

# Moral Panics, the First Amendment, and the Limits of Social Science

ROBERT CORN-REVERE

The Supreme Court appeared to show social psychology no respect—no respect at all—when in *Brown v. Entertainment Merchants Association* it struck down a California law that restricted the sale or rental of violence-themed video games to minors. But the decision was not a show of disrespect. Instead, the Court simply recognized that correlational data are insufficient to overcome basic First Amendment principles.

A majority of the Court found that social science data purporting to show harmful media effects on minors do not trump established constitutional rights. This finding is particularly pertinent in a historical context of successive panics about the latest scourge affecting our children, and in a tradition where scientific “proof” merges with moralistic advocacy. The true importance of *Brown*, however, is its reaffirmation of bedrock First Amendment concepts, i.e., that new communications technologies are constitutionally protected, that the Court will not sanction new categories of “unprotected” expression, that children have rights, and that the government has a heavy burden of proof when it tries to restrict speech.

## A Failure of Proof

Justice Antonin Scalia’s majority opinion in *Brown* surveyed studies that purport to show a connection between exposure to violent video games and harmful effects on children. The opinion explained why the research has been rejected as a basis for regulation by every court to consider it.

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*Robert Corn-Revere practices First Amendment and communications law at Davis Wright Tremaine LLP in Washington, D.C. This article is adapted from an amicus brief he filed in Brown v. Entertainment Merchants Association on behalf of the Comic Book Legal Defense Fund.*

It noted, as have other courts, that nearly all the research is based on correlation, not causation, and that the studies “suffer from significant, admitted flaws in methodology.”<sup>1</sup>

More to the point, correlation, even where found, is insufficient to support the regulations. Research positing even the most significant findings shows “miniscule real-world effects” that “are both small and indistinguishable from effects produced by other media.”<sup>2</sup> Justice Scalia singled out one prominent researcher in the field, who he noted admits that “the *same* effects have been found when children watch cartoons starring Bugs Bunny or the Road Runner . . . or even when they play video games like Sonic the Hedgehog that are rated ‘E’ (appropriate for all ages) . . . or even when they ‘vie[w] a picture of a gun.’”<sup>3</sup>

Other justices were not so skeptical. Justice Breyer dissented, claiming that social scientists “have found *causal* evidence that playing these games results in harm.”<sup>4</sup> He attached to his dissent fifteen pages of appendices prepared with the assistance of the Supreme Court library, listing studies with both positive and negative findings. Justice Alito, joined by Chief Justice Roberts, concurred with the majority opinion. But they expressed concern about the potential adverse impact of the games, reasoning that new interactive technologies may not be comparable to traditional media. Nevertheless, they joined in the outcome of the decision, concluding that the California law was unconstitutionally vague.<sup>5</sup>

These differences of opinion among the justices led some to speculate that there may be hope yet for new video game regulations. With better social science data and a more narrowly drafted law, according to this view, the states or the federal government may one day police the recreational choices of children.

This “glass half full” attitude among

regulatory enthusiasts ignores a more fundamental flaw in what California was trying to achieve. Noting that similar state video game laws had been rejected unanimously by federal courts, California argued not just that social science justified its regulations, but that it did not need to cite studies at all. Rather, the state claimed that it should be able to regulate games whenever the legislature rationally concluded that video games might be detrimental to the moral and ethical development of youth.

Such an approach may be fine when parents are choosing games for their children. And it is perfectly appropriate to use such value-based judgments when a pediatrician makes similar recommendations to patients. But it cuts against the grain of the First Amendment when such mandates are enforced by government decree. The Supreme Court reaffirmed in *Brown* that when Mom or Dad chooses which games are appropriate for the kids, it is called parenting; but when the government does so, it is called censorship.

## Same as It Ever Was . . .

The Court put the controversy over video games into perspective by considering it in historical context. It found that “California’s effort to regulate violent video games is the latest episode in a long series of failed attempts to censor violent entertainment for minors.”<sup>6</sup> And indeed it is. The California law represents a long tradition of suppressing media popular among the young. These recurring campaigns are typified by exaggerated claims of adverse effects of popular culture on youth based on pseudoscientific assertions of harm that are little more than thinly veiled moral or editorial preferences. Such censorship crusades have been mounted against dime novels, ragtime music, cinema, comic books, television, and, now, video games.

