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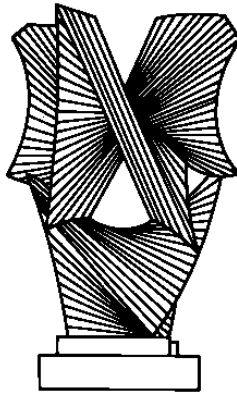
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THE SPEECH ENHANCING EFFECT OF INTERNET REGULATION

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The Speech Enhancing Effect of Internet Regulation

Emily Buss

Amitai Etzioni ends his analysis of regulations aimed at curtailing children's access to harmful speech with a call to "value children more." While I share his willingness to remake the law to serve children better, I do not think his analysis does justice to children's complex interests in the realm of speech. Caught up in the absolutist battle between "full" adult speech rights, on the one hand, and protection from harmful exposure, on the other, Etzioni embraces regulation in the name of protection. But a fuller account of the relationship of authority between state, parent and child, suggests that some state-imposed speech regulation may have a speech enhancing, rather than curtailing, effect for children. Because parents have near absolute censoring authority over their children, regulations may inspire parents to relax their grip on their children's exploration of ideas, even as they constrain adults' freedom somewhat. The best justification for the regulations in question might, thus, be the state's interest in shifting the balance of access to speech, modestly, away from adults and in favor of children.

To a large extent, my disagreement with Professor Etzioni is one of analysis rather than outcomes. I, too, think narrowly crafted regulation can be appropriate in some contexts. But taking a speech-enhancing, rather than a protective, approach to the development of these regulations affects the contours of these regulations. More significant, a pro-speech approach challenges the conventional assumption, embraced by Etzioni, that segregating adult and child access will maximize the interests of both. At least on the internet, children's interest in access to information may well be best served by linking their fate with that of adults. While adults will suffer some speech loss from this linked fate, children will gain considerably more.

The internet offers an especially salient context in which to consider this potential tension, because of its special speech value to children. First, it is the gateway to an exceptional volume and variety of information, accessible from anywhere at anytime. It is relatively easy to use, allowing children who "enter" with no pre-existing knowledge or sophisticated questions to find their way to answers. For children, it is also the best, most public, forum available for the free exchange of ideas. Unlike adults, who have control

over where they go, what they do, and to whom they speak, children have very little opportunity for a free and public exchange of ideas. The internet offers children a unique opportunity for the unstructured, unmonitored exploration of information that is so valuable to the fostering of their independent thinking.¹

Of course, these virtues bring with them commensurate risks: The volume and variety of information available on the internet extends to much material that many find offensive, and the opportunity for independent exploration offered makes it likely that children will find their way (whether by design or by mistake) to these offensive materials. Concerned with this potential, many parents will impose restrictions on their children's internet access that will dramatically limit children's opportunity to explore the internet's wealth of inoffensive information freely. To prevent that profound speech-limiting effect, a state might choose to impose regulations that reduce children's access to the materials parents most reasonably fear.

I. Two Entangled Legal Frameworks

Two distinct bodies of law bear on our consideration of child-protective regulations of speech. The first is the children's right to free speech, protected by the First Amendment. The second is a system of laws, constitutional and otherwise, that grant parents vast authority over their children. The Due Process Clause shields this authority from unwelcome state intervention, and the state affirmatively fosters this authority through a host of laws that recognize parental authority in specific contexts, and that hamper children's ability to resist it. These two distinct bodies of law, governing children's speech rights and parental authority, respectively, must be considered together to understand the stakes for children of the regulations in question.

A. Children's First Amendment Rights

¹ The Court has noted the value of this free exploration of ideas in the far more limited environment of the school library. See *Board of Education v. PICO*, 457 U.S. 853 (1982) (celebrating students' ability to "explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum") (quoting *Right to Read Defense Committee v. School Committee*, 454 F. Supp. 703, 715 (Mass. 1978)).

