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The Need for a Two (or More) Tiered First Amendment to Provide for the Protection of Children

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THE NEED FOR A TWO (OR MORE) TIERED FIRST AMENDMENT TO PROVIDE FOR THE PROTECTION OF CHILDREN

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Amitai Etzioni recognizes two distinct problems in protecting children from harmful influences in the media.[1] The first is found in cases involving what he calls the spillover effect. This is the constitutional infirmity present in many of the attempts to limit the access of minors to material that may legitimately be denied them. For example, *Ginsberg v. New York* established that states may prohibit the distribution of pornographic material to children, even if that material is not obscene for an adult audience.[2] But if the regulation also limits the access of adults to that material, there is a constitutional violation of the "spillover" variety.[3] The second problem is found in attempts to shield children from material that seems more clearly to enjoy First Amendment protection (no matter the audience), the most important example being depictions of violence.[4]

I. SPILLOVER CASES

Spillover violations have been found in the attempts to limit youth access to sexually indecent material on the Internet. Both the Communications Decency Act ("CDA")[5] and the Child Online Protection Act ("COPA")[6] were aimed at legitimate goals but unconstitutionally limited adult access.[7] Both address access to material that

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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. The earliest such case is *Butler v. Michigan*, 352 U.S. 380 (1957).

4. *See infra* Part II.A.

5. The CDA was enacted as Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 133–43 (codified at various sections of Titles 18 and 47).

6. Pub. L. No. 105-277, 112 Stat. 2681-736 to 2681-741 (1998) (codified at 47 U.S.C. § 231 (2000)).

7. *See* Reno v. ACLU, 521 U.S. 844 (1997) (holding that CDA is unconstitutional); ACLU v. Ashcroft, 322 F.3d 240 (3d Cir. 2003) (holding that plaintiffs established a substantial likelihood that COPA is unconstitutional).

minors would be unable to obtain in a magazine store but which is readily available on the Internet. If access were limited through a method that had no effect on adult consumption, the statutes could have been held constitutional, but the restrictions spilled over into the adult world.

The most recent unsuccessful attempt to limit the exposure of children to tobacco advertising may also be seen to have suffered from a spillover effect in the context of commercial speech in *Lorillard Tobacco Co. v. Reilly*.[8] Massachusetts' restrictions on tobacco advertising on billboards anywhere within one thousand feet of a school or public playground were struck down because they were too restrictive.[9] While tobacco products cannot be sold to children, and ads aimed at children can be banned, the billboard restriction would have banned such ads in approximately 90 percent of Boston, Springfield, and Worcester, Massachusetts.[10] Adults would have been cut off from information about products they may legally consume.

Spillover problems are resolved, to the extent that they can be resolved, by more closely tailoring the restrictions to the legitimate targets. Dawn Nunziato's article offers a thorough examination of the case law growing out of attempts to regulate the Internet.[11] As she indicates, the care taken in designing the protections is key. She holds out hope that a filtering system can be developed that can protect children from the sexual content of the Internet.

A more recent effort at providing a child-safe zone on the Internet may be found in the Dot Kids Implementation and Efficiency Act of 2002.[12] The act provides for a subdomain within the United States country domain. The domain ".kids.us" would contain only material suitable for children. The creation of this new, limited forum should not raise constitutional problems. The Court in *Reno v. ACLU*[13] refused to accept the government's claim that the CDA was a zoning regulation of the Internet because the act affected the entire Internet. The Dot Kids Act calls for a partitioning that provides a safe zone for children while leaving other parts of the Internet open for communication more suitable for adults. The difficulty with the Dot Kids Act

8. 533 U.S. 525 (2001).
9. *Id.* at 562.
10. *Id.*
11. Dawn Nunziato, *Toward a Constitutional Regulation of Minors' Access to Harmful Internet Speech*, 79 CHI.-KENT L. REV. 121 (2004).
12. Pub. L. No. 107-317, 116 Stat. 2766 (codified at 47 U.S.C. § 941 (2000)).
13. 521 U.S. 844 (1997).

is that the new subdomain is likely to become solely the province of Disney and Nickelodeon. A zone with such content would be valuable for younger children, but if older children are limited to the kids' domain, they will lose access to material that may have value to them. Protection of older children is left to filtering devices that are inadequate for the task. White-list or black-list filters that operate either on a list of acceptable or unacceptable sites quickly lose currency as new sites are added to the Web or sites change their content. Filters that examine content for strings of letters may filter too much, barring access to sites discussing breast cancer or where a word like "Essex" contains the string "sex." Filters are also currently unable to screen for the sort of images that are of the most concern where children are involved.

I have offered, elsewhere, a solution to the problem of children and the Internet that treats the Internet just as well as the print media but still provides some protection for children.[14] When a news dealer is confronted with a minor wishing to purchase a magazine, the merchant, if he is aware of the content, must make a determination as to whether the material is suitable for minors. Internet content providers can be put to the same task; in fact, it is a less onerous task, since the content provider is more cognizant of content than the news dealer.