This phenomenon even has a name among social scientists; it is called a “moral panic” in which

[a] condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; [and] socially-accredited experts pronounce their diagnoses and solutions.<sup>7</sup>

Campaigns to protect children often are the product of “general anxieties about the future direction of society,” but, as a multidisciplinary government report of the UK government found, “they can also be inflamed and manipulated by those with much broader political, moral or religious motivations.”<sup>8</sup>

Such cycles of outrage can be traced to early claims that “a very large majority” of those who turn bad “may trace the commencement of their career in crime to their attendance in Penny Theatres.”<sup>9</sup> Likewise, “Penny Dreadfuls” began to appear in England and continental Europe in the mid-nineteenth century. Forerunner to the American dime novels, these mass-produced serialized stories about the exploits of Gothic villains, pirates, highwaymen, thieves, and murderers were designed to appeal to a youthful and mass audience. Penny Dreadfuls were scapegoated for provoking the commission of juvenile crimes ranging from theft to murder, and by the 1890s “among street boys, reading had become an almost criminal pursuit.”<sup>10</sup>

In the United States, such claims were reprised in Anthony Comstock’s assertions that dime novels were “the inspiration for all the antisocial behavior exhibited by the youth of the day.”<sup>11</sup> Another early American target of moralistic fervor was ragtime music, which was castigated in 1899 as “vulgar, filthy and suggestive music” that should be “suppressed by press and pulpit.”<sup>12</sup> In a 1914 call to arms against jazz, the *Musical Observer* urged its readers to “take a united stand against the Ragtime Evil as we would against bad literature.”<sup>13</sup>

Opponents compared the music to alcohol and other intoxicating

substances, and in December 1933, a Washington State congressman introduced House Bill 194 in the legislature to empower the governor to impose a ban if it was determined that “our people are becoming dangerously demented, confused, distracted or bewildered by jazz music.” It also provided that those convicted of being “jazzily intoxicated shall go before the Superior Court and be sent to an insane asylum.”<sup>14</sup>

The moral panic over jazz was captured perfectly in lyrics from *The Music Man*:

One fine night, they leave the pool hall, headin’ for the dance at the Arm’ry! Libertine men and Scarlet women! And Rag-time, shameless music that’ll grab your son and your daughter with the arms of a jungle animal instink! Mass-staria!<sup>15</sup>

Such concerns foreshadowed later campaigns against music, but by then, the critics had forgotten how foolish those efforts looked in retrospect. Responding to demands like this, NBC in 1940 banned from the radio more than 140 songs because they allegedly “encouraged a disrespect for virginity, mocked marriage, and encouraged sexual promiscuity.” Duke Ellington’s *The Mooche* was blamed for inciting rape, and only the instrumental version of Cole Porter’s *Love for Sale* could be aired.<sup>16</sup>

This drama played out again a couple of decades later in a two-year investigation by the Federal Communications Commission and six FBI field offices into the supposedly corrupting lyrics of the song *Louie Louie* by The Kingsmen.<sup>17</sup> The FBI finally concluded in 1966 that the song’s lyrics were unintelligible (and therefore not obscene).<sup>18</sup> Yet these findings did not prevent a middle school principal in 2005 from banning a marching band’s instrumental performance out of concern for the song’s supposedly “sexually explicit lyrics.”<sup>19</sup>

The advent of cinema likewise “provided all the necessary ingredients for a ‘moral panic’” with its attendant “full-blown conflict over moral values.”<sup>20</sup> Movies with crime stories and depictions of cinematic violence would lead politicians, religious leaders, and social reformers to condemn the influence of motion pictures on

children’s morals and behavior.<sup>21</sup> A 1907 *Chicago Tribune* editorial called movies “schools of crime where murders, robberies, and holdups are illustrated,” and it called on city authorities to “suppress them at once.”<sup>22</sup>

