Several leading civil libertarian groups and advocates (and libertarians) argue that minors of all ages are entitled to First Amendment rights. (To save breath, they are all referred to from here on as civil libertarians.) Reference is mainly not to "production" of speech but to "consumption," the unfettered access to cultural material. Basically, these civil libertarians maintain that children should be treated the same way as adults in this matter. After laying out the arguments advanced by civil libertarians in favor of this surprising position, I critically examine the underlying reasons for these groups to embrace this position. I conclude by suggesting that civil libertarians can defend liberty without hurting children.

I. Children's First Amendment Rights

a. Four policies

Four recently contested issues show the way civil libertarians view minors' First Amendment rights. All concern the protection of children from sexually explicit material and gratuitous violence in the media, from health hazards (specifically, luring cigarette ads), and from commercial exploitation.

One policy concerns the introduction of filters into computers used to access the Internet. Such software blocks access either to a given list of websites or to messages that contain certain key words (e.g., bestiality). Brand names include X-Stop, Cyber Patrol, and Net Nanny. These filters are reported to be quite effective, although occasionally materials they seek to block out slip through, and sometimes material that arguably should be allowed through (e.g., the Starr report?) is screened out.

The second policy at issue involves public efforts to persuade tobacco companies to stop placing the so-called "Joe Camel" type of ads. These ads reportedly target children and are believed to be particularly effective in enticing them to smoke.

A third policy concerns self-imposed limitations that several major corporations and industrial associations have adopted, which limit the information they collect about children who access their websites or send them e-mail. These limitations apply especially to "cookies," devices installed by corporations in a person's computer, often unbeknownst to that person. Cookies allow marketers to recognize the person's computer when its operator approaches the websites again, and to tailor advertising to that user. In addition, information about users is often sold to other corporations. Responding to complaints that such profiling of clients violates their privacy, corporations such as Disney and Kellogg and associations such as the Direct Marketing Association and the OnLine Alliance announced that they would refrain from collecting information about children 12 years or younger unless the youths' parents consented.

The fourth measure entails the introduction of V-chips in television sets, which enable parents to block their TV sets from screening programs that have more violent or vile content than they approve of. Federal law requires that V-chips be installed in all TV sets made after 1993. For the V-chip to differentiate between programs according to their violence rating or some other content attribute (e.g., offensive sexual material), the broadcasted programs must include ratings. For this to occur there must be an agreed-upon set of ratings and a method for programs to include these ratings in a manner that the V-chip can recognize. Most broadcasters have reluctantly agreed to introduce a rating system.

b. Civil libertarian objections

Civil libertarians argue that these policies limit the free flow of information and ideas and hence offend the First Amendment. The main parties challenging these policies are the American Civil Liberties Union (ACLU), the American Library Association (ALA), libertarians (specifically the CATO Institute), and the National Campaign for Freedom of Expression (NCFE). It is crucial for all that follows to note that these associations have demanded—and in some cases succeeded—that various protective devices will be removed not simply for minors approaching maturity, but demand unencumbered access for children of all ages to all cultural materials. Indeed, public debates about the policies at issue center around the question of whether protecting children who are 12 years old or younger comports with the constitution.

A colleague, who read a previous draft of this article, wondered why the line was drawn at this particular age and pointed out that...
older children require protection as well. This particular age is discussed not merely because it is at the focus of public attention (such as it is) on this matter, but also because children age 12 and younger serve as a sort of litmus test. If one cannot convince civil libertarians, judges, and policy makers about the need to protect infants, toddlers, and first graders—one can hardly expect these adults to shield adolescents.

Civil libertarians seem to realize the difficulty of convincing the public of the legitimacy of their position, hence, they often make their case indirectly. For instance, in objecting to limiting Joe Camel ads, the ACLU argues that it is unreasonable to suppress ads that target children because doing so also limits the information flow to adults. As the ACLU states, “... Adults cannot be reduced to reading only what is fit for children.” And, “... attempts to reduce the exposure of minors to tobacco advertisements cannot avoid restricting the same information for the adult population.” Thus, occasionally the ACLU avoids directly claiming that it favors exposing children to tobacco ads, but achieves the same goal by insisting that such curbs intrude on the First Amendment rights of adults.

Other times the ACLU simply states that everyone should have access to material considered damaging to children, but does not explicitly mention that children are to be included. Thus, the ACLU declares that “We believe that the enactment of the proposed tobacco advertising restrictions would impose a drastic curtailment of commercial speech and could have a chilling effect on the right of the public and businesses to engage in free speech about controversial subjects.” Similarly, Steve Dasbach, the party chairman of the Libertarian Party, holds that

If Congress ratifies this agreement, Americans will suffer from the second-hand smoke of the Bill of Rights being torched. ... In their frenzy to control tobacco, politicians want the power to drastically restrict the First Amendment."

In other situations, civil libertarians state their position quite explicitly. Thus, when a public library in Kern County, California allowed children free access to unfiltered computers when threatened by an ACLU lawsuit,12 Ann Beeson, an ACLU National Staff Attorney, wrote, “We applaud the Board of Supervisor’s decision to honor the First Amendment rights of Kern County citizens by ... allow[ing] all adult and minor patrons to decide for themselves whether to access the Internet with or without a filter.”13 Note that the term “minor” references children of all ages, and Beeson does not suggest protecting any of them or that there is any age at which they are unable to “decide for themselves.” This is not a slip of a pen but a position consistently adopted. The same position was struck by the ACLU when it charged the Loudoun County Library Board of Trustees in Virginia, that has introduced filters, of “... removing books from the shelves’ of the Internet with value to both adults and minors in violation of the Constitution.”14

The American Library Association (ALA) makes the same case but more explicitly.15 Its basic charter argues, with reference to Internet access, that “the rights to minors shall in no way be abridged.”14 This position is based on the Library Bill of Rights, which holds that “A person’s right to use a library should not be denied or abridged because of origin, age, background, or views.” In the original 1948 version the document referred only to “origin, background, or views,” as grounds that could not be used to deny service.17 Age (any and all ages) was added in 1996.

Some tobacco industry’s advertisements have targeted young people, according to internal documents introduced in various trials.18 In addition, some statistics indicate a strong correlation between certain tobacco advertisements and increasing numbers of teenage smoking. For example, “The largest increase in adolescent smoking initiation was in 1988, the year that the Joe Camel cartoon character was introduced nationally.”19 In response to government efforts restricting tobacco advertising, the ACLU has stated that “we [should] allow consumers to make decisions for themselves and stop government from deciding for us what speech we should be free to hear about legal products.”20

The ACLU opposes the V-chip on the grounds21 that children’s access to television should not be curbed, because devices such as the V-chip screen out ideas, and because there is no evidence “that explicit sex information and even pornography ... by themselves cause psychological harm to minors of any age.”22

In 1998, a group of representatives of privacy advocacy organizations met at the Electronic Privacy Information Center (EPIC) to prepare for a White House conference on ways to deal with privacy violations.23 A representative from the Center for Media Education as well as one from the Communitarian Network favored the self-imposed, voluntary policies of corporations not to collect information from children age 12 or younger who visit their websites, or to send them email without their parents’ consent. The ACLU’s representative objected on the grounds that a young child may seek information about ways to deal with HIV or pregnancy and fear disclosing such a quest to his or her parents. EPIC’s representative concurred.24

Similarly, the Cato Institute’s reasoning is that “[i]t makes little sense to morally condemn those who sell to children when we ourselves give children the means to buy. So regulation of marketing ... that contain[s] information about children is no more justified than regulation [that] contain[s] information about
The treatment of children as mini-adults runs contrary to almost the total body of social science evidence, enormous bodies of law, and values embodied in the major institutions of democratic societies, all of which view children as developmental creatures. That is, children begin life as highly vulnerable and dependent persons, unable to make reasonable choices on their own, and gradually grow to become (as society hopes, and parents and educators labor to achieve) people able to make moral judgments, competent to act on their own, and ready to be autonomous persons.

Yale Law Professor Joseph Goldstein makes these points as follows:

“YOUNGER children, generally those under 10–12 years old, do lack the cognitive abilities and judgmental skills necessary to make decisions about major events which could severely affect their lives. … Younger children are not able to think abstractly, have a limited future time sense, and are limited in their ability to generalize and predict from experience.”

Goldstein adds:

To be a child is to be at risk, dependent, and without capacity to decide what is ‘best’ for oneself. …

To be an adult who is a parent is to be presumed in law to have the capacity, authority, and responsibility to determine and to do what is good for one’s children.

John O’Neill puts it succinctly:

Currently, there are attempts to define children’s rights on the liberal model of individual rights exercised by potentially autonomous agents – despite the reality of children’s dependency.

Society’s expectations from children, and the rights society accords them, reflect this developmental perspective. Society first requires children to be cared for by their parents and to heed them, as well as to attend school, while society allows children to leave both as they grow older. And society allows young people to consume alcohol, drive, marry, vote, serve in the armed forces, and sign contracts at different ages, but only rarely when they are very young. There seems to be no foundation in social science to assume that when it comes to exposure to information, children are initially less in need of adult protection and guidance than in other aspects of their lives.

III. Notching the slope

Why do leading civil libertarians ignore the significant differences between children and adults? One reason might be the tendency of strong advocates to push their thesis to its illogical conclusion. (Just as civil libertarians tend to treat children like adults, hard core social conservatives often treat adults like children, for instance...
by seeking to ban access to pornography to people of all ages.) In addition, civil libertarians fear the metaphorical slippery slope. For instance, the ACLU warns that “if this legislation [regarding tobacco ads] prevails, Congress could clearly impose similar restrictions on any commercial product.” If children are denied full court First Amendment rights in order to improve their characters, could one not favor the same for adults?

This particular slippery slope, though, is clearly different from others in that clear markers can be set to prevent slippage. Unlike the difficulty in defining differences between “fighting words” (which, due to their dangerous effect, may be banned) and others, differences in age are rather easy to determine. Hence, public policies that prevent children from accessing certain materials, and above all policies enabling parents and educators to protect their wards, will not spill over to adults unless a more encompassing policy is deliberately embraced. Indeed, society expects parents and educators to actively participate in selecting the material to which their children are exposed. Civil libertarians should not hinder the development of the needed policies and tools, merely for the sake of a paradigm that does not apply to children in the first place.

The attempt to extend First Amendment rights to protect children against their parents (rather than the government) is particularly puzzling and troubling. (Such an extension is so farfetched that one may wonder whether it might be inadvertent. One may oppose a voluntary ban on Joe Camel ads, because it was offered under pressure from Congress. Likewise, objection to the introduction of filters into public library computers may be justified. However, while the v-chip has been incorporated into TV sets by force of law, it is not activated unless parents so wish. And the refusal of libraries to inform parents of their children’s choices in books has nothing to do with protecting them from Big Brother.

A good society differs from a civil one in that it is actively concerned with promoting a shared core of substantive values. Its citizens must acquire not merely individual civic skills such as thinking critically and interest public affairs. They must also develop good character and specific normative commitments. For instance, the moral notion that we should not leave the environment in worse shape for the next generation than it was bequeathed to us, needs to be shared with children as they grow up. For children to gain such shared characterization of the good, parents and educators must be able to shape the children’s access to cultural material. It is this shaping that civil libertarians oppose, encumbering both the well being of society and that of children.

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Endnotes

1. I am indebted to Barbara Fusco for her editorial and research assistance.
4. As an example, Amazon.com, an online bookseller, uses cookies to store information about the types of books a user browses and has ordered in the past. When a user returns to Amazon.com after placing an order, she will be greeted, “Hi, [First Name] Here are your recommendations.” See also, Federal Trade Commission, Privacy Online: A Report to Congress, June 1998.
15. For more discussion on libraries’ positions on the subject, see Mark Herring, “Reading Between Librarian’s Lines,” Society (Sept/Oct 1999), 26ff.


21. Aside for the reasons discussed in the text, the ACLU also opposed V-chips as forms of government censorship. The V-chip discussed in the text is voluntary and not government imposed.


23. For more discussion on privacy and children, see Martha Fineman, Intimacy Outside of the Natural Family: The Limits of Privacy, 23 Conn. L. Rev. 955 (1991).

24. Personal observation.