My proposal is that all software used to post to the Internet provide an option under which the e-mail sender, poster to a bulletin board, or Web publisher can choose to make the material available to children or accept the default setting that the content contain a signal activating a filtering program. The content provider can put any legal material on the Internet and adult-to-adult communication is unaffected. If the material contains the signal, and a child's parents have compatible filtering software, the child will be shielded. If parents choose not to activate a filter, they can let the child receive the material others may find objectionable. Liability for the content provider would attach only when a provider places on the Internet, and asserts that it is acceptable for children, adequately defined sexual material predominantly appealing to the prurient interest of minors, patently offensive to prevailing standards in the adult community as a whole

14. *See* Kevin W. Saunders, *Electronic Indecency: Protecting Children in the Wake of the Cable and Internet Cases*, 46 DRAKE L. REV. 1 (1997). Although the article was written several years ago, later cases do not pose any problems not addressed therein. In fact, a recent case eliminated the greatest difficulty that did exist at the time of the article. *See infra* notes 16–19 and accompanying text.

with respect to what is suitable material for minors, and lacking serious literary, artistic, political, or scientific value for minors.[15]

The best criticism of this suggestion, and a problem for any attempt to regulate the Internet, has recently been answered by the Supreme Court. In *Ashcroft v. ACLU*,[16] the Court addressed the community standards portion of the test for sexual obscenity and its extension to "harmful-to-minors" statutes.[17] While a video or magazine dealer can choose not to stock material that would go beyond standards prevailing in the community, when material is placed on the Web, it is available everywhere. The Court did not see this as a problem for regulation. The plurality said that those concerned that their material may be patently offensive in certain communities should not publish in a way that is accessible to those communities, and should either forego Web publishing or place their material behind adult identification screens.[18] Concurrences by Justices O'Connor and Breyer said that the test should be based on the standards of the electronic community.[19]

The Dot Kids Act's approach can serve to protect younger children, at an age where the Internet is most likely to be a source of entertainment. Older children may be protected by these other means. Certainly those who would assert the right of older children to a wide open Internet will object. But the law allows society to protect at least those under seventeen from strongly sexual material. These older children will have developing informational interests in the material available on the Internet, and the scheme suggested would allow access to material with value, while protecting children from the sexual images many find objectionable for minors.

The suggestion by Emily Buss that regulating the Internet can increase access for children is interesting.[20] It does seem likely that at least some parents who would not allow their children Internet access in an unprotected environment will allow freer access under a regime providing protection. They may allow their children open access in

15. The prohibition is similar to the "harmful-to-minors" statute at issue in *Ginsberg* and to the regulations contained in the CDA and COPA. Issues regarding links and non-U.S. sites are addressed in Saunders, *supra* note 14.

16. 535 U.S. 564 (2002).

17. *Id.* at 574.

18. *Id.* at 583.

19. *Id.* at 586–89 (O'Connor, J., concurring); *id.* at 589–91 (Breyer, J., concurring).

20. *See* Emily Buss, *The Speech Enhancing Effect of Internet Regulation*, 79 CHI.-KENT L. REV. 103 (2004).

the ".kids.us" domain, and they may allow their older children access more generally if there is effective filtering. Thus, in Buss's view, limitation can be of benefit not in the sense of protecting children from media influences, but in an information-enhancing way.

It may also be the case that limitations closely tailored to sufficiently protect children without limiting adult access increase the tolerance of society for adult free expression. It is at least an interesting coincidence that in the era since the *Ginsberg* decision, the incidence of prosecution for adult distribution of obscene materials has declined to the point where Cass Sunstein considers the likelihood of such prosecution extremely small.[21] *Ginsberg* allowed society to protect children from material that some see as harmful to them, while still allowing adult access. If availability to minors had to mirror availability to adults, it is questionable whether society would have developed the tolerant position it has with regard to adult expression.

The *Lorillard* case shows that some spillover effect is allowed in the effort to protect children. While the Court found the restrictions unconstitutional, it was because they were too broad an approach to what the Court recognized to be a substantial governmental interest. The Court agreed that reducing the exposure of youth to tobacco advertising would decrease youth smoking, but the billboard bans went too far.[22] As for other limitations, the Court said, "To the extent that studies have identified particular advertising and promotion practices that appeal to youth, tailoring would involve targeting those practices while permitting others."[23] The Food and Drug Administration has identified such practices, finding that the research literature shows color advertisements increase attention and recall beyond black and white formats.[24] Additionally, pictures were found to increase an ad's ability to communicate quickly and memorably, and to provide a way to communicate with youth and the functionally illiterate.[25] Since color and pictorial ads are particular risks for minors, limitations on such ads may not suffer from spillover effect, even though adults also would only see black and white, text only billboard ads.

21. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 210 (1993).

22. *Id.* at 557–61.

23. *Id.* at 563.

24. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44396, 44467 (Food & Drug Admin. Aug. 28, 1996).

25. *Id.*

II. SPEECH AFFORDED FIRST AMENDMENT PROTECTIONS FOR MINORS

A. Violence

Etzioni argues that violent depictions are a greater harm than sexual depictions, while at the same time they are less regulated. The fact that there is less restriction on access by minors to violent materials, even though there is more research that shows it is harmful, has to do with the First Amendment status of sex and of violence. Sufficiently explicit or provocative sexual material may be denied to minors, while violence has been viewed as enjoying First Amendment protection. Since violence is available to minors, there is a subject base for research on the effects of violence. While it cannot be said that minors have no access to sexual material, the law, and ethical concerns, prevent experiments in which minors are exposed to sexual material in the course of a study.

