "commercial social networking websites."[30] States have sought to require ISPs to block content suspected of being child pornography or "harmful to minors,"[31] and actions have been filed seeking to hold search engines and Internet hosting services liable for providing access to child pornography.[32]

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[29] *See* United States v. Am. Library Ass'n, 539 U.S. 194, 214 (2003) (upholding the Children's Internet Protection Act); *cf.* Miller v. Nw. Region Library Bd., 348 F. Supp. 2d 563, 570-71 (M.D.N.C. 2004) (recounting a library's decision to bar the plaintiff from using any computer with Internet access after a librarian observed nude images on the screen, even though the plaintiff claimed the images came from an unwanted pop-up).

[30] Deleting Online Predators Act of 2006, H.R. 5319, 109th Cong. (2006) (proposing an amendment to the Communications Act of 1934).

[31] *See, e.g.*, Ctr. for Democracy & Tech. v. Pappert, 337 F. Supp. 2d 606, 610-11 (E.D. Pa. 2004) (enjoining the enforcement of a Pennsylvania statute allowing the issuance of ex parte orders requiring ISPs to remove or disable access to websites containing child pornography); Complaint at 2-6, The King's English, Inc. v. Shurtleff, No. 2:05CV00485 DB (D. Utah June 9, 2005), *available at* http://www.cdt.org/speech/utahwebblock/20050609hb260complaint.pdf (challenging a Utah statute imposing an obligation on ISPs to block material that is "harmful to minors"); Stipulated Order, *The King's English*, No. 2:05CV00485 DB (D. Utah Aug. 25, 2006), *available at* http://cdt.org/speech/20060829utah.pdf (entering a stipulated preliminary injunction against the enforcement of the contested Utah statute); *cf.* Voicenet Commc'ns, Inc. v. Pappert, 126 Fed. Appx. 55, 60 (3d Cir. 2005) (upholding the seizure of ISP equipment used to access child pornography on USENET).

In the interests of full disclosure, the reader should be aware that I was part of the counsel team for the plaintiffs in *Center for Democracy & Technology v. Pappert*, and currently serve as a member of the ACLU counsel team in *Pilchesky v. Miller*, No. 3:05-CV-2074 (M.D. Pa. Dec. 21, 2005). The *Pilchesky* amended complaint is available at http://www.aclupa.org/downloads/PilcheskyComplaint.pdf, and is discussed *infra* notes 48 and 53.

[32] *See, e.g.*, Report and Recommendation of the United States Magistrate Judge at 1-2, Doe v. Bates, No. 5:05CV91 (E.D. Tex. Jan. 18, 2006) (on file with author) (rejecting liability for Yahoo! for hosting the "Candyman" e-group, alleged to be "a forum for sharing, posting, emailing, and transmitting hard-core illegal child pornography"); Complaint at 13-15, Toback v. Google, Inc., No. 06-007246 (N.Y. Sup. Ct. May 4, 2006) (on file with author) (seeking damages and an injunction against Google for allowing access to child pornography); *see also* Free Speech Coal. v. Gonzales, 406 F. Supp. 2d 1196, 1212-13 (D. Colo. 2005) (enjoining the application of burdensome federal record-keeping rules to "secondary producers," including websites that allow uploading of sexually explicit content).

In the area of intellectual property, an array of initiatives has targeted intermediaries in the effort to suppress particular varieties of content distributed over the Internet.[33] Congress has provided strong incentives under the DMCA for ISPs, search engines, and other intermediaries to take down or block access to websites that are alleged to contain content that infringes intellectual property rights;[34] these incentives have been deployed to induce intermediaries to block access to other, noninfringing content objectionable to copyright holders.[35] Content owners have sought to push their legal entitlements

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[33] *See* Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1346, 1352 (2004) (citing suits against makers of software, search engines, ISPs, credit card companies, venture capital firms, and websites that link to potentially infringing or cracking software); *see also* LAWRENCE LESSIG, FREE CULTURE 190-91 (2004) (describing lawsuits filed by copyright holders against intermediaries, such as lawyers and venture capital firms); Wu, *supra* note 9, at 684 (describing the Digital Millennium Copyright Act as an effort to reestablish regulation through intermediaries).

[34] 17 U.S.C. § 512 (2000).

[35] *See, e.g.*, Rossi v. Motion Picture Ass'n of Am., 391 F.3d 1000, 1002 (9th Cir. 2004) (describing the use of the DMCA's notice and takedown provisions to induce an ISP to take down a website from which illegal content could not be downloaded); Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1204-05 (N.D. Cal. 2004) (detailing the use of DMCA notices to induce ISPs to take down websites containing internal memoranda that embarrassed a voting machine manufacturer, even though the websites were, in fact, protected fair use).

In *Ellison v. Robertson*, the court effectively required AOL to block its users' access to USENET groups containing copyright-infringing material, on the basis of the DMCA obligation to block "repeated infringers." 357 F.3d 1072, 1075 (9th Cir. 2004). The settlement in another aspect of the case required one of the defendants to develop software to allow the plaintiff to delete offensive postings. *See* Press Release, Harlan Ellison, Copyright Infringement Action (Jan. 19, 2002), *available at* http://harlanellison.com/kick/crit_rls.htm.

The sexually explicit website Perfect 10 has been particularly aggressive in seeking to enlist intermediaries to enforce its alleged copyright entitlements regarding revealing pictures that appear on other sites. *See, e.g.*, Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 832 (C.D. Cal. 2006) (seeking to impose liability on a search engine for failing to block links to allegedly infringing websites); Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, No. C 04-0371 JW, 2004 WL 1773349, at *1 (N.D. Cal. Aug. 5, 2004) (bringing an action to impose liability for the failure of a payment site to block payment to repeat-infringing sites); Perfect 10 v. CCBill, L.L.C., 340 F. Supp. 2d 1077, 1082 (C.D. Cal. 2004) (same); Perfect 10, Inc. v. Cybernet Ventures, Inc., 167 F. Supp. 2d 1114, 1118 (C.D. Cal. 2001) (bringing an action against an adult verification service for facilitating access to websites alleged to post some of Perfect 10's copyrighted images).

For initiatives against other intermediaries under the DMCA, see, for example, Daniel W. Kopko, *Looking for a Crack To Break the Internet's Back: The Listen4ever Case and Backbone Provider Liability Under the Copyright Act and the DMCA*, 8 COMP. L. REV. & TECH. J. 83, 85 (2003) (discussing the lawsuit brought by thirteen record companies against the Internet's four major "backbone" providers for failing to block access to a

further, asserting a right to unilaterally require ISPs to reveal the identity of subscribers who are alleged to violate intellectual property rights.[36] They have sought the imposition of secondary liability to effectively oblige software and network providers to monitor their networks for infringing content,[37] as well as regulatory initiatives to require manufacturers of digital devices to hardwire their products to respect copyright claims.[38] Content providers have successfully invoked the DMCA to obtain orders preventing websites from linking to other websites that make available programs that could be used to circumvent copy protection.[39]

The "War on Terror" and other law enforcement initiatives have similarly sought leverage by pressing intermediaries to monitor or interdict otherwise unreachable internet communications. Thus, apparently in 1999, antiterrorism units of the FBI adopted a "good corporate citizenship program," which empowered them to seek to

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website that offered free downloads of copyrighted music); Michael Davis-Wilson, *Google DMCA Takedowns: A Three-Month View*, CHILLING EFFECTS, June 2, 2005, http://www.chillingeffects.org/weather.cgi?WeatherID=498 (detailing Google's growing receipt of takedown demands); Seth Finkelstein, Google Censorship: How It Works, Mar. 10, 2003, http://www.sethf.com/anticensorware/general/google-censorship.php (describing how Google censors its search results due to governmental pressure).

[36] *See In re* Charter Commc'ns, Inc., 393 F.3d 771, 773 (8th Cir. 2005) (quashing a subpoena to a conduit ISP); Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1236 (D.C. Cir. 2003) (same). *Compare* Atl. Recording Corp. v. Doe, 371 F. Supp. 2d 377, 377-78 (W.D.N.Y. 2005) (issuing an ex parte subpoena against a university to obtain ISP records of students alleged to have downloaded infringing material), *with* Recording Indus. Ass'n of Am. v. Univ. of N.C. at Chapel Hill, 367 F. Supp. 2d 945, 958 (M.D.N.C. 2005) (granting universities' motions to quash similar subpoenas).

[37] *See* MGM Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2766 (2005) (seeking to impose liability for failure to prevent copyright violation by users of peer-to-peer networks); *cf. In re* Napster, Inc. Copyright Litig., No. C MDL-00-1369 MHP, 2006 U.S. Dist. LEXIS 30338, at *8 (N.D. Cal. May 17, 2006) (seeking to impose liability on investors in enterprises that facilitated infringement by third parties); UMG Recordings, Inc. v. Hummer Winblad Venture Partners (*In re* Napster, Inc.), 377 F. Supp. 2d 796, 799-800 (N.D. Cal. 2005) (same).

At least one amicus brief argued that secondary copyright liability should be imposed to encourage providers to configure systems that could be used to suppress other sorts of content judged illegal. Brief for Kids First Coalition et al. as Amici Curiae in Support of Petitioner, *Grokster*, 125 S. Ct. 2764 (2005) (No. 04-480).

[38] *See* Am. Library Ass'n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005) (reversing the FCC's broadcast-flag-technology order).

[39] *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 458 (2d Cir. 2001) (approving the invocation of the DMCA by motion picture studios). *But cf.* Newborn v. Yahoo!, Inc., 391 F. Supp. 2d 181, 184 (D.D.C. 2005) (dismissing as poorly pleaded a complaint seeking to hold a search engine liable in a secondary copyright infringement suit).

induce ISPs to censor websites that were constitutionally protected but were not viewed by the FBI as consonant with the public interest.[40] The USA PATRIOT Act has provided federal officers with unilateral authority to demand that private intermediaries secretly turn over the records of those whose communications pass through their equipment,[41] an authority that the government has not been reluctant to exercise.[42] Pre-9/11 legislation has been invoked to authorize re-

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[40] *See* Zieper v. Metzinger, 392 F. Supp. 2d 516, 522-23, 538 (S.D.N.Y. 2005) (reviewing the FBI's effort, under its "'good corporate citizenship program,'" to require a website owner and ISPs to take down a video detailing an imaginary New Year's Eve attack on Times Square).

[41] *See, e.g.*, Doe v. Ashcroft (*Doe I*) , 334 F. Supp. 2d 471, 475 (S.D.N.Y. 2004) (striking down the USA PATRIOT Act's use for that purpose as unconstitutional, but staying the enforcement of the court's judgment); Doe v. Gonzales (*Doe II*) , 386 F. Supp. 2d 66, 81 (D. Conn. 2005) (same). Both cases were recently either remanded for reconsideration or dismissed as moot in light of amendments to the underlying statutory authorization. Doe v. Gonzales, 449 F.3d 415, 421 (2d Cir. 2006) (vacating and remanding *Doe I*, and dismissing *Doe II* as moot).

[42] *See, e.g.*, Barton Gellman, *The FBI's Secret Scrutiny: In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans*, WASH. POST, Nov. 6, 2005, at A1 (reporting the issuance of more than thirty thousand national security letters per year to holders of transaction records).

Official compulsion has not always been necessary. For example, eBay enlisted in the "War on Terror" by volunteering to provide law enforcement with its enormous proprietary stock of data. *See* Posting of Ernest Miller & Nimrod Kozlovski to LawMeme, eBay to Law Enforcement—We're Here to Help, http://research.yale.edu/lawmeme/modules.php?name=News&file=article&sid=925 (Feb. 17, 2003, 9:09 EST) (quoting eBay's Director of Compliance and Law Enforcement Relations regarding this company policy). Similarly, AT&T apparently acquiesced to federal requests to install monitoring devices in strategically placed Internet junctions, permitting monitoring of billions of Internet messages. *See* Complaint at 1-2, Hepting v. AT&T Corp., 2006 U.S. Dist. LEXIS 41160 (N.D. Cal. June 6, 2006) (No. C-06-672 VRW), *available at* http://www.eff.org/legal/cases/att/att-complaint.pdf; *see also* Ryan Singel, *Court Filing Confirms Spy Docs*, WIRED NEWS, May 26, 2006, http://www.wired.com/news/technology/0,71008-0.html (reporting on a former AT&T employee's revelation of the company's disputed practice); Ryan Singel, *Whistle-Blower Outs NSA Spy Room*, WIRED NEWS, Apr. 7, 2006, http://www.wired.com/news/technology/0,70619-0.html (same). A number of telephone companies have voluntarily provided federal authorities with local and long-distance phone records on tens of millions of Americans. *See, e.g.*, Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY, May 11, 2006, at 1, *available at* http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm ("The National Security Agency has been secretly collecting the phone call records of tens of millions of Americans, using data provided by AT&T, Verizon and BellSouth . . . ."); Matt Richtel & Ken Belson, *U.S. Focused on Obtaining Long-Distance Phone Data, Company Officials Indicate*, N.Y. TIMES, May 18, 2006, at A22 (concluding that the government's efforts to obtain information from the nation's phone companies to identify terrorists focused on long-distance carriers). *But cf.* Elec. Frontier Found., Best Data Practices for Online Service Providers from the Electronic Frontier Foundation (Aug. 19, 2004), http://www.eff.org/osp/20040819_OSPBestPractices.pdf (outlining

quirements that intermediary networks structure their operations to facilitate wiretapping,[43] while the USA PATRIOT Act and subsequent legislation have authorized ISPs to voluntarily disclose electronic transaction information to law enforcement authorities in order to avoid the "'danger of death or serious physical injury.'"[44] In pursuit of the "War on Terror," the federal government has sought to impose criminal liability under material support statutes[45] for assisting in the construction of a website that acts as an intermediary for Islamic debate and discussion.[46]

This effort has not been limited to the "War on Terror." In more mundane pursuits, the New York Attorney General has successfully enlisted the aid of credit card companies in his effort to interdict offshore Internet gambling.[47] Pennsylvania state police persuaded a Ca-

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strategies for intermediaries to avoid retaining information that may be subject to subpoena).

[43] *See* Am. Council on Educ. v. FCC, 451 F.3d 226, 227 (D.C. Cir. 2006) (upholding a rule requiring networks to adopt technology that allows wiretapping).

[44] Birnhack & Elkin-Koren, *supra* note 10, ¶ 104 (quoting 18 U.S.C.A. § 2702(b) (2002)); *cf., e.g.*, A.B. 1327, 212th Leg., 2006 Sess. (N.J. 2006), *available at* http://www.njleg.state.nj.us/2006/bills/a1500/1327_i2.pdf (proposing to obligate ISPs and "interactive computer services" to obtain and retain identifying information for posters and to disclose the information to the targets of "false or defamatory" postings).

[45] *See* 18 U.S.C.A. § 2339B (2005) (prohibiting the provision of "material support or resources to designated foreign terrorist organizations").

[46] Sami Omar Al-Hussayen, a computer science student in Idaho, was prosecuted for designing and maintaining a website for an Islamic charity that posted edicts from radical clerics along with pleas for peaceful dialogue and could be used to access links to sites operated by a designated terrorist group. The government claimed the website functioned illegally to fund and recruit terrorists. *See* Bob Fick, *Trial Pits Free Speech vs. Terror*, AKRON BEACON J., May 29, 2004, at A5 (quoting a prosecutor alleging that "Al-Hussayen provided the linkage to create the platform and then the content to advocate extreme jihad"); Richard B. Schmitt, *Free Speech Crux of Terrorism Case: Sami Omar Al-Hussayen's Lawyers Say He Was Trying to Foster Dialogue on His Fatwa-Filled Websites*, L.A. TIMES, May 23, 2004, at A25 (detailing the arrest of Al-Hussayen and the charges against him). After a seven-week trial, Al-Hussayen was acquitted on the material support charges, but agreed to be deported in exchange for the immigration charges against him being dropped. *See* Bob Fick, *Feds Drop Charges in Deal that Sends Al-Hussayen Home*, SPOKESMAN REVIEW (Spokane, Wash.), July 1 2004, at A1. For discussion, see *infra* note 268 and accompanying text.

[47] *See* Press Release, Office of New York State Attorney General Eliot Spitzer, Agreement Reached with Paypal To Bar New Yorkers from Online Gambling (Aug. 21, 2002), *available at* http://www.oag.state.ny.us/press/2002/aug/aug21a_02.html ("Attorney General Eliot Spitzer today announced that PayPal, the nation's leading 'e-cash' company, has agreed to stop online gambling merchants from using its facilities to take money from New York gamblers."); *see also* Ryan Naraine, *PayPal to Fine Gambling, Porn Sites*, INTERNETNEWS.COM, Sept. 13, 2004, http://www.internetnews.com/ec-news/article.php/3407211 ("PayPal, the eBay-owned online payment provider, plans to levy

nadian ISP to suppress a political message board harshly critical of local officials.[48] An enterprising plaintiffs' law firm in California has brought a private action seeking to hold search sites liable for carrying links to gambling sites.[49] Recent federal legislation empowers federal regulators to issue rules to require that payment systems block Internet gaming transactions, and allows federal and state law enforcement officials to obtain judicial orders against Internet intermediaries to withdraw communications facilities used to facilitate internet gambling.[50]

Proxy censorship of the Internet is no passing fad; it is a growth industry of Internet regulation.

II. FREE EXPRESSION AND THE PROBLEM OF THE WEAKEST LINK

A. *The Dangers of Proxy Censorship*

The strategy of recruiting proxy censors by targeting the weakest link in the chain of communication has obvious advantages for regulators. It provides a mechanism for the exercise of authority over otherwise ungovernable conduct. Moreover, it does so at a discount: the cost of monitoring and sanctioning disfavored communications is largely externalized onto the intermediaries who are the subjects of direct regulation. But these advantages come with substantial costs to the system of free expression.

First, even if the ultimate target is an entirely legitimate one, and the proxy censor attempts to block only speech unprotected by constitutional immunity, there is always danger of error. An ISP or search engine may mistake a family photo album for child pornography, an AIDS prevention site for obscenity, a political commentary for a "true threat," or a parody for a copyright violation. A system of informal private monitors encouraged by the government provides none of the

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fines of up to $500 for users who violate its acceptable use policy regarding adult content and services, prescription drugs and gambling.").

[48] *See* Amended Complaint at 3-12, Pilchesky v. Miller, No. 3:05-CV-2074 (M.D. Pa. Dec. 21, 2005), *available at* http://www.aclupa.org/downloads/PilcheskyComplaint.pdf.

[49] *See* Complaint, Cisneros v. Yahoo!, Inc., No. CGC-04-433518 (Cal. Super. Ct. Aug. 3, 2004), *available at* http://www.techfirm.com/yahoocomplaint.pdf (illustrating the California firm acting as a "private attorney general," suing Yahoo!, Google, and other search engines for sponsoring gambling links).

[50] Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, § 802 (2006) (to be codified at 31 U.S.C. §§ 5361-5367).

due process guarantees that preserve accuracy in the public sector, and the dominant incentive of intermediaries is to protect themselves from sanctions, rather than to protect the target from censorship. Nor is there any warrant of proportionality. Unlike an official determination, which assesses damages or penalties tailored to the prospect of public harm, censorship by proxy is an unavoidably blunt instrument. Private censorship takes place at low levels of visibility. It is neither coordinated nor reviewed.[51] Often, neither speakers nor listeners will know that the message has not been conveyed, and there is no way to determine how dialogue has been deformed.

Second, if it is costly to distinguish protected from unprotected speech, the proxy censor is likely to abandon the effort to avoid errors and adopt a conscious policy of prophylactic self-censorship that blocks any content that could precipitate the threat of sanctions.[52] To be sure, every prospect of liability or other sanction can chill speech, but intermediaries have a peculiarly fragile commitment to the speech that they facilitate. In networked environments, revenue from the marginal customer brings only a small payoff, a benefit that can easily be dwarfed by threatened penalties—or even by the threat of official displeasure.[53] It is almost always cheaper to drop a marginal website than to employ counsel. Indeed, even if imposition of the penalty is unlikely and absolute expected value of the perceived loss is no greater than the expected gain from retaining the customer, the risk-averse intermediary is likely to buy "insurance" by dropping the risky

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[51] My colleague Polk Wagner has expressed similar concerns about the substitution of software for publicly enforced legal rules as a means of control on the Internet. R. Polk Wagner, *On Software Regulation*, 78 S. CAL. L. REV. 457, 478-81 (2005).

[52] *See* Sonia K. Katyal, *The New Surveillance*, 54 CASE W. RES. L. REV. 297, 368 (2003) ("*Napster* placed the responsibility to detect infringement with intellectual property owners, and the DMCA's standard for a notice-and-takedown request is surprisingly subject to manipulative assertions of copyright infringement. Consequently, overdeterrence of speech is a relatively straightforward, and realistic, risk."); Lemley & Reese, *supra* note 33, at 1380 (discussing efforts to impose secondary liability that "lack the granularity of suits against direct infringers," in addition to explaining that no individualized defenses are available); PROGRAMME IN COMPARATIVE MEDIA LAW & POLICY, *supra* note 26, at 70 ("There is a dangerous trend towards a private form of censorship in [notice-and-takedown] approaches, and a 'shoot first, ask questions later' approach to removing questioned content.").

[53] *See* Zieper v. Metzinger, 392 F. Supp. 2d 516, 518-19 (S.D.N.Y. 2005) (describing an ISP's ready acquiescence to an FBI request to take down a constitutionally protected website); Amended Complaint at 3-12, *Pilchesky*, No. 3:05-CV-2074, *available at* http://www.aclupa.org/downloads/pilcheskycomplaint.pdf (describing similar acquiescence).

customer where the ultimate risk of sanctions is unclear.[54] As a number of commentators have noted, in many situations an intermediary—particularly an upstream intermediary whose contact with the speaker is mediated by other entities—cannot capture the full value of speech, but can easily avoid potential liability by simply declining to carry speech that could raise problems.[55]

An intermediary's policy, in turn, can trigger a cascade of censorship. Even where they propound their own views, speakers who use the facilities of an upstream intermediary with a policy of proxy censorship will themselves engage in self-censorship as a means of assuring uninterrupted access if doing so is less costly than seeking out a new and permissive intermediary. Where they are conduits for the content of others, as is increasingly the case with the blogosphere, speakers will be still more likely to steer clear of links to content that could induce their own ISPs to cut off their access to the Internet.

Intermediaries are peculiarly susceptible to chill, for they often face cost and revenue structures quite different from those of first-party speakers. Where the intermediary's success depends on sales to a broad customer base, public association with controversial speech—much less active efforts to defend it—may be untenable. Likewise, where an intermediary is partially dependent on other revenue streams, whether from advertisers or other corporate affiliates, it may

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[54] *See* LESSIG, *supra* note 33, at 98, 187-88, 192-93 (arguing that, although the U.S. legal system protects fair use in theory, in practice the constant threat of a lawsuit discourages people and companies from distributing copyrighted material even when doing so would be fair use).

