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Regulating TV Violence: The FCC's National Rorschach Test

ROBERT CORN-REVERE

"Transported to a surreal landscape, a young girl kills the first woman she meets and then teams up with three complete strangers to kill again."—TV listing for *The Wizard of Oz*, MARIN (CAL.) INDEP.-J., 2001.

If to everything there is a season, then 2004 surely is the season of censorship. With massive fines for indecency, calls to revoke station licenses, and demands to reinstate the long-defunct fairness doctrine, it seems that no proposal to insert government into the editorial decisions of broadcasters is too extreme. In addition to everything else, both Congress and the Federal Communications Commission (FCC) are examining the possibility of regulating depictions of violence on TV.

The government's interest in this issue should come as no surprise: efforts to regulate televised violence are almost as old as the medium itself. As early as 1952, an era when legislators were convinced that the rise in juvenile delinquency was caused by comic

books, Congress convened its first hearings on TV violence.¹ Since then, the FCC and Congress periodically have revisited the issue and, from time to time, have recommended various regulatory and self-regulatory approaches.

Congress narrowly avoided passing legislation in 2004 that would have required the FCC to adopt new regulations to restrict television violence.² However, at the request of thirty-nine members of Congress, the Commission launched an inquiry to determine the extent to which TV violence is a problem and how (or even whether) it may be regulated. Specifically, the Commission sought comment from interested parties on such issues as the "incidence of violent programming," the "effects of viewing violent programming," the role of "parental guidelines and [the] V-chip," and "possible new regulatory solution[s]" for violent programming. It also asked whether potential regulations would be authorized by the Communications Act and would be consistent with the First Amendment.³

Eye of the Beholder

The FCC's inquiry is as much a national Rorschach test as it is a public policy proceeding. Revealing a gift for understatement, the Commission acknowledged that there is not necessarily "a well-established definition of violence" or "violent programming." As it turns out, "[a]lmost everyone has his or her own definition of violence,"⁴ a fact that applies equally to social science researchers, policy makers, and, last but not least, members of the public. What

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Regulating TV Violence

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is meant by the term *violent programming* bears on every aspect of the FCC's inquiry, from the amount of such programming that exists to questions of its purported impact, as well as whether the Commission can adopt any regulations that are consistent with the law and the First Amendment.

Although much of the public policy debate on the subject of televised violence is animated by social science research on the subject, those conducting the studies have used a wide variety of definitions and measures such that the definition of *violence* or *aggression* becomes extremely murky. Furthermore, these studies have involved great diversity in what is classified as a violent program, as well as a wide array of responses that the researchers consider aggressive. In many cases, it is "especially difficult to relate real aggression to the research, since so often the research has involved at best metaphors for aggression rather than the real thing and at worst, measures that have little relationship to real aggression or violence."⁵

Policy makers similarly have used a wide range of definitions in this area, suggesting that some depictions of violence are "good" while others are "bad." Former Surgeon General Jocelyn Elders testified that presentations of violence should not be sanitized and should realistically portray the consequence "that you really do bleed."⁶ Congressman Carlos Moorhead, on the other hand, objected to programs in which "people are shot and get hurt and are writhing in pain" and concluded that "cowboy movies were better." Senator John Kerry has objected to reality-based shows like *Cops*, while other lawmakers have declined to differentiate between the various types of programs. Former Senator John Danforth reportedly said, "Shakespeare, *Beavis and Butthead*, Schwarzenegger, it's all the same."⁷ The late Senator Paul Simon explained to a group of broadcasters that cartoons such as *Tom and Jerry* are too violent, but that a film such as *Schindler's List* would be permissible so long as it is not aired "at eight o'clock when a lot of kids are watching."⁸ Senator Ernest Hollings once complained about the violence level in the

network sitcom *Love and War*, showing a clip at one hearing in which the characters threw popcorn at each other as part of a spoof on televised violence.⁹

Defying Gravity

Social science studies have been at the heart of the public policy debate over media effects. Groups such as the American Academy of Pediatrics (AAP) claim that 3,500 studies demonstrate adverse effects of media violence,¹⁰ and it is commonplace for these organizations and policy makers to casually (and falsely) assert that thousands of studies point to a "causal connection." A June 2000 joint public statement of the AAP, American Medical Association (AMA), and the American Psychological Association (APA), among others, stated that "[w]ell over 1,000 studies . . . point overwhelmingly to a causal connection between media violence and aggressive behavior in some children."¹¹ Certain proponents of the causal hypothesis have even made the astonishing statements that television shows are behind half the homicides in the United States¹² and the cause of 10 percent of violent crimes.¹³ Many of these advocates state boldly that "the debate is over"¹⁴ and that to dispute a causal link between TV and aggression is to "argue against gravity."¹⁵

Such statements are wildly inaccurate, as noted in more balanced reviews of the research. To begin with, there are about 200 to 250 studies of the effects of televised violence, not thousands, and they do not provide the uniform findings of adverse effects as claimed by advocates of regulation. After a review of the literature, the Federal Trade Commission (FTC) noted that "[m]ost researchers and investigators agree that exposure to media violence alone does not cause a child to commit a violent act, and it is not the sole, or even necessarily the most important, factor contributing to youth aggression, anti-social attitudes, and violence."¹⁶ A 2001 Surgeon General's report similarly found that "many questions remain regarding the short- and long-term effects of media violence, especially on violent behavior."¹⁷

It is important to explore the chasm between the debate-is-over/more-certain-than-gravity line of argument and the conclusions of the FTC and the Surgeon General. A significant question is not how many studies on violence exist, but

why the number is so grossly overstated by some. Answering that question also provides a valuable touchstone for evaluating what the studies really mean and whether they provide an adequate basis for policy making.

Politicizing Social Science Research

One factor making it difficult to dispassionately interpret research findings in the area of televised violence is the extent to which the issue has been politicized. In the policy arena, research is used less as a path to understanding the issue and more as currency to be exchanged for political leverage. As a result, studies of televised violence are rarely reported or discussed in terms of what was actually found (or not) by the researchers, and this creates a tendency to misstate or exaggerate their impact. The policy debate is a *mélange* of social science mixed with politics and advocacy, and there is not always a clear dividing line between the researchers and the advocates.¹⁸

One indication of this is the extent to which prominent organizations have weighed in on the issue by "endorsing" research findings in the aggregate rather than by reviewing the research and reporting on particular studies. The June 2000 announcement by the AMA, APA, and AAP provides a good case in point. That well-publicized announcement was characterized by its misstatement of the actual extent of the research ("well over 1,000 studies") and its careless use of the concept of causality. The important point is not that there are fewer studies on televised violence than advertised, but that such statements "indicate that the organization[s] involved do[] not know the status of the research and [are] not taking a position based on a rigorous examination of the scientific research."¹⁹

Why would such well-respected professional organizations take a position that is not based on sound research findings? Perhaps the answer is that in the world of public policy, it is not all about the facts. Dr. Edward Hill, a member of the AMA's board of trustees, provided some insight into this issue at a May 2001 panel discussion hosted by the Freedom Forum. In describing the AMA's motivations for signing the June 2000 joint statement on televised violence, he noted that

there were political reasons for signing on. We're looking for a champion in Congress that will be willing in the long run to back our desire for funding of comprehensive school health in this country.