Marjorie Heins takes issue with Etzioni's belief that violence in the media does any harm to children, arguing that there is no basis to conclude that such images cause increased violence in the real world.[26] While Colin Macleod argues that the shielding of children from media influences need not be limited to material that can be shown to cause harm but can reach material that is unsettling,[27] a category that could include violence, the best response to Heins is simply to note the conclusion of the scientific community on this issue. If she is correct in her claim that Etzioni fails to understand the social science, Etzioni is at least in good company. Six major professional organizations in the health field have found the science conclusive. In a joint July, 2000 statement, the American Psychological Association, the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Medical Association, the American Academy of Family Physicians, and the American Psychiatric Association concluded that "well over 1,000 studies . . . point overwhelmingly to a causal connection between media violence and aggressive

26. *See* Marjorie Heins, *On Protecting Children—From Censorship: A Reply to Amitai Etzioni*, 79 CHI.-KENT L. REV. 229 (2004).

27. *See* Colin M. Macleod, *A Liberal Theory of Freedom of Expression for Children*, 79 CHI.-KENT. L. REV. 55 (2004).

behavior in some children."[28] The American Academy of Pediatrics, in an earlier policy statement, said: "The vast majority of studies conclude that there is a cause-and-effect relationship between media violence and real-life violence."[29] The Academy said that the link is "undeniable and uncontestable."[30] A representative of the pediatrics group also testified before the United States Senate Commerce Committee that there are now more than 3500 studies on the relationship between media violence and real world violence, that "[a]ll but 18 have shown a positive correlation between media exposure and violent behavior," and that epidemiological studies conclude that "exposure to violent media was a factor in half of the 10,000 homicides committed in the United States in the [year studied]."[31]

The view of the scientific community is that the debate is over and that there is a connection between media violence and real world aggression. The Surgeon General's report, *Youth Violence*, noted that ethical considerations prevent using the sort of randomized studies best used to establish causation, but concluded that "a diverse body of research provides strong evidence that exposure to violence in the media can increase children's aggressive behavior in the short term."[32] While less secure in finding a long-term causal connection, the report finds a "small but statistically significant impact on aggression over many years."[33] The scientific community has reached a conclusion contested primarily by strong civil libertarians and the media industry itself. The existence of a few scientists who disagree does not weaken that conclusion any more than a few tobacco industry scientists weakened the developing realization that cigarettes cause cancer or than the protestations of creation scientists refuted the scientific community's acceptance of evolution as scientific theory.

While I disagree with Heins's treatment of the science in the area, I do agree with her that the science may be inadequate to meet

28. Am. Acad. of Pediatrics et al., Joint Statement on the Impact of Entertainment Violence on Children (July 26, 2000), *available at* http://www.aap.org/advocacy/releases/jstmtevc.htm (last visited Sept. 12, 2003).

29. American Academy of Pediatrics Committee on Communications, *Media Violence*, 95 PEDIATRICS 949, 949 (1995).

30. *Id.*

31. Donald E. Cook, M.D., Testimony of the American Academy of Pediatrics on Media Violence Before the U.S. Senate Commerce Committee (Sept. 13, 2000), *available at* http://commerce.senate.gov/hearings/0913coo.pdf (last visited Sept. 12, 2003).

32. YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL, App. 4-B at ¶ 4 (2001), *available at* http://www.surgeongeneral.gov/library/youthviolence/chapter4/appendix4bsec3.html (last visited Sept. 12, 2003).

33. *Id.* at ¶ 1.

the strict scrutiny required to limit speech that would otherwise be protected by the First Amendment. If strong violence, unlike strong sex, is protected, a restriction on access by minors requires a compelling governmental interest and that the restriction be necessary to, or narrowly tailored to, that interest. Courts have been willing to accept the claim that the physical and psychological well-being of youth is a compelling governmental interest, but the failure of the science to identify precisely what sort of image leads to increased violence has caused restrictions to fail the narrow tailoring requirement.[34] Scientists cannot do the sort of experiment the courts seem to want; children cannot be placed into experimental and control groups and be shown only one sort of image to determine the effect of that image.

There is, however, the possibility that a statute limited to violent, or perhaps only to first person shooter, video games would not suffer from this weakness. Since playing a video game includes watching images, the science on the more passive media is relevant. In addition, there is good reason to believe that the more active, interactive nature of video games would strengthen the effect.

Judge Richard Posner rejected the contention that interactivity makes violent video games more dangerous, arguing that the distinction between interactive video games and passive media is "superficial":

> Maybe video games are different. They are, after all, interactive. But this point is superficial, in fact erroneous. All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.[35]

But this response really confuses two different uses of the word "interactive." The sort of literary interaction Judge Posner relies on is really nothing more than some sort of reader empathy with a character. This is far different from interactivity in the sense of participation in the action. It is the difference between being in the audience for a play and being on stage. While an actor really interacts with others in the cast, the audience is only moved by the portrayals presented. The interactivity of a flight simulator is a completely different experience

34. *See, e.g.*, Video Software Dealers Ass'n v. Webster, 773 F. Supp. 1275 (W.D. Mo. 1991), *aff'd*, 968 F.2d 684 (8th Cir. 1992).

35. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001).

from, and one more likely to lead to a response in actual flight than, reading a flight manual or a book written by a pilot.[36]

While the scientific evidence specific to video games is just beginning to accumulate, Craig Anderson and Karen Dill have completed a comparison of aggressiveness-producing effects of violent video games.[37] They conclude that the combination of correlational and laboratory results supports the existence of a causal relationship.[38] They also believe violent video games to be of more concern than violence in television or film because of the active nature of the games and player identification with the game aggressor.[39] "In a sense, violent video games provide a complete learning environment for aggression, with simultaneous exposure to modeling, reinforcement, and rehearsal of behaviors. This combination of learning strategies has been shown to be more powerful than any of these methods used singly."[40]

Even if one remains skeptical regarding the psychological studies on causation, there are special dangers to be found in the training provided to children by violent video games. Lt. Col. Dave Grossman, who taught psychology at the United States Military Academy, compares video games played by children with similar electronics-based military training.[41] He notes that electronics-based training increased the number of soldiers willing to fire their weapons at the enemy from 20–25 percent in World War II to 90–95 percent in the Vietnam War,[42] demonstrating that simulation increases the willingness to kill.

36. Even accepting Judge Posner's point as to the interactivity of good literature or film, the argument that violent video games are particularly dangerous still holds. A difference in identification through participation may make an experience more likely to produce aggression. Studies show that subjects who identify with a media aggressor are more likely to become aggressive than subjects not so instructed. *See, e.g.*, Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life*, 78 J. PERSONALITY & SOC. PSYCHOL. 772, 788 (2000) (citing Jacques-Phillipe Leyens & Steve Picus, *Identification with the Winner of a Fight and Name Mediation: Their Differential Effects upon Subsequent Aggressive Behavior*, 12 BRIT. J. SOC. & CLINICAL PSYCHOL. 374 (1973)).

37. *Id.* at 772.

38. *Id.* at 787.

39. *Id.* at 788.

40. *Id.* (citations omitted).

41. *See* DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY (1995); DAVE GROSSMAN & GLORIA DEGAETANO, STOP TEACHING OUR KIDS TO KILL: A CALL TO ACTION AGAINST TV, MOVIE & VIDEO GAME VIOLENCE (1999).

42. GROSSMAN, *supra* note 42, at 250 ("In World War II, 75 to 80 percent of riflemen did not fire their weapons at an exposed enemy, even to save their lives and the lives of their friends.... In Vietnam, the nonfiring rate was close to 5 percent."); GROSSMAN & DEGAETANO, *supra* note 42, at 72 (In World War II, "[t]he firing rate was a mere 15 percent among riflemen....").

He and coauthor Gloria DeGaetano also argue that the games provide deadly skill. To illustrate this point, they describe the shootings at Heath High School near Paducah, Kentucky by student Michael Carneal.[43] Carneal was said by his attorney to have had "no appreciable exposure to firearms,"[44] yet, with eight[45] or nine[46] shots, he had eight hits, all in the head or upper torso. That level of accuracy with a handgun is astounding. "The FBI says that the average experienced law enforcement officer, in the average shootout, at an average range of seven yards, hits with approximately one bullet in five."[47] While lacking firearms training, Carneal did play first person shooter video games, and they appear to have made him an effective killer. Grossman and DeGaetano describe the events:

> [Carneal] never moved his feet during his rampage. He never fired far to the right or left, never far up or down. He simply fired once at everything that popped up on his "screen." It is not natural to fire once at each target. The normal, almost universal, response is to fire at a target until it drops and then move on to the next target. This is the defensive reaction that will save our lives, the human instinctual reaction—eliminate the threat quickly. Not to shoot once and go on to another target before the first target has been eliminated. But most video games teach you to fire at each target only once, hitting as many targets as you can as fast as you can in order to rack up a high score. And many video games give bonus effects . . . for head shots.[48]

Later shootings in Jonesboro, Arkansas, by thirteen-year-old Mitchell Johnson and eleven-year-old Andrew Golden, also implicate video game training. Both boys played violent video games, although one of them also had firearm experience.[49] Again, Grossman and DeGaetano describe the incident:

> These two avid video game players fired a combined total of twenty-seven shots over a range of over one hundred yards and hit fifteen people. They strategically trapped their victims, lined them up, and shot with deadly accuracy. Battle-scarred veterans and military analysts reacted with amazement at the accuracy of their shooting, on one hand, and the military strategy involved in setting

43. GROSSMAN & DEGAETANO, *supra* note 42, at 4, 75–76.

44. *See* John Cheves, *Do Violent Images Cause Violent Action? Heath Parents' Lawsuit Must Prove Direct Link*, LEXINGTON HERALD-LEADER, May 2, 1999, at A1.

45. *See id.*; GROSSMAN & DEGAETANO, *supra* note 42, at 75.