[55] *See, e.g.*, Assaf Hamdani, *Who's Liable for Cyberwrongs?*, 87 CORNELL L. REV. 901, 916 (2002) (arguing that strict liability for ISPs results in overdeterrence and excessive censorship); Matt Jackson, *The Digital Millennium Copyright Act of 1998: A Proposed Amendment to Accommodate Free Speech*, 5 COMM. L. & POL'Y 61, 63 (2000) (arguing that by imposing liability on online service providers Congress has provided them with incentives to censor their users); Lemley & Reese, *supra* note 33, at 1385-86 ("ISPs, auction sites, search engines, wireline providers, and other intermediaries capture only a tiny part of the value of a third-party posting."); Malla Pollack, *The Right to Know? Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47, 109 (1999) ("To negate their own possible liability, OSPs [online service providers] and ISPs are required to take down content when notified by the allegedly aggrieved right holder. No court is involved. No process is provided to the censored speaker before this restraint on his or her speech."); Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1836, 1886-87 (2000) (discussing the various theories for holding an ISP liable for copyright infringement by a subscriber); Schruers, *supra* note 26, at 244-45 (discussing intermediary liability's potential "reductive effect on public discourse").

be vulnerable to pressures to which the primary speaker is immune.[56] Putting the censorship decision in the hands of the intermediary allows commercially powerful blocs of customers a potential veto on the speech of others.

Third, even if the intermediary decides to expend the resources to identify and target only speech that is legally unprotected, the intermediary's response will often be far from precisely tailored; collateral damage to protected expression will be an appealing exchange for avoiding liability. A speaker who is threatened with prosecution can avoid collateral damage by editing her website to comply with the law, but, for many intermediaries, it is easier to block or take down a website than to edit it.[57] In a hierarchically networked environment, excision of a higher-level connection is often more easily achieved than denial of access to a single node; it is easier for a recipient ISP to identify and block transmissions from the domain name "terra.es" than to identify and block a particular page, http://www.terra.es/example/example. In a multiparty network, isolating a single node from the network as a whole is easier than isolating it from a particular destination; when a host ISP is asked to prevent transmission to Utah, for example, pulling the website entirely is easier than seeking to determine the ultimate source of each query and to prevent communication only with recipients in Utah. Where technology makes it easier to block a series of affiliated (or unaffiliated) websites than to target only a single

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[56] For example, Yahoo! recently shut down chat rooms in response to pressure from advertisers. *See* John Oates, *Yahoo! Shuts Door on Dodgy Chatrooms*, THE REGISTER, June 22, 2005, http://www.theregister.co.uk/2005/06/22/yahoo_shuts_chatrooms ("Yahoo! has pulled the plug on user-created chat rooms in the US with apparent child sex content after major advertisers withdrew their ads."); Zachary Rodgers, *Chat Rooms Closed, Advertisers Bolt at Yahoo!*, CLICKZ NEWS, June 24, 2005, http://www.clickz.com/news/article.php/3515226 ("In addition to shutting down all user-created chat rooms, Yahoo has made unavailable the ability to create new chat rooms."). For a discussion of the similar phenomenon of Google's censoring of links available to Chinese users as a way of obtaining access to Chinese markets, see *supra* note 17 and accompanying text.

[57] To identify a speaker as "risky" or not is a bimodal choice, especially where there is an official black list. By contrast, to identify and edit out problematic aspects of speech and potential substitutions is far more difficult for an intermediary. Often, the intermediary will be technically unable to control content precisely. *See, e.g.*, Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1198 n.2 (N.D. Cal. 2004) (discussing how in co-location configuration, an ISP "could not comply by merely disabling or removing the hyperlink and related information demanded by Diebold" and "OPG's only option to comply with the demand was to cut off IndyMedia's Internet connectivity entirely" (quotation marks omitted)). Even search engines that link to particular URLs have no capacity to edit content.

offending URL, the profit-maximizing intermediary likely will choose the mechanism that is least costly, rather than the one that preserves the most speech. And where the number of potential liability-producing nodes is great, the scaled-up filtering process yields well-recognized problems of inaccuracy. Thus, for example, in *Center for Democracy & Technology v. Pappert,* the court found that ISPs blocked access to around 1.2 million "innocent" websites in response to demands by law enforcement to disable four hundred targeted URLs.[58] In contrast to first-party sanctions, intermediaries have limited incentives to preserve access to protected speech.[59]

Finally, efforts to generate proxy censorship by targeting intermediaries are less likely to be challenged in court than censorship efforts directed at speakers or listeners, and are therefore more likely to be consciously manipulated to suppress protected speech. Given the divergence between their interest and those of the speakers, intermediaries are unlikely to expend much time or energy contesting dubious demands that can be satisfied by sacrificing a marginal user of their services. Unlike a speaker, who has an interest in all of the profits to be earned from a determination that speech is protected, the intermediary's interest is limited to the profits from speech conveyed over its own network, and a regulator intent on suppressing a particular type of communication can take advantage of that fact. Thus, in all but one of the four hundred instances in which Pennsylvania sought to require ISPs to block access by their subscribers to websites alleged to contain child pornography, ISPs acceded to the requests without awaiting judicial determination of the claim.[60] This pliancy was motivated in part by the Pennsylvania Attorney General's issuance of a

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[58] 337 F. Supp. 2d 606, 642, 650, 655 (E.D. Pa. 2004).

[59] There are, of course, limits to this proposition. An occlusion of content might attain sufficient breadth that it would substantially undercut customers' willingness to purchase the intermediary's services. But particularly where occlusion occurs without disclosure, this result is unlikely. An ISP that successfully blocked all access to all pornography might lose substantial market share. An ISP that surreptitiously failed to connect with only a third of those sites might not. A Google image search for "sex" on June 24, 2005 yielded 1.7 million sites without filtering, and 1.12 million sites at the default "moderate" filtering. *Cf.* Benjamin Edelman, *An Empirical Analysis of Google SafeSearch* (2003), http://cyber.law.harvard.edu/people/edelman/google-safesearch (describing and analyzing Google's "SafeSearch" filtering mechanism, and concluding that "SafeSearch blocks at least tens of thousands of web pages without any sexually explicit content").

[60] *See Ctr. for Democracy & Tech.*, 337 F. Supp. 2d at 660 (noting that only one ISP did not comply with the informal notice process).

press release effectively accusing the one ISP that demanded a judicial order of aiding and abetting pedophilia.[61]

Especially where the available levers can be wielded by private parties, the power of the proxy censor can be hijacked by those with priorities distinctly at odds with the public interest.[62] Thus, for example, when the Diebold Corporation invoked the DMCA "cease and desist" authority to block embarrassing disclosures of the flaws in its electronic voting machines, most ISPs acceded to the demand that the sites be blocked, notwithstanding the patent impropriety of the copyright claims.[63] Google is reported to respond to "cease and desist" notices in most cases by simply removing search results, a reaction that can be used to suppress access to websites of critics.[64] A recent article

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[61] *See id.* at 625, 660 (quoting the Attorney General's press release).

[62] The award of legal sanctions at the instance of a private party is, of course, state action subject to First Amendment review. *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991) ("These legal obligations would be enforced through the official power of the Minnesota courts. Under our cases, that is enough to constitute 'state action' for purposes of the Fourteenth Amendment."); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 n.51 (1982) ("Although this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute.").

[63] *See* Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1203 (N.D. Cal. 2004) (describing Diebold's bad-faith effort to suppress embarrassing corporate documents); Press Release, Elec. Frontier Found., ISP Rejects Diebold Copyright Claims Against News Website: EFF Defends Right to Publish Links to Electronic Voting Memos (Oct. 16, 2003), *available at* http://www.eff.org/legal/ISP_liability/20031016_eff_pr.php (indicating that the Online Policy Group was the only one of "dozens" of ISPs to resist Diebold's takedown letters); *cf.* Christian Ahlert et al., How "Liberty" Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation, http://www.rootsecure.net/content/downloads/pdf/liberty_disappeared_from_cyberspace.pdf (last visited Oct. 22, 2006) (describing the ready acquiescence of European ISPs in responding to a request to take down an excerpt from John Stuart Mill's *On Liberty*, which was clearly in the public domain); Sjoera Nas, The Multatuli Project: ISP Notice and Take Down (Oct. 27, 2004), http://www.bof.nl/docs/researchpaperSANE.pdf (describing the rapid acquiescence of seven of ten Dutch ISPs to a similarly baseless demand); Jennifer Urban & Laura Quilter, Summary Report: Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act 12 (2005), http://mylaw.usc.edu/documents/512rep-execsum_out.pdf (reporting that a census of section 512 "takedown notices" that resulted in blocking by ISPs or search engines found that thirty percent of the notices involved weak or baseless claims).

[64] *See* Davis-Wilson, *supra* note 35 ("Google receives more than 30 copyright-based takedown demands each month invoking the Digital Millennium Copyright Act. A re-

in *Forbes* was explicit in expressing the common corporate wisdom for dealing with Internet critics:

> ATTACK THE HOST. Find some copyrighted text that a blogger has lifted from your Web site and threaten to sue his Internet service provider under the Digital Millennium Copyright Act. That may prompt the ISP to shut him down. Or threaten to drag the host into a defamation suit against the blogger. The host isn't liable but may skip the hassle and cut off the blogger's access anyway.[65]

In a concentrated intermediary market, there is a still higher payoff to abuse: if threats of legal action designed to suppress criticism can incentivize intermediaries that have substantial market position, intimidation can proceed wholesale rather than retail.

B. *The Coasian Counter and Its Limits*

Advocates of proxy censorship often acknowledge the possibility that overzealous intermediaries will suppress protected speech.[66] To the extent that they do not simply assume the problem away,[67] their

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view of three months of notices shows they cluster in a few big categories: C&Ds [cease-and-desist notices] from companies and individuals demanding removal of competitors' sites; C&Ds demanding removal of 'cracks' or material copied wholesale; and C&Ds demanding removal of criticism."); *cf.* Reuters, *Google Restores Church Links*, WIRED NEWS, Mar. 22, 2002, http://www.wired.com/news/ebiz/0,1272,51257,00.html (discussing Google's initial removal of pages of a website criticizing the Church of Scientology after receiving a takedown notice from the Church).

[65] Daniel Lyons, *Attack of the Blogs!*, FORBES, Nov. 14, 2005, at 128, 132 (noting that another option is to "[s]ubpoena the host company, demanding the blogger's name or Internet address").

[66] *See, e.g.*, Katyal, *supra* note 5, at 1100 ("Placing burdens on ISPs risks balkanizing the net and inducing ISPs to purge risky users."); Reidenberg, *Technology and Internet Jurisdiction*, *supra* note 7, at 1966 ("Civil libertarians may also be concerned about the abuse of intermediaries by the state when intermediaries are pressed into law enforcement functions."); Lichtman & Posner, *supra* note 9, at 12-13 ("[I]t is unlikely that telephone company liability [for failure to prevent crank phone calls] would be attractive, both because of obvious privacy concerns and because of worries that, in its attempts to address the problem of crank calls, the telephone company would inadvertently interfere with a sizeable percentage of legitimate telephone activity."), *quoted and paraphrased without citation in* Brief of Amici Curiae Kenneth Arrow et al. in Support of Petitioners at 6, MGM Studios Inc. v. Grokster, Ltd., 125 S. Ct. 2764 (2005) (No. 04-480).

[67] *See, e.g.*, Reidenberg, *Technology and Internet Jurisdiction*, *supra* note 7, at 1966 ("These objections, however, are not insurmountable obstacles. The response lies in legislation that protects against overreaching and that protects against abuse of intermediaries."); Lichtman & Posner *supra* note 9, at 19 ("Legal rules, however, could ease these concerns."); *id.* at 23 ("Our first response is that this concern, while plausible, seems overdrawn.").

response is rooted in a faith that market forces will assure that sanctions targeted at intermediaries will be no more dangerous than similar sanctions would be if the state simply sought to enforce its norms directly against speakers or listeners.

The argument comes in two forms. One version holds that "Internet subscribers can discipline service providers that disable content needlessly . . . by changing providers."[68] A different, complementary claim maintains that, rather than being fully censored, "a user whose actions online reveal him to be a risky user will be charged a higher price by his ISP," and any adverse effects not captured by the willingness of the user to pay that fee could be counterbalanced by an appropriate subsidy.[69] Since the cost of such risk premiums would presumably be no greater than the expected value of the sanctions threatened, the claim goes, the effect on the speaker would be identical to a sanction imposed directly, where the speaker insures against the sanction.[70]

The suggestion that the threat of subscriber "discipline" constrains overenthusiastic intermediaries from censorship is not wholly baseless. A commercial ISP that blocked access to pornography entirely, a network that refused to upload any music files, or a search engine that systematically refused to respond to a query containing the word "sex" might well lose customers. But there are substantial reasons to believe that, in many circumstances, the threat of customer departure provides little hedge against a wide range of overzealous censorship.

To begin with, many Americans access the Internet through ISPs that they do not select.[71] The student at college or the employee at work is unlikely to "discipline" her ISP by departing, and the depar-

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[68] Douglas Lichtman, *How the Law Responds to Self-Help* 56-57 (U. Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 232, 2005), *available at* http://ssrn.com/abstract=629287; *see also* Lichtman & Posner, *supra* note 9, at 36 ("[M]arket forces will largely discipline this sort of behavior . . . .").

[69] Lichtman & Posner, *supra* note 9, at 24-26. The notion that a precisely balanced countervailing subsidy would in fact be adopted has a quaint counterfactual charm.

[70] *Id.* The argument is not entirely spelled out with respect to listeners, but presumably in the world of Lichtman and Posner, listeners could pay premiums equivalent to the expected value of the sanction.

[71] *See* Paul Harwood & Lee Rainie, Pew Internet & Am. Life Project, People Who Use the Internet Away From Home and Work 2 (March 2004), http://www.pewinternet.org/pdfs/pip_other_places.pdf (reporting that "40% of those connecting to the Internet on a typical day log on from work," and "23% have accessed the internet from a location other than home or place of work").

ture of a library patron because the library censors Internet access at its computer terminals will serve only to lighten the burden of overused facilities. There are a variety of more general reasons why both speakers and listeners may find it difficult to switch to a competing Internet intermediary to "discipline" those intermediaries that engage in overzealous censorship. ISPs do not provide a la carte service packages; from a limited set of options customers must choose bundles of reliability, convenience, price, and freedom from censorship. Likewise, the "first mover" advantage in networked environments is notorious, and, to the degree that intermediaries exercise market power, the shield of consumer sovereignty is weakened. The e-mail customer who seeks to avoid censorship must sacrifice her address; the browser customer must sacrifice her bookmarks; the search engine user must sacrifice familiar search techniques and the personalized search algorithms that are likely to be increasingly important. Similarly, if PayPal and the three major credit cards are persuaded to block payment to a website, the theoretical availability of a competing payment system is unlikely to save that site from commercial extinction.

Even where an exit to competing intermediaries is available, if the target does not know about the censorship or is technologically unsophisticated and thus unable to shift its patronage, theoretically available market discipline may be at most a small check on overzealous censorship. This condition is likely to be common, for the easiest way to avoid customer backlash and potential liability simultaneously is by censoring the flow of information without alerting either the sender or the receiver. The challenge of ferreting out the terms of censorship may be well beyond the capacity of all but the most sophisticated patrons,[72] and, in any event, the necessity of devoting effort to detecting the exercise of intermediary censorship is a distinct deterrent cost imposed on both speakers and listeners by the strategy of targeting intermediaries. Standard terms of service that permit intermediaries to engage in censorship may be important to repeat-playing providers who are likely to encounter demands that they act as government

[72] To take a minor example, though Google Image Search bills itself as the "most comprehensive image search on the web," Google Image Search, http://images.google.com (last visited Oct. 22, 2006), its default setting is a "moderate" filter that "excludes most explicit images," Google Help: Search Preferences, http://images.google.com/intl/en/help/customize.html#safe (last visited Oct. 22, 2006). The existence of the filter is revealed only if a customer clicks on the "preferences" link. Google Image Search, http://images.google.com (follow hyperlink to "preferences") (last visited Oct. 22, 2006). Google does not reveal at all its periodic exclusions of search results due to DMCA takedown notices or political pressure.

proxies, but are unlikely to loom large in the consciousness of any but the most zealously attentive end users. And even if end users are aware of and concerned about the issue, they may be in no realistic position to do anything about it. If censorship is imposed by an intermediary one or two layers into the stream of communication, an objecting end user must not only uncover the censorship, but persuade her immediate access point to bargain with its own upstream provider.[73]

The related claim that the equilibrium outcome of a sanction directed against intermediaries will not be proxy censorship, but rather targeted increases in the price of access, relies on the capacity of speakers (or listeners) to make side payments compensating intermediaries for their risk of loss. There are reasons to doubt that many speakers or listeners will in fact be in a position to make these side payments, and in the absence of payments, censorship is the likely outcome. Many intermediaries have business models that depend on advertising revenues or similar third party payment mechanisms, which are wholly unadapted to the process of levying risk premiums. Google charges neither searchers nor sites for its services. In response to pressure to drop risky sites from search results, it could conceivably contact each targeted site to ask for a side payment, but it would be far more likely to simply block access. So too, ISPs that charge subscribers for Internet access have no contact with the websites viewed, and do not closely monitor their subscribers' viewing habits. Threatened with liability for allowing subscribers to access proscribed websites, the ISP is far more likely to block the websites than to negotiate a side payment with either websites or subscribers.

The pricing structure of ISPs whose revenue comes directly from speakers who could make side payments tends to be undiscriminating.[74] And the possibility of crafting particular deals with fringe customers is likely to be unattractive to an established intermediary, particularly where other customers (or customers of integrated businesses) may be alienated.[75]

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[73] Worse, if the fear of third party liability shapes development of software, hardware, or payment systems, it may be virtually impossible to alter the standard operating procedure.

[74] *See* Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847, 1868 (2006) (predicting that the transaction costs associated with usage-based metering and billing for access to the Internet are likely to be substantial).

[75] *See* CLAYTON M. CHRISTENSEN, THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL 158-60 (1997) (arguing that established firms

Even where price discrimination might be commercially feasible, it could only be imposed on the basis of actuarial predictions. A system that keyed the costs of access to Internet to the content of a class of communications including both constitutionally protected and unprotected material would raise problems both of equity and of constitutional substance. The class of teenagers living alone is doubtless more likely to illegally share music than the class of suburban grandmothers, but raising the price of Internet access for the former as a class is a dubious form of guilt by association. The fact that a particular teenager is unwilling to pay the premium assessed for her class may reflect an unwillingness to pay for costs incurred by the conduct of others, and the process of adverse selection may quickly lead providers to eliminate service to the class of teenagers as a whole.[76]

Even if adverse selection halts short of prohibitive cost escalation, the predictable impact of a sanction that targets intermediaries will be greater than that of a sanction which targets speakers. An actuarially accurate premium to compensate intermediaries will characteristically overdeter speakers whose real risk is less than the class average. The designer of a dissident website who carefully tailors her product to remain within the bounds of protected speech will be forced to pay a premium for access to government-targeted intermediaries that is keyed not to her own actual low risk of illegal content, but to the higher, average risk posed by the class of which she is a member. Moreover, even for those speakers whose probability of violation falls precisely at the actuarial average of their class, the payment of a premium will not immunize them from primary legal sanctions. Thus, the imposition of intermediary liability will deter more speech than

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go for high margins and large markets, avoid higher risk, and avoid strategies that endanger other parts of the business). In a fully competitive market, one could imagine the emergence of specialized intermediaries who serve particularly risky speakers. But the market for intermediaries is increasingly concentrated, casting doubt on the broad availability of niche ISPs. *See* Eli M. Noam, *Deregulation and Market Concentration: An Analysis of Post-1996 Consolidations*, 58 FED. COMM. L.J. 539 (2006) (examining the competitive pressures on the Internet market, and arguing that the market for ISPs is increasingly concentrated); Eli M. Noam, *The Internet: Still Wide Open and Competitive?* (Oxford Internet Inst., Internet Issue Brief No. 1, Aug. 2003), http://www.oii.ox.ac.uk/resources/publications/IB1all.pdf (same).

[76] *Cf.* Michael R. Rothschild & Joseph Stiglitz, *Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information*, 90 Q.J. ECON. 629 (1976) (describing a cycle in insurance markets in which good-risk customers are unwilling to pay a price that includes the risk imposed by bad-risk customers and withdraw from the market, resulting in the need for insurers to raise their premiums, which triggers another round of adverse selection).

primary liability: to access the Internet, a speaker will have to pay a premium to the intermediary and still face the additional expected costs of potential primary sanctions.

The demand by an intermediary for a risk premium would often result in a deterrent substantially greater than the equivalent expected risk of sanctions being imposed on the primary actor. A speaker who is willing to risk draconian sanctions, by reason of the availability of bankruptcy protection, by reason of ideological commitment, or by reason of her expectation of future payoffs, will often be unable to turn those buffering assets into a stream of funds sufficient to induce an intermediary to adopt a similar approach.[77] Neil Netanel argues persuasively that the virtues achieved by the copyright system include not only the production of information and culture, but also the stimulation of such production by entities that are not as dependent on the government as subsidy recipients would be.[78] Intermediaries do not have the portfolio of copyright resources that primary speakers have to fall back on in order to resist government pressure. Further, they are likely to be vulnerable to collateral consequences, such as public pressure manifested in the loss of business, which would not affect primary speakers.

The deterrent incidence of intermediary sanctions provides another cause for concern. The class of gay liberation sites is more likely to cross the boundary into "obscenity" than the class of Colonial American recipe sites, but charging a government-generated premium for hosting the former seems precisely the sort of content discrimination that the American system of free expression seeks to prohibit.[79]

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[77] From the point of view of the intermediary, as Judge Richard Posner observed, "[t]he provider might find it impossible to estimate its potential damages liability to the copyright holders and would anyway face the risk of being enjoined." *In re* Aimster Copyright Litig., 334 F.3d 643, 649 (7th Cir. 2003). From the point of view of the speaker or listener, the willingness of an individual to run risks of liability is not limited by current assets, but by her taste for risk and the availability of bankruptcy. Both speakers and listeners are likely to generate external benefits that they cannot monetize, but that may guide their willingness to accept risks of loss.

[78] Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 347-52 (1996).

[79] The proposition that the First Amendment forbids the imposition of cost structures that burden particular types of speech recurs in a well-established line of cases. *See, e.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123, 134-35 (1992) (enjoining the imposition of a fee for the use of a public forum based on possible costs of policing, declaring that "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob"); Simon & Schuster, Inc. v. Crime Victims Bd., 502 U.S. 105, 116 (1991) (striking down a statute that limited the ability of convicted criminals to receive compensation for their writing,

Since mainstream speakers are less likely to push the boundaries of acceptable discourse, insurgent speakers, whose shelter from majoritarian suppression is the special concern of the First Amendment,[80] are likely to face the harshest premiums. Indeed, to the extent that the premiums reflect the expected cost of litigation, strategic manipulation by ideological opponents of online primary speakers is entirely predictable: one way to raise the costs of the speaker's website is to regularly sue the intermediaries that connect that website to the Internet.[81]

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stating that, "[i]n the context of financial regulation, it bears repeating . . . that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace"); Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229 (1987) (invalidating a tax on magazines where tax exemptions were available to sports and religious publications, stating that "the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*"); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 592 (1983) (striking down a tax on newspapers that entailed the power "to single out the press but also to tailor the tax so that it singles out a few members of the press" because of its "potential for abuse"); Grosjean v. Am. Press Co., 297 U.S. 233, 245-51 (1936) (canvassing the history of "taxes on knowledge" as constraints on free expression and striking down a discriminatory tax on newspapers).

[80] *See* Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119, 121-23 (2001) (outlining the history of cases in which "the Court has taken special pains to provide protection against government interference with mechanisms of communication that are, as Justice Black put it, 'essential to the poorly financed causes of little people'"). Lichtman and Posner's suggestion that any inefficiencies can be avoided by providing a blanket subvention for Internet access, *supra* note 9, at 7, of course provides no remedy for this sort of selective suppression. Moreover, to the extent that intermediaries (or speakers) are dependent on a continued stream of government subvention, the independence that lies at the base of the system of free expression is compromised.