. . . .

We haven't found that champion yet, so some of our reason was political and some of it was true belief that our science department signed off on what was good science. I question that, of course, and I have. But I still believe that all the science is not in.²⁰

In further comments, Dr. Hill acknowledged not only that more research is needed, but also that completely reliable results might be elusive:

Up until the time I read [a critique of the social science research], I was fairly comfortable with the research that we were presented with at the American Medical Association. I have become less comfortable. I still don't believe that I am necessarily wrong. I just believe none of the research has been done yet or the right kind of research and maybe we cannot do the right kind of research in the right context.²¹

Such statements are far removed from the rhetoric that "the debate is over," which so often dominates policy discussion on this issue. At the same Freedom Forum event, Jeff McIntyre of the APA was asked directly if he is "convinced there is a causal link between media violence and actual violence." His answer is revealing:

Not to sound too Clintonesque, but how do you define causal? [laughter] I think one of the difficult things in this debate has been a problem in just that term—causal—unfortunately, that when we use the term causal, a lot of folks think that that is something that can be used in a predictive sort of way. When we use it in social science context, generally what we see is that in the roots of violence, and we have to kind of get away from your traditional cause-and-effect model when we talk about violence, because there is nothing in the roots of violence prevention that aims at one thing.²²

These more moderate descriptions of the research findings cannot be reconciled with the claims made in the policy arena that "the evidence is overwhelming" and that "[t]o argue against it is like arguing against gravity."²³ Such statements make wonderful nice sound bites, but they should not be confused with science.

Comic Books, Science, and Public Policy

Quasi-scientific pronouncements have a long history in the world of public policy, most especially in matters that are related to the protection of children. In 1954, psychiatrist Dr. Fredric Wertham

published *Seduction of the Innocent*, a book that claimed that reading comic books caused juvenile delinquency. He described instances of violence, sex, drug use, and other adult behavior in comic books and concluded, largely based on undocumented anecdotes, that reading this material caused similar behavior in children.²⁴

The Senate Judiciary Committee convened a special subcommittee that held hearings on the topic of comic books and juvenile delinquency in 1954. Dr. Wertham testified extensively before the subcommittee, restating arguments from his book and pointing to comic books as the major cause of juvenile crime. Citing statistics that juvenile delinquency rose more than 40 percent between 1948 and 1953, Dr. Wertham reasoned that the comic books must have caused children to become delinquents.²⁵ The example is relevant here because comic books were as pervasive in 1954 as television is in 2004, reaching over 90 percent of children between the ages of six and eleven years and over 80 percent of children between twelve and seventeen.²⁶ However, twenty years after his sensational testimony and outside the glare of the media spotlight, Dr. Wertham backed off his assertions and became "a comic book fan," corresponding with other fans²⁷ and even publishing a book about fanzines, which are self-published books by comics fans.²⁸

It is not at all unusual for anecdotes to masquerade as fact in the debate over televised violence, particularly when bolstered by the patina of credibility provided by scientific references. In one widely reported incident in 2000, an activist group claimed that children were committing violent acts after watching the wrestling program *WWF Smackdown!* on television. On the basis of this assertion, the group orchestrated a campaign to persuade advertisers not to sponsor World Wrestling Entertainment (WWE), blaming the deaths of four children on the *Smackdown!* show.²⁹ WWE sued the group for libel in November 2000 and ultimately agreed to settle the case for payment of \$3.5 million to WWE.³⁰

The group acknowledged that it had made false statements about the deaths and issued a public apology.³¹ Retractions, however, are never as highly publicized as the sensational accusations, which combine with inflated descriptions of

social science research to color the policy debate.

Just the Facts, Please

Stripped of the flamboyant rhetoric of the policy arena, social science research on the effects of televised violence is not very impressive. Although the evidence in support of a link is often described as overwhelming in the policy debates, the evidence is, in fact, weak and inconsistent. A detailed examination of the 200 to 250 existing studies shows that the literature does not come close to supporting the claim of a causal relationship between depictions of violence in the media and aggression. Nor is there evidence that exposure to violent imagery leads to desensitization, however that vague concept may be measured.

In 2002, Professor Jonathan Freedman of the University of Toronto conducted an exhaustive review of the available research and concluded that "evidence does not support the hypothesis that exposure to film or television violence causes children or adults to be aggressive," a hypothesis that "has never been seriously challenged."³² In response to the FCC's recent inquiry, Professor Freedman reviewed more recent studies and surveys of the literature on media violence and found that "the few studies done since" 2002 do not change his conclusion.³³

Laboratory Experiments

The typical laboratory experiment brings subjects into the laboratory, shows them violent or nonviolent films, and then measures aggression levels, also in the laboratory setting. For his 2002 book, Freedman reviewed eighty-seven such experiments and found that 37 percent of the studies supported the causal hypothesis, 22 percent gave mixed results, and 41 percent did not support the hypothesis.³⁴

Professor Freedman noted that laboratory experiments have serious limitations. Such experiments are short-term, involve only brief exposures to programs, use measures of aggression that are often questionable, and are conducted in an artificial environment, therefore increasing the effect of experimenter demand. Consequently, he concluded that such experiments do not provide much support

for the causal hypothesis, both because of their inherent limitations and, more importantly, because of the weakness of the results. Moreover, when unrealistic measures of aggression are removed from the analysis (e.g., thinking “aggressive thoughts,” hitting a Bobo doll, or administering a loud noise), Professor Freedman found that the percentage of supporting studies drops even further, to 28 percent, while 55 percent of the studies show no support for the causal hypothesis.³⁵

Field Experiments

Field experiments are experiments done in natural settings, as opposed to laboratories. These experiments examine the subjects’ reactions to violent programs in their homes or classrooms and observe any resulting behavior in the school playground or equivalent setting. Professor Freedman reviewed a total of twenty-three experiments³⁶ and concluded that only three found some support for the causal hypothesis, while twenty did not. Further, the three experiments that obtained supportive results all had small samples. He concluded that the field experiments provided little or no support for the causal hypothesis and therefore constitute evidence against the causal hypothesis. Because they are done in natural settings and therefore avoid many of the problems of the laboratory research, the field experiments should be the best test of the hypothesis. However, the fact that the field experiments produced such negative result is a strong indication, according to Freedman, that any positive laboratory results were not due to the direct effect of the violent media.