The Supreme Court has made clear that the First Amendment right to free speech, like other constitutional rights, applies to children as well as adults.² This right includes the right to speak, as well as to hear and read the speech of others.³ This is not to say, however, that the scope of children’s speech protection is co-extensive with that of adults. Indeed, the Court has frequently relied upon the special circumstances of childhood, and the special circumstances of the child-specific school setting, to justify reducing the protection afforded to children’s speech.⁴

Courts and commentators commonly offer two justifications, both tied to children’s ongoing development, for curtailing children’s speech rights. First, children’s less developed capacities make them less prepared to exercise speech rights and, second, their greater vulnerabilities increase the potential harm associated with certain speech. As applied to the right to access information; immature capacities might lead children to make bad judgments about what to read and how to assess what they read, whereas children’s special vulnerabilities could increase the risk that this access to information will impose psychological and developmental harm.⁵ These two justifications for regulation address different sides of the rights-interest balance. Where child-specific harms weigh more heavily in favor of regulation than do the parallel adult harms, children’s diminished capacities lighten the countervailing speech interest that weighs so heavily against regulation where adult speech is at issue.

² *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969).

³ *Board of Education v. PICO*, 457 U.S. 853, 866-68 (1982) (“just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.”); see also Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 Pa. J. of Constitutional L. 223 (1999) (arguing that existing constitutional doctrine supports the recognition of mature minors’ access to information without parental consent).

⁴ See, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968) (“we have recognized that even where there is an invasion of freedoms, ‘the power of the state to control the conduct of children reaches beyond the scope of its authority over adults...’”) (quoting *Prince v. Massachusetts*, 321 U.S. 170 (1944).); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (concluding that a student newspaper produced in the context of a journalism class should be afforded only minimal first amendment protection); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (concluding that the First Amendment did not prevent the school from disciplining a student for his use of vulgarity during his speech at a student assembly).

⁵ In *FCC v. Pacifica Foundation*, 438 U.S. 726, 757-58, Justice Powell explains in a concurring opinion: A child ... is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.” *Ginsberg v. New York* at 649-50 (Stewart, J., concurring in the result). Thus children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the unwilling through the exercise of choice. At the same time, such speech may have a deeper and more lasting negative effect on a child than on an adult.

Professor Etzioni considers both of these justifications and concludes that, together, they provide strong support for certain forms of internet regulation. While I am in no position to second-guess his conclusions about child-specific harm, I disagree with his conclusion that children's immaturity qualifies their interest in speech. To the contrary, the process of development gives special value to children's speech, and, particularly, children's access to information.

Professor Etzioni concludes that exposure to certain information and images, particularly those depicting violence, is, indeed, harmful to children. This is not, as he notes, the speech targeted by Congress's many attempts to regulate internet speech.⁶ In contrast, he suggests that there is no convincing evidence suggesting that children are harmed by exposure to the sort of sexually indecent materials that are the focus of these regulations.⁷ While noting that this lack of support might be due, in part, to the difficulty of studying the question effectively, he concludes that, absent such support, regulation of access to these materials may not be justified. Because the empirical link between exposure to media violence and aggressive behavior is much stronger, he concludes that the state has a strong interest in controlling children's access to these materials. As I will argue, later, this straightforward reliance on empirical evidence is less compelling, if the purpose of regulation is to relax parents' access constraints, rather than to protect children from harmful exposure. To achieve that purpose, what matters most is parents', rather than scientists', view of harm.

Bolstering his conclusion that certain access regulations are justified is Etzioni's conclusion that children lack the maturity to exercise speech rights in a manner worthy of full constitutional protection. He concludes:

⁶ See, Communications Decency Act of 1996 47 U.S.C.A. Sec. 223 (1997) (prohibiting knowing transmission of obscene, indecent, or patently offensive images to recipients under 18 years of age); Child Online Protection Act, 47 U.S.C. A. Sec. 231 (2002) (prohibiting the display of sexually explicit material deemed harmful to minors on the World Wide Web); Children's Internet Protection Act (conditioning libraries' receipt of federal funding on their use of filters designed to screen out sexually explicit materials deemed harmful to minors).