[81] *See* Lyons, *supra* note 65, at 132 (suggesting that businesses threaten to sue ISPs on marginal claims in order to induce them to silence critical blogs); *cf.* Nike, Inc. v. Kasky, 539 U.S. 654, 679-80 (2003) (Breyer, J., dissenting) ("The delegation of state authority to private individuals authorizes a purely ideological plaintiff, convinced that his opponent is not telling the truth, to bring into the courtroom the kind of political battle better waged in other forums. Where that political battle is hard fought, such plaintiffs potentially constitute a large and hostile crowd freely able to bring prosecutions designed to vindicate their beliefs, and to do so unencumbered by the legal and practical checks that tend to keep the energies of public enforcement agencies focused upon more purely economic harm."); Reno v. ACLU, 521 U.S. 844, 880 (1997) (rejecting a proposed rule that "would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his . . . child . . . would be present"); *Forsyth County*, 505 U.S. at 134-35 (indicating that the First Amendment forbids "charging a premium in the case of a controversial political message delivered before a hostile audience").

Finally, there is an important class of regulation targeted at intermediaries where the claim that commercial forces will moderate censorship is almost wholly illusory. In the case of threatened criminal punishments, side payments will almost always be insufficient to induce intermediaries to avoid censorship. A speaker who is willing herself to risk imprisonment is not often in a position to "cash out" that willingness and pay it to the intermediary. Moreover, the risk preferences of an intermediary regarding criminal conviction are likely to differ substantially from those of a committed first-party speaker. The threat of criminal conviction is not something that can be insured against by plausibly available policies.

To be sure, censorship by intermediaries, like direct censorship by governments, is unlikely to fully eradicate access to any particular publication on the Internet. The long tail[82] of distributors and redistributors ensures that an effort to bar a discrete piece of information from public discourse is unlikely to be completely successful; there are too many ways for the embargoed bit of data to leak out.[83] If the information is likely to replicate, the vast bulk of unregulable small fry may be adequate to hold the line against government suppression of inconvenient information. But a censor need not stamp out information entirely to effectively rig the market of ideas. The salience of Internet communication is famously sensitive to marginal changes in availability.[84] If the goal of the government is to control the arguments that organize popular opinion, affecting the central actors may well be

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[82] Chris Anderson, About Me, The Long Tail Blog, http://www.longtail.com/about.html (explaining that, as presented in more depth in the author's book on the subject, "[t]he theory of the Long Tail is that our culture and economy is increasingly shifting away from a focus on a relatively small number of 'hits' (mainstream products and markets) at the head of the demand curve and toward a huge number of niches in the tail").

[83] *See, e.g.*, Eschenfelder & Desai, *supra* note 2 (describing the replication of the DeCSS decryption program in the face of efforts to suppress it); Eschenfelder et al., *supra* note 2 (describing DeCSS postings in European Union member nations, China, Hong Kong, and Macau).

[84] *See e.g.*, Steven Lohr, *New Microsoft Browser Raises Google's Hackles*, N.Y. TIMES, May 1, 2006, at A1 (reporting that on-screen boxes are the starting point for thirty to fifty percent of user searches); Thorsten Joachims et al., Accurately Interpreting Click-Through Data as Implicit Feedback 3 fig.1 (2005), http://www.cs.cornell.edu/People/tj/publications/joachims_etal_05a.pdf (illustrating that forty-two percent of users clicked the number one result on searches of scholarly journal abstracts, and only sixteen percent clicked on the number two results); Jakob Nielsen, Alertbox Column, The Power of Defaults (Sept. 26, 2005), http://www.useit.com/alertbox/defaults.html (arguing that "[s]earch engine users click the results listings' top entry much more often than can be explained by relevancy ratings").

adequate for the task.[85] To assure the presence of countervailing sources of cultural power, major actors are crucial because they stand astride the attention of the central mass of the population.

So too, excision of particular viewpoints from mainstream discourse may be sufficient to defeat the "wisdom of crowds."[86] Even if those perceptions are available to the segments willing to expend the time, effort, and expertise to search for them, the balance of popular perception may be skewed away from a proper evaluation of the matters before the public for decision.

III. FIRST AMENDMENT DOCTRINE AND THE PROBLEM OF PROXY CENSORSHIP

A. *Learning from History: The McCarthy Era, Indirect Sanctions, and the Suppression of Dissent*

Though some argue that the "law of the Internet" requires novel doctrines, the emerging strategy of censorship by proxy is not without precedent. The McCarthy era saw the rise of efforts by state and federal governments in the United States to persuade private parties to control speakers and publishers whom the accepted free speech jurisprudence placed beyond the reach of official prosecution. The dangers of this strategy, in turn, induced the courts to develop free expression doctrines that can provide guidance in evaluating the efforts to spawn proxy censorship of the Internet.

During the first century and a quarter of America's constitutional history, judges imposed few constitutional constraints on governmental efforts to sanction the authors of disfavored communications. The press could claim a constitutional protection against prior restraints at

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[85] *See e.g.*, John McMillan & Pablo Zoido, *How to Subvert Democracy: Montesinos in Peru* 6-11 (CESifo, Working Paper No. 1173, April 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=520902 (estimating that the bribes paid by the Peruvian government to television channel owners were about one hundred times those paid to judges and politicians); Anick Jesdanun, *Iran Tightens Net Control*, LAS VEGAS SUN, June 22, 2005, http://www.lasvegassun.com/sunbin/stories/tech/2005/jun/22/062209840.html ("'If you're looking to stem . . . the mobilization of political groups, it's not what the BBC or Amnesty International is saying that you're concerned with. It's what some Iranian dissident is saying in Farsi language to compatriots.'" (quoting Ron Deibert, a Univeristy of Toronto professor who studied censorship in Iran for the OpenNet Initiative)).

[86] JAMES SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES, AND NATIONS (2004).

the federal level under the First Amendment—though the protection was rarely vindicated by the courts.[87] First Amendment doctrine posed no barrier to subsequent punishment of speakers and publishers, either in the form of criminal prosecution or civil liability. Such efforts were limited, if at all, by common law immunities and the constrained scope of federal police powers. State constitutional protection—which provided the only shelter against suppression at the state and local level before the incorporation of the First Amendment in 1925—was similarly forgiving. When social disorder or other ills threatened, therefore, direct sanctions against speech went to federal court free of constitutional constraint.

In the aftermath of the World War I and the succeeding Red Scare, First Amendment doctrine began to include more substantial bulwarks against efforts to criminally punish speakers or listeners. In the years before World War II, when faced with the challenge of seeking to suppress speech and publication regarded as dangerous, the federal government could no longer freely apply criminal sanctions. It began, instead, to turn to indirect methods.

Private sanctions, catalyzed by public disclosure, were summoned to reach proponents of dangerous ideas who lay beyond the grasp of federal law enforcement. Thus, the Special Committee on Un-American Activities (the precursor of the House Un-American Activities Committee) took the position that "[w]hile Congress does not have the power to deny to citizens the right to believe in, teach, or advocate communism, fascism, and nazism, it does have the right to fo-

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[87] The Sedition Act, which was successfully defended as a subsequent punishment in the lower courts, was ultimately repudiated by Congress. Antebellum efforts to censor antislavery mail were defeated in the legislature in part on the basis of constitutional argument, but the 1873 Comstock Act imposed prohibitions on the mailing of "obscene, lewd, or lascivious" matter, along with information regarding birth control. *See Ex parte* Jackson, 96 U.S. 727, 736 (1877) ("All that Congress meant by this act was, that mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished."). Federal efforts to exclude antiwar publications from effective access to the mail during World War I were upheld in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407 (1921). *See also* Leach v. Carlile, 258 U.S. 138, 140 (1922) (affirming the right of the Postmaster General to issue a fraud order, over dissents by Justices Holmes and Brandeis); Lewis Publ'g Co. v. Morgan, 229 U.S. 288, 313-16 (1913) (upholding the validity of section 2 of the Post Office Appropriation Act of 1912, which allowed the denial of mail privileges for publications that did not comply with certain reporting requirements). *See generally* Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment,* 86 VA. L. REV. 1 (2000) (detailing twentieth-century censorship efforts on the state and federal levels).

cus the spotlight of publicity upon their activities."[88] So too, the House Committee on the Judiciary introduced legislation requiring registration and labeling, but not censorship, of foreign propaganda on the ground that "the spotlight of pitiless publicity [would] serve as a deterrent to the spread of pernicious propaganda."[89]

These efforts took deeper root in the years following World War II.[90] The anticommunist crusade that culminated in the McCarthy era saw efforts to criminally punish "dangerous" expression directly, but more governmental attention was focused on mobilizing private sanctions to discipline First Amendment exercises that were either constitutionally or practically immune to prosecution.[91] The "spotlight of

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[88] SPEC. COMM. ON UN-AMERICAN ACTIVITIES, INVESTIGATION OF UN-AMERICAN ACTIVITIES AND PROPAGANDA, H.R. REP. NO. 76-2, at 13 (1939); *see* H.R REP. NO. 77-1, at 24 (1941) ("This committee is the only agency of Government that has the power of exposure. . . . There are many phases of un-American activities that cannot be reached by legislation or administrative action."); H.R. REP. NO. 76-1476, at 3-4, 24 (1940) ("The committee conceives its principal task to have been the revelation of the attempts now being made by extreme groups in this country to deceive the great mass of earnest and devoted American citizens. . . . The purpose of this committee is the task of protecting our . . . constitutional democracy by turning [on] the light of pitiless publicity . . . .").

[89] H.R. REP. NO. 75-1381, at 2 (1937); *see* Inst. of Living Law, *Combating Totalitarian Propaganda: The Method of Exposure*, 10 U. CHI. L. REV. 107, 107-08 (1943) (arguing that "[o]ne of the methods of destroying the poison of totalitarian propaganda is to expose it to the sun and air of informed criticism"); Bruce Lannes Smith, *Democratic Control of Propaganda Through Registration and Disclosure I*, 6 PUB. OPINION. Q. 27, 30 (1942) (arguing for both the "further development of the principle of balance in discussion" and the "development of administrative agencies for disclosing to the average voters the real affiliations of influential propagandists").

[90] This account of the strategy of "pitiless publicity" is adapted from my analysis in Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 15-28 (1991).

[91] *See* MORTON J. HOROWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 61 (1998) (reporting that HUAC issued 135 contempt citations); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 75 (2000) (stating that less than two hundred people were prosecuted under domestic security statutes); Corey Robin, *Fragmented State, Pluralist Society: How Liberal Institutions Promote Fear*, 69 MO. L. REV. 1061, 1084 (2004) (stating that "liberal limitations upon the state ensured that no more than two hundred people spent time behind bars" during the McCarthy years); William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 SUP. CT. REV. 375, 428 (detailing criminal prosecution efforts during the McCarthy era); *see also* Barsky v. United States, 167 F.2d 241, 256 (D.C. Cir. 1948) (Edgerton, J., dissenting) ("The Committee and its members have repeatedly said in terms or in effect that its main purpose is to do by exposure and publicity what it believes may not validly be done by legislation."). For discussion of the dynamics of the McCarthy era, see generally DAVID CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER (1978); ELLEN W. SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA (1998).

pitiless publicity" was directed against those who engaged in "disloyal" or "subversive" activities, and blacklists were published with the expectation that private parties would seek out and sanction malefactors who lay beyond the reach of the government.[92] The House Un-American Activities Committee (HUAC) regularly issued indices of identified "communist sympathizers," which became the basis of formal and informal blacklists in the public and private sectors.[93] HUAC and its imitators continued their efforts with substantial effect through the mid-1950s; official designation was expected to, and in fact resulted in, private sanctions. Often these sanctions resulted not only from the ideological commitment of private employers or publishers, but from a desire of those intermediaries to avoid pressure on the part of the American Legion, the Catholic Church, and large numbers of

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[92] *See, e.g.*, SCHRECKER, *supra* note 91, at 211-17, 266-305 (discussing the dissemination of blacklists by the FBI "Responsibilities Program").

[93] The chair of the HUAC, J. Parnell Thomas, characterized its activities in this way: "The chief function of the committee has always been the exposure of un-American activities. This is based upon the conviction that the American public will not tolerate efforts to subvert or destroy the American system of government once such efforts have been pointed out." 80 CONG. REC. A4277 (1947) (statement of Rep. Richard M. Nixon) (quoting Chairman Thomas' remarks from a November 4, 1947 ABC Radio address). The Committee's program sought "[t]o expose and ferret out . . . Communist sympathizers in the Federal Government . . . [and t]o spotlight . . . Communists controlling . . . vital unions," H. COMM. ON UN-AMERICAN ACTIVITIES, 80TH CONG., INVESTIGATION OF UN-AMERICAN ACTIVITIES IN THE UNITED STATES 2 (Comm. Print 1948), and "to permit American public opinion . . . to evaluate the merit of many in private life who either openly associate with and assist disloyal groups or covertly operate[d] as members or fellow-travellers of such organizations," Corey Rubin, *Fragmented State, Pluralist Society: How Liberal Institutions Promote Fear*, 69 MO. L. REV. 1061, 1066 (2004) (quotation marks omitted). *See generally* Barenblatt v. United States, 360 U.S. 109, 157-59, 163-68 (1959) (Black, J., dissenting) (detailing HUAC's intent to punish by exposure, and providing an appendix of supporting quotations from the hearings); M.J. HEALE, AMERICAN ANTICOMMUNISM: COMBATTING THE ENEMY WITHIN: 1830-1970, at 155-61 (1990) (discussing "Congressional Anticommunism").

In addition to providing evidence or proof of disloyalty to government loyalty boards, defiance of or designation by HUAC meshed with sanctions administered by the private sector. Between 1949 and 1959, HUAC directly furnished to employers information on 60,000 persons. CAUTE, *supra* note 91, at 102-03. Private networks also disseminated the findings of the Committee. *See* HEALE, *supra* 139, 156, 170, 173.

In the area of entertainment, see LARRY CEPLAIR & STEVEN ENGLUND, THE INQUISITION IN HOLLYWOOD: POLITICS IN THE FILM COMMUNITY: 1930-60, at 161-73, 210-25, 376-86 (1983); RICHARD M. FRIED, NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE 156-57 (1990); Harold W. Horowitz, *Legal Aspects of "Political Black Listing" in the Entertainment Industry*, 29 S. CAL. L. REV. 263 (1956).

In the field of higher education, see LIONEL S. LEWIS, COLD WAR ON CAMPUS: A STUDY OF THE POLITICS OF ORGANIZATIONAL CONTROL 49 (1988); ELLEN W. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES 10, 126-307 (1986).

concerned citizens for whom radical associations were a sign of disloyalty.[94] As one commentator observed:

> [I]t helps to view McCarthyism as a process. . . . First the objectionable groups and individuals were identified [through] a committee hearing, for example, or an FBI investigation; then, they were punished, usually by being fired. . . . In most cases it was a government agency which identified the culprits and a private employer which fired them.[95]

Similarly, sanctions directed against association rather than expression were marshaled to persuade private parties to cut off support for problematic activities.[96]

The enterprise that Senator McCarthy emblematized achieved a substantial impact on citizens' lives, the discourse of the republic, and the exercise of the First Amendment rights of speech, belief, and association, in large measure through the mobilization of entities outside of government and indirect governmental sanctions. Conventional criminal prosecutions ultimately were brought against active members of the Communist Party itself. Fellow travelers and former Party members, though they fell within the terms of statutes, were usually not prosecuted in their own right unless they refused to reveal information. Official loyalty dismissals were often predicated on previous disclosures, and were themselves effective intimidation in large measure because of the stigma that they precipitated. The sanctions at the command of Senator McCarthy, his precursors, and his imitators, lay primarily in the ability to obtain and publish information, with the expectation that private parties would respond. So well recognized was this dynamic at the time that massive resistance in the

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[94] *See, e.g.*, Gojack v. United States, 384 U.S. 702, 709-10 & n.8, 717 (1966) (reversing a conviction for the refusal to testify at 1955 HUAC hearings, which were part of a "plan for driving Reds out of important industries"—according to the hearings' chair, once communists were exposed "loyal Americans who work[ed] with them [would] do the rest of the job" (quotation marks omitted)); Russell v. United States, 369 U.S. 749, 767 (1962) (detailing 1955 and 1956 investigations by the Senate Internal Security Subcommittee into alleged communist influence in the press).

[95] SCHRECKER, *supra* note 93, at 9; *see also* SCHRECKER, *supra* note 91, at 272 ("[M]ost dismissals that took place within the private sector seemed to have occurred as a result of an employer's willingness to collaborate with an official agency.").

[96] *See* David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 6 (2003) ("In the Cold War, most 'radicals' were punished not for their speech but for their membership, affiliation, or sympathetic association with the Communist Party.").

American South consciously adopted similar tactics in the effort to eviscerate civil rights initiatives.[97]

These efforts at censorship by proxy and indirect sanctions generated what are now generally recognized as pathologies. Since indirect sanctions could be imposed without either due process or public oversight, the actual targets of the sanctions were often innocent of the offenses for which they were singled out, and the "offenses" themselves were often actions that were constitutionally protected. Even where the targets were "guilty," others who engaged in innocent activities were induced to avoid perfectly legitimate undertakings for fear of becoming the focus of zealous private retaliation. Third parties tried to insulate themselves by cutting off contact with those who might bring down wrath. And the spread of private sanctions set a tone in society that legitimated formal efforts at repression, which in turn generated still greater private efforts. The attentive reader will note that these dynamics track the concerns articulated earlier about the potential pathologies of proxy censorship on the Internet: private enforcement tended to be overzealous, inaccurate, heedless of constitutional distinctions, and vulnerable to strategic abuse.[98]

B. *Doctrinal Responses to Indirect Sanctions*

In reaction to the excesses of the McCarthy era—as well as the efforts by massive resistance in the South to deploy similar indirect sanctions against civil rights organizations—the Supreme Court during the late 1950s and early 1960s evolved a series of doctrinal structures to safeguard against the pathologies created by indirect sanctions.[99] An awareness of the reluctance of most individuals to risk social sanctions

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[97] *See* POWE, *supra* note 91, at 165 (comparing efforts in the South to constrict the NAACP, such as demanding that membership lists be made public, to congressional anticommunist tactics); HOROWITZ, *supra* note 91, at 34-35; SCHRECKER, *supra* note 91, at 392-94; *cf.* Dombrowski v. Pfister, 380 U.S. 479, 487-88 (1965) (describing the seizure of the membership lists of a civil rights organization during a police raid of the executive director's home and office, along with the announcement that the organization was subversive in order to "frighten off potential members").

[98] For one recent account of the impact of McCarthyism on the polity, see SCHRECKER, *supra* note 91, at 276-77, 359-414.

[99] *See* Cole, *supra* note 96, at 1 (2003) (quoting Professor Ralph Brown's 1958 observation that censorship was being directed toward "the speaker rather than the speech").

For overviews of the complex of doctrines that emerged in response to the Cold War excesses, see HOROWITZ, *supra* note 91, at 65-73; Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1851-65 (2004).

and ostracism in order to challenge censorial interventions during the McCarthy era underpinned both a recognition by the Court of the importance of intermediate associations that might buffer individuals, and a willingness of the Court to accept third party challenges brought by associations or individuals whose situations rendered them more robust. More broadly, the Court rejected the proposition that the First Amendment constrained only official efforts to criminally punish protected speech and association. Against the backdrop of the indirect sanctions of the McCarthy era, the Court recognized the potentially drastic effects of indirect gambits directed to vulnerable pressure points, and declared that First Amendment freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."[100] It also recognized the particular leverage exercised by incentives directed to and against third parties, and in later cases highlighted the danger of "self-censorship" by intermediaries who transmit the speech of others. These are lessons courts can appropriately deploy in litigation regarding the impact of efforts to mobilize proxy censorship on the Internet.

The Court operationalized its recognition of these dangers in several further lines of doctrine. First, the Court acknowledged that even interventions directed at legitimate targets could inflict unacceptable collateral damage on the system of free expression. In a series of cases, the Court determined that government interventions could be illegitimate not only because they were improperly censorial in intent, but because they were not sufficiently "narrowly drawn" to adequately avoid censorial effects. The Court took account of not only the amount of protected activity that was directly punished, but also the "chilling effect"[101] that could result in self-censorship by parties who sought to avoid the reach of government regulation. Second, the experience of the scope of self-censorship that resulted from the McCarthy era impelled the Court to look with disfavor on regulatory schemes that posed risks that innocent activities would be caught up in the net of government suppression. This concern raised barriers to vague regulations whose shadows impelled possible dissenters to steer clear of actions that might have offended authorities. It inclined the Court toward skepticism of regulations that imposed vicarious liability

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[100] Bates v. City of Little Rock, 361 U.S. 516, 523 (1960).

[101] Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 482 (1985) ("[T]he chilling effect doctrine was forged in the judicial effort to repudiate McCarthyism and forestall repression of the civil rights movement.").

for association with the wrongs of others. It also underpinned the construction of safe harbors for the transmission of true facts. Each of these doctrinal responses remains a part of our constitutional jurisprudence, and each is an important element of the appropriate judicial response to the problems of proxy censorship of Internet communications.

1. "Subtle Government Interference": Indirect Censorship as Constitutional Violation

The outset of the McCarthy era, as we have noted, saw claims that indirect efforts to interfere with the dissemination of "subversive" speech provided an end run around First Amendment constraint. The government was free, it was argued, to suppress through indirect incentives so long as it avoided criminal prosecutions and prior restraint; the results of "pitiless publicity" were not the responsibility of the government but of the aroused citizenry. These claims were advanced not only by the members of HUAC but by some of the judges first asked to review the elements of the anticommunist crusade.[102]

This rationale crumbled, however, under the manifest impact of McCarthyism on free expression. During the 1950s and early 1960s, the Court recognized that censorship need be neither irresistibly backed by official force nor directed initially at speakers to fall within the proscription of the First Amendment. It rejected the claim that McCarthy-era governmental blacklists were immune from constitutional scrutiny because their impact was mediated by private implementation. In evaluating blacklists and similar efforts to mobilize censorship by intermediaries, the Court recognized the often fragile status of intermediaries in the system of free speech, the importance of "chilling effects" experienced by intermediaries, and the dangers of

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[102] *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 200 (1951) (Reed, J., dissenting) (arguing that promulgation of a list of "Communist-action" or "Communist-front" organizations by the Attorney General did not constitute an abridgement of the First Amendment rights of organizations so listed); *id.* at 183-84 (Jackson, J., concurring) ("[M]ere designation as subversive deprives the organizations themselves of no legal right or immunity. . . . Their claim of injury [results from] sanctions applied by public disapproval."); Barsky v. United States, 167 F.2d 241, 249 & n.28 (D.C. Cir. 1948) ("[D]amage . . . would not occur because of the Congressional act itself; that is, the Congress is not imposing a liability, or attaching by direct enactment a stigma."); United States v. Josephson, 165 F.2d 82, 90 (2d Cir. 1947) (rejecting the theory that Congress' investigation of "Un-American or subversive propaganda impairs in some way . . . freedom of expression").

censorship by proxy. That recognition provides the roots for the First Amendment doctrines that currently govern proxy censorship.