Longitudinal Studies

Longitudinal research on media violence starts with the results of surveys on the correlation between viewing violent programming and aggressive behavior. However, since correlation alone does not provide information about a causal link between media violence and aggression, longitudinal studies gather data on viewing habits and aggressiveness in an attempt to provide evidence that will establish whether there is a causal effect. Professor Freedman reviewed the eight longitudinal studies that have been conducted on the issue of media violence and aggression and found only three studies that provided

clear support for the causal hypothesis.³⁷

Even in those three studies, however, the results were neither strong nor consistent (and the other five provided no support whatsoever). The same three studies that found the only supportive results also produced many more non-supportive results. He concluded that the evidence from longitudinal studies provides little support for the causal hypothesis and could be interpreted as evidence against that hypothesis.

Professor Freedman’s findings are entirely consistent with the work of others in the field. Thirty-three scholars in the fields of media, psychology, and culture concluded in 2002 that the research on media violence has not demonstrated that violent entertainment causes real-world harm.³⁸ In sum, studies that claim to have found causality between media violence and effects are grossly overstated. In fact, the causes of violent behavior are far more complex, and the experimental studies of reactions to violent programs are too simplistic.

Reality Check

Actual experience with real-world aggression and violent crime provides an important reality check against claims that pictures of violence produce aggressive acts. If the theories are correct, then increasing levels of violence in the media must result in higher levels of violence in society. But the actual statistics show just the opposite. Although critics of media violence complain that the level of mayhem continues to escalate, the rate of violent crime in the United States began to drop in 1994, and the reduction has continued through 2003 to the lowest level ever recorded. Between 1994 and 2003, violent crime rates declined about 55 percent, according to a September 2004 Department of Justice report, which found the crime rate is at its lowest level since it began conducting the survey in 1973.³⁹

Not only are crime rates declining, but the total number of crimes is dropping as well. FBI figures released in October 2004 indicated that the number of violent crimes reported nationwide dropped 3 percent between 2002 and 2003, for an aggregate reduction of 26 percent over the past decade. The reduction prompted Attorney General John Ashcroft to

observe that “[a]ll across our country, law-abiding Americans are enjoying unprecedented safety.”⁴⁰

Another study showed that in major metropolitan areas where violent television programs have the largest audiences, the rate of violent crime (including homicide, rape, robbery, and aggravated assault) is low. Steven Messner studied statistics to determine whether “population aggregates with high levels of exposure to violent television content also exhibit high rates of criminal violence.”⁴¹ He compared FBI violent crime rates in metropolitan areas to the popularity of “violent” programs in those areas⁴² and found that the “data consistently indicate that high levels of exposure to violent television content are accompanied by relatively low rates of violent crime.”⁴³ In fact, Messner found that areas “in which large audiences are attracted to violent television programming tend to exhibit *low* rates of violent crime.”⁴⁴

Not only have overall violent crimes rates decreased, but youth violence in general and school violence in particular have declined markedly since the early 1990s. Bureau of Justice statistics show the rate of violent crime in schools declined by more than 50 percent between 1994 and 2001.⁴⁵ Between 1995 and 2001, the percentage of students who reported being victims of crime at school decreased from 10 percent to 6 percent.⁴⁶

Other studies also report that violence among youth is decreasing. National Center for Education statistics show the number of homicides in U.S. schools in 2001–02 was only half the number it was five years earlier.⁴⁷ From 1993 to 2001, the percentage of students who reported having been in a physical fight decreased, as did the percentage of students who reported carrying a weapon to school at least one day.⁴⁸ The Centers for Disease Control and Prevention reported that the percentage of high school students who had been in a physical fight dropped to 33 percent in 2003 from 43 percent in 1991,⁴⁹ and the percentage of students who carried a weapon to school decreased from 26.1 percent in 1991 to 17.1 percent in 2003.⁵⁰

Despite the continuing efforts of media critics to link television programming to increased violent behavior, the facts do not support this asser-

tion. If violent programming is responsible for crime, then violent crime rates should have increased in recent years. The fact that they have not, and instead have moved in the opposite direction, should lead proponents of the causal hypothesis to check their premises.

Violent Programming and the First Amendment

Beyond the debate about social science and what it means, any attempt to regulate televised violence would face insurmountable First Amendment barriers. As the Tennessee Supreme Court has noted, “every court that has considered the issue has invalidated attempts to regulate materials solely based on violent content, regardless of whether that material is called violence, excess violence, or included within the definition of obscenity.”⁵¹ The U.S. Supreme Court initially set a high hurdle for regulation in this area, invalidating a state law that curbed the publication of magazines “devoted principally to criminal news and stories of bloodshed, lust or crime.”⁵² In doing so, the Court observed that “[w]hat is one man’s amusement, teaches another’s doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.”⁵³ Since then, a growing number of courts have struck down laws that attempted to restrict the rental to minors of videotapes depicting violence,⁵⁴ that regulated the sale of “violent” trading cards,⁵⁵ that sought to restrict pornography because of an alleged connection with violence,⁵⁶ that sought to regulate access by minors to “violent” video games,⁵⁷ and that sought to impose various forms of tort liability for media that allegedly incited violent acts.⁵⁸

The Seventh Circuit has observed that “violence on television . . . is protected speech, however insidious. Any other answer leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us.”⁵⁹ Similarly, in striking down restrictions on renting to minors videotapes that depict violence, the Eighth Circuit confirmed that violent video programming is entitled to “the highest degree of First Amendment protection.”⁶⁰ Any regulation of violent tele-

vision programming obviously would be content-based and subject to First Amendment strict scrutiny.⁶¹ Under the applicable standard, the government must demonstrate that any regulation of violent programming is necessary to serve a compelling interest and that it has adopted the least restrictive means of achieving its purpose.⁶²

Violent Images Cannot Be Equated to Indecency or Obscenity

The FCC inquiry asks whether violent programming may be classified as expression that qualifies for some lesser degree of constitutional protection, as does “obscene” or “indecent” speech.⁶³ However, the Supreme Court has made clear that

[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when the government seeks to control the flow of information to minors.⁶⁴