⁷ Etzioni at ; see also Richard Thornburgh and Herbert S. Lin, Youth, Pornography and the Internet, National Academy Press 6.2.4 (2002) [*hereinafter* National Research Council Report] (noting the lack of empirical evidence on the impact of sexually explicit material on children). This is surely, in part, because these effects are harder to study than the effects of exposure to depictions of violence, which are a mainstay of the television programming and video games to which children in many households have been continually exposed. See *id.* at 6.2 (noting that, "because our society has more permissive attitudes about allowing young people to view violent material than sexually explicit material," the impact of exposure to violence has been more thoroughly studied).

Children—according to practically all of a huge social science literature and elementary common sense—are different from adults in that they have few of the attributes of mature persons that justify respecting their choices. Children have not yet formed their own preferences, have not acquired basic moral values, do not have the information needed for sound judgments, and are subject to ready manipulation by others.⁸

While Etzioni acknowledges that these deficits are particularly great in younger children, he relies on this argument to support the regulation, albeit lesser regulation, of adolescent speech and access as well. This suggestion that adolescents' speech and access is less worthy of protection than adults' is a serious mistake, that fails to account for the role the law itself plays in fostering children's incomplete development.

Children's ongoing development compromises the value of their speech in some respects, but it enhances its value in others. Indeed, because speech, itself, plays such an important role in development, it has a special value to children largely absent for adults. Children, and particularly adolescents, are heavily engaged in the process of identity formation, the process of working through what they believe, both on matters of fact and principle.⁹ While parental upbringing plays a large role in shaping this identity, children increasingly turn to independent, non-parental sources as they grow up.¹⁰ Development, then, points children toward the marketplace of ideas, to work out who they are, and what they think.

More than at any other life stage, adolescents are programmed to speak and listen, to engage in the marketplace of ideas in a genuine search for truth. Children enter the marketplace open to persuasion, and prepared to "try on" various viewpoints, and characterizations of facts. Adults, in contrast, may be less qualified, by virtue of their

⁸ Etzioni 8/28/02 draft, p.

⁹ See Jane Kroger, *Identity in Adolescence: The Balance Between Self and Other* 21, 46 (Routledge, 2d ed. 1996) (noting the importance of adolescence for identity development).

¹⁰ See Ritch C. Savin-Williams and Thomas J. Berndt, *Friendship and Peer Relations*, in S. Shirley Feldman and Glen R. Elliot, eds., *At the Threshold: The Developing Adolescent* 277, 279 (Harvard 1990) ("[B]y allowing oneself to become vulnerable around a coequal, adolescent friends share with one another their most personal thoughts and feelings, become sensitive to the needs and desires of others and in the process acquire a deep understanding of the other and the self"); Michael D. Berzonsky, *A Process Perspective on Identity and Stress Management*, in Gerald R. Adams, Thomas P. Gullotta, and Raymond Montemayor, eds., *Adolescent Identity Formation* 198 (Sage 1992) (finding that adolescents actively engaged in the process of sorting out their identities look to others for ideas about the alternatives to consider).

more complete identity development, to profit from their participation. While their greater wisdom and competence may enhance the value of the speech adults bring to the marketplace, their prospect of persuading one another can be expected to dwindle with age.¹¹

The fact that children are likely to make “errors,” along the way, due to their incomplete development, shorter supply of experience, and moral immaturity, is not a reason, in itself, to devalue their market participation. Indeed, healthy development depends upon an opportunity to practice, to engage in a process of trial and error, that can facilitate the development of self-knowledge, a better sense of the world, and greater moral understanding. While this experimentation will have developmental value in many contexts, mistakes in other contexts can produce serious lasting consequences such as babies, health problems, and jail.¹² Compared to most arenas of choice, the harm associated with speech “mistakes” will be tame. Speech, then, has a special value to children as a practice ground for choice that is relatively, if not absolutely, safe.¹³

Children’s ongoing development may enhance the value of their speech in a third respect. Their ongoing process of “becoming,”¹⁴ gives them the opportunity to develop habits that can carry into adulthood, when approaches to deliberation, no less than the substance of our views, become more fixed. Perhaps habits of discourse instilled in adolescents can alter the adult speakers and listeners we become. Affording children opportunities to seek out dissenting viewpoints, and to explore issues broadly, may translate into a better functioning marketplace for adults.