In 1950, the Court acknowledged in dicta that "[u]nder some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular . . . political parties wear identifying arm-bands . . . is obviously of [that] nature."[103] The next year, the Court's majority joined in Justice Frankfurter's conclusion that "it would be blindness" to ignore the drastic impact of placement on a blacklist of communist-front organizations.[104] By 1957, as McCarthyism began to fade, Chief Justice Warren could speak for all but Justice Clark in describing the impact of HUAC investigations on freedom of speech and association, and in rejecting the claim that the government was not responsible:

> The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. . . . Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy. Beyond that, there is the more subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at some future time . . . . That this impact is partly the result of non-governmental activity by private persons cannot relieve the investigators of their responsibility for initiating the reaction.[105]

The next year, in *NAACP v. Alabama ex rel. Patterson*, Justice Harlan wrote for a unanimous court, invalidating a requirement that the Alabama NAACP disclose its membership lists:

> In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action. . . . It is not sufficient to answer, as the

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[103] Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 402 (1950).

[104] *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 161 (Frankfurter, J., concurring); *see also id.* at 158 (noting that generating publicity and securing meeting places became difficult once a group had been labeled "communist"); United States v. Rumely, 345 U.S. 41, 44 (1953) (remarking that "we would have to be that 'blind' Court, against which Mr. Chief Justice Taft admonished . . . , that does not see what '[a]ll others can see and understand' not to know" that the effect of exposure is cause for concern (citation omitted)).

[105] Watkins v. United States, 354 U.S. 178, 197-98 (1957); *see also* Sweezy v. New Hampshire, 354 U.S. 234, 248 (1957) (describing the "inhibiting effect in the flow of democratic expression and controversy upon those directly affected and those touched more subtly" by legislative investigations).

> State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from state action but from private [action].[106]

By the beginning of the 1960s, the Supreme Court could unanimously avow that freedoms of speech, press, assembly, and association were protected against both "heavy-handed frontal attack" and "subtle interference" designed to mobilize private sanctions.[107]

2. The Problem of Chilled Intermediaries in Old Media and New

The concern that "subtle government interference"[108] might trigger censorship by private parties drew particular force from the efficacy of McCarthy-era blacklists in shaping the practices of the entertainment industry. The Court was well aware that the coercive effect of indirect sanctions is magnified when deployed against intermediaries who transmit the work of others. The effect of the blacklists highlighted the fact that intermediaries are likely to have fragile commitments to the free expression rights of the speakers whose speech they carry, and the Court's legal doctrine, forged in the crucible of the McCarthyite repression, recognized the need to guard against the tendency of intermediaries to yield to censorial pressure.

Cognizant of the fact that particular links in the chain of communication are often reluctant or unable to bring First Amendment chal-

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[106] 357 U.S. 449, 461-463 (1958); *see also* Speiser v. Randall, 357 U.S. 513, 526 (1958) (expressing hostility to devices whose "practical operation . . . must necessarily produce a result that the State could not command directly").

[107] Bates v. City of Little Rock, 361 U.S. 516, 523-24 (1960) (striking down a demand for the membership list of Little Rock's NAACP branches and finding that "[t]here was substantial uncontroverted evidence that public identification of persons in the community as members of the organizations had been followed by harassment and threats of bodily harm" and that "[t]his repressive effect, while in part the result of private attitudes and pressures, was brought to bear only after the exercise of governmental power had threatened to force disclosure of the members' names"); *see also* Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 550-57 (1963) (refusing to allow a state legislative committee to compel the production of NAACP membership lists); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961) (prohibiting Louisiana from requiring the NAACP to annually deny that any of its members were communists); Shelton v. Tucker, 364 U.S. 479, 485-87 (1960) (refusing to allow Arkansas to require schoolteachers to reveal organizational affiliations); Talley v. California, 362 U.S. 60, 64 (1960) (overturning a city ordinance requiring handbills to contain names and addresses of their sponsors).

[108] *Bates*, 361 U.S. at 523.

lenges, the Court developed a procedural scaffolding that allowed more robust litigants willing to appear in court to raise the interests of others elsewhere in the chain. Thus, the Court acknowledged that listeners as well as speakers had First Amendment rights to unimpeded communication,[109] and that these rights could be raised by speakers or intermediaries.[110] The Court also allowed associations to raise the rights of their members,[111] and speakers to challenge the impact of restrictions on intermediaries.[112] These doctrines continue to frame the rights of litigants in modern litigation over efforts to chill weak links in the chain of Internet communications.[113]

Equally significant, as we will see, the Court recognized the importance of intermediaries to substantive analysis. In evaluating the dan-

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[109] Lamont v. Postmaster Gen., 381 U.S. 301, 306-07 (1965) ("The [disputed] Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. . . . This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights."); *see also* Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972) (recognizing a First Amendment right to "'receive information and ideas'" (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969))).

[110] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 756 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both."); *see also* Procunier v. Martinez, 416 U.S. 396, 408-09 (1974) (allowing speakers to raise the rights of listeners).

[111] *See, e.g.*, NAACP v. Button, 371 U.S. 415, 428 (1963); *Louisiana ex rel. Gremillion*, 366 U.S. at 296; Bates v. City of Little Rock, 361 U.S. 516, 523 n.9 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 459 (1958); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 183-87 (1951) (Jackson, J., concurring).

[112] *See* Bantam Books v. Sullivan, 372 U.S. 58, 65 n.6 (1963) ("The distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights. The publisher has the greater economic stake, because suppression of a particular book prevents him from recouping his investment in publishing it. Unless he is permitted to sue, infringements of freedom of the press may too often go unremedied.").

[113] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 875 (1997) (indicating that, in evaluating claims of speakers, courts must weigh the rights of potential listeners); Am. Library Ass'n v. FCC, 406 F.3d 689, 697 (D.C. Cir. 2005) (stating that university librarians have standing to challenge technology regulations directed at equipment manufacturers because, "if the regulations implemented . . . take effect, there is a substantial probability that the [librarians] would be prevented from assisting faculty to make broadcast clips available to students in their distance-learning courses via the Internet"); ACLU v. Ashcroft, 322 F.3d 240, 266 n.33 (3d Cir. 2003) (approving a district court holding that the ACLU had "listener" standing, as a user of the Internet, to challenge a statute requiring web posters to impose burdens on access), *aff'd*, Ashcroft v. ACLU, 542 U.S. 656 (2004); Ctr. for Democracy & Tech. v. Pappert, 337 F. Supp. 2d 606, 647 (E.D. Pa. 2004) (recognizing standing for an organization whose members were denied access to information that was suppressed by a regulatory scheme directed against intermediaries).

gers to free expression from "subtle" government regulation, the Court was alive to the potential for suppression that arose out of efforts to manipulate intermediaries in a variety of media over the last two generations.

a. *Print, Film, and Broadcast Intermediaries*

The analysis in *Farmers Educational & Cooperative Union, North Dakota Division v. WDAY, Inc.*[114] set the tone in broadcasting; the Court granted an implied immunity against state libel actions to broadcasters who provided airtime to qualified candidates because of the danger that broadcasters would be impelled to censor controversial programming. Justice Black reasoned:

> [I]f a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution. . . . It follows from all this that allowing censorship, even of the attenuated type advocated here, would almost inevitably force a candidate to avoid controversial issues during political debates over radio and television. . . .[115]

In the next term, the Court returned to this theme in print media. Reversing the conviction of a bookseller under a statute that imposed absolute liability for possession of "obscene or indecent writing," the Court in *Smith v. California* determined that an obscenity statute without an element of scienter imposed an unconstitutional "collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it."[116] Justice Brennan continued for the Court, reasoning:

> The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.[117]

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[114] 360 U.S. 525 (1959).

[115] *Id.* at 530.

[116] 361 U.S. 147, 150-51 (1959).

[117] *Id.* at 153-54; *see also* Manual Enters., Inc. v. Day, 370 U.S. 478, 493 (1962) ("Since publishers cannot practicably be expected to investigate each of their advertisers, and since the economic consequences of an order barring even a single issue of a periodical from the mails might entail heavy financial sacrifice, a magazine publisher

So too, *Bantam Books, Inc. v. Sullivan* invalidated the practice of the Rhode Island Commission to Encourage Morality in Youth of notifying distributors of designated books and magazines that those items had been reviewed by the Commission and declared objectionable for sale or display to youths under eighteen years of age.[118] Striking down the stratagem as improper administrative censorship, the majority relied on McCarthy-era precedent in rejecting the claim that the state could avoid the strictures of the First Amendment by bypassing official criminal proceedings and relying on "informal censorship" by an entity lacking enforcement authority:

> It is not as if this were not regulation by the State of Rhode Island. . . . These acts and practices directly and designedly stopped the circulation of publications in many parts of Rhode Island. It is true, as noted by the Supreme Court of Rhode Island, that Silverstein [the distributor] was "free" to ignore the Commission's notices . . . [but t]he Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulation of the listed publications *ex proprio vigore*. It would be naive to credit the State's assertion that these blacklists are in the nature of mere legal advice . . . .[119]

The *Bantam Books* Court observed that orders directed to intermediary distributors had the effect of suppressing the books of publishers who depended on those intermediaries to convey their books to the public:

> The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication, and the direct and obviously intended result of the Commission's activities was to curtail the circulation in Rhode Island of books published by appellants. . . . The distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication

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might refrain from accepting advertisements from those whose own materials could conceivably be deemed objectionable by the Post Office Department.").

[118] 372 U.S. 58, 71-72 (1963).

[119] *Id.* at 68-69; *see also id.* at 72 ("Their operation was in fact a scheme of state censorship effectuated by extralegal sanctions; they acted as an agency not to advise but to suppress."); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 684 (1968) (striking down a requirement that film exhibitors submit films for "classification" by a local "classification board," expressing concern that "a local exhibitor who cannot afford to risk losing the youthful audience when a film may be of marginal interest to adults . . . may contract to show only the totally inane").

The Court in *Meese v. Keene* acknowledged the proposition that official designations could induce intermediaries to censor speech, but found on the facts before it that the statutory duty for exhibitors to label films "political propaganda" "places no burden on protected expression." 481 U.S. 465, 480 (1987).

of his rights.[120]

This concern for the danger of proxy censorship lies at the core of two keystones of the modern First Amendment doctrinal structure. In *New York Times Co. v. Sullivan*,[121] the Court began its analysis with the observation that the speech at issue was contained in a paid advertisement. Citing both *Smith* and *Bantam Books*, the Court recognized the importance of intermediaries to a system of free expression:

> That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.[122]

The Court went on to quote the reasoning regarding "self-censorship" by booksellers expressed in *Smith*. In the context of libel judgments, the Court discerned the potential for "a comparable 'self-censorship'" that justified requiring both a showing of falsehood and "actual malice" as prerequisites to recovery of libel judgments by public officials.[123]

In *Freedman v. Maryland*, the Court again evinced concern with the potential of chilling effects to induce intermediaries to engage in proxy censorship.[124] It struck down a state scheme for administrative censorship of films, announcing that any such undertaking must provide prompt judicial review of any government decision to censor a particular film.[125] The Court expressed the view that even a temporary

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[120] 372 U.S. at 65 n.6 (citation omitted).

[121] 376 U.S. 254 (1964).

[122] *Id.* at 266. Nor did the Court hesitate to brush aside the claim that private agency in the lawsuit broke the chain of responsibility to the state. *See id.* at 265 ("It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute.").

[123] *Id.* at 279-80; *cf.* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (striking down a statute forbidding payment for writings about a crime because "the statute plainly imposes a financial disincentive only on speech of a particular content"); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974) ("Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy.").

[124] 380 U.S. 51, 61 (1965).

[125] *Id.* at 60.

administrative restraint could chill intermediaries. Citing *Bantam Books*, it observed:

> [A]n administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. . . . Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation.[126]

b. *New Media and the Problem of Chilled Intermediaries*

Both *New York Times Co. v. Sullivan* and *Freedman v. Maryland* have thrived as part of the First Amendment doctrine of the late twentieth and early twenty-first centuries.[127] With the rise of new media, moreover, the Court has continued to manifest concern for the potential impact of regulatory schemes that may give rise to proxy censorship by intermediaries.[128]

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[126] *Id.* at 59; *see also* McKinney v. Alabama, 424 U.S. 669, 675-76 (1976) ("[W]e recognized in *Freedman* that individual exhibitors as well as distributors may be unwilling, for various reasons, to oppose a state claim of obscenity regarding certain material."); Blount v. Rizzi, 400 U.S. 410, 418-19 (1971) (invalidating as inconsistent with *Freedman* a statute empowering the Postmaster General, without judicial intervention, to refuse payment of money orders to a person shown "on satisfactory evidence" to be selling obscene materials, and to stamp as "Unlawful" and return to senders mail addressed to that person).

[127] For instances of the Court relying on *New York Times*, see, for example, Nike, Inc. v. Kasky, 539 U.S. 654, 659 (2003) (Stevens, J., concurring) (discussing the *New York Times* definition of "malice"); Illinois *ex rel.* Madigan v. Telemarketing Assocs., 538 U.S. 600, 620-21 (2003) (noting the "breathing space" protection of speech); BE&K Constr. Co. v. NLRB, 536 U.S. 516, 531 (2002) (same); Bartnicki v. Vopper, 532 U.S. 514, 534-35 (2001) (citing the commitment to "debate on public issues"); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548 (2001) (citing the commitment to debate for "political and social changes"). For instances of the Court reaffirming *Freedman*, see City of Littleton v. Z. J. Gifts D-4, L.L.C., 541 U.S. 774, 776, 782 (2004) (explicating *Freedman*'s protections of potentially chilled yet constitutional speech); *Madigan*, 538 U.S. at 620 n.9 (same); Thomas v. Chi. Park Dist., 534 U.S. 316, 321 (2002) (same); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 217 (1990) (same).

[128] The partial exception has been the sui generis regulation of broadcast media, where the Court sought to walk a "'tightrope'" between the dangers of public and private censorship identified from the early days of broadcasting. CBS, Inc. v. FCC, 453 U.S. 367, 394 (1981) (quoting CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973)). Given the potential interference of signals from competing broadcast stations, some regulation was regarded as essential, but regulation threatened to bring either government censorship or private monopolies that stood astride the new medium. The initial account of the dilemma observed: "'We can not allow any single person or group to place themselves in [a] position where they can censor the material which shall be broadcasted to the public, nor do I believe that the Government should

i. Video Recorders: The Manufacturer as Intermediary

In *Sony Corp. of America v. Universal City Studios, Inc.*, the Court refused to impose vicarious liability for copyright infringement on manufacturers of then-novel videotape recorders (VTRs), which could be used to tape material broadcast over the air.[129] In part, that determination was based on a perception that the equipment manufacturers functioned as intermediaries, opening up a channel of communication between broadcast programmers who were eager to have their material "time-shifted" and potential viewers who could use the recorders to view material that was otherwise inaccessible. Imposing vicarious liability at the behest of other broadcast programmers who sought to enforce their copyright claims, the Court observed, could induce manufacturers to close down that channel of communication, effectively imposing censorship of free broadcasters by those who sought compensation:

> If there are millions of owners of VTR's who make copies of televised sports events, religious broadcasts, and educational programs such as Mister Rogers' Neighborhood, and if the proprietors of those programs welcome the practice, the business of supplying the equipment that makes such copying feasible should not be stifled simply because the equipment is used by some individuals to make unauthorized reproductions of respondents' works. . . . [A] finding of contributory infringement would inevitably frustrate the interests of broadcasters in reaching the portion of their audience that is available only through time-shifting.[130]

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ever be placed in the position of censoring this material.'" *Democratic Nat'l Comm.*, 412 U.S. at 104 (quoting *To Regulate Radio Communication: Hearings on H.R. 7357 Before the H. Comm. on the Merchant Marine and Fisheries*, 68th Cong. 8 (1924) (Statement of Herbert Hoover, Secretary of Commerce)).

For the navigation of this "tightrope," see, for example, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 681 (1998) (allowing journalistic discretion to determine the qualifications of candidates for televised political debate); FCC v. League of Women Voters of Cal., 468 U.S. 364, 402 (1984) (striking down a prohibition on "editorializing" by public broadcasters); *CBS, Inc. v. FCC*, 453 U.S. at 396-97 (upholding the requirement that broadcasters must sell time to federal candidates); FCC v. Pacifica Found., 438 U.S. 726, 750-51 (1978) (upholding "decency" time channeling); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400-01 (1969) (upholding the Fairness Doctrine imposed on broadcasters by the FCC).

[129] 464 U.S. 417, 456 (1984).

[130] *Id.* at 446.

ii. The Cable Trilogy: The Danger of Networks as Proxy Censors

As telecommunications policy grappled with the rise of federally regulated cable networks, the Court again confronted the threat that the subjects of government regulation would censor material they transmitted in response to regulatory incentives. That threat was sufficient to persuade the Court to require heightened levels of justification for regulatory interventions. In *Turner Broadcasting System, Inc. v. FCC,* the Court began its review of provisions of the Cable Television Consumer Protection and Competition Act of 1992, which required cable systems to carry local broadcast channels.[131] The Court recognized the threat of censorship by cable systems:

> When an individual subscribes to cable, the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch. The potential for abuse of this private power over a central avenue of communication cannot be overlooked.[132]

Yet the effort to alleviate this danger raised other concerns. In addition to an interference with the unfettered control of the networks themselves—and one man's "censor" is another's "editor"—the Court discerned a second harm in the "must-carry" requirements: the reservation of channels for local broadcasters induced the networks to censor other cable programmers.[133] For the majority of the Court, these overlapping dangers were sufficient to require heightened First

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[131] 512 U.S. 622, 626 (1994).

[132] *Id.* at 656-57 (footnote omitted).

[133] *Id.* at 637; s*ee id.* at 645 ("The must-carry provisions also burden cable programmers by reducing the number of channels for which they can compete."). The Court remanded for a determination of whether these burdens could be adequately justified under the First Amendment. *Id.* at 668. When the Court later returned to its examination of the "must-carry" provisions, it observed again the provisions' "potential to interfere with protected speech in two ways": by reducing the number of channels over which cable operators "exercise unfettered control," and by "render[ing] it more difficult for cable programmers to compete for carriage on the limited channels remaining." Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 214 (1997) (quotation marks omitted). The Court upheld the "must-carry" rule, observing that the "actual effects" of the rule were "modest" and "congruent to the benefits it affords." *Id.* at 214-15.

Amendment scrutiny of the "must-carry" provisions, and the case was remanded for analysis of the justification for the statute.

The 1992 cable statute and the problem of proxy censorship returned to the Court two years later in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.[134] There the Court reviewed a second set of provisions structuring the dealings of cable networks with "indecent" programming carried by channels that used the networks as intermediaries.[135] The case generated a fractured constellation of six opinions and three separate holdings that ultimately highlight the importance of structuring constitutional doctrine to limit the dangers of proxy censorship.

On one issue regarding proxy censorship there was a clear majority. Justice Breyer wrote an opinion that gained the votes of six Justices for the proposition that the portion of the statute which required cable operators to block and segregate "indecent" programs sent through their networks over "leased channels" was unconstitutional.[136] Although the statute neither imposed criminal penalties on speakers nor directly prohibited carriage of disfavored messages, the majority opinion harked back to the McCarthy-era recognition that indirect as well as direct censorship can distort the system of free expression. It recognized the effective censorship that resulted from imposing procedural burdens on intermediaries who carry unpopular modes of expression.

The statute and its implementing regulations required cable network operators to place "patently offensive" leased-channel programs on a separate channel and to block that channel in the absence of a specific written request to view it.[137] Imposing that regime on the cable networks, in the view of the majority, had at least three censorial impacts on the flow of communication from programmer to viewer. First, the challenged system burdened the choices of viewers. A subscriber seeking the disfavored content could not "decide to watch a single program [subject to the system] without considerable advance

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[134] 518 U.S. 727 (1996).

[135] The provisions dealt both with channels that local franchising authorities required cable networks to make available for "public access," and with "leased" channels that the federal statute required networks to make available for paid carriage of commercial content that originated outside of the cable system. *Id.* at 732, 734.

[136] *Id.* at 732, 753-60 (Breyer, J., joined by Stevens, O'Connor, Souter, Kennedy, Ginsburg, JJ., as to Part III).

[137] *Id.* at 753-54.

planning."[138] The majority recognized an additional burden on viewers: "the 'written notice' requirement will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel."[139] Second, the regulatory scheme burdened the opportunities of programmers to communicate. Programmers whose content fell within the disfavored class could not reach "viewers who select programs day by day (or, through 'surfing,' minute by minute)."[140] Third, the incentives of the regulatory system were likely to encourage active censorship by the system operators. By simply refusing to carry potentially troublesome programming at the outset, the cable network could avoid the burdens of monitoring programs for "patently offensive" content, establishing separate channels, and responding to viewer requests. In the Court's view, the likely impact of the system on the decisions of cable system operators was to impair the opportunities of both programmers and viewers by encouraging cable operators "to ban programming that the operator would otherwise permit to run" as a means of avoiding the "costs and burdens" associated with statutory compliance.[141] These impacts were not adequately justified, in the view of the majority, since an alternative and less burdensome system that allowed subscribers to request blocking of offensive channels or programming would serve equally well the purpose of safeguarding children whose parents sought to shield them from indecency.[142]

Five of the six Justices who joined the holding on the "block and segregate" provision also found a second provision of the statute unconstitutional. Cable system operators were historically barred by their franchise agreements with local governments from engaging in censorship of "public access channels," which were entitled under

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[138] *Id.* at 754.

[139] *Id.* (citing Lamont v. Postmaster Gen., 381 U.S. 310, 307 (1965), which held unconstitutional a law requiring that the Post Office be notified by those wishing to receive communist literature).

[140] *Id.*

[141] *Id.*

[142] *Id.* at 755-70. Justice Thomas, writing for Justice Scalia and Chief Justice Rehnquist, acknowledged some burden on free speech rights, but downplayed the impact of the regulatory scheme. The opinion echoed the arguments of the defenders of McCarthy blacklists by minimizing the impact on speech: "[P]etitioners' allegations of an official list . . . are pure hyperbole. . . . [T]his is hardly the kind of chilling effect that implicates the First Amendment." *Id.* at 834-35 (Thomas, J., concurring in part and dissenting in part).

these agreements to use system facilities. By contrast, section 10(c) of the 1992 Act empowered system operators to refuse carriage to the limited class of "indecent" programs carried by those "public access" channels. In his concurrence, Justice Kennedy inferred that "[p]erhaps Congress drafted the law this way to avoid the clear constitutional difficulties of banning indecent speech from access channels,"[143] but a majority of the Court found the effort to empower proxy censors unconstitutional.

In reaching this conclusion, this group of Justices rejected the position—analogous again to the claims of defenders of the McCarthy blacklists—that any decision to ban "indecent" material could not be attributed to official action, but only to the intervening private decision of cable operators.[144] No single opinion, however, commanded a majority. The opinion of Justice Kennedy, writing for himself and Justice Ginsburg, is the clearest: a provision that "singles out one sort of speech for vulnerability to private censorship" can only be constitutional if it is "narrowly tailored to serve a compelling state interest."[145] The statutory provisions "do not require direct action against speech, but do authorize a cable operator to deny the use of its property to certain forms of speech. . . . When the government identifies certain speech on the basis of its content as vulnerable to exclusion from a common carrier or public forum, strict scrutiny applies."[146]

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[143] *Id.* at 807 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[144] That position had prevailed before the D.C. Circuit. *See* Alliance for Cmty. Media v. FCC, 56 F.3d 105, 112-21 (D.C. Cir. 1995) (focusing on the "state action" question), *aff'd in part, rev'd in part sub nom.* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996). It was echoed in modified form by the opinion of Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, which would have upheld this part of the statute on the ground that it "merely restore[s] part of the editorial discretion an operator would have absent Government regulation without burdening the programmer's underlying speech rights." *Denver Area Educ.*, 518 U.S. at 823 (Thomas, J., concurring in part and dissenting in part).

