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FREE SPEECH AND CHILDREN'S INTERESTS

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Amitai Etzioni's essay explores the conflict between freedom of speech and the protection of children.[1] He argues that the First Amendment right of free speech should not trump every other consideration, least of all that of the interests of children. I think he is right. However I also think that the picture is more complicated than the one he depicts, and I also believe that there is much to be gained from being clearer about the underlying warrant for a right to free speech. Understanding why free speech is valuable is crucial to a proper appreciation of what forms of speech ought to be allowed and of who may be included within the scope of persons accorded the right in question.

Let me start to complicate the picture by turning to the Supreme Court cases that Etzioni discusses at the outset of his essay. In *Ginsberg v. New York*,[2] the Court upheld a New York penal law proscribing the sale of pornographic material to minors. Ten years later, in *FCC v. Pacifica Foundation*,[3] the Court upheld an FCC ruling constraining the times at which indecent speech may be transmitted given that, at certain times, children might be likely to be listening or watching. Etzioni identifies two principles on which the Court rested its reasoning: "that children should not be allowed the same access to certain types of materials as adults, and that the state is entitled to pass laws aiding parents in carrying out their duties."[4]

This summary compresses reasoning that is, in fact, quite complex. In the first place—and this is something to which I will return—the Court has always affirmed the view that the absolute constitutional protection of the First Amendment does not simply, and without need of further consideration, extend to all forms of speech. Second, the Court in *Ginsberg* acknowledges two interests justifying

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1. Amitai Etzioni, *On Protecting Children from Speech*, 79 CHI.-KENT L. REV. 3 (2004).
2. 390 U.S. 629 (1968).
3. 438 U.S. 726 (1978).
4. Etzioni, *supra* note 1, at 6.

the limitation upon the availability of certain types of material to minors. The first is the recognition of parental authority and the right of parents to bring up their children as they see fit. Such authority is "basic in the structure of society."[5] Here the Court followed the key judgment of *Prince v. Massachusetts*.[6] The second interest is an "independent interest" the State has in the well-being of the children who live within its jurisdiction.[7]

Now it is not entirely clear how these two interests can always be rendered consistent with one another. If parents have authority—that is, the right to bring up their children as they determine is appropriate—then the state's role is restricted to ensuring that nothing obstructs parents in the exercise of this basic right. The problem with children having access to certain materials is that any parental decision as to whether or not their children should have access to the material in question is bypassed or subverted. It is not that parents would necessarily deny their children such access and would in consequence need the state's assistance in enforcing this denial of access. Note that in *Ginsberg*, the Court was explicit that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children."[8] Similarly, in *Pacifica Foundation,* the Court made it clear that the state, in preventing the dissemination of indecent speech to children, leaves "to parents the decision as to what speech of this kind their children shall hear and repeat."[9] On this view, the right of a parent to choose what her children shall see and do is primary. The state's role is simply to see to it that parents can exercise this right freely and without improper constraint. If parents would rather that their children did not have access to certain kinds of material, then the state will ensure that the law blocks access. If, by contrast, parents choose to let their children see certain materials, then the state will not intervene since it should not place obstacles in their way.

However, this latter permission sits uneasily with the role the state has as a protector of its children, a role which derives from an acknowledgement of its legitimate interest in the welfare of the young. This is an interest that is "independent"[10] and "transcen-

5. *Ginsberg*, 390 U.S. at 639.
6. 321 U.S. 158 (1944).
7. *Ginsberg*, 390 U.S. at 640.
8. *Id.* at 639.
9. 438 U.S. at 758.
10. *Ginsberg*, 390 U.S. at 640.

dent."[11] It would seem to follow that if the state determines that children should not have access to material that is harmful to their interests, then it would be obligated to deny them such access, whatever the children's parents' views on the matter might be. There is then an evident tension between the state's concession to the parents or guardians of a right of choice over their children's lives and the same state's role as a protector of children. Relevant here, and serving to underpin this latter role, is the ideal of the state as *parens patriae*, literally the "parent of his or her country." The idea is that the state extends its protection to those individuals within its jurisdiction who cannot care for themselves. The class of such persons includes, but is evidently not exhausted by, children.

Notably, a *parens patriae* acts as a parent "in the last instance." The state only takes parental responsibilities on itself when others cannot or do not do so, that is, when there is a clear failure of parenthood on the part of those to whom parental responsibilities have been or might have been accorded "in the first instance." In our societies, such responsibilities in the first instance are accorded to the child's natural parents, or to guardians who stand to the child in a salient and appropriate relationship. The modern liberal state is a "state of families," as Amy Gutman nicely expresses it, by contrast with a "family state."[12] The latter is one in which the state assumes direct responsibility for the upbringing of the young.[13] Plato infamously recommended this for his class of guardians in *The Republic*. In the "state of families," the state is content for children to be reared in families that enjoy a degree of autonomy and protection from official interference in the conduct of their affairs. According this autonomy to parents is not only thought of as a natural extension of a fundamental right that individuals have to form families, but is also, on balance and in general, in the best interests of children. By contrast, it would not be good for children—nor would it be conducive to the reproduction of the right kind of society and polity—to have the state assume direct and unmediated control of the rearing of children.