Given such strong editorial endorsement, it is not surprising that Chicago adopted the nation’s first film censorship ordinance in 1907, requiring exhibitors to obtain a police permit before any movie could be shown.<sup>23</sup> Other cities soon followed suit. In 1910, a committee in Cleveland reviewed some 250 films and declared that 40 percent of them were unfit for children “because they focused on crime, drunkenness, and loose morals.”<sup>24</sup> By 1926, seven states and at least 100 municipalities imposed pre-exhibition censorship on movies.<sup>25</sup>

In the post-war years between 1948 and 1953, various crusaders stepped forward to blame an asserted increase in juvenile delinquency on “the pre-occupation with violence and horror fostered by the wide distribution of sex, crime, and horror comic books.”<sup>26</sup> Civic groups such as the PTA and the National Institute of Municipal Law Officers denounced comics, and ordinances were proposed in cities across the United States. In addition, public burnings of comic books were organized.<sup>27</sup> As a tragic irony, some of the public burnings were staged not long after the publication of Ray Bradbury’s dystopian novel *Fahrenheit 451*, in which firemen had the job of burning books.<sup>28</sup>

By 1949, laws to regulate comic books, mostly designed to ban the sale of crime comics to minors, were pending in fourteen states, and eventually at least fifty U.S. cities would attempt to regulate their sale.<sup>29</sup> Various measures were adopted, including the circulation of blacklists by police or local prosecutors as part of organized programs “to drive certain publications from [the] community.” In some jurisdictions, lists were derived based on recommendations from interested organizations, while other communities established advisory committees or “literature commissions” to identify suspect works.<sup>30</sup> Such methods proved to be highly effective, “establishing a virtual censorship over reading matter by keeping it from reaching newsstands or by withdrawing it afterwards.”<sup>31</sup>

In 1954, the Senate Judiciary Committee convened a special Subcommittee to Investigate Juvenile Delinquency in the United States and held hearings on the topic of comic books and juvenile delinquency.<sup>32</sup> The star witness was psychiatrist Dr. Fredric Wertham, a vociferous anti-comic book crusader. His 1954 book *Seduction of the Innocent* became Exhibit A for the case against comic books.<sup>33</sup>

Wertham was no stranger to the florid rhetoric of the moral crusader.

## [T]he language describing . . . video game violence is little changed from the moral panics of yesteryear.

Not to be outdone by his predecessor, Anthony Comstock, he proclaimed, “Hitler was a beginner compared to the comic-book industry.”<sup>34</sup> He posited that “as long as the crime comic books industry exists in its present forms, there are no secure homes,” and he took an exceedingly broad view of which comics fell into that category. For example, he described *Superman* comics as “particularly injurious to the ethical development of children” for engendering fantasies of “sadistic joy in seeing people punished over and over again” and for teaching “complete contempt of the police.”<sup>35</sup>

Wertham previously had lobbied the State of New York to adopt a “public health” law prohibiting the sale and display of crime comics to children under the age of fifteen, describing such materials as “the cause of a psychological mutilation of children.”<sup>36</sup> The legislature passed the proposed bill in March 1952, but Governor Thomas E. Dewey vetoed it. Dewey’s veto memorandum said that the bill violated the First Amendment.<sup>37</sup>

At the federal level, the Senate subcommittee’s report adopted Wertham’s rhetorical style and warned that crime and horror comic books “offer short courses in murder, mayhem, robbery, rape, cannibalism, carnage, necrophilia, sex, sadism, masochism, and virtually every other form of crime,

degeneracy, bestiality, and horror.”<sup>38</sup> Ultimately, however, the committee, to its credit, rejected the notion of federal censorship as “totally out of keeping with our basic American concepts of a free press operating in a free land for a free people.”<sup>39</sup> Instead, it endorsed a strict system of self-regulation.