[145] *Denver Area Educ.*, 518 U.S. at 782, 803 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[146] *Id.* at 783; s*ee also id.* at 797 ("Laws removing common-carriage protection from a single form of speech based on its content should be reviewed under the same standard as content-based restrictions on speech in a public forum."); *id.* at 802-03 ("The provisions here are content-based discriminations in the strong sense of suppressing a certain form of expression that the Government dislikes or otherwise wishes to exclude on account of its effects, and there is no justification for anything but strict scrutiny here. . . . It contravenes the First Amendment to give Government a general license to single out some categories of speech for lesser protection so long as it stops short of viewpoint discrimination."); *id.* at 806 ("[T]he discretion conferred by the law is slight. The operator is not authorized to place programs of its own liking on the leased access

Like McCarthy-era employers who could be expected to divest themselves of officially identified subversives, there was every reason to believe that cable system operators would exercise their discretion to the detriment of those who were out of the mainstream:

> Perhaps some operators will choose to show the indecent programming they now may banish if they can command a better price than other access programmers are willing to pay. . . . [But there is little] reason to think cable operators will choose to show indecent programs on public access channels. The operator is not paid, or paid much, for transmitting programs on these channels . . . [and] the operator will wish to avoid unwanted controversy . . . . The obvious consequence invited by the discretion is exclusion.[147]

The plurality opinion of Justice Breyer, writing for himself and Justices Stevens and Souter, likewise rested its condemnation of the system on the censorial dangers of the "cable operator's veto." It recognized the "risk that the veto itself may be mistaken; and its use, or threatened use, could prevent the presentation of programming, that, though borderline, is not 'patently offensive' to its targeted audience."[148] Justice Breyer's plurality concluded that the proposed system was unconstitutional; it "would greatly increase the risk that certain categories of programming (say, borderline offensive programs) will not appear" without any "obvious" justifying need.[149]

The opacity of Justice Breyer's approach arises from the fact that the Justices joining his analysis combined with the quite different analysis of Justices Thomas, Scalia, and Rehnquist[150] to form a majority

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channels, nor to remove other speech (racist or violent, for example) that might be offensive to it or to viewers. The operator is just given a veto over the one kind of lawful speech Congress disdains.").

[147] *Id.* at 811. Justice Stevens's separate analysis on this point was similar. He argued that this provision of the statute was invalid because "[i]t would inject federally authorized private censors into fora from which they might otherwise be excluded, and it would therefore limit local fora that might otherwise be open to all constitutionally protected speech." *Id.* at 773 (Stevens, J., concurring).

[148] *Id.* at 763 (plurality opinion).

[149] *Id.* at 766.

[150] Justice Thomas, joined by Justice Scalia and Chief Justice Rehnquist, would have viewed any government rule that gave discretion to cable operators as per se permissible. They took the position that, as with the "public access" channels, any decision by cable operators to bar "indecent" programming should not be regarded as "censorship," but as private choice. *Id.* at 823-24 (Thomas, J., concurring in part and dissenting in part). The seven-member majority on this point was completed by Justice O'Connor, who joined the Breyer camp's balancing analysis of the problems, but diverged from their conclusion that the public access provisions were unconstitutional. *Id.* at 779 (O'Connor, J., concurring in part and dissenting in part).

holding on a third issue. This group of seven Justices determined that the parallel provision of the Act that allowed cable operators to bar "indecent" programming on leased channels—as opposed to public access channels—comported with the strictures of the First Amendment. The Breyer opinion acknowledged that the "leased channel" provision, like the "public access" provision, regulated speech and required assurance that "it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech."[151]

Characterizing the goal of the statute as a compelling need "to protect children from exposure to patently offensive sex-related material," the opinion noted that such materials "confront[] the citizen" in the "privacy of the home."[152] The conceded cost to free expression "is not the same as the certainty that accompanies a governmental ban" and in any event the system was no more restrictive than the FCC regulation of indecency in broadcasting that had been upheld previously.[153] Justice Breyer went on to observe that costs to the free expression interests of programmers and viewers were in part counterbalanced by the benefits to the rights of cable operators. In his view, the statute sought to strike a balance between

> those interests served by the access requirements themselves (increasing the availability of avenues of expression to programmers who otherwise would not have them), and the disadvantage to the First Amendment interests of cable operators and other programmers (those to whom the cable operator would have assigned the channels devoted to access).[154]

Taken alone, this balancing act on "leased channels" is understandable. It acknowledges the risk of proxy censorship, but views that risk as being warranted by the combination of government and free expression interests served by the rule. But, as the partial dissents of Justice Kennedy on one hand and Justice Thomas on the other hand point out, reconciling the holding with the invalidation of an identical scheme on "public channels" is a challenge. Justice Breyer's opinion proceeds to distinguish "public access channels" from "leased channels" on two lines of argument. First, he observes that historically, the "public access channels" had not been controlled by the cable operators at the time the indecency provisions were adopted. Rather, they

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[151] *Id.* at 743 (plurality opinion).
[152] *Id.* at 743-44 (quotation marks omitted).
[153] *Id.* at 743-44, 746.
[154] *Id.* at 743-44 (citation omitted).

were under the control of local public franchising authorities, so transferring control to operators could not be characterized as "restoring editorial rights." The "much diminished" claim that the regime in public access channels provided countervailing free expression benefits to displaced "editors" was accordingly less powerful than in the "leased channel" context in justifying the likely censorial effects. Second, the Breyer opinion maintains that the control by local authorities—which is absent in the case of leased channels—casts doubt on the child-protective interest in providing a "cable operator's veto": "given present supervisory mechanisms, the need for this particular provision, aimed directly at public access channels, is not obvious," and on the record before the Court "the Government cannot sustain its burden of showing that § 10(c) is necessary to protect children or that it is appropriately tailored to secure that end."[155]

The most recent chapter in federal cable regulation brought another issue of proxy censorship to the Court, and resulted in some clarification. *United States v. Playboy Entertainment Group, Inc.* addressed a provision of the 1996 Communications Decency Act in which Congress imposed limits on the freedom of cable operators to carry channels "primarily dedicated to sexually oriented programming."[156] Before the adoption of the statute, as a matter of economic self interest, cable operators treated "adult" channels as "premium" channels available only upon special payment, and scrambled transmission of those channels to subscribers who did not pay for the premium service. A technological artifact, however, provoked congressional intervention. While it was technologically possible to block transmission of the channels entirely, operators found it cheaper to simply "scramble" the transmission using a technology by which signals occasionally "bled" into visibility, creating a context in which "viewers who [had] not paid to receive [sexually explicit] channels [could have] happen[ed] across discernible images of a sexually explicit nature."[157]

In response to accounts of children who had been exposed to sexually explicit signal bleed, section 504 of the Communications Decency Act required cable operators to use the more expensive technology to "fully block" any channel that subscribers affirmatively requested not to receive.[158] In addition, for channels "primarily

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[155] *Id.* at 766.
[156] 529 U.S. 803, 806 (2000) (quotation marks omitted).
[157] *Id.* at 808.
[158] 47 U.S.C. § 560 (2000).

dedicated to sexually oriented programming," section 505 requires cable operators to choose either to adopt a still more expensive systemwide "fully blocking" technology, or to limit the transmission of the targeted channels to hours between 10 p.m. and 6 a.m.—times when children were thought to be less likely to be exposed to discernable images.[159] The bulk of cable operators responded by choosing to act as proxy censors. Because of the cost of "full blocking" and the risk of sanctions if any signals bled through, "the only reasonable way for a substantial number of cable operators to comply with the letter of section 505 is to time channel, which silences the protected speech for two-thirds of the day in every home in a cable service area, regardless of the presence or likely presence of children or of the wishes of the viewers."[160]

As with other "subtle interferences," it could be argued that this silencing was not a government ban: the decision to "time channel" rather than adopt more expensive blocking technology was a choice of the system operators, and some chose not to engage in censorship. Moreover, the "time channeling" did not entirely prevent receipt of the channels: recipients who sought the targeted channels could view them either by "time shifting" with VCRs or by waiting for the time channel to open at 10 p.m. But the majority of the Court took the position that "[i]t is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."[161] Under that level of scrutiny, the Court determined that the challenged provision was unconstitutionally intrusive. The government failed to carry its burden of demonstrating that the less restrictive alternative of publicizing the "opt out" rights under sec-

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[159] *Id.* § 561.

[160] *Playboy Entmn't Group*, 529 U.S. at 812; s*ee also id.* at 809 (noting that "most cable operators had no practical choice but to curtail [the targeted] programming during the [regulated] sixteen hours or risk the penalties imposed" and that sixty-nine percent of operators time channeled) (quotation marks omitted); *id.* at 821 ("A rational cable operator, faced with the possibility of sanctions for intermittent bleeding, could well choose to time channel even if the bleeding is too momentary to pose any concern to most households.").

[161] *Id.* at 812; s*ee also id.* at 826 ("[S]pecial consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression.").

The four dissenters acknowledged that the statute imposed "speech related restrictions," but argued that this was a "burden" which "[increased] the cost of adult channel broadcasting," rather than "banning" it. *Id.* at 845 (Breyer, J., dissenting).

tion 504 would inadequately address legitimate concerns; "the government has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban."[162]

iii. Subtle Interference and Internet Intermediaries

Analysis of efforts by the government to target weak links in Internet chains of communication thus takes place against the background of the long-standing position, rooted in the lessons of the McCarthy era, that "subtle interferences" and efforts to dissuade transmission by intermediaries constitute cognizable dangers to free expression, no less than threats of direct prosecution of speakers or listeners. The fact that these efforts enlist the cooperation of private parties makes them more, rather than less, dangerous in comparison to direct regulation. Private discretion is often less visible and less procedurally regular than public sanction.

As yet, relatively few efforts to recruit proxy censors on the Internet have reached adjudication, though the Court has recognized the danger that overbroad regulation of Internet communications poses. In the first encounter with Internet regulation, the Court warned that it "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."[163] More recently, the Court expressed concern that efforts to limit speech "harmful to minors" on the Internet where "only an affirmative defense is available" imposes risks that "speakers may self-censor rather than risk the perils of trial. There is a potential for extraordinary harm and a serious chill upon protected speech."[164] The tendency of intermediaries to engage in broadly prophylactic responses to government incentives calls forth the same concerns. The dangers of proxy censorship should lead courts to regard efforts to enlist intermediaries as Internet censors as no less dangerous than efforts to encourage cable networks to bowdlerize their content or bookstores to purge their stocks.

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[162] *Id.* at 823 (majority opinion); s*ee also id.* at 814 (concluding that "even where speech is indecent and enters the home," the least restrictive alternative is required); *id.* at 815 ("[T]argeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners . . . .").

[163] Reno v. ACLU, 521 U.S. 844, 872 (1997).

[164] Ashcroft v. ACLU, 542 U.S. 656, 670-71 (2004).

C. *Doctrinal Structures To Address the Problem of the Weakest Link*

Having learned the lesson in the McCarthy era that "subtle interferences" and indirect attacks on free speech could deform the system of free expression, the Supreme Court elaborated two lines of First Amendment doctrine that bear with particular salience on the problem of proxy censorship. The first set of doctrines requires courts to assess the degree to which a particular regulatory scheme is likely to reach beyond legitimate targets to impose collateral damage on protected speech. The second set of doctrines provides safe harbors for intermediaries by treating vague regulations, efforts to impose vicarious liability, and efforts to penalize dissemination of true facts as presumptively impermissible without a particularized evaluation of their propensity to impose collateral damage. Each has implications for the analysis of proxy censorship in the context of the Internet.

1. The Doctrinal Heritage

The reaction against the abuses of the McCarthy era catalyzed doctrinal formulations directed to the danger that efforts nominally addressed to legitimate problems might inflict severe collateral damage on the system of free expression. A net thrown widely in an effort to catch communist agents was likely to entangle a variety of legitimate dissenters and political opponents; indeed, the experience of the McCarthy era suggested that broad prohibitions were not infrequently deployed for precisely this purpose. Even if official discretion did not actively apply the sanctions to the entire spectrum of activity that fell within the scope of the nominal prohibitions, the possibility of official prosecution or private persecution could itself "chill" expression[165] and induce "self-censorship" among those who might fall within the net should they catch the attention of hostile officials.[166]

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[165] *See, e.g.*, Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) (emphasizing that the punishment of protected association "affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers"); *see also* Shelton v. Tucker, 364 U.S. 479, 487 (1960) (quoting from *Wieman*); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 555 (1963) (discussing alleged "subversive" activity within the Miami branch of the NAACP).

[166] The Supreme Court account of "self-censorship" as a phenomenon begins with Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 531 n.56 (1952) (Frankfurter, J., concurring) (noting how self-censorship distorted studio-era Hollywood's depiction of historical figures). It next appears in Smith v. California, 361 U.S. 147, 153 (1959) ("[I]f

To be sure, as long as there are varieties of speech that can be legitimately suppressed, "self-censorship" cannot be an evil in and of itself, for "chilling" individuals from engaging in illegal activities is precisely the legitimate office of law. Constitutional difficulty arises, however, when the "self-censorship" suppresses speech that is constitutionally protected; constitutional doctrine has internalized the lesson of the McCarthy era that the system of free expression can suffer not only from direct assault but also from collateral damage.

In reaction to McCarthy-era excesses, the Court deployed doctrines that require courts to evaluate the dangers of collateral damage from sanctions directed at legitimate public harms. Where the government defined specific communicative conduct that triggered sanctions, the Court increasingly held, the definition could not constitutionally extend to impose punishment on actions that were protected by the First Amendment. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms";[167] statutes that "burn[ed] the house to roast the pig" by forbidding both constitutional and unconstitutional conduct were deemed constitutionally impermissible.[168] Even where the official prohibition itself banned only unprotected activities, in deploying sanctions against communications the government was required to use "sensitive tools" to avoid the risk of error in applying the legal categories that could re-

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the bookseller is criminally liable without knowledge of the contents . . . he will tend to restrict the books he sells to those he has inspected, and thus the state will have imposed a restriction of constitutionally protected as well as obscene literature."), and N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278 (1964) (quoting from *Smith*).

[167] NAACP v. Button, 371 U.S. 415, 438 (1963) (citations omitted); s*ee also* Keyishian v. Bd. of Regents, 385 U.S. 589, 609 (1967) (striking an employment exclusion for impermissible overbreadth where it bars "employment both for association which legitimately may be proscribed and for association which may not be proscribed consistently with First Amendment rights"); United States v. Robel, 389 U.S. 258, 265-66 (1967) (striking a bar on employment where the "statute casts its net across a broad range of associational activities, indiscriminately trapping membership which can be constitutionally punished and membership which cannot be so proscribed" (citation omitted)); Elfbrandt v. Russell, 384 U.S. 11, 16 (1966) (striking down a loyalty oath requirement); Aptheker v. Sec'y of State, 378 U.S. 500, 507, 508 (1964) (striking as "unnecessarily broad[]" a statute revoking the passports of members of "communist-front organizations"); *Wieman*, 344 U.S. at 191 ("Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power.").

These cases drew on earlier requirements that statutes punishing speech be "narrowly drawn to prevent the supposed evil." *E.g.*, Cantwell v. Connecticut, 310 U.S. 296, 307 (1940).

[168] Butler v. Michigan, 352 U.S. 380, 383 (1957).

sult in the "deterrence of speech which the Constitution makes free."[169]

The memory of the moral panics of the McCarthy era led to similar constraints on government regulations that did not directly punish expressive activities, but were likely to catalyze private persecution. In reviewing requirements that teachers disclose "every conceivable kind of associational tie—social, professional, political, avocational, or religious," with the collateral danger of "pressure upon a teacher to avoid any ties which might displease those who control his professional destiny," the Court concluded that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[170]

2. Collateral Damage Doctrines and the Problem of Proxy Censorship of the Internet

These concerns with collateral damage to free expression inflicted in pursuit of nominally legitimate goals have remained a vibrant part of First Amendment doctrine. In some contexts the concern appears in free-standing form: excessive suppression of protected speech is an evil sufficient to invalidate a regulatory intervention as unconstitutionally "overbroad."[171] In others it is embedded in an analysis of the

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[169] Speiser v. Randall, 357 U.S. 513, 525-26 (1958). *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 n.50 (1982) (discussing the precision of regulation required and finding that the imposition of damages liability in the context of protected activity requires a clear showing of direct and proximate involvement in an unlawful objective).

[170] Shelton v. Tucker, 364 U.S. 479, 486, 488 (1960); s*ee also* Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 297 (1961) (striking a statute requiring the disclosure of NAACP membership lists as insufficiently "narrowly drawn to prevent the supposed evil" (quoting *Cantwell*, 310 U.S. at 307)); Talley v. California, 362 U.S. 60, 64 (1960) (striking down as overbroad a requirement that all handbills bear identification). Again, the Court drew on earlier analyses that considered the unjustified impact of regulations on modes of communication as well as the legal proscription of speech. *See, e.g.*, Schneider v. State, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").

[171] Ashcroft v. ACLU, 542 U.S. 656, 665 (2004) ("A statute that 'effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective . . . .'" (quoting Reno v. ACLU, 521 U.S. 844, 874 (1997))); *see also* Ashcroft v. Free Speech Coal., 535 U.S. 234, 252-53 (2002) ("The Government cannot ban speech fit for adults simply because it may fall into the hands of children. . . . The objective is to prohibit illegal conduct, but this restriction goes well beyond that inter-

degree of congruence between means and ends required by "strict,"[172] "intermediate,"[173] or "moderate"[174] scrutiny. On any "level of scrutiny" greater than "minimal," regulations cannot stand where the government's legitimate goal can be accomplished effectively by other more "narrowly tailored" or "less intrusive" alternatives, or where there is "unnecessary and substantial" impact on protected speech. Finally, the procedural mechanisms by which even facially appropriate regulations are applied must be adequate to assure that the actual impact of

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est by restricting the speech available to law-abiding adults."); *Reno*, 521 U.S. at 875 ("[T]he governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults."); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 564 (2001) (citing *Reno*); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 127 (1989) ("In our judgment, this case, like *Butler*, presents us with 'legislation not reasonably restricted to the evil with which it is said to deal.'" (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957))); Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 575, 577 (1987) (holding that a regulation prohibiting "all First Amendment activities" was substantially overbroad (quotation marks omitted)); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 68 (1981) (holding that when a zoning law "infringes upon a protected liberty," the Court must consider less intrusive alternatives).

[172] *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 814 (2000) (noting that, under strict scrutiny, "the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative").

[173] *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 668 (1994) (inquiring under "intermediate scrutiny" into whether "'substantially more speech than . . . necessary'" was suppressed and "the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests" (quoting *Sable Commc'ns of Cal.*, 492 U.S. at 129)). Similarly, the Court has reviewed injunctions against speech carefully to assure that they are no broader than necessary to achieve their desired goals. *See, e.g.*, Madsen v. Women's Health Ctr., 512 U.S. 753, 765 (1994) (discussing a trial judge's ability to tailor injunctions to provide "more precise relief"); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 n.47 (1982) ("'[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest [, and] if the governmental interest is unrelated to the suppression of speech . . . .'" (quoting United States v. O'Brien, 391 U.S. 367, 376-77 (1968))); Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968) (holding that an injunction relating to First Amendment rights "must be couched in the narrowest terms that will accomplish the pin-pointed objective").

[174] *See, e.g.*, Edenfield v. Fane, 507 U.S. 761, 777 (1993) ("Even under the First Amendment's somewhat more forgiving standards for restrictions on commercial speech, a State may not curb protected expression without advancing a substantial governmental interest."); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 569-72 (1980) (holding that the First and Fourteenth Amendments require that the suppression of speech be "no more extensive than necessary" to achieve an important government interest).

the statute does not extend unconstitutionally beyond the realm of government necessity.[175]

This doctrinal structure carries important implications for the problem of proxy censorship of the Internet. Because of the fragility of Internet intermediaries' commitment to particular streams of carriage, when addressing efforts to target intermediaries, courts must take particularly careful account of the real impact of the regulatory intervention at two levels.

First, the impact of challenged regulations will illuminate the "narrowness of the tailoring" of the regulation in question: the broader the swath of communication effectively suppressed, the less narrowly the regulation is tailored, and the greater the burden of justification before it can be adjudged constitutionally acceptable. Second, in examining the intrusiveness of alternatives to challenged regulations, courts must realistically evaluate the impact of the proposed regulatory regimes. In both examinations, courts must be alive to the likely reactions of intermediaries to government regulation. As we have noted, efforts to exert leverage against intermediaries are quite likely to result in impacts on the speech those intermediaries facilitate that are substantially broader than the explicit scope of the regulation. As weak links in the chain of communications, therefore, intermediaries are particularly likely to generate the collateral damage at which overbreadth doctrines are directed. Conversely, in contemplating the intrusiveness of alternatives to challenged regulations, courts also need to take account of the collateral damage intermediaries can be expected to wreak.

a. *Precision of Regulation and Collateral Damage*

The clearest concern with the potential collateral damage wrought by regulation of Internet intermediaries emerges from the constellation of opinions in *United States v. American Library Ass'n.*[176]

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[175] At least two lines of cases operationalize this concern. First, prior restraint cases such as *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam), build on the earlier analysis of *Near v. Minnesota*, 283 U.S. 697 (1931), that a judgment interfering with legitimate channels of communication cannot be premised on only a demonstration that past communication has been unprotected. Second, *Freedman v. Maryland*, 380 U.S. 51 (1965), and subsequent cases, *see supra* note 127, mandate that the procedures by which orders to prevent speech are implemented are accompanied by adequate notice and opportunity to be heard, and prompt judicial determination, lest overbroad administrative determinations chill protected speech.

[176] 539 U.S. 194 (2003).

Stymied in its initial efforts to criminally punish any transmission or display of "indecent" material on the Internet,[177] Congress turned to seek leverage over a more limited class of intermediaries who could block receipt of "indecent" images. The Children's Internet Protection Act (CIPA),[178] adopted in 1998, required libraries receiving federal funds to act as censors by installing software to filter out "visual depictions" that were "harmful to minors" from transmissions to library terminals that accessed the Internet. The impact of this requirement was anything but precisely tailored. On one hand, the available software blocked websites containing images that were subject to interdiction as "harmful to minors" yet lawful as to adults; on the other hand, it was conceded on all sides that the software that would in fact be deployed in response to this mandate effectively censored "content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as 'pornography' or 'sex.'"[179] For three members of the Court, this collateral damage would have been sufficient to invalidate the statute.[180]

Two more Justices evinced concern about the effect of the statute on free expression, but concluded that the actual effects of the statute were slight because the record did not show that patrons were unable to bypass the filters. Justice Breyer's opinion acknowledged that "[t]he Act directly restricts the public's receipt of information. . . . [a]nd it does so through limitations imposed by outside bodies (here Congress) upon two critically important sources of information—the

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[177] *See* Reno v. ACLU 521 U.S. 844, 885 (1997) (holding that the challenged provisions of the Communications Decency Act violated the First Amendment, because "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship").

[178] Pub. L. No. 106-554, §§ 1701-1741, 114 Stat. 2763 (2000) (codified at 20 U.S.C. § 9134 (2001) and 47 U.S.C. § 254(h) (2000)).