The suggestion that the Commission “could expand its definition of indecency to include violent programming” is based on a misunderstanding of the government’s authority to regulate indecency. Review of the FCC’s indecency policy makes clear that the First Amendment precludes extending it to include violence. Although restrictions against indecency and profanity have existed in some form since the Radio Act of 1927, the Commission officially defined the term *indecent* for the first time in 1975 to clarify the concept in light of the Supreme Court’s then-recent constitutional ruling regarding the obscenity standard in *Miller v. California*.⁶⁵ Noting that “the term ‘indecent’ has never been authoritatively construed by the Courts in connection with [18 U.S.C.] Section 1464,” it “reformulate[d] the concept” of indecency as “language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.”⁶⁶ At about the same time, the Commission also made clear its understanding that statutory restrictions on

indecency did not include violence and that any attempt to expand the definition would raise “sensitive First Amendment problems.”⁶⁷

The same conclusion follows from any attempt to treat violence as obscenity. There is no judicial support whatsoever for the notion that violent speech could legitimately be regulated as if it were obscene. Suggestions to the contrary are the stuff of idle bureaucratic speculation and fringe academic musings, not serious legal analysis. For example, former FCC Commissioner Gloria Tristani once called upon Congress and state governments to treat violent programs as obscene, dismissing First Amendment concerns as nothing more than the “most popular sham objection to protecting children from harmful media influences.”⁶⁸ Additionally, one academic writer has suggested that violence should be equated with obscenity because the ancient origins of the word *obscene* may include violence as well as sex.⁶⁹ However, such arguments are entirely out of touch with the state of the law as it has been analyzed and applied in a growing number of cases.

One of the leading authorities on this question is the Seventh Circuit decision in *American Amusement Machine Ass’n v. Kendrick*.⁷⁰ That opinion, written by Judge Richard Posner, explained in detail why violent expression presents “a different concern from that which animates the obscenity laws.”⁷¹ A principal difference, according to the court, is that obscenity is regulated not because it is harmful, but because it is “to many people disgusting, embarrassing, degrading, disturbing, outrageous, and insulting.”⁷² Violent speech, on the other hand, may only be regulated if it can be proven harmful, just like any other protected speech that may be subjected to regulation. However, such regulations are subject to the basic rule that the “government may not [restrict] speech because it increases the chance an unlawful act will be committed at some indefinite future time.”⁷³

All existing judicial authority on this subject confirms that violent speech cannot be equated with obscenity. “Simply put, depictions of violence cannot fall within the legal definition of obscenity for either minors or adults.”⁷⁴ As numerous courts have explained, obscenity

“encompasses only expression that ‘depict[s] or describe[s] sexual conduct.’”⁷⁵ Consequently, “[m]aterial that contains violence but not depictions or descriptions of sexual conduct cannot be obscene.”⁷⁶ As one court emphasized recently, “historical justifications for the obscenity exception simply do not apply to depictions of violence.”⁷⁷ Images of violence “have been used in literature, art, and the media to convey important messages throughout our history, and there is no indication that such expressions have ever been excluded from the protections of the First Amendment or subject to government regulation.”⁷⁸

The suggestion by some theorists that the judicially accepted definition of obscenity is too limited because historical antecedents to modern obscenity law included very broad restrictions on profanity, blasphemy, and depictions of violence ignores more than a century of constitutional jurisprudence.⁷⁹ The fact that ancient understandings of the term *obscenity*, or even that some antiquated obscenity laws in the United States, contained expansive restrictions on blasphemy or violence is hardly a persuasive rationale for expanding the concept of obscenity in the twenty-first century. Just because our history includes the unfortunate episode of Comstockery⁸⁰ is not a reason to repeat the mistake, any more than society should (or would) support reinstating the death penalty for sodomy as it existed in Colonial America.⁸¹ As the Supreme Court made clear in *Lawrence v. Texas*,⁸² prohibitions on consensual sodomy between adults are unconstitutional despite a history of laws prohibiting the practice that date back to 1533.

With respect to restrictions on speech, a principal purpose of the 1873 Comstock Act was to prohibit the dissemination of information about contraceptives.⁸³ Yet it scarcely could be argued that adding birth control information to a definition of *obscenity* would survive today.⁸⁴ In fact, when an updated Comstock restriction on the dissemination of abortion-related information was included in the Communications Decency Act in 1996, the provision was so obviously unconstitutional that the U.S. Justice Department refused to even defend it in court.⁸⁵ For the same reasons, any attempt to expand the

concept of *obscenity* to include violence would violate the First Amendment.

Basic First Amendment Principles

Virtually all observers agree that any attempt to regulate all televised violence would impose an unprecedented degree of censorship. As the FCC concluded in 1975 when it declined to equate indecent programming with violent programming, “no reform short of wholesale proscription” of all violent material would “provide absolute assurance that children or particularly sensitive adults will be insulated from objectionable material.”⁸⁶ Under such an absolute approach, said Chairman Richard E. Wiley (quoted by the Commission), “many traditional children’s films should be banned because they include some element of violence—for example, episodes in *Peter Pan* when Captain Hook is eaten by a crocodile or in *Snow White* where the young heroine is poisoned by the witch.” Chairman Wiley concluded that “[s]uch an extreme result simply does not make sense and would not be acceptable to the American people.”⁸⁷

This point has been acknowledged by those who have studied the phenomenon of television violence. For example, the *1997 TV Violence Report* noted that if all violence were eliminated, “viewers might never see a historical drama like *Roots*, or such outstanding theatrical films as *Beauty and the Beast*, *The Lion King*, *Forrest Gump* and *Schindler’s List*.”⁸⁸ Violence is an important element in storytelling, and “violent themes have been found in the Bible, *The Iliad* and *The Odyssey*, fairy tales, theater, literature, film, and . . . television.” The report added that in many instances, “the use of violence may be critical to a story that sends an anti-violence message”; and it would be impossible to tell some stories, including Shakespeare’s *Hamlet*, the history of World War II (or, for that matter, any war), or the life of Abraham Lincoln, without depictions of violence.⁸⁹ The study pointed out that parents know “that violence can be instructive in teaching their children important lessons about life,” and it sought to conduct a contextual analysis to determine when programs presented “inappropriate or improper uses of violence.” Similarly, the *National Television Violence Study* is premised on

the understanding that “all acts of violence are not equivalent in their impact on the audience” and that “the larger meaning or message that is conveyed” must be examined program by program.⁹⁰

The problem, then, is far more complex than determining whether televised violence may have some effect on the viewer that is measurable by social scientists. Even if such evidence could be characterized as sufficient to support content-based regulation (a highly dubious proposition), it would be necessary for the government not only to adopt regulations that precisely define which violent programs will be regulated (based on specific supporting evidence), but also to articulate a rationale for doing so that survives strict scrutiny. But as Judge Harry Edwards of the U.S. Court of Appeals for the D.C. Circuit and Professor Mitchell Berman wrote in an influential law review article, “[w]hen it comes to televised violence, we cannot imagine how regulators can distinguish between harmless and harmful violent speech, and we can find no proposal that overcomes the lack of supporting data.”⁹¹