Wertham failed to obtain the federal legislation he advocated and was unable to secure passage of the New York censorship bill. But he nonetheless was credited with persuading a number of states and cities to adopt such laws.<sup>40</sup> His actions and writings fueled a national movement to get comic books off the shelves and triggered police action against comic books in more than fifty cities.<sup>41</sup> And, although Wertham was deeply disappointed in the voluntary industry code that was adopted to forestall legislation, as a practical matter, the national system of informal censorship that resulted had a profound chilling effect.<sup>42</sup>

So goes the cycle of outrage in the typical moral panic. “Whenever the introduction of a new mass medium is defined as a threat to the young, we can expect a campaign by adults to regulate, ban or censor, followed by a lessening of interest until the appearance of a new medium reopens public debate.”<sup>43</sup> Despite this well-trodden path, the reaction carries with it “an intrinsic historical amnesia.”<sup>44</sup> “Every new panic develops as if it were the first time such issues were debated in public and yet the debates are strikingly similar.”<sup>45</sup> At the same time, “preoccupation with the latest media fad immediately relegates older media to the shadows of acceptance.”<sup>46</sup>

Repeating this pattern, the language describing media and video game violence is little changed from the moral panics of yesteryear. Taking a cue from Comstock and Wertham, supporters of regulation routinely cite examples of games they consider the most lurid and assert broad claims about the adverse effects of such materials on youth.

### Back off, Man—I’m a Scientist

While all moral crusaders over the decades have sought to protect children from bad influences that they claimed would cause them to commit crimes (or at least behave disrespectfully), Anthony Comstock, at least, was

honest about his animating concerns. He wrote that “*Satan lays the snare, and children are his victims.*” His overriding goal was to “awaken thought upon the subject of *Evil Reading.*” Comstock’s ultimate mission was to save children from the wages of sin.<sup>47</sup>

The purposes of social reformers did not change in the moral panics of the twentieth century, but the crusaders began to dress up their moralistic arguments with the trappings of science. In the well-rehearsed script of the typical moral panic, however, science has been used less as a tool for understanding than as currency to be exchanged for political leverage. As a result, the policy debates in this area are a mélange of social science mixed with politics and advocacy, and rarely is there a clear dividing line between the researchers and the advocates. The debate over media violence has followed the standard script, dominated by “reactionary rhetoric, flawed research, and distorted accounts of legitimate scientific studies.”<sup>48</sup>

Some scholars have warned that such misuse of social science can do great damage when it is “weak in methodology, but strong in ideology” and that in such cases “social science runs the risk of becoming little more than ‘opinion with numbers.’”<sup>49</sup> Criminologist David Gauntlett described this “opportunistic mixing of concerns about the roots of violence with political reservations about the content of screen media” as “a lazy form of propaganda.” Those who exploit such moral panics are dubbed “moral entrepreneurs.”<sup>50</sup>

The panic over film censorship provides a clear example of the distortion of scientific claims in service of a political objective. In 1933, the Motion Picture Research Council published an exhaustive nine-volume scholarly study on the effects of movies on American children, commonly known as the Payne Fund studies. The project was undertaken with a goal of discrediting movies, but the researchers actually reached more nuanced conclusions that were “about one-third unfavorable to the movies, about one-third favorable, and about one-third neutral.”<sup>51</sup> Unfortunately, the researchers’ reservations were forgotten as their work became part of the policy debates.

Not content to rely on the more dryly academic analysis, the Council also commissioned a book to summarize the research for popular consumption.<sup>52</sup> The resulting work was more a polemic than an accurate digest of the study. “It twisted conclusions, omitted facts, and used inflammatory language to conclude that children’s mental attitudes were changed by their viewing choices” and that films were “responsible for juvenile delinquency, promiscuity, and disrespect to parents.” But as such things go, “it was the popularized version that stuck in the minds of policymakers.”<sup>53</sup>

The comic book panic followed the same pattern. Fredric Wertham’s *Seduction of the Innocent* has been classified as “the archetypal reaction to a new mass medium,” with its denunciation of comics as “morally contagious and sexually dangerous.”<sup>54</sup> Yet, despite its Comstockian prose and its unabashed purpose to further the author’s anti-comic book crusade, the book was touted as a work of “science.”<sup>55</sup> Due to its purportedly authoritative nature, Wertham’s book was tremendously influential, not just in the United States, but in Canada and Europe as well.<sup>56</sup>