[179] *Am. Library Ass'n*, 539 U.S. at 208-09 (2003) (citations omitted); *see also id.* at 233-34 (Souter, J., dissenting) (explaining that the plurality concedes that the filters will deny access to "text and pictures harmful to no one").

[180] *See id.* at 220 (Stevens, J., dissenting) ("[CIPA] operates as a blunt nationwide restraint on adult access to an enormous amount of valuable information that individual librarians cannot possibly review. . . . In my view, this restraint is unconstitutional." (quotation marks and citations omitted)); *id.* at 222 ("[A] statutory blunderbuss that mandates this vast amount of 'overblocking' abridges the freedom of speech protected by the First Amendment."); *id.* at 231 (Souter, J., dissenting, joined by Ginsburg, J.) (concurring with Justice Stevens that CIPA "impose[s] an unconstitutional condition" on subsidies to local libraries).

Internet as accessed via public libraries."[181] Applying what he referred to as "heightened . . . scrutiny,"[182] however, Justice Breyer concluded that the burden was de minimis, and therefore not "disproportionate."[183] The Solicitor General had represented that under CIPA "the adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, 'Please disable the entire filter,'" and thus the "small burden" was insufficient to invalidate the statute.[184] Justice Kennedy separately concurred in the result because of the absence of proof "that the ability of adult library users to have access to the material is burdened in any significant degree."[185]

Finally, the plurality opinion of Justice Rehnquist, joined by Justices Scalia, O'Connor, and Thomas, upheld CIPA both on the basis of the "ease with which patrons may have the filtering software disabled" and on the additional ground that the statute involved the spending power, rather than "direct regulation of private conduct."[186]

Taken at face value, these analyses imply that an effort to precipitate effective proxy censorship by direct regulation would be viewed as impermissible by the entire Court, and that at least a majority of the Court would also view truly effective proxy censorship as impermissible, even if it resulted from financial incentives rather than direct regulation.[187]

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[181] *Id.* at 216 (Breyer, J., concurring) (citations omitted).

[182] *Id.* at 217 (inquiring whether "the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives").

[183] *Id.* at 220.

[184] *Id.* at 219.

[185] *Id.* at 215 (Kennedy, J., concurring). Justice Kennedy observed that "[t]he District Court, in its 'Preliminary Statement,' did say that 'the unblocking may take days, and may be unavailable, especially in branch libraries, which are often less well staffed than main libraries.' That statement, however, does not appear to be a specific finding." *Id.* at 214 (citations omitted). Rather than relying on the account of the court that tried the evidence, the Justices relied on the Solicitor General's contrary representation of fact at oral argument. *Id.* at 209 (plurality opinion); *id.* at 214 (Kennedy, J., concurring). *But cf. id.* at 232-33 (Souter, J. dissenting) ("I realize the Solicitor General represented this to be the Government's policy . . . . [but] the District Court expressly found that 'unblocking may take days, and may be unavailable, especially in branch libraries . . . .'").

[186] *Id.* at 196, 209-10 n.4 (plurality opinion).

[187] The plurality's analysis is in some tension with the recognition in other cases that the threat of exposure as the recipient of adult channels is a cognizable burden on the exercise of First Amendment rights. *See, e.g.*, Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 754 (1996) (noting that the fear that television companies might "disclose the list of those who wish to watch the 'patently offensive' channel" will restrict subscription).

Center for Democracy & Technology v. Pappert[188] provides a more recent case study. Concerned that concededly unprotected child pornography was available on the Internet to Pennsylvania residents, the Pennsylvania legislature sought to exert leverage not over the elusive posters of such material, but over the more easily targeted intermediaries who facilitated transmission to residents of Pennsylvania. It adopted a statute designed to recruit ISPs as proxy censors by requiring them to bar access to "child pornography items" by subscribers in Pennsylvania.[189] The statutory scheme provided for the state Attorney General or a district attorney to bring an *ex parte* proceeding to designate web pages by Uniform Resource Locator addresses (URLs) upon proof that there was probable cause to believe that the URL provided "access to" "child pornography items." Once informed of this designation, ISPs were required to "disable [Pennsylvania subscribers'] access to" those URLs on pain of criminal penalties ranging up to seven years of imprisonment.[190]

In theory, an ISP could devise equipment and software to reach into the stream of data directed to each subscriber in Pennsylvania and precisely block access to the designated "child pornography" URL only. In practice, however, the reaction of ISPs was to cut off access to a broad swath of protected speech. Commercial and technical realities impelled ISPs toward less costly and more easily implemented

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This analysis ignores, moreover, the burden that filters place on website communications by blocking the possibility of gaining willing listeners' attention. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 728 (2000) ("[T]he First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be the opportunity to win their attention.'" (quoting Kovacs v. Cooper, 336 U.S. 77, 87 (1949))); *cf. id.* at 780 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (arguing that a law forbidding leafleting is unconstitutional because it "leav[es] petitioners without adequate means of communication"); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 563 (2001) (invalidating a ban on outdoor advertising because it failed to provide sufficient "alternative avenues" for communication).

The plaintiffs before the *American Library Ass'n* trial court included such potential speakers, but the trial court assumed that the interests of all of the plaintiffs were identical. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 416 n.3 (E.D. Pa. 2002) (granting plaintiffs standing, over government objections). Justice Stevens alludes to the issue in his dissent:

> Until a blocked site or group of sites is unblocked, a patron is unlikely to know what is being hidden and therefore whether there is any point in asking for the filter to be removed. . . . Inevitably, the interest of the authors of those works in reaching the widest possible audience would be abridged.

Am. Library Ass'n, 539 U.S. at 224-25 (Stevens, J., dissenting).

[188] 337 F. Supp. 2d 606 (E.D. Pa. 2004).

[189] 18 PA. CONS. STAT. § 7622 (2003).

[190] *Id.* § 7624.

mechanisms that blocked subscribers' access throughout their networks either to particular "domain names" used by the targeted web pages,[191] or to IP addresses associated with those domain names.[192] Because both domain names and IP addresses are shared, either of these methods served to block substantial numbers of unrelated websites, but faced with the prospect of criminal prosecution, ISPs reacted predictably. Rather than challenging the demands to block websites, most ISPs complied with the blocking order in the least costly fashion, and in the first waves of designations, "[m]ore than 1,190,000 innocent web sites were blocked in an effort to block less than 400 child pornography web sites."[193] Indeed, the ISPs generally did not even require a "probable cause" order; they were willing to block access to websites nationwide on the sole basis of a letter from the Attorney General threatening to invoke the statute.[194]

When Pennsylvania subscribers challenged the statute, the trial court viewed the statute with an appropriately critical eye. Although it acknowledged that the statute on its face required only that ISPs block access to unprotected material, the court rejected the state's argument that the predictable collateral damage regarding access to innocent websites "does not violate the First Amendment because it resulted from decisions made by ISPs, not state actors."[195] Relying on the analogous analysis of the reaction of cable intermediaries in *Play-*

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[191] In the URL http://www.whitehouse.gov/government/brown-bio.html, for instance, the "domain name" is "whitehouse.gov." Blocking access to that "domain name" would block access to every site that shares the domain name.

[192] The *Center for Democracy & Technology* court explained:

> [T]he URL alone is not sufficient for the user's computer to locate the web site. A user's computer must first determine the numeric Internet Protocol Address or IP address of the desired web site. Every device, or computer, using the Internet must have a unique IP address. . . . When a user seeks to access a particular URL, the user's computer initiates a look up through a series of global databases known as the domain name system ("DNS") to determine the IP Address of the Web Server that can provide the desired web pages. . . . Although a specific URL refers only to one specific web site, many different web sites (each with different domain names and URLs) are hosted on the same physical Web Server, and all the web sites on a server share the same IP Address.

337 F. Supp. 2d at 617-18.

[193] *Id.* at 655.

[194] *Id.* at 660 ("In the one instance when an ISP, WorldCom, did not respond to Informal Notices, defendant carried out its 'thinly veiled threat' and obtained a court order against WorldCom and subsequently issued a press release describing the legal proceeding.").

[195] *Id.* at 651.

boy Entertainment Group, and the McCarthy-era learning of *Bantam Books,* the court concluded that the predictable reactions of the ISPs to the shadow of prosecution could not be disavowed by the state any more than McCarthy-era red hunters could disavow the impact of their "pitiless publicity" on the lives of their victims.[196]

Turning to the justifications for the statute, the court observed that the blocking requirements could be easily circumvented by sophisticated users relying on proxy web servers or anonymizers, and that the Attorney General failed to provide evidence either that the blocking orders would impede child abuse, or that the state had exhausted the routes of direct investigation of the "entities that produce, publish, and distribute the child pornography."[197] The court went on to observe that the statutory blocking orders had the same overbroad effect of prior restraints. Statutory designations required blocking not on the basis of the current content of the URLs, but on the basis that they had once linked to web pages with problematic content, and having implemented the blocks, ISPs had no incentive to review the content.

> Just as the content of a newspaper changes without changing the title of the publication, the content identified by a URL can change without the URL itself changing. In fact, it is possible that the owner or publisher of material on a web site identified by a URL can change without the URL changing. Plaintiffs demonstrated this by purchasing the http://www.littleangels.tv/tr URL and converting the alleged child pornography web site into a web site dedicated to a description of this case. . . . Moreover, other than the instances in which complaints were made about blocked innocent content, ISPs have continued to maintain their blocking action.[198]

The trial court held the statute unconstitutional, rejecting the state's claim that the possibility that ISPs could contest overbroad orders in criminal prosecutions would save the statute, since "[a]n ISP has little incentive to challenge the suppression of a web site with which it has no business relationship."[199]

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[196] *Id.* at 650-52. Judge Edwards in *American Library Ass'n v. FCC* recently voiced similar conclusions with more asperity: "Intervenor [Motion Picture Association of America] . . . argues that any injury suffered by the Libraries following the FCC's implementation of the broadcast flag regulations will be 'due solely to the independent . . . decisions of third parties not before this Court.' . . . This is a specious argument." 406 F.3d 689, 697 (D.C. Cir. 2005) (citations omitted).

[197] *Ctr. for Democracy & Tech.*, 337 F. Supp. 2d at 655.

[198] *Id.* at 657-58 (citations omitted).

[199] *Id.* at 658. Pennsylvania declined to appeal the determination in *Center for Democracy & Technology*. We may see more discussion of these issues in the litigation around the Utah statute that sought to invoke a similar approach to block material that is "harm-

Similar problems attend governmental efforts to interfere with Internet communications by exerting pressure against other weak links in the chain of Internet communications. Professors Mann and Belzley have recently advanced proposals to exert leverage against websites by targeting payment intermediaries, and these proposals raise substantial concerns of collateral impact.[200] On one hand, there can be no First Amendment objection to a prohibition on payment for contraband pirated movies or child pornography. On the other hand, an enterprise that distributes legal content should not be subject to a commercial death sentence on the ground that it once violated the law.[201] This is particularly so if the death sentence is handed down by executive fiat rather than judicial determination; an agreement with a payment intermediary to prevent payment to "wrongdoers" constitutes at least as effective a prior restraint as the issuance of a list of "immoral" books. Just as the former cannot be issued without the "First Amendment due process" required by *Freedman v. Maryland*, the latter must be hedged with similar safeguards.[202] So too, the emerging tactic of law enforcement officials in targeting ISPs with "requests" that they take down websites that officials find problematic

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ful to minors." *See* Stipulated Order, The King's English v. Shurtleff, No. 2:05CV00485 DB (D. Utah Aug. 25, 2006), *available at* http://www.cdt.org/speech/20060829utah.pdf; Complaint at 3, *The King's English*, No. 2:05CV00485 DB (D. Utah June 9, 2005), *available at* http://www.cdt.org/speech/utahwebblock/20050609hb260complaint.pdf.

[200] Mann & Belzley, *supra* note 8, at 271-72, 289-90, 307 (expressing enthusiasm for the use of "hot lists" to prohibit payment intermediaries from doing business with enterprises that engage in activities the state seeks to suppress; giving accounts of efforts of the New York Attorney General to prevent payment intermediaries from handling gambling sites); *cf.* Mann, *supra* note 8, at 716 ("[C]onsumers should not lose the protections they have under conventional systems . . . . [despite] [t]he need to allow experimentation . . . .").

[201] *See* Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (per curiam) (finding unconstitutional a statute that authorized courts to issue orders prohibiting the future exhibition of film by a theater that had shown an obscene film in the past); Near v. Minnesota, 283 U.S. 697, 722-23 (1931) (striking down a statute that allowed the court to prohibit future publication by periodicals that had published unprotected libel in the past).

The Court in *Alexander v. United States*, 509 U.S. 544, 551 (1993), approved the forfeiture of stock imposed on a dealer of obscene publications, but did not interfere in future activities, distinguishing *Near* and *Vance* on the ground that "[Alexander] is perfectly free to open an adult bookstore or otherwise engage in the production and distribution of erotic materials; he just cannot finance these enterprises with assets derived from his prior racketeering offenses." *See also* Arcara v. Cloud Books, Inc., 478 U.S. 697, 705-06 n.2 (1986) (distinguishing the closure order sought here, which "has nothing to do with any expressive conduct at all," from a prior restraint under *Near*).

[202] *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 71 (1963) (finding unconstitutional the "complete suppression of . . . listed publications" by informal notice).

raises, in modern form, the threats to free expression implicit in any mechanism of prior restraint.[203]

b. *"Less Intrusive Alternatives"*

Even if they are not unconstitutionally overbroad, efforts to recruit intermediaries as proxy censors should generally be viewed as "more intrusive" for First Amendment purposes than efforts to regulate speakers or listeners directly. Just as First Amendment doctrine treats the availability of sanctions against conduct as a basis for invalidating prohibition of speech enabling such conduct,[204] and the possibility of subsequent prosecution as a reason to avoid prior restraint,[205] proxy censorship should be permissible only as a last resort.

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[203] *Zieper v. Metzinger*, 392 F. Supp. 2d 516 (S.D.N.Y. 2005), represents a paradigmatic case of improper government action to leverage the weakness of intermediaries. When law enforcement officers were unsuccessful in their efforts to persuade a website owner to take down a wholly protected imaginary video documentary of preparations for a military coup targeted at the Times Square celebration of the millennium, federal agents approached the intermediaries who hosted the website, informing the host "that they wanted the video blocked because they were concerned that it could be 'inciting a riot,'" and that "'[w]e've contacted your upstream provider, GTE. And if you don't pull the site down, they will.'" *Id.* at 523, 531. When the web host took down the website, the author of the website sued the federal agents. The trial court found a violation of the First Amendment had been made out for summary judgment purposes, but granted immunity to the FBI agents on the ground that they had been advised by their attorneys of the propriety of their actions under the FBI's "good corporate citizenship" program. *Id.* at 538. The conclusion of the district court that the FBI's actions are constitutionally dubious seems well grounded; the conclusion that they may be privileged by "qualified immunity" seems to ignore the heritage of *Bantam Books* and the learning of the McCarthy era that "subtle interferences" no less than direct prosecutions are subject to First Amendment scrutiny. *See, e.g.*, discussion of Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), *supra* note 102.

[204] *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 245 (2002) ("'Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech.'" (quoting Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 689 (1959) (quoting Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring)))); Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 800 (1988) (striking down a broad prophylactic disclosure requirement that infringed on First Amendment protections against compelled speech where "the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements"); Schneider v. New Jersey (Town of Irvington), 308 U.S. 147, 162 (1939) ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.").

[205] *See, e.g.*, Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975) ("[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.").

Theories of the First Amendment converge on this conclusion. Protection of autonomy is a clear part of the constitutional grounding of free expression; the Court regularly proclaims that the "heart of the First Amendment" is the ideal that "each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."[206] Vesting authority over expression or receipt of messages with parties other than the speaker or hearer increases the intrusiveness of government regulation, for it moves that decision away from the parties whose autonomy is centrally at issue.

On a second front, the system of free expression serves the political goal of minimizing the risk that government will "excis[e] certain ideas or viewpoints from the public dialogue."[207] Sanctions exerted against those who are least likely to resist risk such excision more than authority exerted over those whose commitment to speech is more robust. And sanctions directed at intermediaries in a fashion that prevents them from alerting the end users,[208] or sanctions that impose criminal penalties (which are intrinsically impossible to capitalize into user fees), should be regarded as more intrusive still.

Nor should efforts to recruit the discretion of intermediaries into suppressing publicly disfavored speech find shelter under doctrines protecting the discretion of publishers and broadcasters. The Court has observed "that editors—newspaper or broadcast—can and do abuse this power is beyond doubt," but "[c]alculated risks of abuse are

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[206] Eldred v. Ashcroft, 537 U.S. 186, 220 (2003) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994)). A law that prohibits reading without official consent, like a law that prohibits speaking without consent, "constitutes a dramatic departure from our national heritage and constitutional tradition." Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 166 (2002).

[207] *Turner Broad. Sys.*, 512 U.S. at 642; *see also* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998) (noting that serious constitutional problems arise where governmental funding is "calculated to drive certain ideas or viewpoints from the marketplace" (quotation marks and citation omitted)); Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992) (rejecting content-based discrimination because of threat of deforming public dialogue); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (same).

[208] *See, e.g.*, Doe v. Gonzales (*Doe I*), 386 F. Supp. 2d 66, 70 (D. Conn 2005) (striking down the application of an order which prohibited disclosing that a person was being investigated by the FBI); Doe v. Ashcroft (*Doe II*), 334 F. Supp. 2d 471, 501-03 (S.D.N.Y. 2004) (observing that the order "coerces the reasonable recipient into immediate compliance" by prohibiting disclosure of "the issuance of the [order] to 'any person'"). *Doe I* was vacated and remanded, and *Doe II* dismissed as moot, by *Doe v. Gonzales*, 449 F.3d 415, (2d Cir. 2006).

taken in order to preserve higher values."[209] Those higher values inhere in institutions that can check government abuse, not institutions that undertake censorship at government behest.

In recent cases, the Court has tended to view efforts to suppress speech as constitutionally suspect where the government forgoes mechanisms allowing listener choice and instead imposes direct prohibitions on speech.[210] The Court is on solid ground in seeing mechanisms that locate decisions with the end user as less intrusive, and this insight is of particular import for regulation of intermediaries. Empowering users to filter is less intrusive than imposing obligations on intermediaries. A majority of the Court seemed to grasp this fact in *American Library Ass'n*: the likely overblocking by the mandated filters was seen as impermissible by the dissent, and Justice Kennedy's concurrence was premised on the proposition that end users could costlessly avoid the overblocking.[211]

D. *Safe Harbors and Clear Boundaries: The Danger of Liability Without Fault or Falsity*

1. The Doctrinal Heritage

The McCarthy era warped the political culture of the United States by raising the risks of political action.[212] Those who voiced controversial sentiments could find themselves subject to prosecution or discharge, or pinned by the "spotlight of pitiless publicity."[213] But un-

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[209] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673-74 (1998) (quoting CBS, Inc., v. Democratic Nat'l Comm., 412 U.S. 117, 124-25 (1973)).

[210] *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656, 667 (2004) (upholding an injunction against a statute prohibiting dissemination of images "harmful to minors" where the adoption of user-based filters was a less intrusive alternative); United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (requiring the less restrictive alternative of allowing subscribers to request blocking of particular programs); Reno v. ACLU, 521 U.S. 844, 877 (1997) (considering "*user-based* software" an effective method to allow "*parents* [to] prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate").

[211] United States v. Am. Library Ass'n, 539 U.S. 194, 215 (2003) (Kennedy, J., concurring) (arguing that adult users' access was not shown to be "burdened in any significant degree"); *see also* discussion *supra* notes 176-187 (evaluating the Court's "concern with the potential collateral damage wrought by regulation of internet intermediaries" in *American Library Ass'n*).

[212] *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 607 (1967) (citing scholarly findings that "the stifling effect on the academic mind from curtailing freedom of association in such manner is manifest").

[213] *See supra* note 89.

demonstrative association was dangerous as well. Connection with targets of government suspicion could precipitate intrusive investigation, and aid to the objects of prosecution could risk both civil and criminal sanctions. One of the pathologies of the McCarthy era, like the echoes of the McCarthyite techniques in the effort to suppress the civil rights movement in the South, was precisely the impact of such prospects on citizens not deeply committed to dissent. As the Court recognized, members of a group potentiate and enable each others' advocacy: "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[214] Conversely, as McCarthyite techniques induced the less-committed members of the polity to turn away, controversial advocates were left without shelter or resources, and each member of civil society examined her cohorts to assure that associates brought no danger of persecution.

In response to this experience, a cluster of First Amendment doctrines evolved to bar legal mechanisms particularly likely to deter the less committed from political speech and association. These doctrinal structures established safe harbors in which unheroic citizens could still feel free to participate in discourse, to associate, and to facilitate the discourse of others.

a. *First Amendment Skepticism of Strict and Vicarious Liability*

The earliest initiative came in *Wieman v. Updegraff*, where the Court invalidated a state statute requiring that public employees disavow being "affiliated directly or indirectly" with any organization listed as subversive by the United States Attorney General.[215] The statute was held unconstitutional because "the fact of association alone determines disloyalty and disqualification" regardless of "whether association existed innocently or knowingly"; the prospect of sanction-

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[214] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958); s*ee also id.* at 460-61 ("[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."); Bhd. of R.R. Trainmen v. Virginia, 377 U.S. 1, 6 (1964) (recognizing "[t]he right of members to consult with each other in a fraternal organization"); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 544 (1963) ("'[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.'" (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. at 460)); NAACP v. Button, 371 U.S. 415, 437-38 (1963) (striking down prohibition of "cooperative activity that would make advocacy of litigation meaningful").

[215] 344 U.S. 183, 186 (1952) (quotation marks omitted).

ing innocent association threatened unacceptably "to stifle the flow of democratic expression and controversy at one of its chief sources."[216]

As the tide of McCarthyism receded, the Court responded more fully to the chilling effect of guilt by association, erecting a margin of safety for those who engage in political organization. In *Scales v. United States*, the Court interpreted the prohibition of membership in the Communist Party in light of constitutional mandates by limiting it to "only 'active' members having also a guilty knowledge and intent."[217] The Court acknowledged a concern that "the mere existence of such an enactment tends to inhibit the exercise of constitutionally protected rights, in that it engenders an unhealthy fear that one may find himself unwittingly embroiled in criminal liability," but stated that the intent requirement met the concern: "The clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy. There must be clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.'"[218]

Subsequent cases viewed *Scales* as the foundation of a constitutional principle establishing a safe harbor for political association not specifically intended to accomplish unlawful ends.[219] A solid line of

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[216] *Id.* at 191; s*ee also* Sweezy v. New Hampshire, 354 U.S. 234, 248 (1957) (striking down a contempt citation for refusal to answer political questions, where "as in *Wieman*, the program for the rooting out of subversion is drawn without regard to the presence or absence of guilty knowledge in those affected").

Wieman, like several of the other cases in this line, was nominally a due process case, but as Henry Monaghan noted a generation ago, issues of substance and procedure intertwine with particular tenacity in the area of free expression. Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 518 (1970) ("[C]ourts have lately come to realize that procedural guarantees play an equally large role in protecting freedom of speech; indeed, they 'assume an importance fully as great as the validity of the substantive rule of law to be applied.'" (quoting Speiser v. Randall, 357 U.S. 513, 520 (1958))).

[217] 367 U.S. 203, 228 (1961).

[218] *Id.* at 229 (quoting Noto v. United States, 367 U.S. 290, 299-300 (1961)); s*ee also Noto*, 367 U.S. at 299-300 (requiring proof beyond a reasonable doubt "for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes").