The Problem of Vagueness

It is basic First Amendment doctrine that the government cannot use a vague standard for the sensitive task of regulating constitutionally protected speech.⁹² Imprecise speech restrictions are invalid for a number of reasons. First, without clear guidelines, those subject to a restriction cannot understand what is forbidden and what is not.⁹³ Second, a vague standard impermissibly chills speech, causing speakers to “steer far wider of the unlawful zone”⁹⁴ and to restrict their expression “to that which is unquestionably safe.”⁹⁵ Third, restrictions on speech that lack clear limits give government officials far too much discretion to curb disfavored expression.⁹⁶ These concerns are not lessened by the fact that the government may seek regulations in the interest of protecting children. As the Supreme Court has made clear, “the permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children.”⁹⁷

For purposes of regulating TV violence, there is no precise way to define *gratuitous* or *harmful* violence and with-

stand constitutional scrutiny. This is another factor that distinguishes proposed regulation in this area from the law of obscenity, which requires a specific definition of *sexual conduct* in the statute or through authoritative construction. No such specific definition is possible when the subject is violence.⁹⁸ Former Chairman Wiley observed that “[s]hort of an absolute ban on all forms of ‘violence’—including even slapstick comedy—the question of what is appropriate for family viewing is entirely subjective.”⁹⁹ Reviewing courts that have invalidated local regulations on vagueness grounds have reached the same conclusion.¹⁰⁰

This problem is exacerbated by the many types of programs that can be characterized as violent in some way. In any proposed regulation, the government would be required to decide whether the definition of *violence* includes only fictional depictions of violence or if it also would include reality-based violence. If both, would the rules cover news, sports, and nature programs that include violent scenes, or would there be exceptions? Questions arise even within the various subcategories. For example, would it be acceptable for children to see professional football but not professional wrestling? Additionally, if some types of programs are not covered by the rules, how are the exemptions justified? Are they supported by the social science studies that policy makers have cited to justify the regulation of violent programming?

The subjectivity of such choices, along with a lack of any supporting science to support distinctions between harmful or gratuitous violence and other televised violence, led Judge Edwards and Professor Berman to posit that because “existing social science data do not supply a basis upon which one may determine with adequate certainty which violent programs cause harmful behavior, . . . legislators face an insurmountable problem in finding a generic definition of violence that is coherent and not overbroad.”¹⁰¹ Ultimately, “any regulation of television violence confronts an inherent tradeoff between precision and effectiveness” with the “risk . . . that any restriction in this area that is neither overbroad nor vague will leave unregulated so much violent programming that it will no longer

accomplish a compelling interest.”¹⁰² Judge Edwards described this exercise as “a jurisprudential quagmire.”¹⁰³

Regulation of Violent Programming Is Viewpoint-Based

Social science researchers have attempted to overcome the obvious definitional problems by proposing what they describe as a contextual approach to determining what type of violent programs present the greatest risk. The *1997 TV Violence Report* asserts, for example, that “all violence, in our view, is not created equal,” and it employed a “contextual analysis” in order “to distinguish between uses of violence which raise concern and those acts which, because of their nature and the context in which they occur, do not raise such concerns.”¹⁰⁴ Similarly, the *National Television Violence Study* stresses that “[i]t is important to consider the larger meaning or message that is conveyed by a program,” including its “overall narrative purpose,” in order to determine whether the “overall message . . . is an anti-violence one.”¹⁰⁵

The contextual factors used to determine whether violence is acceptable or inappropriate are the essence of viewpoint discrimination. The *National Television Violence Study* noted the correlation between specific contextual factors and the impact of violence:

When considering a particular program, think about whether violence is rewarded or punished, whether heroes or good characters engage in violence, whether violence appears to be justified or morally sanctioned, whether the serious negative consequences of violence are portrayed, and whether humor is used. All of these elements enhance the risks associated with children’s exposure to violent depictions.¹⁰⁶

The study notes that “the overall narrative purpose of an historical or educational program may be to condemn the evilness of violence, whereas an action-adventure show may seem to glorify violence.” It cites as an example of “good” violence the theatrical film *Boyz ‘n the Hood* because of its overall anti-violence message, despite the fact that the movie “ranks high in terms of frequency of violent interactions and scenes.”¹⁰⁷ For the same reasons, the *1997 TV Violence Report* indicated that “*Schindler’s List* contains graphic violence but because of its historical importance and necessity to the plot,

the violence does not raise concerns.”¹⁰⁸ In short, violence is deemed to be acceptable if it teaches a socially “correct” moral or historical lesson.

But the government cannot constitutionally regulate speech based on content or the message it conveys.¹⁰⁹ Government regulation may not favor one speaker over another,¹¹⁰ and discriminating against speech based on its message is presumed unconstitutional.¹¹¹ When the government targets not just the subject matter of speech, but particular views taken by speakers on a subject, the First Amendment violation is all the more blatant.¹¹² “Viewpoint discrimination is . . . an egregious form of content discrimination,”¹¹³ and the government is barred from regulating speech when the specific motivating ideology, opinion, or perspective of the speaker is the rationale for the restriction.¹¹⁴

The contextual approach to defining *violence* harkens back to a First Amendment theory that permitted local governments to operate film censorship boards in the decades before the Supreme Court finally put an end to the practice.¹¹⁵ Former Chief Justice Earl Warren described the “astonishing” extent “to which censorship has recently been used in this country” during the period the film review boards were in operation.¹¹⁶ He noted, for example, Atlanta banned *Lost Boundaries*, a film about a black physician and his family who “passed” for white, on grounds that exhibition of the film would “adversely affect the peace, morals and good order” of the community; Ohio’s censors deleted scenes of orphans resorting to violence in the film *It Happened in Europe*; the Chicago licensing board banned newsreel films of Chicago policemen shooting at labor pickets and refused a license to exhibit the film *Anatomy of a Murder*; and the New York film licensing board censored more than 5 percent of the movies it reviewed.¹¹⁷ Such examples are just the tip of the iceberg.¹¹⁸

Ultimately, however, First Amendment doctrine evolved, and the Supreme Court ended the reign of the film review boards.¹¹⁹ As a consequence, contemporary understandings of the First Amendment preclude the FCC from declaring itself a national review board for televised violence. As the Seventh Circuit observed, “[a]ny other answer leaves the govern-

ment in control of all the institutions of culture, the great censor and director of which thoughts are good for us.”¹²⁰ For those who believe it is legitimate for government to do so, how could policy makers sort out which violent images are good and which ones are bad?