But *Seduction of the Innocent* was anything but scientific, and its findings have been thoroughly discredited. It consisted of random, undocumented, and unverifiable case studies of children who supposedly had been harmed by reading comic books.<sup>57</sup> The examples were “carefully selected to support Wertham’s conclusions about comic books,” which were presented through the dramatic reconstruction of contrived dialogue.<sup>58</sup> Scholarly critiques noted that the book lacked any scientifically gathered research data or systematic inventory of comic book content and concluded that, “[w]ithout such an inventory, the conjectures are biased, unreliable, and useless.”<sup>59</sup>

Such evident weaknesses did not prevent Wertham from presenting his conclusions as if they represented a scientific consensus, despite the fact that “most professional social workers, psychologists, sociologists, and criminologists denied any direct link between mass media and delinquency.”<sup>60</sup> He confidently testified before Congress that his book

provided “incontrovertible evidence of the pernicious influences on youth of crime comic books” and that “on this subject there is practically no controversy.”<sup>61</sup> He made such claims despite data that had been presented to the Senate subcommittee showing that juvenile delinquency *actually declined* during the years that “crime comics” increased in popularity.<sup>62</sup>

This experience is virtually identical to current claims about media and video game violence. Channeling Wertham, advocates of increased regulation frequently have made the claim that “the scientific debate is . . . over” about the impact of fictionalized violence.<sup>63</sup> Such present-day crusaders are prone to extravagant rhetoric, comparing their theories to such things as the link between smoking and health and asserting that to dispute their conclusions is to “argue against gravity.”<sup>64</sup> However, researchers in the field who have not signed on to this faux consensus caution that such “[g]randiose claims demand intense skeptical scrutiny.”<sup>65</sup>

Contrary to the assertions of regulatory advocates, there is nothing approaching a scientific consensus on the asserted link between electronic media or video games and violent behavior.<sup>66</sup> Additionally, legislative endorsements by various professional associations have not been based on careful or in-depth reviews of the literature.<sup>67</sup>

Interdisciplinary reviews have found “long-running and often heated debates among researchers on the issue of media effects” about such fundamental issues as “how the key questions are to be framed, what might count as an answer, and what the implications of these answers might be in terms of what should be done.”<sup>68</sup> In particular, there is a “stand-off” between researchers in the tradition of psychological effects research—which is particularly prominent in the United States—and researchers within disciplines such as sociology, anthropology and cultural studies.<sup>69</sup> Looking at the issue more broadly, the UK government’s recent review of the media effects literature found significant disagreement among scholars and concluded that the evidence of a causal link between violent media content and violent behavior to be “weak and inadequate.”<sup>70</sup>

Most importantly, real-world reductions in crime and violence contradict claims of widespread effects of video games on minors. During the past twenty years, “as video games became increasingly popular, and as technology allowed ever more detailed depictions of violence, youth violence rates have plunged—not only in the United States, but in most industrialized nations.”<sup>71</sup> According to FBI statistics, since 1995, the juvenile crime rate has dropped by 36 percent, and the juvenile murder rate has plummeted by 62 percent.<sup>72</sup> Antiviolence crusaders in the past frequently would cite rising crime rates in the 1970s and 1980s as proof of their media effects theories. But the current decline in crime “has passed without comment by many of the same scholars.”<sup>73</sup>

Given the persistent refusal of real-world experience to corroborate their theories, proponents of media violence regulation have tried to have it both ways. They argue that social science research is sufficient to support restrictions on speech, but they also claim that the government should not be required to present such data at all. They argue that courts should defer to legislative judgments about which games should be censored to protect the “ethical and moral development” of children. Reduced to their essence, arguments favoring the regulation of violence-themed games are little more than a call to return to the age of Anthony Comstock, in which the government could ban literature in order to save America’s youth from sin.