[219] *See, e.g.*, Healy v. James, 408 U.S. 169, 186 (1972) ("The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims."); Keyishian v. Bd. of Regents, 385 U.S. 589, 608 (1967) ("[L]egislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization . . . violates constitutional limitations."); United States v. Robel, 389 U.S. 258, 265 (1967) (invalidating a statute forbidding members of the Communist Party from working in

precedents established the proposition that "[t]he First Amendment . . . restricts the ability of the State to impose liability on an individual solely because of his association with another."[220] It is only knowing and intentional alignment with illicit undertakings that can constitute the predicate for liability, and the intent must be affirmatively established by appropriate evidence. Citizens have no obligation to monitor, censor, or inform on their associates.

The threat posed by strict liability was not limited to problems of association. Just as strict liability for "subversive" association threatened to turn citizens into overzealous monitors of each others' patriotism, criminal or civil liability without fault for the communications of others risked generating a problematic corps of proxy censors. Constitutional skepticism of liability without fault thus took root as a broader First Amendment doctrine.

In *Smith v. California*, the Court reviewed a Los Angeles ordinance that imposed strict criminal liability on booksellers who possessed "obscene or indecent" books or writings.[221] The Court acknowledged the legitimacy of strict liability for possession of contraband in other circumstances, but nonetheless observed that there are "legal devices and doctrines in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression."[222] The *Smith* Court noted the bookseller's likely "timidity in the face of his absolute criminal liability"[223] and held the ordinance's punishment of booksellers without knowledge or fault to be unconstitutionally likely to encourage them to act as proxy censors:

> [I]f the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books

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defense facilities, finding that "guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government" is impermissible); Elfbrandt v. Russell, 384 U.S. 11, 16 (1966) (striking an oath binding state employees from becoming members of the Communist Party, since "proscription of mere knowing membership, without any showing of 'specific intent,' would run afoul of the Constitution"); Aptheker v. Sec'y of State, 378 U.S. 500, 510 (1964) (invalidating the statutory denial of passports to members of Communist Party, because "'[i]ndiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power'" (quoting *Wieman*, 344 U.S. at 191)).

[220] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918-19 (1982) (reversing a grant of damages because there lacked a showing of conscious affiliation with unlawful activity).

[221] 361 U.S. 147, 148 (1959).

[222] *Id.* at 150-51.

[223] *Id.* at 154.

> he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.[224]

In the last half century, *Smith* has regularly served as the basis for decisions rejecting the imposition of liability without fault on intermediaries who facilitate the transmission of erotic materials from speaker to listener.[225] These decisions are congruent with the protections for publishers against liability for defamation without fault,[226] and the greater protection provided to critics of public figures and public officials by *New York Times Co. v. Sullivan* and its progeny.[227]

b. *Transmission of Truth and Constitutional Privilege*

In the last generation the Court has developed, as well, a second safe harbor based not on the mental state of the speaker but on the content of the speech: regardless of other doctrinal analysis, "[a]s a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'"[228] To pierce

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[224] *Id.* at 153.

[225] *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) (interpreting a child pornography statute in light of *Smith* to require knowledge of the age of the individuals pictured); New York v. Ferber, 458 U.S. 747, 765 (1982) ("As with obscenity laws, criminal responsibility [for child pornography] may not be imposed without some element of scienter on the part of the defendant."); Manual Enters., Inc. v. Day, 370 U.S. 478, 492 (1962) (rejecting "the power of the Post Office to bar a magazine from the mails, if exercised without proof of the publisher's knowledge of the character of the advertisements included in the magazine"); *cf.* Ginsberg v. New York, 390 U.S. 629, 644 (1968) (approving an obscenity statute where "'[i]t is not innocent but *calculated* purveyance of filth which is exorcized'" (quoting People v. Finkelstein, 174 N.E.2d 470, 471 (1961))).

[226] *See, e.g.*, Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990) ("[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection."); Time, Inc. v. Firestone, 424 U.S. 448, 463 (1976) (noting the distinction between "journalistic negligence" and defamation) (quotation marks omitted); Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (forbidding states from imposing defamation liability without fault).

[227] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (requiring deliberate falsehood or reckless disregard); Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) (adopting the same standard for intentional infliction of emotional distress); Time, Inc. v. Hill, 385 U.S. 374, 390 (1967) (applying the same standard to "false light" privacy actions).

[228] Bartnicki v. Vopper, 532 U.S. 514, 527 (2001) (citations omitted); s*ee also* Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989) ("[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . ."); Smith v.

the privilege, plaintiffs or prosecutors generally bear the burden of demonstrating falsity.[229] Even where the reputation of private figures is at issue, in defamation actions:

> [P]lacement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result. Because such a "chilling" effect would be antithetical to the First Amendment's protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. To do otherwise could only result in a deterrence of speech which the Constitution makes free.[230]

The analysis applies with particular force to media that act as intermediaries for the information provided by others; constitutional privilege limits the ability of the state to co-opt intermediaries into the role of censoring true information they transmit. In *Bartnicki v. Vopper*, the Court reviewed an effort to impose liability on a radio commentator who broadcast portions of an illegally intercepted cell phone conversation among union leaders discussing the need to "blow off [the] front porches" of public officials negotiating with the union.[231] Notwithstanding a statute that imposed liability on any person who disclosed information they "'kn[ew] or ha[d] reason to know'"[232] was the result of illegal interception, the Court held that the commentator was constitutionally immune from suit for compensatory, statutory, or punitive damages. The statute was said to be "a content-neutral law of general applicability," but was still "a regulation of pure speech."[233] Invoking the general presumption against sanctioning publication of truthful information, the Court held that the act of

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Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979) (reversing a conviction for publishing the name of a defendant in a juvenile proceeding); Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 829 (1978) (reversing a conviction for the publication of an article about a pending confidential inquiry by the Virginia Judicial Inquiry and Review Commission); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975) (reversing the award of damages for invasion of privacy against a publisher of the name of a rape victim disclosed in court records); N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (refusing to enjoin the publication of purloined Pentagon Papers).

[229] The Court regularly phrases the privilege as one that can be overcome by overriding public necessity, but equally regularly finds the necessity absent.

[230] Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) (citation and quotation marks omitted).

[231] 532 U.S. 514, 519 (2001).

[232] *Id.* at 520 (citation omitted).

[233] *Id.* at 526.

publishing the information provided by the anonymous interceptor was constitutionally privileged, declaring that "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it."[234]

2. Fault, Falsity, and the Problem of Proxy Censorship of the Internet

The presumptions against liability without fault and in favor of a privilege for truthful communications provide useful starting points to analyze a series of proposed and actual efforts by government to co-opt Internet intermediaries as proxy censors. Three areas of current practice raise these issues in particularly pressing fashion: the controversy around vicarious liability for copyright violation, efforts to enlist intermediaries in the "War on Terror," and the role of collaborative authorship in weaving the World Wide Web. In each, there is reason to believe that draconian threats of liability would as effectively "tend to restrict the public's access to [communications] which the State could not constitutionally suppress directly"[235] when deployed against Internet intermediaries as when deployed against fellow travelers, hard copy publishers, and booksellers. In considering contemporary efforts to bring legal pressure to bear on vulnerable "points of con-

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[234] *Id.* at 529; *see also id.* at 535 ("[A] stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."). *But cf. id.* at 533 (leaving open "disclosures of . . . information of purely private concern"); *id.* at 535-36 (Breyer, J., concurring) (emphasizing the narrowness of the holding, the "unusual public concern" of the speech at issue, and the necessity of balancing "speech-restricting and speech-enhancing consequences").

The Court did not directly distinguish *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), but presumably such a distinction could rest either on the proposition that the regulation in *Bartnicki* was "a regulation of pure speech," *Bartnicki*, 532 U.S. at 526, or that, unlike the promissory estoppel approved in *Cowles Media*, the "State itself defined the content of publications that would trigger liability" and the challenged statute imposed more than the "incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them," *Cowles Media*, 501 U.S. at 670, 672. *Cf.* Doe v. GTE Corp., 347 F.3d 655, 659 (7th Cir. 2003) (rejecting the web hosting company's liability under a wiretap statue for the sale on a site it hosted of tapes obtained in violation of the federal wiretap statute, explaining that "[j]ust as the telephone company is not liable as an aider and abettor for tapes or narcotics sold by phone, and the Postal Service is not liable for tapes sold (and delivered) by mail, so a web host cannot be classified as an aider and abettor of criminal activities conducted through access to the Internet").

[235] Smith v. California, 361 U.S. 147, 154 (1959).

trol" on the Internet, therefore, we would do well to remember the safe harbors crafted in response to the McCarthy era.

a. *Vicarious Liability for Copyright Violation*

Although controversies raged a decade ago regarding the scope of liability of Internet intermediaries for defamation, section 230 of the Communications Decency Act (CDA)[236] has largely suppressed efforts to use defamation law as a lever to impel Internet intermediaries to act as proxy censors of allegedly libelous content.[237] Likewise, although the DMCA erects a system that can be manipulated to induce intermediaries to censor targeted works,[238] in form, at least, it provides protection against liability of many Internet intermediaries for unknowing contribution to copyright violations, and limits incentives for

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[236] 47 U.S.C. § 230 (2000).

[237] Numerous cases hold that various "information computer service[s]" qualify for immunity from defamation actions because they do not function as "information content provider[s]" within the meaning of the CDA. *See, e.g.*, Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003) (user-created content on an online dating site); Batzel v. Smith, 333 F.3d 1018, 1031-31 (9th Cir. 2003) (posting of a received email message); Green v. Am. Online, Inc., 318 F.3d 465, 471 (3d Cir. 2003) (chat room messages); Ben Ezra, Weinstein & Co. v. Am. Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000) (online posting of stock information); Zeran v. Am. Online, Inc., 129 F.3d 327, 327 (4th Cir. 1997) (online message-board postings); Optinrealbig.com, LLC v. Ironport Sys., 323 F. Supp. 2d 1037, 1046-47 (N.D. Cal. 2004) (online spam complaint business). *But cf.* Hy Cite Corp. v. Badbusinessbureau.com, 418 F. Supp. 2d 1142, 1148 (D. Ariz. 2005) (noting that immunity is not available to defendants who provide the allegedly wrongful content themselves); MCW, Inc. v. Badbusinessbureau.com, L.L.C., No. 3:02-CV-2727-G, 2004 U.S. Dist. LEXIS 6678, at *36 (N.D. Tex. Apr. 19, 2004) (refusing to extend immunity to a business that posted customer complaints that were disparaging to outside companies); Barrett v. Rosenthal, 9 Cal. Rptr. 3d 142, 152 (Cal. Ct. App. 2004), *review granted*, 87 P.3d 797 (Cal. 2004) (suggesting that distributor liability survived 47 U.S.C. § 230). See also *infra* note 274, noting cases recognizing immunity from statutory liability.

[238] A number of authors highlight the possibilities for manipulation. *See, e.g.*, Sonia K. Katyal, *Privacy vs. Piracy*, 7 YALE J.L. & TECH. 222, 281-89 (2004) (noting the efforts of the Recording Industry Association of America to compel an ISP to block privately stored content); Katyal, *supra* note 52, at 330-31 (noting the takedown and subpoena provisions that copyright owners may use as leverage against ISPs to effect the removal of infringing, third party material); Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 661-62 (2005) (citing examples of erroneous and potentially abusive takedown notices); *see also* Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1204 (N.D. Cal. 2004) (detailing the misuse of DMCA notice to suppress information).

intermediaries to take initiatives to censor material passing through their facilities.[239]

Still, efforts have proceeded apace to use threats of liability to enlist Internet intermediaries as proxy censors. The strategy has been most prominent in the attempts by content providers to impose vicarious copyright liability, which would not be barred by section 230, on intermediaries who provide novel mechanisms that can be used to facilitate the transfer of information over the Internet.

These attempts took place against the background of the rule in *Sony Corp. of America v. Universal City Studios, Inc.*,[240] which, as has been noted previously, considered the secondary copyright liability of manufacturers of videocassette recorders who opened up the opportunity for viewers to record and "time shift" programs broadcast on television. The *Sony* Court refused to impose the obligation on manufacturers to act as proxy censors. Rather, the Court held that liability was inappropriate since the equipment had "substantial noninfringing uses": among others, public television stations waived copyright entitlements and encouraged viewers to time shift their broadcasts. Vicarious liability would "frustrate the interests of broadcasters in reaching the portion of their audience that is available only through time-shifting."[241]

With the explosion of Internet use, content providers adopted the position that innovators who forged network mechanisms that could be used to share music should be liable for copyright violations that took place over their networks, notwithstanding the fact that some sharing was entirely legitimate. The first—and most notorious—case involved Napster, whose business model touted the possibility of providing an end run around the copyright laws. In *A&M Records, Inc. v.*

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[239] 17 U.S.C. § 512(a)(2) (2000) (providing protection for "automatic" transmission of material); *id.* § 512(c) (providing the "storage" safe harbor); *id.* § 512(d) (providing the "information tools" safe harbor).

Section 512(i), however, also requires that intermediaries "accommodate[] . . . standard technical measures" used by copyright holders to protect their interests, and that they adopt and "reasonably implement" a policy of "termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers." At least one court has held that configuration of a system that makes identification of repeat infringers impossible precludes recognition of the DMCA safe harbor. *In re* Aimster Copyright Litig., 252 F. Supp. 2d 634, 659 (N.D. Ill. 2002) ("Adopting a repeat infringer policy and then purposely eviscerating any hope that such a policy could ever be carried out is not an 'implementation' as required by [section] 512(i).").

[240] 464 U.S. 917 (1984).

[241] *Id.* at 446.

Napster, Inc., the Ninth Circuit imposed a duty on Napster to exercise control over its proprietary peer-to-peer network to censor its system users; the court distinguished *Sony* because the ongoing central indexing function gave Napster, unlike Sony, "actual, specific knowledge of direct infringement" by users of its system.[242] The *Napster* court reversed, as overbroad, the lower court's requirement that Napster ensure "that no 'copying, downloading, uploading, transmitting, or distributing' of plaintiffs' works occur on the system," but observed that "Napster . . . bears the burden of policing the system within the limits of the system."[243]

When a new set of technologists began to configure peer-to-peer systems whose "limits" avoided either the knowledge or central control that grounded liability for Napster, the recording industry again invoked theories of secondary copyright liability. In the *Aimster* litigation, reviewing one of these second generation decentralized and anonymous peer-to-peer file sharing systems, the district court issued an injunction requiring "measures to ensure that the Aimster System and Service prevents any and all copying, downloading, distributing, uploading, linking to, or transmitting of Plaintiffs' Copyrighted Works."[244] The Seventh Circuit affirmed. Judge Richard Posner commented that "[t]he fact that copyrighted materials might sometimes be shared between users of such a system . . . would not make the firm a contributory infringer."[245] However, the plaintiffs had demonstrated that widespread, infringing file sharing had been facilitated by the network and was apparently encouraged by the defendants, and the defendants had adduced "no evidence whatsoever . . . that Aimster is *actually* used for any of the stated non-infringing purposes."[246] Moreover, the "ostrich-like refusal to discover the extent to which its system was being used to infringe copyright," combined with the deliberate design of a system that made knowledge impossible, was tantamount to guilty knowledge, and therefore sufficient to impose liability for contribution to copyright infringement.[247] In dictum, Judge

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[242] 239 F.3d 1004, 1020 (9th Cir. 2001); c*f.* Ellison v. Robertson, 357 F.3d 1072, 1077 (9th Cir. 2004) (holding that a jury could conclude that "AOL had reason to know of potentially infringing activity occurring within its USENET network").

[243] *Napster*, 239 F.3d at 1027.

[244] *In re* Aimster Copyright Litig., No. 01-6-8933, 2002 U.S. Dist. LEXIS 21453, at *2 (N.D. Ill. Oct. 30, 2002).

[245] *In re* Aimster Copyright Litig., 334 F.3d 643, 647 (7th Cir. 2003) (noting that otherwise AOL could be liable for its Instant Message service).

[246] *Id.* at 653 (quotation marks omitted).

[247] *Id.* at 655.

Posner went further, suggesting that the *Sony* safe harbor for "substantial noninfringing uses" would be unavailable whenever censorship mechanisms would not be "disproportionately costly" to install.[248]

The Supreme Court denied certiorari in *Aimster*, but turned to the issue in *MGM Studios, Inc. v. Grokster, Ltd.*,[249] a case involving two other peer-to-peer networks that billed themselves as successors to Napster and whose architecture, like that of *Aimster*, precluded centralized knowledge and control by the operators. Relying on Judge Posner's opinion in *Aimster*, the entertainment industry asked the Court to overturn the holding in *Sony* and impose vicarious liability for distributing software that facilitated copyright violations where the software was used "principally for infringement" and the infringing use "can be readily blocked."[250] Other amici advanced the proposition that just as vicarious liability is imposed elsewhere in the law upon landlords, bartenders, and the voluntary bailors of motor vehicles to encourage them to control other actors, vicarious liability should be imposed on the operators of systems that facilitate copyright violation in order to "give manufacturers . . . incentive to deter infringement"[251] where it would be technically possible to interpose software to block infringing uses. Nothing in these lines of reasoning, in principle, limited the potential of indirect liability to software distributors; the obligation to "readily block" might be equally applicable to ISPs, search engines, or other Internet intermediaries.

One group of three Justices was attracted to the position of the entertainment industry,[252] while another faction of three Justices sought to retain the *Sony* safe harbor untouched.[253] The entire Court, however, joined in an opinion by Justice Souter that pretermitted the

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[248] *Id.* at 647, 653.

[249] 125 S. Ct. 2764 (2005).

[250] Brief of Petitioner at 32-33, *Grokster*, 125 S. Ct. 2764 (No. 04-480).

[251] Brief of Amici Curiae Kenneth J. Arrow et al. in Support of Petitioners at 3-4, *Grokster*, 125 S. Ct. 2764 (No. 04-480). These amici further reasoned:

> Bars sometimes are held liable when bartenders serve alcoholic beverages to patrons who later harm others while driving drunk. A motor vehicle owner can be held to account if a driver to whom he loans his car ends up causing an accident. Landlords are sometimes deemed responsible if they take inadequate precautions against criminal activity that in turn harms tenants.

Id.

[252] *Grokster*, 125 S. Ct. at 2783 (Ginsburg, J., concurring, joined by Rehnquist, C.J., and Kennedy, J.).

[253] *Id.* at 2787 (Breyer, J., concurring, joined by Stevens and O'Connor, JJ.).

exact scope of the defense of "substantial noninfringing uses" and the duty to prevent copyright violations. The Court read *Sony* as addressing only the degree to which "contributory" copyright liability could be based on the distribution of a product.[254] Such "contributory" liability is premised on an intent to induce a copyright violation, and the Court read *Sony* to preclude "imputing culpable intent as a matter of law from the characteristics or uses of a distributed product," but to permit liability for third party copyright violations based on "evidence of intent if there is such evidence . . . as shown by clear expression or other affirmative steps taken to foster infringement, [making the distributor] liable for the resulting acts of infringement by third parties."[255] The opinion cautioned, however, that "mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability."[256] Reviewing the evidence of the defendants' practices, the Court found that the defendants each "clearly voiced the objective that recipients use [their free software] to download copyrighted works, and each took active steps to encourage infringement."[257]

Some commentators have viewed this focus on purpose as a misstep, avoiding as it does judicial evaluation of competing economic and technological effects.[258] However, the lessons of the McCarthy era support the limitation of intermediary liability to cases of purposeful inducement. Like the presumption against vicarious liability for communicative torts and the protection against sanctions for innocent association, a requirement of a showing of purposeful inducement erects a safe harbor for those who innocently facilitate the speech of others, and stems their inclination to engage in prophylactic censorship.

When one recalls the fragility of intermediary commitment to free speech, and the dangers of censorship by proxy, the argument that Internet intermediaries should be subjected to vicarious liability on the ground that tavernkeepers have similar liability rings more than a

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[254] *Id.* at 2776 (majority opinion) ("One infringes contributorily by intentionally inducing or encouraging direct infringement . . . and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.") (citations omitted).

[255] *Id.* at 2779-80.

[256] *Id.* at 2780.

[257] *Id.* at 2772.

[258] *See, e.g.*, Tim Wu, *The Copyright Paradox*, 2005 SUP. CT. REV. 229, 230 (arguing that the Court failed to examine the "welfarist" perspective, which calls for "a disciplined focus on questions of industry economics and consumer, or user, welfare").

little hollow. The easiest response to the threat of vicarious liability is to remove the risk by avoiding the activities that bring the threat of suit. If a bartender sells a bit less booze to a sober customer, society suffers relatively little. On the other hand, if Internet intermediaries erect technological barriers that filter out legitimate communication, they have imposed exactly the censorship the government is constitutionally prohibited from sanctioning directly.[259] The Court is properly wary of mandating a control mechanism that can be so easily diverted to censorial purposes.[260]

b. *Material Support, the "War on Terror," and the Internet*

A second set of issues regarding vicarious liability of Internet intermediaries arises out of efforts to disrupt "terrorist networks" and their supporters. Current regulations require financial intermediaries to deny services to individuals alleged to associate with terrorist networks, and require nonprofit organizations to assure that they neither employ nor make funds available to organizations on terrorism watch lists.[261] Internet intermediaries present obvious targets for a similar

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[259] The issue arises not only from the temptation of peer-to-peer networks to install overzealous filters to block transmission within their network, but also from the inclination of other networks to block access to peer-to-peer mechanisms out of a fear of associating with copyright infringers.

[260] In this dimension, *Grokster*'s result is less than ideal. The opinion emphasizes that "in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement." *Grokster*, 125 S. Ct. at 2781 n.12 (2005). At one level it establishes a safe harbor for devices (and services) capable of substantial noninfringing uses, but, as Wu points out, other parts of the opinion suggest that a "dual use technology" reduces its likelihood of being classified as an illegal inducement by adopting a design that facilitates proxy censorship. Wu, *supra* note 258, at 247. If courts adopt something like a per se rule that filtering devices immunize against secondary liability, the experience with safe harbor provisions of the DMCA suggests that companies may view filtering as effectively mandatory. *See, e.g.*, Ed Oswald, *BitTorrent, Hollywood Reach Piracy Deal*, BETA NEWS, Nov. 22, 2005, http://www.betanews.com/article/BitTorrent_Hollywood_Reach_Piracy_Deal/1132701192 (reporting that the creator of a popular file-storing software company agreed to preclude his website from locating allegedly pirated films).

[261] *See* DAY, BERRY, & HOWARD FOUND., INC., HANDBOOK ON COUNTER-TERRORISM MEASURES: WHAT U.S. NONPROFITS AND GRANTMAKERS NEED TO KNOW (2004), *available at* http://www.cof.org/files/Documents/Publications/2004/CounterTerrorismHandbook.pdf (discussing specific provisions of Executive Order 13224, the USA PATRIOT Act, and the U.S. Tax Code that make U.S. nonprofits and grant makers responsible for ensuring that their funding or activities do not assist terrorist networks); s*ee also* Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment at 1, ACLU v. Office of Personnel Mgmt., No. 1:04cv01958 EGS (D.D.C. Feb. 7, 2005), *available at* http://

effort by the U.S. government to enlist a corps of strategically placed collaborators into the "War on Terror."