The upshot of this discussion is as follows. Should children be allowed to read obscene materials if their parents are happy for them to do so? If such a choice is viewed as one that falls within the proper remit of parental discretion inasmuch as the child's interests are not

11. *Id.* (quoting People v. Kahan, 206 N.E.2d 333, 334 (1965)).
12. AMY GUTMAN, DEMOCRATIC EDUCATION 22, 28 (1987).
13. *Id.* at 23.

seriously adversely affected, then the answer is clearly "yes." If, on the other hand, one believes that any parent who allows her child to read such material is exposing the child to serious harm, and thus is palpably failing in her parental responsibilities, then it will be appropriate for the state as *parens patriae* to interfere. In that instance, the answer to the question posed is clearly "no." As a result, I think it is evident that whether or not children should be allowed to read obscene materials if their parents are happy for them to do so is crucially dependent upon the age of the child. The parent who allows her five-year-old to view explicit, obscene material is exposing that child to serious harm, and the state, as *parens patriae*, may legitimately interfere to protect the child. Things are evidently not so simple when we imagine that it is a sixteen-year-old who is allowed to view the material in question.

Of course, now an additional complicating factor is a strong intuition that a young person should be able to make her own choices—at least with respect to what she does and does not read. It is not just that it is moot whether exposure to obscenity is harmful to the interests of a teenager. It might be. The point is that when a certain age is reached, we believe that it is for the individual herself to determine whether she wishes to expose herself to putative dangers. What that age is will obviously be open to serious, and probably intractable, debate. It is also clear that we will think that the age at which youngsters should be permitted to engage in different kinds of activities will vary in line with the nature—the significance, seriousness, and consequential import—of the engagements in question. We think, for example, that the age at which someone should be allowed to have sex need not be the same age at which they should be permitted to work for money, to vote, or to serve in the armed forces of their country.

I need then to turn to a consideration of whether children have a right to free speech. But before I do so, I will consider what it means to protect and promote the interests of children. In particular I want to do two things. I want, first, to draw attention to an ambiguity in the import of talk of a child's interests—namely, the ambiguity between the child's interests as a child and the child's interests as a future adult. Second, I want to note that society as a whole has an interest in the protection of children's interests. Etzioni follows the American courts in judging that "there is a compelling public interest to protect children from harmful cultural products which should remain freely

accessible to adults."[14] In his discussion of age-graded protections, he notes that children "clearly are developmental creatures whose capabilities change a great deal as they mature."[15] I am happy to follow him in both claims. His appeal to the fact of a child's developmental nature is intended to support the entirely plausible view—and one to which I shall return—that children of a certain age simply lack the capacities that their adult counterparts do. It is in consequence of this that children may rightfully be denied the rights that adults have.

However, the fact that children do, normally, grow up into adults has a further significant implication. When we harm a child, we can also thereby harm the adult she will grow into. Indeed it may be that the harm we do now to this child is best thought of as a harm to the future adult—or that the greater part of the harm that is done by the present action is one done to the future adult. Consider, thus, that denying a child an education certainly deprives the child of cognitive stimulation, enjoyment, and access to knowledge. But it also limits the future opportunities of the mature adult whom the child will become.

In this vein, Joel Feinberg has spoken of a subclass of rights possessed only by children, which he entitles "rights-in-trust."[16] These are rights given to the child, but held in trust for the person of the adult she will become. Feinberg thinks the most important of these is a child's right to an "open future," that is, to the maximal possible range of subsequent autonomous choices as an adult.[17] In somewhat similar fashion, John Eekelaar has spoken of a child's "developmental" rights.[18] These are the rights a child has to develop her potential in such a manner that she can enter adulthood without serious disadvantage.[19] Feinberg ascribes the rights to the child's adult-self, the child having them only in an "anticipatory" form. Eekelaar, by contrast, attributes the rights in question to the adult's child-self. This need make no important difference so long as we grant—what some philosophers will, I agree, represent as metaphysically contentious—

14. Etzioni, *supra* note 1, at 33.

15. *Id.* at 46.

16. Joel Feinberg, *The Child's Right to an Open Future*, *in* WHOSE CHILD?: CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124, 125 (William Aiken & Hugh La Follette eds., 1980).

17. *Id.* at 124–27.