¹¹ Cf. Sunstein’s research on deliberation/polarization?

¹² Juvenile criminal offending offers a good example of a context in which developmentally inspired experimentation can produce serious harmful consequences. While sociologists and psychologists commonly conclude that some experimentation with law breaking is developmentally healthy (and common) in adolescence, the cost of getting caught can be profound. Cf. Terri E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 *Psychological Rev.* 674, 692 (1993) (suggesting that the bulk of adolescent offending, which she calls “adolescent-limited” offending reflects a healthy desire of adolescents to bridge a gap between biological maturity and social immaturity); Edwin M. Schur, *Radical Nonintervention* (1973) (arguing that law enforcement response to adolescent offending fosters deviance in otherwise developmentally healthy adolescents by shaping their identities in a destructive direction).

¹³ Cf. Franklin E. Zimring, *The Changing World Legal World of Adolescence*, 91 (1982) (calling for a legal approach to adolescence that maximizes adolescents’ opportunity to practice exercising their rights and assuming responsibilities, while minimizing the harm caused by their mistakes).

¹⁴ Etzioni at (*quoting* David Archaud and Colin M. MacLeod, in *The Moral and Political Status of Children*).

Etzioni assumes, as do most, that whatever value we afford children's speech weighs against state regulation. But this need not be so. Because children's access to speech is in the tight control of their parents, regulations that encourage parents to loosen that control are likely to yield significant speech benefits for children.

B. Parents' Legal Authority Over Their Children's Speech

The state gives parents broad authority to control the choices of their children, and backs them up with judicial orders and police enforcement when children balk.¹⁵ It enforces children's dependence by withholding voting rights, narrowing work opportunities, and preventing them from entering binding agreements. The state further reduces children's choices by forcing them to schools for the bulk of their day, and by compelling them to digest a formal curriculum of the state or parent's choosing for most of the school day. Of course, all these restrictions are imposed for their own good, and it is not my intention, here, to question the efficacy of those limitations. Rather, I suggest that we must take these substantial "baseline" infringements on children's freedom into account, when we assess their interest in additional regulation.

The state exercises far greater indirect control over children's access to speech, by delegating authority to parents, than it exercises directly in the form of speech qualifying regulations. Parents' control over children's access to information outside of school hours is near absolute. Parents can refuse to allow any computer access, install "white list" filters that only allow access to an approved list of websites, or insist on looking over their children's shoulders whenever they log on. They can prohibit their children's use of libraries and other public spaces that offer access to information, or can insist on accompanying them, whenever they go. All such control, as exercises of parental authority, will be backed up by the state.

¹⁵ Where children refuse to obey the rules imposed by their parents, parents can invoke the assistance of the courts, through their "status offense" jurisdiction, and of the police, should children attempt to run away. Where a child violates a court order directing her compliance with parental rules, her status offense can be converted to a charge of juvenile delinquency. See Harry J. Rothgerber, Jr., *The Bootstrapping of Status Offenders: A Vicious Practice*, 1 J. U.L. Ky Children's Rts. J. 1 (1991) (discussing "the process whereby a juvenile court, either through its contempt power or by means of an escape petition, elevates a status offender to a public offender ("delinquent") for the same noncriminal misbehavior which brought the child before the Court in the first place").