The difficulty of this exercise is well illustrated by *The Passion of the Christ*, reportedly one of the most violent films ever made. The *New York Times* described it as “harrowingly violent; the final hour . . . consists of a man being beaten, tortured and killed in graphic and lingering detail” until he is “a mass of flayed and bloody flesh, barely able to stand, moaning and howling in pain.”¹²¹ Another reviewer, on the other hand, wrote that “the extremely naturalistic depiction of violence” was used to “drive home the idea that Jesus . . . lived.”¹²² For some, the film’s theme may serve as a paradigmatic example of how the “merits” of a program may outweigh the impact of the depicted violence, while others may question this premise.¹²³ In any event, because viewers bring their own experiences to the subject, it is not possible to predict what effect, if any, the film may have on them. In Georgia, a couple was arrested after an argument spurred by the film turned violent.¹²⁴

Conclusion

Regulating television violence would be one of the thorniest First Amendment problems of our time. The constitutional issues addressed in this article only touch on the difficult threshold questions of whether depictions of violence may be treated as some form of less-protected speech and how that category might be defined. Even if would-be regulators could clear that hurdle, they would still be confronted with traditional First Amendment barriers, such as the burden to prove that regulations materially advance their stated interest and that there are no less restrictive means to serve that purpose. Taken together, the many First Amendment problems likely would be insurmountable. ☐

Endnotes

1. *Investigation of Radio and Television Programs: Hearings Before the House Comm. on Interstate and Foreign Commerce*, 82d Cong., 2d Sess. (1952).

2. Children’s Protection from Violent

Programming Act, S. 161, 108th Cong. § 4 (2003). This bill was first introduced as free-standing legislation. Its provisions subsequently were incorporated as an amendment to S. 2056, the Broadcast Decency Enforcement Act of 2004, 108th Cong. (2004), but that legislation was not adopted by Congress.

3. *Notice of Inquiry in the Matter of Violent Television Programming and Its Impact on Children*, 19 FCC Rcd. 14394 ¶¶ 3–4, 5–7, 16–19, 20–22, 23–28 (2004), [hereinafter *Notice of Inquiry*].

4. UCLA CTR. FOR COMMUNICATION POLICY, 1997 TV VIOLENCE REPORT 26 (Jan. 1998).

5. Jonathan L. Freedman, *FCC Inquiry on the Effects of Televised Violence: What Does the Scientific Research Show?*, Appendix to *Comments of the Media Associations*, MB Docket No. 04-261 (2004), at 40. Professor Freedman was retained as an expert by the media associations.

6. Hanna Rosin, *The Producers: Congress Fights TV Violence*, NEW REPUBLIC, Dec. 13, 1993, at 12.

7. *Id.*

8. Kim McAvooy, *Washington Watch*, BROADCASTING & CABLE, Mar. 7, 1994, at 58.

9. Robert Corn-Revere, *Television Violence and the Limits of Voluntarism*, 12 YALE J. ON REG. 187, 193 (1995).

10. See *Notice of Inquiry*, *supra* note 3, ¶ 7 n.18 (citing AAP, *Media Violence*, 108 PEDIATRICS 1222, 1223 (Nov. 2001)).

11. *Id.* ¶ 6 n.17.

12. See Brandon S. Centerwall, *Television and Violence: The Scale of the Problem and Where to Go from Here*, 267 JAMA 3059 (1992).

13. See L. Rowell Huesmann et al., *The Stability of Aggression over Time and Generations*, 20 DEV. PSYCHOL. 1120 (1984).

14. AM. PSYCHIATRIC ASS’N, PSYCHIATRIC EFFECTS OF MEDIA VIOLENCE, available at http://www.psych.org/public_info/media_violence.cfm.

15. See Lawrie Mifflin, *Many Researchers Say Link Is Already Clear on Media and Youth Violence*, N.Y. TIMES, May 9, 1999 (quoting Jeffrey McIntyre of the APA).

16. FTC, *A Review of Research on the Impact of Violence in Entertainment Media*, Appendix A, in MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES (Sept. 2000), at 8.

17. YOUTH VIOLENCE: REPORT OF THE SURGEON GENERAL app. 4-B(2001).

18. Freedman, *supra* note 5, at 21–22, 29 (providing details on researchers in the field who have moved beyond studying the phenomenon of televised violence and have become policy advocates).

19. *Id.* at 5–6 (“it is obvious that these organizations have issued their potentially very important statements without knowing the sci-

entific literature”). See also JONATHAN FREEDMAN, MEDIA VIOLENCE AND ITS EFFECT ON AGGRESSION 9 (2002) (“That the [American Academy of Pediatrics] gave such an inflated figure [for the number of studies] is only one indication that they do not know the research. Imagine the response if an organization of economists asserted that there were serious economic problems in over 150 American states. No one would bother asking for their statistics, since if they were so sloppy as to think that there were that many states, who could possibly trust the rest of their statement?”).

20. FREEDOM FORUM FIRST AMENDMENT CENTER, VIOLENCE IN THE MEDIA—CONNECTION OR CAUSE (May 1, 2001) (transcription from webcast), attached as Exhibit I of COMMENTS OF THE MEDIA ASSOCIATIONS, MB Docket No. 04–261 (2004), at 14–15.

21. *Id.* at 8–9.

22. *Id.* at 9.

23. Mifflin, *supra* note 15 (quoting Jeffrey McIntyre of the APA).

24. See Frederic Wertham, *What Parents Don’t Know About Comic Books*, LADIES HOME J., Nov. 1953 (excerpting SEDUCTION OF THE INNOCENT). The anecdotes also described a teenager found driving a stolen car and twelve-year-old boys caught stealing, all of whom supposedly “learned” their behavior from comic books even though no evidence suggested that the boys in question had actually seen the comics that Wertham concluded had “obviously inspired” them. *Id.*

25. Note, *Regulation of Comic Books*, 68 HARV. L. REV. 489, 489 n.9 (Jan. 1955) (citing S. REP. NO. 83–1064, at 7 (1954)).

26. *Id.* at 489 n.3.

27. Dwight Decker describes his correspondence with Dr. Wertham in *Fredric Wertham—Anti-Comics Crusader Who Turned Advocate*, AMAZING HEROES (1987). A version of this article is available at <http://art-bin.com/art/awertham.html> (visited Oct. 6, 2004).