### What’s Law Got to Do with It?

None of this is to suggest that parents are not right to be concerned if their children want to play games that they believe reinforce poor values. The Supreme Court in *Brown* acknowledged that some violent games may raise problems such that “perhaps none of us would allow our own children to play them.”<sup>74</sup> But it also confirmed that it could not interpret the law based on what the justices may believe “parents *ought* to want” for their children.<sup>75</sup> Justice Scalia’s opinion for the Court observed that there are numerous more serious problems that cannot be addressed by governmental restriction of free expression. For example, the Court has held that the

government cannot prohibit expression encouraging anti-Semitism, advocating political philosophy hostile to the Constitution, or encouraging disrespect for the American flag.<sup>76</sup> In this case, *Brown* restated the fundamental First Amendment principle that “esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.”<sup>77</sup>

Ultimately, *Brown v. EMA* was about the preservation of hard-won First Amendment rules that had been established in response to earlier twentieth century moral panics. In striking down efforts to ban the distribution of crime magazines and comic books to minors more than sixty years ago, the Court found it is difficult to distinguish politics from entertainment and dangerous to try. It therefore held that such publications “are as much entitled to the protection of free speech as the best of literature.”<sup>78</sup> During the same time period, the Court invalidated censorship of motion pictures, noting that each medium may “present its own particular problems,” but “the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary.”<sup>79</sup>

All told, the arguments California made to support its video game restrictions threatened to undo more basic First Amendment law than any single case in living memory. The state argued that new interactive technologies should get less constitutional protection, that the Court can create new categories of unprotected speech, that children lack constitutional rights, and that legislatures can justify censorship based on a “rational basis” whim (otherwise known as legislative “findings”). But the Supreme Court held firm, issuing an opinion that, as former Justice David Souter once put it, keeps the “starch in the standards.”<sup>80</sup>

In the end, *Brown v. EMA* was not about whether the Court respects the work of social scientists; it was about the level of respect it has for the constitutional values embodied in the First Amendment.

## Endnotes

1. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738–39 (2011).

2. *Id.*

3. *Id.* at 2739 (emphasis in original).

4. *Id.* at 2768 (Breyer, J., dissenting) (emphasis in original).

5. *Id.* at 2746 (Alito, J., concurring).

6. *Id.* at 2741.

7. STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* 1 (3d ed. 2002).

8. U.K. DEP’T FOR CHILDREN, SCHOOLS & FAMILIES & DEP’T FOR CULTURE, MEDIA & SPORT, *THE IMPACT OF THE COMMERCIAL WORLD ON CHILDREN’S WELLBEING—REPORT OF AN INDEPENDENT ASSESSMENT* 25 (Dec. 2009), available at [www.education.gov.uk/publications/standard/publicationDetail/Page1/DCSF-00669-2009](http://www.education.gov.uk/publications/standard/publicationDetail/Page1/DCSF-00669-2009).

9. JAMES GRANT, *SKETCHES IN LONDON* (1838) (quoted in JOHN SPRINGHALL, *YOUTH, POPULAR CULTURE AND MORAL PANICS* 9 (1998)).

10. SPRINGHALL, *supra* note 9, at 38–58, 75, 93.

11. 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. 757 (1992).

12. JOHN E. SEMONCHE, *CENSORING SEX: HISTORICAL JOURNEY THROUGH AMERICAN MEDIA* 144 (2007).

13. *See, e.g.*, PETER BLECHA, *TABOO TUNES: A HISTORY OF BANNED BANDS & CENSORED SONGS* 17 (2004).

14. *Id.* at 23.

15. MEREDITH WILLSON, *Ya Got Trouble, THE MUSIC MAN* (1957).

16. Blanchard, *supra* note 11, at 824.

17. *See* Eric Predoehl, *The FBI Investigation of the Song “Louie Louie”* (1984) (collection of FBI reports obtained through FOIA request) (copies available from author).

18. *See* BLECHA, *supra* note 13, at 97–100.