The state further controls children's access to speech through compulsory schooling laws, which dedicate most of the child's day to school and school-related activities. By requiring children's participation in a prescribed curriculum, the state monopolizes the child's speaking and information gathering hours. These are hours in which children's speech and access are heavily constrained, in part by state imposed regulations (which the Constitution allows), and in part by parental choice (which the Constitution protects). In all aspects of the school day characterized as curricular, the Court has said, children's speech protection is minimal,¹⁶ and the heavy control schools generally exercise over that curriculum substantially limits children's speech opportunities within it. Moreover, should the state choose to afford children considerable freedom of speech within that curriculum, the Constitution affords parents authority to veto those choices, by removing their children from public school.¹⁷

Viewing children's opportunities to access information through the lens of all relevant laws, we see the following: The First Amendment protects children's access to speech against some forms of direct state regulation. States nevertheless undermine children's ability to access information through a web of laws that affords parents strong authority over their children, and renders children dependent on their parents. Moreover, parents' own constitutional rights prevent the state from qualifying parents' censorship control by requiring parents to allow a certain level of access. The state could, presumably, enhance children's access to information by eliminating its laws that reinforce parental authority altogether, but such an approach would sweep far too broadly. The state might well conclude that children's interests are generally served by subjecting them to their parents' authority, but disserved when that authority is exercised to severely curtail children's access to speech. To enhance children's access to speech, then, without undermining parental authority, the state must win the confidence of parents loath to relinquish informational control.

Recognizing the considerable value of speech, and particularly access, to adolescents, the state might impose regulations aimed at screening out the material most worrisome to parents, in order to encourage parents to allow their children greater

¹⁶ *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

¹⁷ See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking down state law requiring all children to attend public schools); ; home schooling.

freedom in their exploration of information overall. I am not suggesting that this has been identified as a state interest, but, rather, that it could, and perhaps should, be. The best argument for internet regulation, in the absence of any convincing showing of harm, is a pro-speech argument: Without the regulation, some children's independent access to this wealth of information is likely to be sharply curtailed.

This conception of parent-state collaboration parallels the more conventional conception embraced by Professor Etzioni and the Court, but it runs in the opposite direction. Where the conventional conception recognizes the state's interest in helping parents protect their children from harmful speech,¹⁸ I am adding the state's interest in helping parents avoid overprotection. Parents, acting alone, have limited knowledge and crude tools available to them to control their children's access to internet speech. The state is in a better position to fine-tune that control, leaving more information more freely accessible, to children.¹⁹

Under this conception of rights, authorities, and interests, certain regulations could be speech favoring—that is, they would be aimed at enhancing the speech interests of children overall. That is not to say that they would enhance the access of every child, for some children, surely, would have full internet access in the absence of regulation. The interest would be defined then, to maximize speech access of children, in the aggregate, rather than each child, in particular. This conception, then, shifts the tension from adults speech against child protection to adult speech against child speech, raising basic questions about whose speech we should prefer.

Of course, my speech-speech conception invites a straightforward doctrinal objection: Even if children's speech interests are the same or greater than those of adults, the First Amendment gives the states no affirmative authority to advance those interests. The First Amendment shields individuals (children and adults) from state infringement on speech; it does not create a right to state-provided opportunities for speech. But this lawyer's argument can be met with a lawyerly response: The state infringes far more heavily on children's freedom of speech, by delegating heavy speech control to parents,

¹⁸ Etzioni at ; Ginsberg v. New York, 390 U.S. 629, 639 (1968).

¹⁹ Of course, these two conceptions of state-parent collaboration are not necessarily in conflict. The state might have an interest in helping both the parent who did too little (the harm rationale), and the parent inclined to do too much (the enhanced speech rationale). As I will argue, later, however, the two rationales call for somewhat different solutions.

than it does on adults, by imposing certain specific regulations. These regulations, then, can be seen as the state's attempt to reduce the constraints it imposes, indirectly, on children's access. Indeed, the state's other curtailments of children's freedom can be better justified if the speech suppressing effects of those curtailments are minimized. Viewed in the context of the entire legal relationship among parent, child, and state, these regulations impose modest speech infringements, on adults, to modestly diminish the speech infringements the state poses, through parents, on children.

But I do not wish to give too much attention to this doctrinal manipulation. Nor do I insist that First Amendment doctrine is particularly well designed to handle the problem I address. Rather, I focus on an actual tension between two groups' speech interests, a tension produced by the awkward intersection of many laws, constitutional and otherwise.