28. FREDERIC WERTHAM, THE WORLD OF FANZINES: A SPECIAL FORM OF COMMUNICATION (1973).

29. See Paul Farhi, *TV Watchdog Apologizes for False Claims On Wrestling*, WASH. POST, July 9, 2002, at O1.

30. See John M. Higgins, *Bozell’s \$3.5M Apology*, BROADCASTING & CABLE, July 15, 2002, at 36; *Flash: Wrestling I, Parent Group*, 0, NEWSDAY, July 9, 2002, at A12.

31. L. Brent Bozell III, *Parents Television Council Retraction to WWE and to the Public* (July 9, 2002).

32. Freedman, *supra* note 5, at 6.

33. *Id.* at 2.

34. See MEDIA VIOLENCE AND ITS EFFECT ON AGGRESSION, *supra* note 19, at 46–84.

35. *Id.* at 62–63. Freedman has noted that “many of the experiments with children defined aggression in terms of behaviours that are so remote from actual aggression that they are highly questionable or even laughable as

measures of aggression” (e.g., asking the subject if he would pop a balloon if he had one). Since Bobo dolls are made for the purpose of being hit, Freedman has pointed out that “[c]alling punching a Bobo doll aggressive is like calling kicking a football aggressive. . . . No harm is intended and none is done.” *Id.* at 61.

36. *Id.* at 85–107.

37. *Id.* at 108–34.

38. See Brief of Amici Curiae Thirty-Three Media Scholars at 6–12, Interactive Digital Software Ass’n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003) (No. 02–310), attached to *ACLU Comments*, MB Docket No. 04–261 (filed Sept. 15, 2004).

39. See BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, VIOLENT CRIME RATES HAVE DECLINED SINCE 1994, REACHING THE LOWEST LEVEL EVER RECORDED IN 2003 (2004), at <http://www.ojp.usdoj.gov/bjs/glance/viort.htm>.

40. Dan Eggen, *Violent Crime Decreased 3% Last Year, FBI Reports*, WASH. POST, Oct. 26, 2004, at A2.

41. Steven Messner, *Television Violence and Violent Crime: An Aggregate Analysis*, 33 SOC. PROBS. 218 (1986).

42. Messner used a list of “violent” TV shows as identified by an antiviolence advocacy group. *Id.*

43. *Id.* at 228.

44. *Id.* at 223–24.

45. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, INDICATORS OF SCHOOL CRIME AND SAFETY: 2003 (2003), available at <http://www.ojp.usdoj.gov/bjs/abstract/iscs03.htm>.

46. *Id.*

47. There were twenty-eight homicides in schools in 1996–97 and fourteen homicides in 2001–02. See NAT’L CTR. FOR EDUC. STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY, 2003, at fig. 1.2, available at <http://nces.ed.gov/pubs2004/crime03/1.asp>.

48. *Id.* at figs. 5.2, 11.2.

49. CDC, YRBSS: YOUTH RISK BEHAVIOR SURVEILLANCE SYSTEM (2004), available at www.cdc.gov/HealthyYouth/yrbs/index.htm.

50. *Id.*

51. Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 531 (Tenn. 1993) (emphasis added). See also Video Software Dealers Ass’n v. Maleng, 325 F. Supp. 2d 1180, 1182 (W.D. Wash. 2004) (“no such regulation has passed constitutional muster”).

52. Winters v. New York, 333 U.S. 507, 510–11 (1948).

53. *Id.* at 501.

54. Video Software Dealers Ass’n v. Webster, 968 F.2d 684 (8th Cir. 1992).

55. Eclipse Enters. v. Gulotta, 134 F.3d 63 (2d Cir. 1997).

56. Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188 (9th Cir. 1989).

57. Interactive Digital Software Ass’n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003);

Am. Amusement Machine Ass’n v. Kendrick, 244 F.3d 572 (7th Cir. 2001); Video Software Dealers Ass’n v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

58. See James v. Meow Media, Inc., 300 F.3d 683 (6th Cir. 2002) (First Amendment precludes private tort action based on distribution of violent media products); Sanders v. Acclaim Entm’t, Inc., 188 F. Supp. 2d 1264 (D. Colo. 2002) (same as *Meow Media*); Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167 (D. Conn. 2002) (First Amendment bars tort claim based on alleged wrongful death caused by video game); Watters v. TSR, 904 F.2d 378 (6th Cir. 1990) (First Amendment precludes wrongful death claim against Dungeons and Dragons game); Herceg v. Hustler, 814 F.2d 1017 (5th Cir. 1987) (First Amendment precludes tort action over article plaintiff alleged advocated practice of autoerotic asphyxia); Fed’n of Turkish-Am. Societies v. ABC, 620 F. Supp. 56 (S.D.N.Y. 1985) (First Amendment protects telecast of film *Midnight Express* despite allegation it incited violence against Turkish-Americans); Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991), *aff’d*, 958 F.2d 1084 (1992) (First Amendment precludes tort action alleging Ozzy Osbourne album incited teen suicide); McCollum v. CBS, 202 Cal. App. 3d 989 (1988) (same as *Osbourne*); Vance v. Judas Priest, Nos. 86-5844, 86-3939, 1990 WL 130920 (D. Nev. 1990) (First Amendment precludes tort action alleging Judas Priest album incited teen suicide); Olivia N. v. NBC, 126 Cal. App. 3d 488 (1981) (First Amendment precludes tort action alleging television program incited copycat rape).

59. Am. Booksellers Ass’n, Inc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986).

60. Video Software Dealers Ass’n v. Webster, 968 F.2d 684, 689 (8th Cir. 1992).

61. Various courts have held that strict scrutiny is the applicable standard for regulation of violent media and that such regulations are “presumptively invalid.” *E.g.*, *Interactive Digital Software*, 329 F.3d at 958. See also *Eclipse Enters. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997); *Webster*, 968 F.2d at 689.

62. *Interactive Digital Software*, 329 F.3d at 958; *Webster*, 968 F.2d at 689.

63. *Notice of Inquiry*, supra note 3, ¶ 25.

64. *Erznoznik v. Jacksonville*, 422 U.S. 205, 213–14 (1975).

65. 413 U.S. 15 (1973); see *Citizen’s Complaint Against Pacifica Foundation Station WBAI (FM)*, New York, N.Y., 56 F.C.C.2d 94 (1975).

66. *Pacifica*, 56 F.C.C.2d at 97–98.

67. Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418, 420 (1975). The FCC concluded that regulating televised violence could result in “improper governmental interference in sensitive, subjective decisions about programming, could tend to freeze present standards and could also

discourage creative developments in the medium.” *Id.*

68. Commissioner Gloria Tristani, On Children and Television, Keynote Address at the Annenberg Public Policy Center Conference on Children and Media (June 26, 2000).