19. SEMONCHE, *supra* note 12, at 138–42.

20. LAURA WITTERN-KELLER, *FREEDOM OF THE SCREEN* 18 (2008).

21. LAWRENCE KUTNER & CHERYL K. OLSON, *GRAND THEFT CHILDHOOD* 38 (2008).

22. Blanchard, *supra* note 11, at 761.

23. *Id.*

24. *Id.* at 763.

25. WITTERN-KELLER, *supra* note 20, at 22, 30.

26. Note, *Regulation of Comic Books*, 68 HARV. L. REV. 489, 489–90 (Jan. 1955).

27. DAVID HAJDU, *THE TEN-CENT PLAGUE* 143–53 (2008); SPRINGHALL, *supra* note 9, at 130.

28. HAJDU, *supra* note 27, at 303–04.

29. *Id.* at 150; KUTNER & OLSON, *supra* note 21, at 50.

30. *Regulation of Comic Books, supra*

note 26, at 495–96.

31. *Id.* at 496.

32. *Juvenile Delinquency (Comic Books): Hearings Before the S. Subcomm. on Juvenile Delinquency*, 83d Cong., 2d Sess. (Apr. 21–22 and June 24, 1954) (hereinafter *Senate Hearings*).

33. *See* FREDRIC WERTHAM, *SEDUCTION OF THE INNOCENT* (1954); AMY KISTE NYBERG, *SEAL OF APPROVAL: THE HISTORY OF THE COMICS CODE 50* (1998) (Wertham’s book was the “primer of the American campaign” against comics).

34. *Senate Hearings, supra* note 32, at 95.

35. *Id.* at 84, 86.

36. SPRINGHALL, *supra* note 9, at 132.

37. *See* *People v. Bookcase, Inc.*, 201 N.E.2d 14, 15–16 (N.Y. 1964).

38. S. REP. NO. 84-62, at 7 (1955).

39. *Id.* at 23.

40. Blanchard, *supra* note 11, at 789; KUTNER & OLSON, *supra* note 21, at 50; SPRINGHALL, *supra* note 9, at 140.

41. NYBERG, *supra* note 33, at 34.

42. The comics code devastated the industry. Entire categories, such as horror comics, were terminated. Although not entirely due to the new content code, the number of comic book titles that were published dropped by 40 percent, from around 500 in 1952 to approximately 300 in 1955. SPRINGHALL, *supra* note 9, at 140–41. In 1955, for first time since the business began, no new publishers entered the comic book market. NYBERG, *supra* note 33, at 124–25.

43. SPRINGHALL, *supra* note 9, at 7.

44. Kirsten Drotner, *Modernity and Media Panics*, in *MEDIA CULTURES: REAPPRAISING TRANSNATIONAL MEDIA* 52 (Michael Skovmand & Kim Christian Schroder eds., 1992).

45. *Id.*; SPRINGHALL, *supra* note 9, at 7.

46. Drotner, *supra* note 44, at 52.

47. ANTHONY COMSTOCK, *TRAPS FOR THE YOUNG* 5, 9, 239 (Robert H. Bremner ed., John Harvard Library 1967) (1993).

48. *See, e.g.*, DAVID TREND, *THE MYTH OF MEDIA VIOLENCE* 45–49 (2007).

49. Christopher J. Ferguson & Cheryl K. Olson, *The Supreme Court and Video Game Violence: Will Regulation Be Worth the Costs to the First Amendment?*, *CRIMINOLOGIST*, July/Aug. 2010, at 19–20.

50. DAVID GAUNTLETT, *MOVING EXPERIENCES: MEDIA EFFECTS AND BEYOND* 130–35, 147 (2d ed. 2005).

51. *CHILDREN AND THE MOVIES: MEDIA INFLUENCE AND THE PAYNE FUND CONTROVERSY* 104 (Garth S. Jowett et al. eds., 1996). *See* WITTERN-KELLER, *supra* note 20, at 58.