II. The Competing Speech Interests of Children and Adults

The potential gains and losses to adult and child access associated with state intervention will vary considerably with context. After arguing that children stand to gain much more than adults stand to lose from the tailored regulation of the internet, I will argue that physically segregating adult and child access is likely to reduce those gains to children considerably.

A. The Special Value of Internet Access for Children

A strong argument can be made that the value, to children, of independent internet access outweighs whatever loss of value, to adults, would be associated with regulations designed to afford children that independent access. The argument begins with the suggestion, set out above, that children, particularly adolescents, have a special, developmental, interest in the free exploration of ideas. As already discussed, the potential to engage in unfettered and expansive exploration on the internet makes it an especially suitable medium for this developmental work. Moreover, the wealth of information available to children in a successfully regulated world is vast, whereas the

information lost to adults, while significant, is minor by comparison. Finally, adults have far more comprehensive means available to seek similar information elsewhere than do children, whose movements, finances, and schedule are controlled by the same people who will tightly control their internet access, in the absence of state regulation.

The scope of the internet access restrictions imposed on many children in a regulation-free world can be expected to be far greater than the scope of those restrictions imposed on adults (or by children permitted full access) by well-tailored regulation.²⁰ At worst, adults will lose access to sexually explicit materials that do not qualify as obscene but are widely viewed as offensive. Children, in contrast, may lose access to the internet altogether, or face severe curtailments on the freedom with which they use it. Put more starkly, adults risk the loss of a relatively small band of speech of questionable value, whereas children risk the loss of a vast amount of speech, much of high political, social and scientific value. Moreover, where adults would be left free, in the regulated world, to explore what remains with abandon, many children still allowed access will be closely monitored by their parents in an unregulated world.²¹

While this comparative assessment is based, in part, on the sheer volume of speech potentially lost and gained and on the likely change in the level of independence afforded child users, it also makes assumptions about the relative value of various forms of speech. While First Amendment doctrine has resisted classifying sexually indecent speech as low-value speech,²² such a value assessment may be more appropriate in this context, where speech interests are pitted against one another. The question here is not, simply, whether access to this sort of speech is worth protecting, in the abstract, but whether it is more or less worth protecting than children's access to speech of more obvious political, scientific, and cultural value that this protection may prevent.

The greater value of children's internet access derives, also, from the relative scarcity of access opportunities for children, when compared to those of adults. For children, internet access in schools and libraries may be the only means available to them

²⁰ Etzioni cite, parents who use filters?

²¹ This is not to suggest that children's use of the internet, in collaboration with their parents, is less valuable than their independent use, but, rather, that both forms of use are valuable, and the loss of either a significant speech loss to children.

²² See Jeffrey A. Shaman, *The Theory of Low-Value Speech*, 48 S.M.U. L. Rev. 297 (1995) (noting that some members of the Court, but not a majority, would categorize non-obscene sexually explicit expression as low-value speech).

to explore vast bodies of information. Any other access to the internet, or other sources of comparable information, will be significantly controlled by their parents: Their parents will determine whether there is internet access at home, at all, and, if so, whether, when, and under what circumstances their children can use it. Parents control their children's finances both directly (by controlling payment and allowance) and indirectly, in collaboration with the state, (by controlling their employment). Parents also control their children's movements and associations, further diminishing children's opportunities to seek out information on their own. Adults, in contrast, have considerably more, though surely not absolute, control over all these aspects of their lives, and thus, have far greater alternative access to the information in question. They can buy their own internet access through their home, buy books and images, and even arrange associations, to facilitate access and exchange.²³

First Amendment analysis consistently takes account of this issue of scarcity, in considering the degree of the speech harm caused by imposing regulations. Whether the Court is assessing the appropriateness of restricting radio broadcasts containing profanity, or of imposing zoning constraints on "adult" theatres, or determining whether a restriction on speech in a non-public forum is reasonable, the availability of alternative opportunities to speak and to hear weakens the case for First Amendment protection.²⁴ In our context, the relative scarcity of children's access opportunities argues for favoring those opportunities over the more replaceable access opportunities of adults. While this argument about relative scarcity could be made in all speech contexts, the argument is

²³ These alternatives are less available to adults of limited means, but here, again, the relative picture is what matters. However limited adults' resources, and however constricted adults' employment opportunities, they are far less limited than the resources and employment opportunities of children. More to the point, these resources and opportunities are, relatively speaking, far less in children's control.