18. John Eekelaar, *The Emergence of Children's Rights*, 6 OXFORD J. LEGAL STUD. 161, 170–71 (1986).

19. *Id.*

that the child and the adult she eventually becomes are merely distinct temporal stages, or "slices," of one and the same person. Being the same person, she has the same set of interests. These interests are merely differently distributed across her lifetime. So long then as we can talk of the child-self or of the adult-self as stages of the same person, we can acknowledge that in preventing harms from befalling a child, we may also, and in anticipation, be protecting the interests of the adult that the child will become. Moreover, the interests an adult has, *as and when an adult*, are not those she had as a child.

There is a further point. One reason for preventing a person from growing up in a certain way is that it is not in her interests to do so. Being deprived of an early education is harmful to the life opportunities of the adult. However, society also has an interest in ensuring that its children grow up to be the sorts of adults who can play their part in maintaining the fabric of that society. Thus, those who have not received an education will be incapable of undertaking certain jobs. They may also be insufficiently capable of discharging their obligations as citizens. It is evident, then, that the state has an important "reproductive role" to play in contradistinction to, and in addition to, its role as *parens patriae*. A state has an interest in securing over time the continued preconditions of its own future existence. I do not mean to imply that the state has a transcendent interest in its own preservation that somehow bears no connection to the interests and rights of its citizens, both present and future. A state that secures the conditions of its own future existence thereby serves the interests of those who will be under its continued protection. This is the ultimate warrant for the state's existence. Moreover, any plausible account of what a state is permitted to do in order to secure its own future—what kinds of citizenship education it may compel, for instance—must in the last analysis be grounded in the interests and rights of its future citizens.

The preconditions of a state's future existence are varied. It is not just, for instance, that the population must not grow too small or too large to sustain itself. The population must also be fit and able to supply, among other things, workers, an army, lawyers, and politicians. It has been suggested that the British state's historical adoption of the role of *parens patriae* was motivated less by an unmediated and socially disinterested concern for the condition of children at the time—extensive poverty, overcrowded housing, illiteracy and poor health—but rather by two concerns. The first concern was that home-

less and "street" children posed a worrying threat to social order. A compulsory basic education might ensure that children could be schooled for productive factory work.[20] The second concern was the large number of young recruits to the army who were failing their medical examinations at a time when the interests of the British Empire needed defending on several fronts.[21] The British state wanted healthy, educated, and adequately housed children who would, in consequence, not be lawless vagabonds, but might play their part in the economic progress and military defense of their nation.

How is this relevant to the case of free speech and obscenity? In Part IV of his article, Etzioni examines the evidence concerning the scope and the nature of the harm done to children by exposure to pornography and violence. He notes that the evidence shows that "significant harm is caused,"[22] and concludes that "social science data strongly support the need to protect children from harmful material, especially from exposure to violence in the media and on the Internet."[23] I see no reason to dispute either the accumulated evidence or the normative conclusion he draws from it. What, however, is noteworthy is Etzioni's citation of longitudinal studies, that is, those pieces of empirical research following the careers of children who have viewed violent material into adulthood. The evidence cited is consistent in suggesting that children exposed to violence are more likely, *as adults*, to be aggressive, violent, and even criminal.

Again, I do not seek to dispute the findings. The important point is that there are two very different kinds of claims. One is that exposing children to violence does harm to children as children—by, for instance, making them more fearful and anxious, or by disposing children to be more aggressive to their peers. The other is that exposing children to violence produces, or tends to produce, more violent adults disposed to do harm to other adults. The state, in its role as *parens patriae*, has a reason to think, in respect of the truth of the first claim, that children should be protected from harmful material. The state, in its reproductive role, has a reason in respect of the truth of the second claim to think that children should be protected from harmful material. Inasmuch as both claims are true, or probably true,

20. LIONEL ROSE, THE EROSION OF CHILDHOOD: CHILD OPPRESSION IN BRITAIN 1860–1918, at 6 (1991).

21. GEORGE K. BEHLMER, CHILD ABUSE AND MORAL REFORM IN ENGLAND, 1870–1908, at 204 (1982).

22. Etzioni, *supra* note 1, at 35.

23. *Id.* at 39.

the state thereby has a double reason to limit the access of children to certain kinds of material. However, the truth of both claims should not obscure the fact that there are two claims, and thus two very different kinds of reason for favoring restrictive legislation.

I have argued that the role of the state in respect of the protection of children's interests is a complex one. The state itself has a double role, as a protector in the last instance of the vulnerable who cannot protect themselves, and as a guarantor of the future flourishing of the society for which it legislates. Parents also have interests. Indeed they arguably have a right to bring up their children as they see fit, subject to the constraint—which the state as *parens patriae* will enforce—that they do not, in doing so, seriously harm the children. What then of the children themselves? What of their rights, putative or actual? What, more particularly, of a child's right to free speech? If a child does have a right to free speech or, more precisely, has one in just the same way that an adult does, then much of the preceding discussion is simply besides the point, for rights are thought to trump other considerations.[24] Thus, if a child has a right to free speech, then the state would be enjoined to protect it and could not successfully appeal to grounds on which it might be constrained.

Under the United Nations Convention on the Rights of the Child, a child—which Article 1 incidentally defines as any human being under the age of eighteen years "unless under the law applicable to the child, majority is attained earlier"—is accorded a large number of rights.[25] One of them is a right to freedom of expression.[26] This is specified as encompassing the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice."[27] Restrictions are permitted only "[f]or respect of the rights or reputations of others," or "[f]or the protection of national security or of public order . . ., or of public health or morals."[28] The United States, shamefully, has not ratified the Convention (the only other non-ratifying country is Somalia). It is thus not bound by its terms.

24. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 190–92 (1977).

25. Convention on the Rights of the Child, *adopted and opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 44, 46.

26. *Id.* at 48–49 (art. 13).

27. *Id.* at 48.

28. *Id.* at 48–49 (art. 13(2)(a)–(b)).

However, the Supreme Court, in *Tinker v. Des Moines Independent Community School District,* affirmed its view that school students at least "are 'persons' under our Constitution . . . possessed of fundamental rights which the State must respect."[29] It does not, of course, follow that because children are legally accorded fundamental rights—whether the legal instrument in question is a national constitution or an international covenant—that this ascription of fundamental rights to children is morally defensible. It is thus notable that Justice Stewart stated his view, in *Ginsberg*, that a constitutional guarantee of free choice presupposes a capacity to choose which a child is not possessed of, or at least not fully possessed of.[30] He reaffirmed this view in his concurring judgment in *Tinker.*[31] His comments indicate a principal reason for thinking of children as not possessed of the rights that adults have. This is an appeal to the simple fact that children lack the capacity or capacities that are seen as an essential qualification for rights-holders. A defender of the view that children should have rights, for his part, can allow that everything turns on the question of capacity,[32] and straightforwardly deny that children lack the requisite capacity.

Much of the debate about children's rights does, as a result, appeal to claims about their lack or possession of a requisite capacity. For instance, one set of questions about rights concerns what it is to have a right. The will theory asserts that a right is a protected exercise of choice; the interest theory, by contrast, views a right as the protection of an interest of sufficient importance to impose on others certain duties.[33] Defenders of the will theory are prepared to concede that since children lack an ability to exercise choice, they cannot have rights. Or, at best, they do have rights, but the choices that are constitutive of these rights are made not by the children themselves, but instead by their representatives.[34] On the other side of the debate, at least one prominent defender of the interest theory sees the fact that

29. 393 U.S. 503, 511 (1969).

30. Ginsberg v. New York, 390 U.S. 629, 649–50.

31. 393 U.S. at 514–15.

32. *See* HOWARD COHEN, EQUAL RIGHTS FOR CHILDREN ix (1980).

33. Prominent defenders of the will theory include H.L.A. Hart and Hillel Steiner. *See* H.L.A. Hart, *Bentham on Legal Rights, in* OXFORD ESSAYS IN JURISPRUDENCE 171–201 (A.W.B. Simpson ed., 1973); HILLEL STEINER, AN ESSAY ON RIGHTS 58 (1994). A prominent defender of the interest theory is J. Raz. *See* J. Raz, *Legal Rights*, 4 OXFORD J. LEGAL STUD. 1 (1984).

34. Hart, *supra* note 33, at 192 n.86.

children do have rights as enough to discredit the will theory, thus making children a "test-case" for which theory of rights is correct.[35]

There is another set of questions about capacity that is relevant to the issue of whether children do or do not have rights. This is not the capacity which is constitutive of having any right at all, but the capacities which are specific to particular kinds of rights and, indeed, to particular individual rights. A familiar distinction in the categorization of rights according to their content—what they are rights to—is that between "welfare" and "liberty" rights. Welfare rights are rights to those things that may be characterized as the necessary and important preconditions or constituents of a human being's well-being, such as health, education, and housing. Liberty rights are rights to exercise choice in some activity that is properly regarded as a central part of one's life, such as voting, religion, association, and speech.

How is capacity relevant here? Children may be thought of as lacking certain cognitive abilities, those, most centrally, involved in the acquisition and processing of information in an ordered fashion. Thus children are not able to form consistent and stable beliefs, and to appreciate the significance of options and their consequences. Children also lack certain volitional abilities. They are not able to form consistent enduring desires in the light of which they can then act. Nor can they formulate independent choices that are a function of stable beliefs and desires. These claims are made with an obvious qualification. What is true of some children, defined by the United Nations Convention as anyone under eighteen years of age, is not true of all of them. The very young child does lack those adult capacities that the youngster on the cusp of adulthood need not, and probably will not. The three-year-old is a very different creature from the seventeen-year-old. Children are developmental creatures who grow into adulthood and thus, in consequence, grow into the possession of the abilities that qualify adults for their warranted possession of rights. If children do lack rights, they do not lack them simply because they are children. Rather, it is their childishness, as a condition of incapacity reliably associated with young age, which disqualifies them. Note that childishness in this sense is not a feature only of children. Some adults, for instance, the very seriously mentally disabled, are childlike.

35. *See* NEIL MACCORMICK, LEGAL RIGHTS AND SOCIAL DEMOCRACY 154–66 (1982).

A child incapable of exercising choice is reasonably disqualified from having liberty rights. Someone who is not able to choose surely cannot have a right whose content is a fundamental choice. Indeed the point of having a liberty right is to protect the exercise of choice in a crucial area of one's life. The child can neither properly exercise choice nor recognize why it is important to be permitted to exercise choice in this regard. Thus I do not think that children can be said to have the right to freedom of expression that is protected by the First Amendment. It does not follow that the age at which the law determines that a child does acquire the adult right of free expression is rightly fixed at eighteen, or at whatever age positive conventional law in most states does settle upon. Nor does it follow that there is official license to silence the views of children. Children may not have a right to free speech, but that does not mean that they can make no claim upon the authorities to have their views heard. Indeed, one of the most important articles of the United Nations Convention, Article 12, accords to the child the right freely to express her views on matters affecting her. It adds the crucial assurance that these views will be given "due weight in accordance with the age and maturity of the child."[36]

The principle that a child's views on its own welfare should be heard, and accorded appropriate influence, is a central principle of United Kingdom law and social policy in respect of the child. It should be noted—and this is critical to the current discussion—that this right stands in the place of a liberty right to make one's own choices. The right to be heard is only a right to make use of the opportunity to influence whomever it is who will otherwise choose for the child. The authority to choose on behalf of the child still rests with some appropriate adult. At most the child has the right to represent to this adult her views as to what should happen to her, and to be taken as seriously as her age and maturity permits. At a certain age, the child becomes mature enough to make her own choices. She is then an adult.

This was the import of the celebrated British House of Lords judgment, *Gillick v. West Norfolk & Wisbech Area Health Authority*.[37] This case concerned the right of doctors to advise young people, without and even against parental consent, on sexual and contraceptive matters. The judgment has subsequently exercised considerable

36. Convention on the Rights of the Child, *supra* note 25, art. 12, at 48.

37. [1986] A.C. 112.

influence in the determination of cases of putative medical consent given or withheld by young persons. In a critical, and much quoted, part of his judgment, Lord Scarman, gave concise expression to what he viewed as the "underlying principle of the law": "[P]arental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision."[38] It is consistent with British law, and a plausible account of how the law should treat children, to think as follows. Children have a right to make known their views on any matter affecting their welfare. These views must be accorded a weight that is proportionate to the individual child's maturity and understanding of the matter in question. At a certain point in their development, children are sufficiently mature to determine for themselves what shall happen to them. In effect, they grow into the possession of adult liberty rights.

If a child has a right to express views on issues that touch on her own welfare, but does not have an adult right to free expression, we need to know more about the nature of the latter right. A first and important feature of this right is that the correlative duty—one which we may think of the state as being obligated to discharge—is to not interfere with citizens' expressions of speech. It is a negative duty of inaction. It is *not* a positive duty of assistance in the facilitation of expression, nor in the transmission of any views expressed. I have a right to express my views. I do not have a right that these views should be read or heard by everyone whom I might wish should have access to them. At most, I have the right that the state shall not in its laws and policies unreasonably restrict access. Thus the individual who utters a view that is offensive to some group of people, even if he has a right to make the utterance, does not have a right that those who will be offended by it shall hear it. Somebody who has a right to manufacture and sell pornographic material does not have a right that everyone shall be exposed to this material. Thus, an adult who sells or makes available obscene material cannot insist that the state assist him in his venture by publicizing the existence of the material or by ensuring that everybody is brought into contact with it. He can complain if, without good reason, some group of individuals are disabled or prevented from having access to the obscene material. But, as Etzioni argues, there *is* in the case of children a very good reason to

38. *Id.* at 186.

restrict or regulate access. I concur with the conclusion of his argument. It is right to exclude children from the audience of those who utter, write, publish, and disseminate certain kinds of obscene material. This is because the present and future selves of children are irretrievably damaged by exposure to such material.

However, this leaves unanswered the question of whether those who would utter, write, publish, and disseminate obscene material have a right to do so. More particularly, do they have a right to do so that is grounded in a general right of free expression? Is the right to free expression a right to the unfettered expression of *any* utterance? The law in the United Kingdom is less concessive to the right of the pornographer than in the United States. The United Kingdom, previously a signatory to the European Convention of Human Rights, has now incorporated this convention into its own legislation by the Human Rights Act of 1998.[39] Article 10 accords a right of freedom of expression, but notably allows the state to justify an interference with expression for, *inter alia*, "the prevention of disorder or crime" and "for the protection of health or morals."[40] Moreover, the European Court of Human Rights has allowed states a significant margin of appreciation in its enforcement of this right, and it has tolerated states interfering with non-political modes of speech to a much greater extent than it tolerates in respect of political speech.[41] Thus, the Court upheld the United Kingdom's banning of a book for children entitled *The Little Red Schoolbook,* which contained a substantial chapter on sex.[42]

The Video Recordings Act of 1984 set up a British Board of Film Classification ("BBFC").[43] The Board's remit includes determining the suitability of a video work for a particular certificate with special regard to the harm that may be caused to individual viewers who are likely to see it, including children. In *Regina v. Video Appeals Committee of the British Board of Film Classification,*[44] the court determined that in the case of seven hard-core pornographic videos, the BBFC's refusal to issue a restricted certificate was not supported by a

39. Human Rights Act, 1998, c. 42.

40. *Id.* at sch. 1.

41. *See* DAVID FELDMAN, CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES 906 (2d ed. 2002).

42. Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) (1976).

43. Video Recordings Act, 1984, c. 39.

44. [2000] E.M.L.R. 850. *See generally Risk of Harm does not Require Automatic Refusal,* THE TIMES OF LONDON, June 7, 2000, at 33.

demonstration that significant harm to young people was likely.[45] This judgment does expand the range of permissible material available on videos. However, it is noteworthy that the court considered empirical evidence as to the harmfulness of pornography to be a salient consideration in the restriction of the access of such material to children. Moreover, commentators have pointed out that had other kinds of evidence been taken into account, the judgment might well have favored the initial restriction. The court did not, as arguably it should have done, balance any Article 10 right of free expression against the United Kingdom's obligation, as a signatory to the United Nations Convention on the Rights of the Child, to provide each and every child with "special safeguards and care, including legal protection."[46]

In the United States, of course, freedom of speech has privileged constitutional protection. However, the Supreme Court has long recognized that the First Amendment does not grant judicial protection to each and every speech act. In *Chaplinsky v. New Hampshire,* Justice Murphy stated, with admirable concision, the following view: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[47] The Court specifies these as the lewd and obscene, the profane, the libelous, and insulting or "'fighting' words."[48] Now it is possible to argue that speech, as such, remains protected, and protected absolutely. However, certain well-defined categories of "speech" are, in fact, more properly classified as harmful actions which thereby fall under the scope of the criminal law. John Stuart Mill argued along these lines when, in discussing incitement, he insisted that it would be a mistake to "pretend[] that actions should be as free as opinions." But rather, "even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act."[49] Mill could be interpreted as saying that expressions as such are protected by the law, but that uttering certain words in certain contexts amounts to an incitement to the commission of criminal acts, and thus as being in itself a criminal act.

45. FELDMAN, *supra* note 41, at 953.

46. Susan Edwards, Comment, *The Video Appeals Committee and the Standard of Legal Pornography*, 2001 CRIM. L. REV., 305, 310.

47. 315 U.S. 568, 571–72 (1942).

48. *Id.* at 572.

49. JOHN STUART MILL, ON LIBERTY 119 (Gertrude Himmelfarb ed., Penguin Books 1985) (1859).

One could argue somewhat differently and maintain that some speech acts are rightly exempt from legal regulation and other speech acts are not. The peril of arguing in this fashion is that nothing of special significance then attaches to expressive speech as a kind of human action. Rather each and every type of speech must be shown to warrant legal exemption.

At this point it is important, thus, to be clear about the warrant for a right to free expression. We can speak of the general justifying ground of a right, what it is that is of sufficient importance to support the ascription of the right to the relevant class of individuals. This is not the same thing as a justification of the right—such as might be offered by a consequentialist—along the lines of showing that the possession and exercise of the right in question is, generally and on balance, productive of good. The contrast is one between what we might call respectively a foundational and an instrumental justification of a right. Now, further, even if a right is foundationally justified, it does not follow that there are no considerations—such as those of the public good—of sufficient weight to trump the right in specified circumstances. So, even if it is said that there is a right to free expression (rather than to a subset of expressions) which can be foundationally justified, it does not follow that the right may be exercised in all conceivable circumstances. In whatever manner a right is justified, it will most probably not be justified as having absolute weight sufficient to trump all other relevant claims. In *Chaplinsky,* for example, Justice Murphy continued, immediately after the statement already cited, with the following observation in justification of the legal regulation of some classes of speech: "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[50]

His comments suggest that he, and the Court, favors an instrumental justification of free speech, namely, that it conduces to the truth. Free speech is valuable not in itself, but inasmuch as it produces or tends to produce something else that is valuable, namely the holding of true beliefs. This view informs John Stuart Mill's celebrated and influential defense of freedom of expression in *On Liberty.* For Mill censorship is improper because it presumes that the censor is

50. *Chaplinsky,* 315 U.S. at 572.

infallible, taking his own views not just as true, but as indisputably true. But such a presumption is unjustified because truth, if it emerges at all, does so only through a "collision of adverse opinions," that is, in a context of the uncensored expression of each and every view.[51] Given such an instrumental justification of free speech, it is easy to see why the listed classes of speech lacking First Amendment protection are so exempt. Lewd and obscene utterances, to take just one instance, do not seek to speak the truth, nor to lead us to see what the truth is.[52]

However, such a defense of free speech is vulnerable to the obvious observation that very many instances of speech falling *outside* the unprotected classes are not truth-conducive. This may be so because they are the kind of utterance that is not truth-apt, such as those within the world of art, theater, and literature. Or, it may be that we can be confident that an utterance, even while it has a truth-value and is uttered in the knowledge that it does, will not conduce to the truth. But the right to free expression protects the stupid, the misguided, the ill informed, and the credulous as much as it does the wise. It would not of course follow that utterances that do not conduce to the truth ought to be proscribed. It would need, further, to be shown that there were significant social interests served by proscription. Nevertheless, the instrumental defense requires that free speech serve the public good, even if proscribing some particular instance of speech must be shown to serve a greater public good.

I believe that the proper defense of free speech is not instrumental, seeing its value in what good it is productive of. Rather, it is foundational, seeing its value in what it is important for humans to be able to do when they are free to express themselves. There are various possible versions of a foundational defense of free speech, including one that simply sees freely expressing oneself as itself an expression of an autonomy that ought to be protected. For my own part, I view the foundational value in question as that of our being heard as the source of beliefs, desires, and values. Human beings are social and expressive creatures. Giving expression to what we as individuals think, fear, and hope for is an extremely important way that we can

51. MILL, *supra* note 49, at 116.

52. Ronald Dworkin is skeptical about the possibility of defending a right to pornography as derivative from a right of free expression and instead sees it as based upon an equal right of "moral independence," that is, a right to lead one's life according to one's own moral values free from state regulation. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 336–72 (1985).

be ourselves in a world of other humans. Speaking freely is an intrinsically valuable mode of self-expression within a social context. It is not valuable because it yields some further distinct good. Consider the political sphere. Of course free speech may be instrumentally valuable inasmuch as the unconstrained statement of what we think and value plays its role in the formation of law and policy. What we want politically to come about may be more likely to come about because we *say* that is what we want. However, speaking freely in the political domain is, in the first instance, a mode of civic self-expression, the way in which we converse together as citizens in the polis. It is valuable as such and in itself. Similarly, voting can be seen as instrumentally valuable, a means within an agreed decision-making procedure to secure a valued outcome. However, it is also intrinsically valuable, because participation *as such* in the process of democratic decision-making is a good.

If speaking as such is valuable, it does not follow that every manner or mode of self-expression is equally valuable. Nor does it follow that the foundational value of self-expression on every occasion trumps every other relevant moral consideration. The lewd and obscene, the profane, the libelous, and insulting utterances *are* ways in which humans give expression to their desires and beliefs. However, a significant social harm may be avoided by disallowing their expression, one that is sufficiently important to outweigh the particular value of this mode of self-expression. In the case of "fighting words," it may be that the utterance is rendered by the context and intentions of the person uttering the words into an action, a provocation, or incitement to harmful conduct. In such a case, words are uttered but that is not enough for the utterance to be viewed as an expression meriting, in principle at least, the protection of a right. Indeed, some have argued that pornography is properly characterized as a kind of speech *act*. Moreover, it is an action whose consequential import is the subversion of the equal status of women as humans deserving respect. As such, pornography is not a mode of expression that should be protected by the First Amendment, but a violation of the requirement of the equality of all before the law.[53]

To sum up, seeing the foundational value of the right to free speech as consisting in the value of expressing ourselves allows us to see why some modes of expression are not as valuable as others—and

53. *See* Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFF. 293 (1993).

to see what forms of "speech" are improperly so called. It also allows us to see why children do not have a right to free speech. Earlier it was suggested that the childishness of children—that disqualifies them from having rights—is their lack of certain abilities. Children lack those cognitive abilities that would allow them to form consistent and stable beliefs, and lack those volitional abilities that would allow them to form consistent enduring desires. It is easy now to see how, on the foundational account of the value of free speech just presented, this childish incapacity renders expression of little or no value to children. Children do not have desires and beliefs in the way that adults do, and expressing themselves does not, in consequence, have the value for children that it does for adults. That is not to say that the expression by children of their transient desires and inconstant beliefs is of no value. Nor is it to deny that the more enduring these beliefs and desires become the greater is the value of their expression. However, the value of expression to children is not sufficiently great, as it is with adults, to warrant ascribing to them a right of free expression.

We saw that Article 12 of the United Nations Convention on the Rights of the Child, as does British law, accords to the child the right freely to express her views on matters affecting her, these views being given a weight proportionate to the age and maturity of the child. Why is *this* right valuable? Here it seems to me that the value of the right is instrumental. What matters is not simply that the child says what she thinks, but that what she says plays some part in the determination of what shall happen to her. A child's expression of her views in respect of what touches on her welfare is something of a guide to what does, indeed, promote or adversely affect her well-being. A child is not the best guide to her own welfare. If she were such a guide, then she would most probably be possessed of a capacity to lead her own life that would merit the attribution to her of liberty rights.

However, it is important to give some weight to a child's own views. In the first place, what a child says matters to her provides any guardian or mentor with invaluable evidence as to what in fact is best to do for her. Second, doing to or for the child what is too far at variance from what the child herself wants to be done is unlikely to promote the child's best interests. Consider a doctor trying to decide the best medical procedure for a child. The child's views—her extreme dislike of or fear about a certain procedure, for example—must guide the physician in his determination of the best course of action. He

would be acting unwisely if he chose to pursue an option that the child resolutely opposed.

I conclude that, inasmuch as children do not have a right to free expression, as guaranteed to adults by the First Amendment, no wrong is done to them by denying them access to certain kinds of material, such as pornography. If parents do have a right to determine what their children shall read and view, they do so only so long as their parental decisions do not expose their children to significant harms, or to the serious risk thereof. The state, in its role as *parens patriae*, is entrusted with the protection of children as vulnerable, dependent creatures incapable of protecting their own interests. In its reproductive role, the state is warranted in ensuring that children grow into the right kind of future adult citizens. All of this supports Etzioni's conclusion that children may be protected from speech that is otherwise constitutionally guaranteed. It does so, however, for different and, I hope, instructively different reasons.

Moreover, what I have said leaves open the question of what materials may be adjudged to expose children, in their present or future adult selves, to sufficiently grave harm to merit state regulation of access. How we should understand what shall count as a serious harm is a normative matter to be resolved by philosophical, legal, and political argumentation. Whether something causes a serious harm is an empirical matter to be resolved by full and adequate research. For example, consider the claim that there is a causal relationship between television viewing and the acquisition of beliefs in traditional gender roles.[54] The question of whether that is so is a matter for social-psychological research. Whether, if true, it matters enough to warrant the regulation of the content of television, or of children's access to certain programs, is an issue of legal and political dispute.

There is a further question. The status of children as developmental creatures who are *not yet* adults has been at the very center of this Article's argument. Children normally grow into adults, but they do not do so unaided. Children need to be nurtured, taught, and cared for, all with a view to what they can and should become as adults. Children have then what Eekelaar would call a "developmental" right to those things that are a necessary means to their successful maturation into adulthood. Nevertheless, what those are and exactly when children should have them is a deeply contested matter. All can

54. *See* KEVIN DURKIN, TELEVISION, SEX ROLES AND CHILDREN: A DEVELOPMENTAL SOCIAL PSYCHOLOGICAL ACCOUNT 74–83 (1985).

surely agree that children should have access to the factual information, views, and beliefs that they need for their cognitive and emotional development. But there will be disagreement as to whether some materials at certain ages are educationally necessary or, on the contrary, harmful to the interests of children, and thus properly prohibited. Consider, as a central example, the continuing controversy over whether sex education should be compulsory, what should be contained within it, and when children should be taught the facts of life.[55] Here then is another battle about what it is proper to allow children to see and to read. However, although the terrain is analogous to the one Etzioni sketches in his article, this battle is fought not in the name of the First Amendment right to free speech. Rather, it is fought in the name of the *developmental* rights of children. Children may not have a First Amendment right of access to certain kinds of material, but they may have a developmental right of access to that same material. Whether they do or not is another matter and beyond the scope of this article.

55. *See generally* DAVID ARCHARD, SEX EDUCATION (2000); *Special Issue: Moral Values and Sex Education*, 26 J. MORAL EDUC. 253 (1997).