69. *Notice of Inquiry*, supra note 3, ¶ 25 (citing Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 MICH. ST. DCL L. REV. 51 (2003)). Professor Saunders draws on ancient history to bolster his argument that courts must include violent content, not just sexual content, in the definition of *obscenity*. He relies on the etymological derivation of the word *obscene*, as well as common practices in ancient Greek and Roman theatrical productions, to argue that the definition of *obscenity* includes violence as well as sex. *Id.* at 80–83. Professor Saunders notes with alarm that, in his view, the *Roth* Court mistakenly relied on an 1896 definition of *obscenity* instead of one from over a century earlier. *Id.* at 84. See also KEVIN W. SAUNDERS, VIOLENCE AS OBSCENITY: LIMITING THE MEDIA’S FIRST AMENDMENT PROTECTION 113–18 (1996) (suggesting that historical antecedents to modern obscenity law include very broad restrictions on profanity, blasphemy, and depictions of violence, and noting that the concept of what can be obscene may be too limited by contemporary understandings).

70. 244 F.3d 572 (2001)

71. *Id.* at 575.

72. *Id.* (“Offensiveness is the offense.”).

73. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (citation and internal quotation omitted).

74. *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 958 (8th Cir. 2003).

75. *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 688 (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)).

76. *Id.* See *Eclipse Enters. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997) (“standards that apply to obscenity are different from those that apply to violence”).

77. *Maleng*, *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1185 (W.D. Wash. 2004).

78. *Id.* See *Am. Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (“Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Andersen, and Perrault is aware.”).

79. *E.g.*, Saunders, supra note 69, at 113–18.

80. The first federal obscenity statutes were passed following a lobbying onslaught by Anthony Comstock, who founded the New York Society for the Suppression of Vice. In addition to all things sexual, Comstock crusaded against “dime novels” that he described as

“devil traps for the young.” He claimed that the books’ descriptions of crime and violence were “the inspiration for all of the antisocial behavior exhibited by the youth of the day.” See Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741, 757 (1992).

81. RICHARD A. POSNER, *SEX AND REASON* 61–62 (1992).

82. 539 U.S. 558 (2003).

83. *Id.* at 78–79.

84. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 697 n.22 (1977) (plurality op.) (rejecting argument that exposure to contraceptive information is “harmful to minors” under *Ginsberg*); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72–73 (1983).

85. *Sanger v. Reno*, 966 F. Supp. 151 (E.D.N.Y. 1997).

86. Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418, 423 (1975).

87. *Id.* at 419 n.5.

88. UCLA CTR. FOR COMMUNICATION POLICY, *supra* note 4, at 25.

89. *Id.*

90. MEDIASCOPE, INC., THE NATIONAL TELEVISION VIOLENCE STUDY 8–9 (1994–1995).

91. See Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1565 (1995).

92. *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

93. *Id.* at 871; *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972); *Gentile v. State Bar*, 501 U.S. 1030, 1048 (1991) (regulation of speech is unconstitutional when those subject to it can do no more than “guess at its contours”).

94. *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

95. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

96. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992); *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 770 (1988); *City of Houston v. Hill*, 482 U.S. 451, 468–69 n.18 (1987); *Kolender*, 461 U.S. at 358, 360; *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

97. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689 (1968). See also *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 59 (1963) (condemning a commission that was charged with reviewing material “manifestly tending to the corruption of the youth”).

98. Any effort to distinguish only harmful or gratuitous violence by analogy to the “concepts of ‘prurient interest,’ ‘patently offensive,’ and ‘serious value’ used to define obscenity,” would fail. *Edwards & Berman, supra* note 91, at 1523. It is clear that to the extent “these concepts have proven difficult to apply in obscenity cases, . . . they would pose even more

problems in cases seeking to distinguish between” regulable and nonregulable violence, particularly in that “violent material would have to be at least as graphic and beyond the mainstream as sexually explicit material is to be obscene,” so programming falling within whatever regulation evolved likely would comprise an empty set. *Id.* at 1523–24. See, e.g., NATIONAL TELEVISION VIOLENCE STUDY, *supra* note 90, at 14 (“In general, very little of the violence on television is graphic or explicit.”).

99. Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418, 419 n.5 (1975).

100. *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 532 (Tenn. 1993) (describing statutory restrictions as “entirely subjective”). See *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992) (“every application of the statute create[s] an impermissible risk of suppression of ideas”) (citation omitted); *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1190–91 (W.D. Wash. 2004).

101. *Edwards & Berman, supra* note 91, at 1492.

102. *Id.* at 1555.

103. *Id.* at 1502–03.

104. UCLA CTR. FOR COMMUNICATION POLICY, *supra* note 4, at 27.

105. MEDIASCOPE, INC., *supra* note 90, at 9.

106. *Id.* at 29. Professor Freedman points out that there is no scientific evidence to support the suggestion that different types of portrayals of violence may or may not affect the audience. *Freedman, supra* note 5, at 49–51.

107. MEDIASCOPE, INC., *supra* note 90, at 29.

108. UCLA CTR. FOR COMMUNICATION POLICY, *supra* note 4, at 33.

109. *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

110. *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

111. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–43 (1994).

112. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

113. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995).

114. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

115. See *Freedman v. Maryland*, 380 U.S. 51 (1965); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

116. *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 69–78 (1961) (Warren, C.J., dissenting).

117. See, e.g., *id.* at 69–72 (Warren, C.J., dissenting).

118. See generally EDWARD DEGRAZIA & ROGER NEWMAN, *BANNED FILMS*, at xviii, 177–381 (1982) (describing 122 representative examples of film censorship between 1908 and 1981).

119. *Freedman*, 380 U.S. at 58–61; *id.* at 62 n.1 (Douglas, J. concurring) (“the Chicago censorship system, upheld by the narrowest of margins in *Times Film Corp.* . . . could not survive under today’s standards”).

120. *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985).

121. A.O. Scott, *Good and Evil Locked in a Violent Showdown*, N.Y. TIMES, Feb. 25, 2004.

The level of violence led one reviewer to describe the film as a “two-hour-and-six-minute snuff movie” and to dub it

“The Jesus Chainsaw Massacre.” David Edelstein, *Jesus H. Christ*, SLATE.COM, Feb. 24, 2004, at <http://slate.msn.com/id/2096025/>.

122. E.g., Gary Thompson, *Using Gore with a “Passion,”* PHILA. DAILY NEWS, Feb. 25, 2004.

123. *Id.* (“Adults who want to see ‘The Passion’ should view it themselves before judging whether it’s suitable for younger teens and older children.”).

124. *Georgia Couple Arrested After Debate over “Passion of the Christ” Turns Violent*, USATODAY.COM, Mar. 18, 2004, at http://www.usatoday.com/life/people/2004-03-18-couple-fight-passion_x.htm.

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