46. *See* James Prichard, *Suit Blames Hollywood, Net for Heath Shootings*, LEXINGTON HERALD-LEADER, Apr. 13, 1999, at A1.

47. GROSSMAN & DEGAETANO, *supra* note 42, at 4.

48. *Id.* at 75–76.

49. *Id.* at 76.

> up their "kill zone," on the other. Both skills are taught in an array of home and arcade video games.[50]

The special dangers of violent video games might lead a court to conclude that restrictions on access by minors meet strict scrutiny,[51] despite Judge Posner's rejection of the approach. It appears unlikely, however, that courts will conclude that restrictions on passive media meet strict scrutiny. Thus, limitations on film remain a problem, and restrictions on video games may face the same difficulties.

One approach to placing violent media on the same plane as sexual material and allowing the shielding of minors is to argue that violence should be seen as fitting into the same First Amendment category as sex. It is the obscenity exception to the First Amendment, and its corollary of obscenity for child audiences, that allow the restrictions on youth distribution upheld in *Ginsberg*. I have argued elsewhere that, properly understood, the exception should include sufficiently graphic and offensive violence, that the limitation of the category of obscenity to sex is a product of the Victorian era, and that the concept and case law in earlier eras, as well as the theoretical justifications for the exception, would encompass violence.[52] Recognizing that violence, without regard to sexual content, can be obscene would justify the adoption of the same sort of variable obscenity established in *Ginsberg* and allow the limiting of minor access to material more suited to adults. It was the adoption of this theory that led the federal district court to refuse to enjoin the enforcement of an Indianapolis ordinance limiting youth access to violent video games,[53] and it was the rejection of the theory by Judge Posner that contributed to the reversal of the district court in that same case.[54]

B. Hate Speech

There is another area, one that Etzioni does not discuss, where the constitutional problem may not be in the spillover effect when minors are denied materials, but rather in the protection of materials

50. *Id.* at 76–77.

51. For a further discussion of violent video games and the strict scrutiny test, see Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 L. REV. M.S.U.-D.C.L. 51, 61-78.

52. *See* KEVIN W. SAUNDERS, VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION (1996).

53. *See* Am. Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943 (S.D. Ind. 2000).

54. *See* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

for minors. That is the area of hate speech. A racist child is of questionable psychological health, and the existence of hate-based crime demonstrates the danger of racism to community safety, so attempts to teach racism to children harm both the psychological health of children and the physical safety of society.

The Anti-Defamation League ("ADL") identifies an organization engaged in teaching children such racist beliefs. Resistance Records is "a thinly disguised mouthpiece for the most dangerous organized hate group in America," the National Alliance.[55] Resistance Records has a catalog of approximately 250 titles of hate-filled music CDs. The music groups include "Aggravated Assault," "Nordic Thunder," "Angry Aryans," "Brutal Attack," "Plunder & Pillage," "Blue-Eyed Devils," and "RaHoWa," a contraction of "Racial Holy War," and CD titles include "Racially Motivated Violence," "Holocaust 2000," "Retribution," "Born to Hate," and "On the Attack."[56] Song titles include "Race Riot," "Third Reich," and "White Revolution."[57]

Resistance Records has, in its distribution operations, recently combined hate speech with all the dangers of violent video games. "Ethnic Cleansing" lets a game player choose to be either a skinhead or a Klan member.[58] The player roams a virtual city killing gangs of "subhumans"—African Americans and Hispanic Americans.[59] The goal is to work one's way to the subway and search out and destroy the subhumans' Jewish masters, defeating their plans for world domination and saving the white race.[60]

This hate speech is a tool in the perpetuation of racism. The ADL, speaking of the leader of Resistance Records, says, "Pierce believes hate music—with its racist, anti-Semitic and anti-government messages—can be used simply and effectively to attract troubled youths. His stated goal is to fill the ranks of the National Alliance with a new generation of haters."[61] The ADL quotes Pierce in explaining the process of using music to recruit:

55. Anti-Defamation League, *Deafening Hate: The Revival of Resistance Records*, at http://www.adl.org/resistance_records/summary.asp (2000).

56. *Id.* at http://www.adl.org/resistance_records/print.asp.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

> As hate rock bands subtly infiltrate mainstream youth culture, they capitalize on teen-age rebelliousness and channel it into enmity and fury against "non-Aryans." Pierce has explained, "My aim with resistance music is to give them a rationale for alienation, to help them understand why they're alienated, to help them understand the programs and policies behind these alienating conditions, and to give them a target, a purpose for their anger and rage." Coupled with these organizations' slick and enticing Web sites, hate rock is part of a multimedia approach that packs a powerful and seductive punch. Therein lies the most dangerous threat.[62]

That is a dangerous threat, the danger of perpetuation of racism by reaching youth still in the process of developing their personalities and moral compasses. It is a threat against which our children and society need protection.

III. A TWO-TIERED FIRST AMENDMENT

The approach to allowing protection for children from these harmful media influences is, as Etzioni argues in his article and as I argue in a forthcoming book,[63] to recognize that the First Amendment should operate differently for adults and for children. For adults the freedom of expression should be fully robust. But children should not have a constitutionally protected right to obtain whatever materials they may find attractive. Furthermore, the free expression rights of adults should not include the right to reach an audience of other people's children.

William Galston's analysis of constitutional law regarding children leads him to the conclusion that the Constitution as currently construed may allow the accomplishment of what Etzioni wants.[64] He cites *Ginsberg* as recognizing a difference between the Constitution's treatment of children and adults,[65] and indeed *Ginsberg* does allow different treatment. He also cites to *FCC v. Pacifica Foundation*[66] for the recognition that children may be protected in the broadcast context by requiring the channeling of certain material into hours when children are less likely to be in the audience.[67] Both cases do provide

62. *Id.*

63. KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT (forthcoming Dec. 2003).

64. *See* William Galston, *When Wellbeing Trumps Liberty: Political Theory, Jurisprudence, and Children's Rights*, 79 CHI.-KENT L. REV. 279 (2004).

65. *Id.* at 293.

66. 438 U.S. 726 (1978).

67. Galston, *supra* note 65, at 295–97.

support, but the question they leave open is whether the allowed protection applies only to sexual content or words with a sexual connotation. *Ginsberg* clearly was tied to obscenity law and simply varied the level of prurience and offensiveness to tailor it to the audience of minors. *Pacifica* is less clear in its tie to sex, but there is a strong argument that the material that must be channeled has to be sexually indecent rather than objectionable for some other reason.[68] If there must be a tie to sex, then Etzioni is correct that the Constitution currently leaves children vulnerable in other contexts.

Galston also, however, draws support from another case having nothing to do with sex. *Prince v. Massachusetts* allowed a criminal charge against a woman who allowed, and provided the material for, her niece to distribute literature for the Jehovah's Witnesses.[69] The Court concluded that the state's interest in protecting children could override the religious liberties of either the aunt or the niece.[70] This is a far more generalizable case, and it does not stand alone. There are a number of cases regarding religious liberty that treat children differently, particularly in the area of refusing life-saving medical treatment. Generally, an adult will be allowed to refuse medical treatment, but a court will order life-saving treatment for a child.[71] There are also differences in treatment in other areas, such as procedures required for commitment.[72] While this may not show that the constitutional status quo is adequate for Etzioni's purpose, it is at least an argument by analogy for the recognition of Etzioni's and my call for different treatment in the area of free expression. This proposal would still require an analysis of First Amendment values to determine whether they can give way in the same manner that religious liberty values gave way in *Prince*.

The values behind the First Amendment make the costs that accompany free expression worth bearing, but where children are concerned, the benefits are not as strong and the costs are greater. Children are still developing intellectually and emotionally, and influ-

68. *See* Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1286–87 (1978).

69. 321 U.S. 158 (1944).

70. *Id.* at 166–67.

71. For a discussion of the cases in the area, *see* Elizabeth A. Lingle, *Treating Children by Faith: Colliding Constitutional Issues*, 17 J. LEGAL MED. 301 (1996); Anne D. Lederman, *Understanding Faith: When Religious Parents Decline Conventional Medical Treatment for Their Children*, 45 CASE W. RES. L. REV. 891 (1995).

72. *See* Parham v. J.R., 442 U.S. 584 (1979); *see generally* SAUNDERS, *supra* note 64, at ch. 5.

ences that might be minor for adults can have a serious negative impact on a child. These lessened benefits and greater costs should serve to weaken the general presumption against censorship and allow society to provide protection for children. Etzioni argues for treating different-aged children differently. I rely on a simple distinction between minors, or those under seventeen, and adults for constitutional purposes, but agree that an understanding of the development of children should lead to differences in the actual limitations justified by the more general constitutional argument.

While some of the costs that favor restricting expressions for children have been discussed, the benefits of free expression should also be examined to see why they have less value for children.

A. Politics and the Marketplace of Ideas

The most important benefits protected by the First Amendment's expression clauses are those that speak to the people's role in self-governance. If we cannot hear the views of others, we cannot cast intelligent ballots. If we cannot speak against government, we cannot change the views of the polity. If we put restraints on the marketplace of ideas, the search for truth is cut off—or at least narrowed.

The role of expression in the political process speaks in favor of a strong freedom of expression, but its importance is most clear for those who are allowed to participate in the political system. Since children are not allowed to vote, this rationale is weakened when they are the intended consumers of speech. Adult attempts to influence politics should be directed toward other adults, who can vote for the position advocated. While children's expression relating to social and political change may have some value, especially for older children, that value must be less than adult contributions, or denying children the vote would not be justified.

Despite this argument that the expression rights of children are of less importance to the political process, they are not completely without importance. Claims of a right for adults to influence the children of others may have little credibility, but the expression of children themselves has more value. On some factual issues, such as child abuse, the child may have unique knowledge and must be heard. Children must also learn the role they will take on as active members of the voting political community. There is a societal interest in assuring that children are prepared for this, and learning to express themselves on political topics is a part of that preparation. It is, however, a

training interest, an instrumental interest rather than an intrinsic right.[73] As such, society should be allowed to balance it against other concerns in the upbringing of children.[74]

Macleod also speaks to a value in free expression for children that touches on this training or developmental interest.[75] He phrases it as an interest on the part of children to access information and conditions that foster independent deliberation and reflection and the development of moral powers. Whether this is an individual interest, as he seems to conclude, or a societal interest, it still seems to be a training interest and one that can yield to other interests. The difference in where the interest lies would be most important in determining which interests can serve to override the free expression interest. If it is the child's training interest that is important, and Buss is clear in her position that the child has an interest in working out his or her own identity and system of beliefs,[76] then it is the child's own interests that may serve as a counterweight. If the training interest is society's, other societal interests can override free expression. There do seem to be informational interests that are the child's, and material with serious value for the child should remain available, as the CDA, COPA, and a variety of other restrictive statutes have provided.

The "marketplace of ideas" model of free expression also speaks less strongly for expression to and from children. While we may believe that the free and open exchange of ideas among adults will eventually lead to the truth, that seems less likely for children. Children lack the experiential basis of adults and are more likely to be led astray. We may also be more confident in concluding that the direction in which the child is headed is wrong. It is unreasonable to claim the general infallibility that would justify the suppression of contrary adult expression, but it is more reasonable to claim a better understanding than that possessed by children.

David Archard notes this difference in capacity between children and adults.[77] He asserts that children do not hold beliefs or have desires in the same way adults do, and thus, self-expression does not have the same value for children. He does recognize value in their expression of these half-formed beliefs and rapidly changing desires,

73. *See* JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 106 (1996).

74. For a limitation, see *infra* notes 78–79 and accompanying text.

75. *See* Macleod, *supra* note 28.

76. *See* Buss, *supra* note 20.

77. *See* David Archard, *Free Speech and Children's Interests*, 79 CHI.-KENT L. REV. 83 (2004).

but not to the degree of adult expression of belief or desire. So free expression rights for children need not exist, or at least can exist on a lower plane than the free expression rights of adults. Archard does note the right of children under Article 12 of the United Nations Convention on the Rights of the Child to express views on matters affecting the child, but suggests that this right is instrumental rather than intrinsic.[78]

There is the danger that government could use the right to limit the expression of nonparents to children to impose an orthodoxy on the next generation. To prevent such an imposition, it is important to recognize the right of parents to provide their children with material that society may feel unsuitable. Thus, even if restrictions on the commercial distribution of violent material or hate-filled music to children are acceptable, parents must be free to purchase the materials their children cannot buy directly. The schools must also not be used to restrict one side in an ongoing political debate in the adult community. While schools should be allowed to insist on civility and to prohibit racist invective, they should not be allowed to assert one position on affirmative action and to ban the expression of contrary opinion. This was the real harm in *Tinker v. Des Moines Independent Community School District*.[79] There was, in society, an ongoing debate in the adult community over the conflict in Vietnam. The Des Moines schools banned a form of expression against the war, while doing nothing to restrict speech in favor of the war or on other political topics.[80] It was an attempt to squelch one side of a debate and only allow the expression of the other.

The article by Michael Birnhack and Jacob Rowbottom discusses Internet filtering but also speaks indirectly to the point of children's speech in a democracy.[81] They note differences between United States and European law regarding free expression. The European legal ethos of compromise and balancing, they argue, is more supportive of attempts to shield children. While their discussion is in the context of balancing adult rights against the recognized interest in protecting children from pornography, the value of comparative constitutional analysis is more generalizable. Birnhack and Rowbottom show how

78. *Id.* at 93.

79. 393 U.S. 503 (1969).

80. *Id.* at 510–11.

81. *See* Michael D. Birnhack & Jacob H. Rowbottom, *Shielding Children: The European Way*, 79 CHI.-KENT L. REV. 175 (2004).

balancing adult rights against the interest in protecting children can take place in democratic countries. There is, then, comparative evidence that limits placed on the provision of objectionable material to children would not destroy our democratic system.

B. *Autonomy*

Other justifications for free expression rest on the value of autonomy. Even speech that has no political value has value in the part it plays in self-definition. Those who argue that sexually obscene material should be protected do so not on the basis of political value, since material with serious political value is not obscene. Rather, the argument is that individuals have the right to determine for themselves the material they will read, view, or convey. As long as there is no harm to others, individuals must be free to experiment, to find the life style that they find most satisfactory, and to define themselves.

Edwin Baker is one of the leading current proponents of such a theory. He argues that a fundamental purpose behind the First Amendment is fostering "individual self-fulfillment."[82] Baker says that each of us has a right to self-realization and self-determination, and that part of self-definition is the freedom to express any thoughts we may have. This freedom goes beyond political expression, and Baker would protect telling stories purely for entertainment and singing purely to demonstrate musical accomplishment.[83]

David Richards relies on similar values:

> [P]eople are not to be constrained to communicate or not to communicate, to believe or not to believe, to associate or not to associate. The value placed on this cluster of ideas derives from the notion of self-respect that comes from a *mature person's* full and untrammeled exercise of capacities central to human rationality. . . . Freedom of expression . . .supports a *mature individual's* sovereign autonomy in deciding how to communicate with others; it disfavors restrictions on communication imposed for the sake of the distorting rigidities of the orthodox and the established. In so doing, it nurtures and sustains the self-respect of the *mature person*.[84]

82. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47 (1989) [hereinafter BAKER, HUMAN LIBERTY]; C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978). Martin Redish goes so far as to assert that this self-realization value is the only true value served by the freedom of expression. The values behind democracy itself are only an outgrowth of the value of self-realization. *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593–94 (1982).

83. BAKER, HUMAN LIBERTY, *supra* note 83, at 54.

84. David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974) (emphasis added and citations omitted).

Note, however, that Richards seems to recognize that autonomy interests do not apply, at least with equal strength, to children. Adults may be presumed to know what is in their own best interests and how best to communicate their ideas to others. For younger children, however, others may know better.

Baker and Richards see the protection of free expression as part of the broader right to freedom from government interference in making self-defining decisions. Their position grows out of a tradition tracing back to the work of John Stuart Mill. While Mill's *On Liberty* justifies free speech based on its utility in attaining truth, the aspect of Mill's theory on which autonomy arguments build is found elsewhere in *On Liberty*.[85] Mill finds attempts by society to control the lifestyle decisions of individuals unjustified, except to prevent harms to others. If there is no harm to others, Mill says "neither one person, nor any number of persons, is warranted in saying to another human creature of ripe years that he shall not do with his life for his own benefit what he chooses to do with it."[86]

Mill did, however, recognize a difference between children and adults. The quote above spoke of persons "of ripe years." Mill would allow greater restrictions on children. This may be best shown in Mill's consideration of possible rationales for society acting paternalistically toward adults. Mill found punishment for purely self-regarding behavior by adults unacceptable in part because society has other ways of leading "weaker members" toward expected standards of conduct:

> Society has had absolute power over them during all the early portion of their existence; it has had the whole period of childhood and nonage in which to try whether it could make them capable of rational conduct in life. The existing generation is master both of the training and the entire circumstances of the generation to come .... If society lets any considerable number of its members grow up mere children, ... society has itself to blame for the consequences.[87]

Mill was willing to allow society to shape the thinking of children in a way that would be unacceptable for adults. In childhood, society has the opportunity to teach values it hopes children will accept as they become adults, and requiring society to allow strangers to the

85. JOHN STUART MILL, ON LIBERTY ch. IV (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

86. *Id.* at 142.

87. *Id.* at 149–50.

child to teach opposing values defeats society's right to educate. Society should continue to recognize the primary role of parents in teaching values, but it does not have to allow the magazine or video dealer or the video arcade operator to offer fare to children that society finds harmful and that the parents do not make the effort themselves to provide their children.

CONCLUSION

Limiting the rights of children to obtain whatever material they find attractive and the rights of strangers to the children to provide them whatever they wish to sell serves to strengthen the role and rights of parents. Parents have the right, and responsibility, to determine the influences to which their children are exposed.[88] But, parents need help. Children are subjected to a great many influences, from videos to cable television to video games to the Internet, and the greater explicitness of both sex and violence in the current media make the concern over inappropriate exposure pressing.

The government's role in this area should be supportive of the parents. The argument presented here is only that the government be allowed to make decisions as to what the child can obtain directly from nonparents. Parents must be allowed to disagree with the state and purchase and provide the material to their children themselves. The effect is only a change in presumptions. The current presumption is that it is acceptable for the vendor to provide nonobscene material to minors, and that it is up to the parents to control their children if they do not want their children exposed to influences they find objectionable. The changed presumption would be that there are materials for which it is assumed that the parents would object and that vendors may not provide minors, but parents can counter that presumption by purchasing the material and providing it to their children themselves.

It should be noted that the usual concerns over slippery slopes, raised whenever there is a suggestion that some form of speech be limited, are not compelling here. Recognition of an exception to the First Amendment that would allow the prohibition of flag burning

88. Judge Posner, in *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001), argued that children have expression rights independent of their parents so that they may cast their own independent votes when they come of age. If Judge Posner's position is limited to the ordinance at issue in that case, an ordinance that limited the access of those under eighteen, his conclusion may be reasonable and would speak in favor of limitations addressed only to those under seventeen. If his position reaches those under seventeen, it is in conflict with the Supreme Court's views, as expressed in *Ginsberg*.

might lead to exceptions placing other forms of expression outside the protection of the amendment. Indeed, having amended the Constitution to recognize one exception, a politician might find it more difficult to resist demands to do so again. The same is not true for an age-based exception. While there may be debate over what age during the period of minority to make subject to particular limitations, with our current views on the rights of adulthood—with the exception of the consumption of alcohol—attaching at eighteen makes it inconceivable that the limitations suggested would creep up to twenty-one on the way to thirty or forty. While there might be creep in the nature of the material subject to restriction, the restrictions are, again, only presumptions. Parents can always act contrary to the restriction on direct provision by others and obtain the materials for their children.

This last response also speaks to concerns over a chilling effect. Any restrictions on free expression may affect materials that are not the intended or legitimate targets of the restrictions. Vendors may be unwilling to face the risk that the materials they are providing will turn out to be restricted, and material that should be freely available is kept off the market. Where the restrictions are only on direct distribution to children, the concern is of lesser import. If a video dealer decides not to sell or rent a particular video to a minor, the child's parents can still obtain it for the child. The effect will only be on questionable, borderline material, and the decision there is then placed where it should be—with the parents.