²⁴ See, e.g., *F.C.C. v. Pacifica*, 438 U.S. 726, 750 n. 28 (1978) (noting that adults interested in hearing the words prohibited on the broadcast in question can "purchase tapes and records or go to theaters and nightclubs," or listen to the radio at different hours); *Young v. American Mini-Theatres*, 427 U.S. 50 (1976) ("There is no claim that distributors or exhibitors of adult films are denied access to the market, or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained"); *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 698 (reasonableness of Port Authority's prohibition of solicitation within the airports was established, in part, by its allowance of solicitation on airport sidewalks, frequented by all but 3% of the airport users); *Jones v. North Carolina Prisoners' Labor Union, Inc.* 433 U.S. 119, 131 (finding that the regulation of bulk mail distribution in prison was not unreasonable, in part because "other avenues of outside information flow by the [speaker] remain available.").

particularly strong in the internet context, because of the special value, to children, of this form of access.-

On the internet, children may have more to gain from regulation than adults to lose. If we cannot protect children's independent internet access by other means, the state might be justified in imposing regulations designed to encourage parents to allow this access.

B. The Risk of Segregated Access

If convinced that an unregulated internet will inspire parents to overregulate their children's internet access, why not simply segregate access, offering adults full access, and children more restricted (parent-friendly) access? If libraries are required to offer children regulated internet access and adults non-regulated access, perhaps we can eliminate the speech-speech conflict, just as Professor Etzioni suggests we can eliminate the speech-protection conflict through segregation.²⁵ But the shift in focus from child protection to child access raises a concern with this solution of segregation.

We can expect regulation of child-only access to be greater than the regulation of all-user access. This is because, in unlinking adult and child access, we distance regulation from the core of the First Amendment protection. Adults are entitled to "full" access, children to something less. Once the something less doesn't come at any cost to adults, it is easier to define it more expansively.

Where the goal is protection, the zealous pursuit of regulation is likely to serve the goal well. Child harm and adult speech are two unrelated interests, both forced to compromise if they must be accommodated together. If disentangled, adult speech can be completely protected, and children's harm can be more aggressively avoided. But where the interest at stake, for both children and adults, is access to speech, unlinking the two risks overregulating the speech access of children.

²⁵ Etzioni at ("The first lesson that appears from the cases at hand, albeit indirectly, is that if the goal is to protect children and not to curb adult access to speech, the government should urge or require libraries to have *separate computers for children and adults*) (emphasis in original); see also Pacifica, at 758 ("In most instances, the dissemination of this kind of speech to children may be limited without also limiting willing adults' access to it. Sellers of printed and recorded matter and exhibitors of motion pictures and live performances may be required to shut their doors to children, but such a requirement has no effect on adults' access).")

Ideal regulation would be just enough to encourage the average (reasonable?) parent to relax her control. Unlinking children's access from that of adults' will make it too easy to give regulation-favoring parents more. Indeed, segregated public access is likely to look more like the sort of access protective parents might privately design for their children, rather than like the more narrow regulation designed to minimize intrusions on protected adult speech.

Children need adults to help protect their speech interests, because they are powerless in the legislative process and, less attended to by the courts. Legislation crafted with less opposition from First Amendment champions, and reviewed by the courts without concern for adult speech impact, will, predictably, leave children with considerably less access. While Professor Etzioni suggests that communitarian values will be served by segregating the community's protection of children from adults' exercise of their rights, it seems more in keeping with those values to impose some burden on adults to serve the collective access good of all.

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