The most likely tool of recruitment currently at hand resides in the "material support" statutes, enhanced after the attacks of September 11, 2001, which impose criminal liability upon anyone who "knowingly provides material support or resources" to an organization officially designated as a "foreign terrorist organization."[262] "Material support," in turn, is defined to include "any property, tangible or intangible, or service, including . . . training, expert advice or assistance . . . communications equipment, [or] facilities."[263]

At the extreme, it is possible to imagine a prosecution for failing to filter and block an IP packet directed from or to a website affiliated with a proscribed organization, on the theory that transmitting the packet "provides" a "service," "communications equipment," or a "facility." University of California administrators, indeed, expressed concern about liability for providing a hyperlink on a hosted website to the website of a proscribed organization, on the theory that the link constitutes "communications equipment" or "facilities."[264] Federal prosecutors have not, to my knowledge, gone this far, although the full extent of covert interaction between federal antiterrorist operatives and communications providers is as yet unrevealed.[265] However,

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www.ombwatch.org/npa/CFCMtnDismiss.pdf (stating that in 2004 private organizations wishing to receive contributions through the Combined Federal Campaign were required to certify that "they did not knowingly employ individuals or contribute funds to organizations found on [certain] terrorist-related lists" (quotation marks omitted)); Press Release, ACLU, ACLU and Diverse Coalition of National Non-Profits Win Major Victory in Challenge to Misguided CFC Government Watch List and Contribution Policies (Nov. 9, 2005), http://www.aclu.org/natsec/emergpowers/21264prs20051109.html (referring to the Office of Personnel Management's final regulation releasing private organizations from the requirement to check terrorist watch lists).

[262] 18 U.S.C.A. § 2339B(a)(1) (2006).

[263] *Id.* § 2339A(b)(1).

[264] *See* Declan McCullagh, *University Backs Down on Link Ban*, CNET NEWS.COM, Oct. 8, 2002, http://news.com.com/2100-1023-961297.html, (reporting that a year after the attacks of September 11, the administration of the University of California at San Diego decided to forbid a student website from linking to the website of the Revolutionary Armed Forces of Colombia for fear that this might be construed as "providing 'material support,'" but relented after protests).

[265] *See, e.g.*, Eric Lichtblau & James Risen, *Spy Agency Mined Vast Data Trove, Officials Report*, N.Y. TIMES, Dec. 24, 2005, at A1 (reporting that telecommunications companies "have been storing information on calling patterns and giving it to the federal government to aid in tracking possible terrorists"); Shane Harris & Tim Naftali, *Tinker, Tailor, Miner, Spy: Why the NSA's Snooping is Unprecedented in Scale and Scope*, SLATE, Jan. 3, 2006, http://www.slate.com/id/2133564 (describing the cooperation between pri-

courts have speculated that under the "material support" statutes "a cab driver could be guilty for giving a [foreign terrorist organization] member a ride to the UN," while a host could be liable for "loaning the member a cell phone for use during the stay, or allowing the member to use the fax machine or laptop computer in preparing [a] petition."[266]

Federal prosecutors have done more than speculate. They have advanced the theory that making a telephone call to a foreign terrorist provides "material support" in "providing" the "facilities" of the caller's telephone.[267] Moreover, the Justice Department undertook an unsuccessful seven-week-long trial under the "material support" statutes to prosecute a graduate student in computer science who maintained websites for Islamic charities, which, along with calls for peace and dialogue and other religious topics, permitted the posting of jihadist propaganda and links to Hamas websites. The government's theory was that the defendant had provided "expert advice or assistance" to foreign terrorist organizations.[268]

If unrestrained by First Amendment doctrine, the "material support" statutes, or other similar criminal prohibitions that might be adopted, will threaten to recruit a federally conscripted corps of censors. Webmasters, site owners, or technicians could find themselves the subjects of criminal prosecution for facilitating the transmission of any message originating with federally proscribed organizations. A risk-averse Internet intermediary would not need to descend into paranoia to conclude that the most prudent course would be to proactively censor messages or links that might prove problematic, and to

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vate telecommunications companies and federal authorities in providing access to vast amounts of communications data to the NSA).

[266] United States v. Al-Arian, 308 F. Supp. 2d 1322, 1337-38 & n.31 (M.D. Fla. 2004); *see also* United States v. Al-Arian, 329 F. Supp. 2d 1294, 1300 (M.D. Fla. 2004) (discussing how "criminal liability and punishment for conduct are intertwined with the criminal conduct of others").

[267] United States v. Sattar, 272 F. Supp. 2d 348, 358 (S.D.N.Y. 2003) (noting that the government argued that "mere use of one's telephone" and "using the conference call feature on a person's phone" constituted material support).

[268] Richard B. Schmitt, *Acquittal in Internet Terrorism Case Is a Defeat for Patriot Act* L.A. TIMES, June 11, 2004, at A20 (quotation marks omitted); *see also* Schmitt, *supra* note 46, at A25 ("The government argues that the [student's] services were rendered as part of a plot to raise money and recruit foot soldiers for terrorist missions . . . ."); Fick, *Trial Pits Free Speech vs. Terror*, *supra* note 46, at A5 ("[Prosecutors] allege [that the student] knew his actions would bring in donations and recruits for groups associated with terrorist organizations . . . .").

respond to official "requests" with alacrity. Here again, the legacy of the McCarthy era can provide guidance.

Just as the Court imposed a requirement of knowing alignment with illicit purposes before allowing red hunters and race baiters to disrupt networks of political support and participation in the aftermath of the McCarthy era, First Amendment doctrine should be read at a minimum to provide similar protection to those who innocently associate with illicit actors or provide links in the chain of communication to them over the Internet. Some statutes and common law doctrines deployed in the "War on Terror" already incorporate these limits.[269] However, where positive law lacks such limits, the doctrines rooted in the memory of the McCarthy era counsel that protection must be provided for intermediaries who facilitate public discourse.[270]

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[269] *See, e.g.*, 18 U.S.C. § 842(p)(2) (2000) (prohibiting the "distribution of information relative to [weapons]" with the intent or knowledge that such information will be used "in furtherance of an activity that constitutes a Federal crime of violence"); *id.* § 2339A (prohibiting the provision of "material support or resources" with the intent or knowledge that they are to be used illicitly); Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1028 (7th Cir. 2002) (discussing the definition of civil aiding and abetting liability under 18 U.S.C. §§ 2331-2333).

[270] For cases requiring that "material support" statutes such as 18 U.S.C.A. § 2339 be read to include a specific intent requirement, see *Al-Arian*, 308 F. Supp. 2d at 1337 (concluding that "material support" statutes should not be interpreted to capture those who unknowingly support a foreign terrorist organization without the intent to encourage unlawful activity); United States v. Sattar, 314 F. Supp. 2d 279, 296 (S.D.N.Y. 2004) (same); *cf.* Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382, 400 (9th Cir. 2003); Humanitarian Law Project v. Gonzales, 380 F. Supp. 2d 1134, 1144 (C.D. Cal. 2005); Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185, 1200 (C.D. Cal. 2004); *Sattar*, 272 F. Supp. 2d at 358.

A number of courts have rejected First Amendment limits on the ground that the McCarthy-era cases protect only "association" rather than "action." *See, e.g.*, United States v. Hammoud, 381 F.3d 316, 329 (4th Cir. 2004), *vacated*, 543 U.S. 1097 (asserting that § 2339B does not suppress free expression, that "Hammoud is free to advocate in favor of Hezbollah or its political objectives," and that only material conduct is criminalized); *Humanitarian Law Project*, 352 F.3d at 385 (affirming the previous decisions that § 2339B "did not violate the First Amendment by allegedly imposing guilt by association and restricting symbolic speech"); United States v. Marzook, 383 F. Supp. 2d 1056, 1062 (N.D. Ill. 2005) ("There is no constitutional right to provide . . . the resources with which the terrorists can purchase weapons and explosives.").

Given the Court's recognition of "association" as a form of "cooperative activity" that facilitates "effective advocacy," *see supra* note 214, this distinction seems to ignore the functions of the protection of association in the aftermath of the McCarthy era. A more responsive distinction could be rooted in recognition of a difference between donation of funds or weapons and the facilitation of a "medium for the communication of ideas," Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952), that constitutes the recognized material precondition to public dialogue. *See, e.g.*, Robert Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L.J. 713, 719 (2000) ("Pub-

c. *Safe Harbors Beyond Intent: Privilege for Weaving the Internet*

Publication on the Internet is increasingly a collaborative enterprise. The capacity to provide hyperlinks to other websites allows a burgeoning variety of communicators from blogs to mainstream media to build on the work of others. Links increase exponentially both the information conveyed by the sites' own content, and the exposure sites provide for the thought of others. Search engines weave webs of links custom tailored to the requests of individual users, and conversely provide access to websites to audiences worldwide. Yet every link carries with it a connection with the entire web of data to which the link leads, and it is all too easy to envision a legal environment that obligates intermediaries to cull that web for risky connections, precipitating proxy censorship. When an Internet intermediary confronts an aggressive prosecutor or private plaintiff, intent requirements may prove flimsy shields. As Justice Frankfurter observed during the McCarthy era, "[i]n times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed."[271] The pitfalls of relying on a fact finder's construction of motivation are no less in the twenty-first century.[272]

In traditional media, as we have previously observed, at least for intermediaries who are engaged in public discourse, the Court has established a safe harbor for transmission of truthful information. A newspaper cannot be sanctioned, without extraordinary justification, for publishing information of public importance though it was illegally obtained and disruptive of foreign policy or individual privacy.[273]

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lishing software in print is covered by the First Amendment because it forms part of public discourse and debate."); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1254 (1995) (arguing that communication must "embody a certain kind of relationship between speaker and audience" before it implicates the First Amendment); *cf.* Bartnicki v. Vopper, 532 U.S. 514, 534-35 (2001) (holding that the First Amendment protection of open debate on matters of public importance can, in some instances, outweigh privacy concerns); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913-15 (1982) (holding that the nonviolent, political aspects of a boycott serve the interests of self-government).

[271] Tenney v. Brandhove, 341 U.S. 367, 378 (1951).

[272] *See* Ashcroft v. ACLU, 542 U.S. 656, 670-71 (2004) ("Where a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial.").

[273] *Bartnicki*, 532 U.S. at 528 (discussing *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam), which "upheld the right of the press to publish information of great public concern obtained from documents stolen by a third party"); *see also supra* notes 230-237 (discussing the effects of another party's illegal conduct on First Amendment protection).

The same principle would presumably stand in the way of government officials who seek to punish a newspaper that published the URL of an Al Qaeda website, even if it could be proven that the newspaper harbored jihadist sympathies. The question is whether a different result should be obtained where an Internet intermediary provides links or directions to content that the government seeks to suppress.

The issue has been most directly addressed in the context of intellectual property disputes, in part because intellectual property actions are among the few legal liabilities that can pierce the effectively absolute immunity provided to most Internet intermediaries by section 230 of the Communications Decency Act (CDA).[274] The most aggressive and dubious imposition arose in the *Universal Studios* litigation surrounding the copyright decryption program DeCSS, where the trial court granted, and the Second Circuit upheld, an injunction barring the owners of the periodical website 2600.com from posting links to other websites that made the program available.[275] Where the links were posted for "the purpose of disseminating" the decryption program, both courts held, they constituted prohibited "trafficking" in "circumvention technologies" barred by the DMCA.[276]

The trial court in *Universal Studios* acknowledged that:

> Anything that would impose strict liability on a web site operator for the entire contents of any web site to which the operator linked . . . would raise grave constitutional concerns, as web site operators would be inhibited from linking for fear of exposure to liability. And it is equally clear that . . . some web site operators confronted with claims that they have posted circumvention technology falling within the statute may be more inclined to remove the allegedly offending link rather than test the issue in court. Moreover, web sites often contain a great variety of things, and

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[274] *See supra* note 239 (noting the provisions of the DMCA). The CDA exempts federal criminal laws, laws pertaining to intellectual property, and the Electronic Communications Privacy Act of 1986. 47 U.S.C. § 230(e)(1), (2), (4) (2000). Courts have read the protection against liability for content provided by others to preempt virtually every other cause of action. *E.g.*, Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122 (9th Cir. 2003) (invasion of privacy; negligence); Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1118-19 (W.D. Wash. 2004) (Consumer Protection Act, WASH. REV. CODE ANN. § 19.86.010-920 (West 1999), and tortious interference with business relationships); Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, No. CV 03-09386 PA(RZX), 2004 U.S. Dist. LEXIS 27987, at *8-9 (C.D. Cal. Sept. 30, 2004) (Federal Fair Housing Act, 42 U.S.C. § 3604(c) (2000)); Noah v. AOL Time Warner Inc., 261 F. Supp. 2d 532, 540-41 (E.D. Va. 2003) (Title II of Civil Rights Act of 1964, 42 U.S.C. § 2000a (2000)).

[275] Universal City Studios, Inc. v. Corley, 273 F.3d 429, 434-35 (2d Cir. 2001), *aff'g* Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

[276] 17 U.S.C. § 1201(a)(2), (b)(1) (2000).

> a ban on linking to a site that contains DeCSS amidst other content threatens to restrict communication of this information to an excessive degree.[277]

The trial court believed, however, that a limitation of liability to actions with a sufficient degree of culpability would immunize activity "except in cases in which the conduct in question has little or no redeeming constitutional value."[278] It therefore required clear and convincing evidence that the website owner "create[d] or maintain[ed] the link" to a website containing contraband technology "for the purpose of disseminating" it as a prerequisite to prohibition.[279]

The Second Circuit held that the trial court's test met First Amendment objections:

> If [contraband] materials are posted on one web site and other sites post hyperlinks to the first site, the materials are available for instantaneous worldwide distribution before any preventive measures can be effectively taken. This reality obliges courts considering First Amendment claims in the context of the pending case to choose between two unattractive alternatives: either tolerate some impairment of communication in order to permit Congress to prohibit decryption that may lawfully be prevented, or tolerate some decryption in order to avoid some impairment of communication. . . . [T]he District Court's injunction[] is consistent with the limitations of the First Amendment . . . .[280]

Notwithstanding their initial concern with free expression, the *Universal Studios* courts were seduced by the novelty of the Internet into forgetting the lessons of the McCarthy era. The lacunae are both practical and theoretical. First, as a practical matter, a bulwark that rests entirely on motivation risks erosion under determined assault. Courts faced with the task of discerning the intent of intermediaries may err, particularly where the scales of representation are less than evenly balanced. In the shadow of such errors, the possibility that intermediaries will be required to defend their intent in posting each link to websites that may harbor controversial content is likely to impel intermediaries to censorial excess. Second, as a matter of law, neither court gave adequate weight to the proposition that "[a]s a gen-

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[277] *Reimerdes*, 111 F. Supp. 2d at 340 (citations omitted).

[278] *Id.*

[279] *Id.* at 341. The actual prohibition was embodied in an injunction, which arguably imposes less censorial pressure than the threat of a damage action, since the judge administering the injunction is in a position to police inequitable bullying by the plaintiff.

[280] *Corley*, 273 F.3d at 457-58 (declining to determine whether the standard was constitutionally compelled).

eral matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'"[281] That proposition was emphatically reaffirmed in *Bartnicki*, a case handed down after briefing in the Second Circuit, and it reflects the insight that intermediaries are all too easily converted into proxy censors. Even ill-motivated speech has the capacity to contribute substantially to public debate,[282] and the fact that free public discourse risks the dissemination of "decryption that may lawfully be prevented" is usually not grounds for censorship. A doctrine that seeks to induce intermediaries to suppress true information on the basis of motivation alone is in substantial tension with the recognition of the need for a safe harbor for truth.

A somewhat more promising approach has looked to the degree of connection between the referring websites and the linked websites. Thus, in *Batesville Services, Inc. v. Funeral Depot, Inc.*, the court observed:

> [H]yperlinks are essential to the operation of the Internet for a host of legitimate purposes. The host of a website who establishes a link to another site that may be interesting to the host's website visitors does not undertake any general duty to police whether the linked sites contain any material infringing the copyrights of others."[283]

The court left the door open to liability where the defendant had "extensive involvement" in the copyright infringement on the linked website: where the defendant "actively secured control of the contents of the [linked] website and modified the website to use it for its own purposes."[284] A website owner who effectively adopts the illegal conduct of another as her own has less claim to immunity as a provider of information to the public. Similar analyses in other intellec-

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[281] Bartnicki v. Vopper, 532 U.S. 514, 527 (2001) (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979)).

[282] *See* Hustler Magazine v. Falwell, 485 U.S. 46, 54-56 (1988) (holding that political cartoons are protected speech, despite their "caustic nature"); *see, e.g.*, Nissan Motor Co. v. Nissan Computer Corp., 378 F.3d 1002, 1007 (9th Cir. 2004) (holding, in a trademark case, that "to enjoin Nissan Computer from providing visitors to nissan.com a link to sites with disparaging or negative commentary about Nissan Motor is . . . inconsistent with the First Amendment"); Ford Motor Co. v. 2600 Enters., 177 F. Supp. 2d 661, 662-64 (E.D. Mich. 2001) ("When an Internet user enters [fuckgeneralmotors.com] into a web browser, he is automatically linked to the official website of Plaintiff Ford Motor Company ('Ford'), which is located at 'ford.com'. . . . Trademark law does not permit Plaintiff to enjoin persons from linking to its homepage simply because it does not like the domain name or other content of the linking webpage.").

[283] No. 1:02-CV-01011-DFH-TAB, 2004 U.S. Dist. LEXIS 24336, at *33 (S.D. Ind. Nov. 10, 2004).

[284] *Id.* at *34-35.

tual property cases recognize the importance of allowing intermediaries to provide accurate conduits to unaffiliated websites without taking on liability for those linkages.[285]

A final approach arises in litigation surrounding search engines that facilitate access to both legally distributed and illegally infringing content. The leading cases seem to take the position that "'the fair use doctrine encompasses all claims of First Amendment in the copyright field.'"[286] If the "fair use" of the search engine *user* is at issue,

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[285] *See, e.g.*, Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828, 840 (C.D. Cal. 2006) (holding that a website only infringes a copyright where content is hosted on its own server, reasoning that "[t]o adopt the incorporation test [finding copyright infringement where a website provides online links to other websites] would cause a tremendous chilling effect on the core functionality of the web—its capacity to link, a vital feature of the internet that makes it accessible, creative, and valuable"); *id.* at 842 (reviewing cases holding that hyperlinking does not constitute copyright infringement); *id.* at 856 (holding that Google was not secondarily liable because its search functions did not "materially contribute" to copyright infringement by websites that displayed infringing content, notwithstanding some commercial links); Comcast of Ill. X, LLC v. Hightech Elecs., Inc., No. 03 C 3231, 2004 U.S. Dist. LEXIS 14619, at *8-9 (E.D. Ill. July 28, 2004) ("Defendants correctly point out that under Comcast's theory of increased internet traffic all major search engines such as Yahoo and Google could be named as defendants as well."); Bernstein v. JC Penney, Inc., No. 98-2958 R(Ex), 1998 U.S. Dist. LEXIS 19048, at *2 (C.D. Cal. Sept. 29, 1998) (granting defendant's motion to dismiss); c*f.* Parker v. Google, Inc., 422 F. Supp. 2d 492, 497, 499 (E.D. Pa. 2006) (finding that Google's linking and caching did "not include the necessary volitional element to constitute direct copyright infringement," and did not bear a sufficiently "direct relationship to the infringing acts" to constitute contributory infringement).

Similarly, in Lanham Act litigation, courts have invoked First Amendment concerns in refusing to impose liability on critical websites whose commercial connections lie at the end of a chain of hyperlinks. *See, e.g.*, Bosley Med. Inst., Inc. v. Kremer, 403 F.3d 672, 678 (9th Cir. 2005) ("This roundabout path to the advertising of others is too attenuated to render Kremer's site commercial."); Savannah Coll. of Art & Design, Inc. v. Houeix, 369 F. Supp. 2d 929, 946 (S.D. Ohio 2004) ("To arrive at the sites containing commercial content requires a process which is two steps removed from the initial decision . . . .").

[286] Arista Records, Inc. v. MP3Board, Inc., No. 00 Civ. 4660 (SHS), 2002 U.S. Dist. LEXIS 16165, at *37 (S.D.N.Y. Aug. 28, 2002) (quoting New Era Publ'ns Int'l v. Henry Holt & Co., 873 F.2d 576, 584 (2d Cir. 1989)); *see also* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1028 (9th Cir. 2001) ("First Amendment concerns in copyright are allayed by the presence of the fair use doctrine."); Religious Tech. Ctr. v. Netcom On-Line Commc'n. Servs., Inc., 923 F. Supp. 1231, 1258 (N.D. Cal. 1995) ("The doctrine of fair use already considers First Amendment concerns.").

At least one case has gone further. *See* Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1295 (D. Utah 1999) (ordering defendants to "remove from and not post on defendants' website, addresses to websites that defendants know, or have reason to know, contain the material alleged to infringe plaintiff's copyright" and rejecting First Amendment objections as inapplicable to copyright claims).

this approach seems clearly inadequate: to the extent that search engines must inquire into the use to which customers may put their links, it provides little in the way of protection for dissemination of truthful information. On the other hand, if the "fair use" inquiry goes to the nature of the service provided by the search engine *itself*, an investigation of the "purpose and character of the work" seems like a promising avenue of protecting pathways to information in public discourse.[287]

CONCLUSION

The first wave of legal thinking about the Internet saw millennial omens in technology. The reach of the Internet seemed to exceed the grasp of governments, and this structure heralded—or threatened—the end of censorship.

The new millennium has now dawned, but censorship is still with us. While the Internet makes life more difficult for governments that seek to sanction speakers or listeners directly, it has also provided censors with a tempting array of proxies. Faced with the challenge of controlling the transfer of information on the Internet, governments increasingly adopt the strategy of putting pressure on Internet intermediaries to act for them.

This turn to proxy censors carries with it a series of dangers to the system of free expression, for intermediaries are likely to be substantially less robust in their defense of free speech than are speakers and listeners. Claims that the natural workings of the market—or the Internet—will alleviate these threats misunderstand both technology and politics.

Legal tools to address these dangers of the future can be found in the struggles of the past. The threats of proxy censorship mirror the challenges of the McCarthy era and the battle for civil rights in the

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[287] *See, e.g.*, Kelly v. Arriba Soft Corp., 336 F.3d 811, 819 (9th Cir. 2003) (concluding that the display of "thumbnail" images by a search engine constituted fair use because of the transformative purpose of "improving access to information on the internet"); Field v. Google, Inc., 412 F. Supp. 2d 1106, 1118-19 (D. Nev. 2006) (finding that Google's "caching" of websites which do not opt out is fair use, given, inter alia, the value of the caches for Internet navigation); *cf. Perfect 10*, 416 F. Supp. 2d at 849 (recognizing that, "given the exponentially increasing amounts of data on the web, search engines have become essential sources of vital information for individuals, governments, non-profits, and businesses who seek to locate information," but finding on balance that the harm to possible commercial use of "thumbnail" images precluded fair use).

South, when governments sought to avoid First Amendment constraints by enlisting civil society structures in crusades to suppress left-wing ideology and to hold back the civil rights revolution.

In the 1950s, the Court ultimately recognized the necessity of guarding free expression both against "heavy handed frontal attack" and against "being stifled by more subtle government interference."[288] The doctrines born of that recognition require courts to take cognizance of the likelihood of collateral damage from proxy censorship in First Amendment calculus, and to eschew legal structures that impose liability on intermediaries without fault or falsehood. These doctrines do not answer all of the challenges, but they are indispensable platforms from which to fashion the doctrines necessary to protect free expression in our generation.

[288] Bates v. City of Little Rock, 361 U.S. 516, 523 (1960).