52. See HENRY JAMES FORMAN, *OUR MOVIE MADE CHILDREN* (1935).

53. WITTERN-KELLER, *supra* note 20, at 58–59.

54. Drotner, *supra* note 44, at 45.

55. See WERTHAM, *supra* note 33 (publisher's note to the original edition) ("This book . . . is the result of seven years of scientific investigation"); *Senate Hearings*, *supra* note 32, at 82 (Testimony of Dr. Fredric Wertham) ("This research was a sober, painstaking, laborious clinical study.").

56. *Senate Hearings*, *supra* note 32, at 251; Drotner, *supra* note 44, at 45–46.

57. SPRINGHALL, *supra* note 9, at 125.

58. NYBERG, *supra* note 33, at 96.

59. See, e.g., SHEARON LOWERY & MELVIN DEFLEUR, *Seduction of the Innocent: The Great Comic Book Scare*, in *MILESTONES IN MASS COMMUNICATION RESEARCH* 262, 264 (1983); Patrick Parsons, *Batman and His Audience: The Dialectic of Culture*, in *THE MANY LIVES OF THE BATMAN: CRITICAL APPROACHES TO A SUPERHERO AND HIS MEDIA* 82 (Roberta E. Pearson & William Uricchio eds., 1991) (Wertham's claims were based on a "crude social learning theory model which either implicitly or explicitly assumed unmediated modeling effects").

60. NYBERG, *supra* note 33, at 20; S. REP. NO. 84-62, at 16–17 (1955).

61. *Senate Hearings*, *supra* note 32, at 81, 90.

62. S. SPECIAL COMM. TO INVESTIGATE

ORGANIZED CRIME IN INTERSTATE COMMERCE, A COMPILATION OF INFORMATION AND SUGGESTIONS SUBMITTED TO THE SPECIAL SENATE COMMITTEE TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE RELATIVE TO THE INCIDENCE OF POSSIBLE INFLUENCE THEREON OF SO-CALLED CRIME COMIC BOOKS DURING THE FIVE-YEAR PERIOD 1945 TO 1950, 81st Cong., 2d Sess. 137–48 (1950); SPRINGHALL, *supra* note 9, at 131.

63. E.g., *VIOLENT VIDEO GAME EFFECTS ON CHILDREN AND ADOLESCENTS* 4 (Craig A. Anderson et al. eds., 2007).

64. See Lawrie Mifflin, *Many Researchers Say Link Is Already Clear on Media and Youth Violence*, N.Y. TIMES, May 9, 1999 (quoting Jeffrey McIntyre, then affiliated with the American Psychological Association).

65. Ferguson & Olson, *supra* note 49, at 19.

66. TREND, *supra* note 48, at 47–48; KUTNER & OLSON, *supra* note 21, at 63; JOINT STATE GOV'T COMM'N OF THE COMMONWEALTH OF PA., *THE REPORT OF THE TASK FORCE ON VIOLENT INTERACTIVE VIDEO GAMES* 9, 12 (Dec. 2008).

67. See, e.g., Ferguson & Olson, *supra* note 49, at 19 (noting American Academy of Pediatrics statement based on minimal fact checking); TREND, *supra* note 48, at 48 ("scores of respected humanities professors and intellectuals" sent "letters and petitions to groups like the AMA and the

ACAP, imploring them to back down on blanket condemnations of violent movies and games").

68. *INDEPENDENT ASSESSMENT OF CHILDREN'S WELLBEING*, *supra* note 8, at 72.

69. *Id.* at 72, 124–25.

70. *Id.* at 123.

71. Ferguson & Olson, *supra* note 49, at 19.

72. Adam Thierer, *Violent Video Games & Youth Violence: What Does Real World Evidence Suggest?*, TECH. LIBERATION FRONT (Feb. 9, 2010), <http://techliberation.com/2010/02/09/violent-video-games-youth-violence-what-does-real-world-evidence-suggest/>.

73. Ferguson & Olson, *supra* note 49, at 19.

74. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2739 (2011).

75. *Id.* at 2741 (emphasis in original).

76. *Id.* at 2739.

77. *Id.* at 2733 (quoting *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000)).

78. *Winters v. New York*, 333 U.S. 507, 510 (1948).

79. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

80. *Denver Area Telecomms. Educ. Consortium v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring).