The Kids Are Alright: Violent Media, Free Expression, and the Drive to Regulate

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On April 16, 2007, Sueng Hui Cho killed 32 fellow students and teachers at Virginia Tech University and wounded another 17. It was the worst school shooting in American history. Not only did it devastate the families and friends of those directly touched by the tragedy, it shocked students and their parents across the nation. The search for answers began immediately. Who was the gunman? Why did he do it? What could possibly motivate a person to commit such an insane act of hatred and destruction?

We did not have to wait long to begin to piece together the mystery once the identity of the killer was known. All those acquainted with Cho knew him to be a very troubled young man. Ever since he was a small boy growing up in South Korea, his family had been concerned about how quiet and withdrawn he was. He had no friends, and he rarely if ever spoke. When he did, he was teased by his classmates. In college he began to express himself in plays and essays that described committing disturbing and violent acts. Some fellow students were sufficiently concerned that they stopped attending class. One teacher responded by trying to tutor Cho individually. Separately, his dorm mates contacted campus security when they became concerned that Cho had stalked several young women.

After the tragedy, the boy who would never talk spoke from the grave about his twisted motivations. Cho left behind angry notes and a videotaped "manifesto" complaining of rich kids, debauchery, and "deceitful charlatans." He told the targets of his wrath, "you caused me to do this." Investigators would later conclude that Cho saw himself as a "collector of injustice" for what he believed was a lifetime of suffering and humiliation. Writings that Cho left in his dorm

room, sent to the Virginia Tech English Department, and mailed to NBC News revealed what the investigators described as "twisted references to religion as part of his identity." In particular, he took on the alter ego "Ax Ishmael," which the agents understood to be a biblical reference.

Although no one can ever be certain, they believed that the persona he chose was derived from the Ishmael, the son of Hagar, who was Egyptian maidservant to Abraham and Sarah. Although he was Abraham's eldest son, Ishmael and his mother were cast out of Abraham's household when he was a teenager. But this was far from the only religious reference in Cho's diatribe, and it was not the most direct one. In the videos he sent to NBC News, he asked his imagined tormenters, "Do you know what it feels like to be humiliated and be impaled on a cross?" Knowing that the events he planned would end with his own death, he boasted that "I die like Jesus Christ, to inspire generations of the weak and defenseless people."

There is a word for this kind of thinking – crazy. And as the story emerged, it became clear that Cho's problems ran deep. In a remarkable front page story in the WASHINGTON TIMES, Cho's civil commitment order from December 2005 was reproduced. He had been detained on this occasion after his roommates notified campus security of a suspected stalking incident. The key section of the form, highlighted by the WASHINGTON TIMES, reads as follows:

> Cho "is mentally ill and in need of hospitalization, and presents an imminent danger to self or others as a result of mental illness, or is so seriously mentally ill as to be substantially unable to care for self, and is incapable of volunteering or unwilling to volunteer for treatment."

In short, Cho's problems were well documented even before that tragic day last April. And, while no one might reasonably have anticipated the rampage that came, it all seemed to make sense in the aftermath as the details of Cho's sad and isolated existence came to light.

By now, some of you may be wondering why I am spending so much time talking about the terrible events at Virginia Tech event though they have no possible connection to the topic of

this lecture – depictions of violence in the media. I am doing so because it seems inevitable that, sooner or later, someone will advance the simplistic notion that watching a bad TV show or playing the wrong game will cause a massacre. And in this case, such predictable nonsense came sooner. Pop psychologist Dr. Phil McGraw diagnosed the root cause of violence on the day of the Virginia Tech shootings in an appearance of the *Larry King Show*. He said:

> You cannot tell me – common sense tells you that if these kids are playing video games, where they're on a mass killing spree in a video game, it's glamorized on the big screen, it's become part of the fiber of our society. You take that and mix it with a psychopath, a sociopath or someone suffering from mental illness and add in a dose of rage, the suggestibility is too high. And we're going to have to start dealing with that. We're going to have to start addressing those issues and recognizing that the mass murders of tomorrow are the children of today that are being programmed with this massive violence overdose.

Dr. Phil is far from the only person to advance this theory. Professional "tragedy chasers" like attorney Jack Thompson regularly turn up in the wake of such events to peddle the same story: the media made the killers do it.

The problem is – or, more accurately, one of the many problems – is that such claims have no connection with reality. But why let facts get in the way of such a nice theory?

This was particularly so in the case of Virginia Tech, where Cho had no history of playing any video games, much less violent ones. In media interviews, Cho's roommates said they never saw him playing video games. And, as a subsequent search of his dorm room demonstrated, Cho owned no such games. Virginia Governor Tim Kaine's official report on the Virginia Tech shootings thoroughly reviewed Cho's life, and found that as a pre-teen Cho "watched TV and played video games like 'Sonic the Hedgehog,' but that "[n]one of the video games were war games or had violent themes." A psychologist's analysis of Cho appended to the governor's report does not mention video games at all.

In this case, Cho's psychological problems ran so deep and were so well documented that attempts to scapegoat the media were overwhelmed. But the impulse by some to make the attempt was part of a depressingly familiar pattern. Since 1997, at least 199 newspaper articles focused on video games as a central explanation for the Paducah, Springfield, and Littleton school shootings. Most of these articles, about 176 in all, focused on the Littleton tragedy.

A Causal Relationship

If there is any cause and effect relationship in this story it is this – unsupported claims that pictures of violence cause real world violence have become a powerful catalyst for legislative action. Since 2000, two local governments and seven states have adopted laws to restrict access by minors to video games. Beginning with an Indianapolis ordinance to prohibit kids under 18 from playing violent arcade games, similar measures to criminalize the sale or rental of violent computer games to minors were passed in St. Louis, Washington state, California, Michigan, Minnesota, Louisiana, and Oklahoma. Currently, another six states are considering adopting such laws. These include Delaware, Indiana, Kansas, New York, North Carolina, and Utah.

Such proposals are not confined to state and local governments or to the interactive medium of video games. There has long been interest by some in Washington, D.C. to regulate depictions of violence on television, and such efforts have recently gained some traction at the FCC and in Congress. On April 25, 2007 the FCC released a long-awaited report recommending that Congress should adopt new restrictions. The Commission's key findings included the following:

- "There is strong evidence that exposure to violence in the media can increase aggressive behavior in children, at least in the short term."

- "The Supreme Court's *Pacifica* decision and other decisions relating to restrictions on the broadcast of indecent content provide possible parallels for regulating violent television content."

- "Given the findings in this *Report*, we believe action should be taken to address violent programming."

- "Congress could implement a time channeling solution . . . and/or mandate some other form of consumer choice in obtaining video programming, such as . . . family tiers or [sale of channels] on an *a la carte* basis."

Influential members of Congress have been poised to accept the FCC's invitation. In 2005, Senator John D. Rockefeller introduced a bill he called the "Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005." Among other things (like increasing the amount of fines for "indecent" broadcasts – something that Congress has since done), the bill would have empowered the FCC to regulate violence on television if it concluded that viewer-controlled alternatives, such as the V-chip, were "insufficiently effective." The proposal also would have extended the regulations to include subscription media, like cable and satellite television, and not just free broadcasting. That bill was not adopted, but Senator Rockefeller has pledged to introduce new legislation, which could come at any time.

Last July, Senator Sam Brownback drafted amendments to the FCC's appropriations bill that would have required the FCC to regulate depictions of violence on television. Specifically, the legislation would have required that the Commission "prohibit television broadcast station licensees from broadcasting excessively violent video programming during the hours when a substantial number of children are reasonably likely to be in the audience." In other words, it would have implemented the recommendation from the FCC report on televised violence that the agency adopt so-called "safe harbor" rules like the ones that currently apply to "indecent" broadcasts, prohibiting such programming before 10 p.m. The bill proposed defining "excessively violent video programming" as "a depiction or description of physical force against

an animate being that, in context, is patently offensive as measured by contemporary community standards for the broadcast medium." Ultimately, however, Senator Brownback's amendment was not introduced. But most observers expect that something like it will reemerge.

Congress shall make no law . . .

It is possible to debate the wisdom of such proposals on many levels, such as asking whether such a law would be workable or if it would be good public policy. But the discussion over the regulation of violent imagery inevitably centers on the First Amendment to the Constitution. Why is this so? To answer this question it is important to begin with the language of the amendment itself:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

These mere forty-four words set forth five essential rights of Americans: freedom of (and from) religion, freedom of speech, freedom of the press, the right to assembly, and the right to petition the government. These words can be interpreted to mean many things, but it may not seem obvious that they include the right to play interactive games or to watch slasher flicks. In short, why can't government adopt reasonable restrictions if it believes that depictions of violence may cause – or at least contribute to – actual violence in the real world?

To put this inquiry into perspective, I think it helps to consider the First Amendment impact by thinking about rights other than freedom of speech or freedom of the press. What if we asked the same question as before – whether the government could impose restrictions to curb violence – but framed as a problem of freedom of religion?

In this scenario, what if the argument was made that religion should be banned if it could be shown that it inspired Cho's actions at Virginia Tech? Would that change how you think

most people would answer the First Amendment question? Perhaps that states the problem and its proposed solution too broadly. What about just regulating access to religion by people with psychological problems? Or perhaps limiting exposure of children to religious messages?

When the question is framed as a freedom of religion problem, I think it becomes perfectly obvious to most people that the First Amendment would never tolerate such an intrusion. I think it would be unconstitutional to adopt restrictions on the free exercise of religion even if it could be demonstrated beyond doubt that Sueng Hui Cho was directly influenced by the Bible.

Now, on this point, I want to be perfectly clear: I am not suggesting that Cho acted out of any religious conviction, notwithstanding his diatribe in which he compared himself to Jesus Christ. I don't think anyone will ever know why he committed these terrible acts. I raise the question only to illustrate the danger posed to fundamental First Amendment rights if legislatures seek to adopt restrictions on free speech or religion generally based on the bad acts of individuals. Put another way, I don't think the actions of one insane person can empower the government to diminish my constitutional rights.

Refocusing this as a free speech question, it is important to understand that the First Amendment has been interpreted broadly to protect freedom of expression for all types of speech, and not just political speech. This means that the government cannot act as an arbiter to decide which ideas have sufficient worth to merit constitutional protection. I think Supreme Court Justice Anthony Kennedy expressed this idea most clearly in his opinion for the Court in *United States v. Playboy Entertainment Group*:

> When a student first encounters our free speech jurisprudence, he or she might think it is influenced by the philosophy that one idea is as good as any other, and that in art and literature objective standards of style, taste, decorum, beauty, and esthetics are deemed by the Constitution to be inappropriate, indeed unattainable.

> Quite the opposite is true. The Constitution no more enforces a relativistic philosophy or moral nihilism than it does any other point of view. The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.

This concept at least gets us to the ball park, but it doesn't yet answer the ultimate question of whether First Amendment protections extend to violent television programming and video games. For that, it is necessary to review the way in which First Amendment protections have evolved in the United States. And in this regard, two critical questions must be addressed:

- Is the medium of communication protected by the First Amendment?
- Is the type of speech in question protected by the First Amendment?

Technologies of Freedom

To ask whether new communications technologies are protected by the First Amendment is rather ironic. After all, the printing press was the new communications technology of its time when the United States was founded and it was the only true mass medium. The Framers of the Constitution embraced the press as an integral part of the political system and as an essential right of free people.

Despite this background, the courts historically have been slow to recognize that newer communications media should receive the same level of First Amendment protection as traditional printed media. Until quite recently, each new medium of communication has had to repeat the same cycle: Courts initially deny First Amendment protection or provide only diminished protection, and later provide a greater measure of constitutional recognition as the medium becomes more mainstream.

This was the experience of cinema. When the Supreme Court first addressed the question of whether film is a protected medium in 1915, its answer was simple and emphatic:

> The exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded … as part of the press of the country or as organs of public opinion.

Of course, this decision was handed down 16 years before *Near v. Minnesota*, so it predated any recognition by the Supreme Court of a valid First Amendment claim. But I think it is doubtful the Court would have analyzed the issue differently even after *Near*. In any event, thirty seven years later, after cinema was more fully integrated into American culture, the Court saw things differently. It held that "[e]xpression by means of motion pictures is included within the free speech and free press guarant[ees] of the First and Fourteenth Amendments." Although "[e]ach method (of communication) tends to present its own peculiar problems, the basic principles of freedom of speech and of the press, like the First Amendment's command, do not vary. Those principles . . . make freedom of expression the rule."

Almost every new medium of communication has been subjected to this same evolutionary process. When radio emerged as a national phenomenon, the courts held that the applicable First Amendment protections are greatly diminished. Thus, in 1932, the United States Court of Appeals for the D.C. Circuit upheld a decision by the Federal Radio Commission to deny a license renewal to a broadcaster because he made "intemperate" attacks on public officials. The court explained that radio is an "instrumentality of commerce," and license revocation merely is the "application of the regulatory power of Congress in a field within the scope of its legislative authority." It concluded that it does not violate the First Amendment to deny license renewal because of a licensee's intemperate attacks on public officials and for broadcasts that are "sensational rather than instructive."

This case – *Trinity Methodist Church, South v. Federal Radio Commission* – illustrates starkly how First Amendment questions can be turned on their head by the divergent constitutional treatment accorded different transmission media. The Framers of the Constitution protected the press in substantial part because of a history of press licensing, yet the court here upheld the government's ability to deny a license to broadcast. The traditional press was protected so that it *could* make "intemperate attacks on public officials," yet the broadcaster in this case lost his license for doing just such a thing. And despite the fact that the Supreme Court handed down its landmark decision in *Near v. Minnesota* in 1931 on very analogous facts just a few months earlier, the D.C. Circuit in *Trinity Methodist Church, South* declined even to cite the High Court case. For purposes of First Amendment analysis, different media all too often are on different planets.

The following example illustrates this point. Suppose a hypothetical federal regulator walks into a room and is confronted with five video monitors, each showing the same image. He would dearly love to have the authority to regulate them all. After all, regulation is what regulators do. But the question remains – would he have the constitutional authority to do so? And the answer is, it would depend on what method of transmission was used to get the image to the monitor. Put another way, the important question is not what picture is in the box, it is how did the picture get into the box? Or, as Justice Robert Jackson put it in a case involving the regulation of noisy sound trucks, "each [medium] is a law unto itself."

In this hypothetical scenario, the five monitors would, for the most part, be subject to very different First Amendment standards. A monitor supplied by a DVD or video tape would receive full constitutional protection, just like the traditional printed press. A monitor served by free over the air broadcasting would be subject to both affirmative public interest programming

requirements as well as negative content restrictions, such as rules governing broadcast indecency. A monitor fed by cable television would not face regulation for indecency, but would have other rules governing channel usage imposed by the local franchise. A monitor served by Direct Broadcast Satellite similarly would be free of indecency rules and would not have the franchise requirements of cable, but would be subject to certain other FCC content requirements. Finally, the fifth monitor, connected to the Internet, would receive full First Amendment protection and would not be subject to the types of content regulation that apply to the other media.

How can this be? If the courts have been slow to recognize First Amendment protection for new media, and generally provide less robust constitutional immunity to new forms of communication, how is it that online communication is treated as if it were the Gutenberg press? It is because the Internet broke the mold, and shattered the cycle of repression that historically has shackled each new medium of communication.

In 1996, Congress adopted the Communications Decency Act, or CDA, as a section of the Telecommunications Act of 1996. The central feature of the CDA was to impose broadcast-type indecency restrictions on the Internet. Congress employed essentially the same definition of indecency that the FCC currently applies to broadcasting, and reasoned that it was constitutional because the Supreme Court had upheld the standard for radio in *FCC v. Pacifica Foundation* in 1978.

But the courts at every level disagreed. A unanimous Supreme Court held that the indecency standard was far too vague to survive First Amendment scrutiny, and that the CDA was unconstitutional. Interestingly, the opinion for the Court was written by Justice John Paul Stevens, who 19 years earlier had written the *Pacifica* opinion upholding the indecency standard.

But more importantly, the Court held that the new medium of the Internet would not be treated as a second class citizen under the Constitution. As Justice Stevens wrote for the Court, '"[t]he content of the Internet is as diverse as human thought.' [O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." The great Bruce Ennis, who successfully argued the case, said that with this decision, "the Internet received its constitutional birth certificate."

Playing Games With the First Amendment

How does this translate to constitutional protection for interactive games? Although courts initially were slow to recognize video games as an expressive medium, they now uniformly treat video games as fully protected by the First Amendment. One reason for this is the fact that games have in fact become more fully expressive during the time these issues were under consideration. Cases in early 1980s held that video games are not speech protected by the First Amendment because games provide only entertainment and not information. However, those cases involved zoning and licensing of game arcades – not regulation of game content. By the early 1990s, the Seventh Circuit expressed doubt that "all video games can be characterized as completely devoid of any First Amendment protection."

The first major test of the First Amendment status of video games came in response to an ordinance passed by the City of Indianapolis in 2000. The law restricted access by those under 18 to arcade games that appeal predominantly to a minor's morbid interest in violence or a prurient interest in sex. It targeted games considered to be patently offensive to the prevailing standards in the adult community for what is suitable for those under 18.

The ordinance was challenged on constitutional grounds by the game industry, but the district court denied a motion for a preliminary injunction. The judge agreed that the arcade

games in question might qualify for some measure of First Amendment protection, but just not very much. As a result, he found that the plaintiffs were not likely to succeed on the merits of their constitutional claim. However, this finding was reversed by the United States Court of Appeals for the Seventh Circuit.

In a unanimous opinion for the court written by Judge Richard Posner, the court confirmed that video games are fully protected by the First Amendment, and that any regulation of their content must be subjected to strict constitutional scrutiny. This is lawyer's shorthand for the highest hurdle that the government must overcome to justify a restriction on free expression. It means that the law is presumed to be unconstitutional unless the government can prove that it is necessary to serve a compelling interest and that no less restrictive alternatives exist. Judge Posner found that Indianapolis had failed to meet its burden under this test.

Perhaps more importantly, just as the Supreme Court had done in the case involving the Internet, Judge Posner reasoned that the nature of this new medium did not justify a lower level of constitutional protection. The city had asserted that the interactive nature of games made them more dangerous, and that a lower level of constitutional protection was warranted as a result. But the court emphatically rejected this claim and found that – if anything – the interactive nature of the medium justified a higher level of protection. Judge Posner wrote:

> All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow culture) is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.

This very influential opinion set the standard for all subsequent cases involving the regulation of game content. Where earlier lower court cases expressed some doubt about the constitutional status of interactive games – including the district court decision in the Indianapolis case – Judge Posner's opinion appeared to settle the question. Electronic games tell

stories and engage the player in their narrative. As such, they are as fully protected by the First Amendment as the best of literature.

What About "Violent" Expression?

Even if the medium of communication is protected by the First Amendment, not all speech receives the same degree of constitutional immunity from regulation. So it is necessary to ask whether "violent" speech is protected. More precisely, does the First Amendment protect *depictions* of violence? The speech itself is not "violent," unless, or course, you are watching a football game.

This is not a new question. Anthony Comstock, the man who invented the profession of "vice crusader" in the late 19th Century railed against dime novels, which he called "devil traps for the young. The gangster movies of the 1930s raised concerns about the glorification of mobsters. In the 1950s, Dr. Frederic Wertham testified that violent comic books caused the nation's increase in juvenile delinquency. Beginning the late 1950s to the present day, the same arguments have been made about television and movies. And, of course, there are the efforts to regulate video games.

As a matter of constitutional law, the relevant question is whether depictions of violence fall within the narrow range of speech categories that the courts have said fall outside the protection of the First Amendment. Traditionally, these categories of "unprotected speech" include defamation, incitement to crime, "fighting words" or threats of physical harm, and obscenity. Expression that portrays violent acts does not fit neatly into any of these categories, and recent regulatory efforts have attempted to shoehorn violence into the category of obscenity. The argument is made that violence is disgusting and deeply disturbing, and that violent images therefore violate contemporary community standards.

In order to evaluate such claims, it is necessary to briefly review the concept of obscenity. In 1973, the Supreme Court articulated the current test for obscene expression in *Miller v. California*. It consists of three parts, all of which must be met:

- First, the material, *taken as a whole*, must appeal *primarily* to a prurient interest in sex;
- Second, the material must portray hard core sexual or excretory conduct in a way that is patently offensive *to the average adult* as measured by contemporary community standards; and
- Third, the material, taken as a whole, must lack any serious literary, artistic, political or scientific value.

If any one of these three requirements is not met, the material is not obscene. However, there is a variation on this concept known as "variable obscenity," where material is deemed "harmful to minors." Generally, material falls into this category if it meets the same three conditions of the *Miller* test, but with the proviso that it must appeal to the prurient interest *of minors*, and that it lacks serious merit *for minors*, with "minors" defined as older teens. Such material is still constitutionally protected as to adults, but the law permits the government to place certain limited restrictions on access by minors. For example, stores that sell magazines may be required to place adult titles behind "blinder racks," that obscure the cover photographs.

Notwithstanding the argument that depictions of violence may well be "patently offensive" or even downright disgusting, the comparison to obscenity ends there. For that reason, courts have steadfastly refused to expand the category of obscenity or "harmful to minors" materials to include violent imagery. In 1948, for example, the Supreme Court struck down a New York law that attempted to define crime magazines that focused on "tales of bloodshed and lust" as indecent or obscene. The Court explained that:

> What 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.

These same principles have been applied to the regulation of video images. As the United States Court of Appeals for the Seventh Circuit observed in dictum in an early case:

> 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.

Judge Posner picked up on this concept in his opinion regarding the Indianapolis arcade game ordinance. He wrote that "[v]iolence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low." As a consequence, he reasoned that it cannot be analogized as "obscene" or expression that is "harmful to minors." All of the cases regarding the regulation of video games that followed Judge Posner's opinion have reached the same conclusion. For example, Judge Morris Sheppard Arnold of the Eighth Circuit, in striking down the St. Louis County video game ordinance, wrote that:

> Whether we believe the advent of violent video games adds anything of value to society is irrelevant; guided by the First Amendment, we are obliged to recognize that they are as much entitled to the protection of free speech as the best of literature.

The judicial approach to this issue has been remarkably uniform, regardless of whether the cases involved attempts to regulate video games or movie rentals by minors. The Tennessee Supreme Court, in a 1993 case, noted that:

> 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.

A key problem that has bothered the courts is that the strict limits on the government's ability to regulate speech under the test for obscenity would be too loose and indefinable if the concept were expanded to include violence – however that might be defined. As Judge Harry Edwards of

the United States Court of Appeals for the D.C. Circuit wrote in an influential 1995 law review article:

> When 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.

Judge Edwards characterized any attempt to regulate violence in this way as a "jurisprudential quagmire."

As a result of the fact that courts have held that interactive games are a protected medium and that depictions of violence constitute protected speech under the First Amendment, not a single attempt to regulate violent video games has survived judicial review. Thus, the Indianapolis ordinance passed in 2000 was enjoined in 2001; the St. Louis County ordinance adopted in 2000 was enjoined in 2002; the Washington state law passed in 2003 was enjoined in 2004; the California law passed in 2005 was preliminarily enjoined that same year, and the injunction was made permanent in August 2007; the Illinois law passed in 2002 was preliminarily enjoined in 2005 and that injunction was made permanent in 2007; the Michigan law adopted in 2005 was enjoined in 2006; the Oklahoma law passed in 2006 was preliminarily enjoined that same year and the injunction was made permanent in September 2007; the Minnesota law adopted in 2006 was enjoined that same year; as was the Louisiana video game law.

These decisions are remarkable not just for the uniformity of the results. The language of the growing number of opinions in this area has grown more definite and emphatic in striking down the laws. Notwithstanding this fact, half a dozen states are still considering similar legislation to restrict video games and the FCC has urged Congress to adopt restrictions on television programming.

In this regard, it is useful to remember that the passage of such laws is not cost free. Under federal civil rights law, a litigant that successfully challenges a constitutional violation by a state or local government has the right to collect attorney's fees from the government. Thus far, since 2000, prevailing plaintiffs have collected over $1.5 million in cases challenging laws that restrict video games, with petitions still pending in at least two states. This tally does not include the salaries and fees that state and local governments must pay their own lawyers in such cases. It may be politically popular to champion campaigns to restrict interactive games or offensive images, but it would be interesting to gauge voter reaction if they were informed that the resulting laws would have almost no chance of being upheld and instead would lead to a significant drain on tax dollars.

What About Broadcasting?

Notwithstanding this experience with the states, policymakers at the federal level are debating whether or not to empower the FCC with the authority to regulate imaginary violence on television. If such a law were to be adopted and challenged in court, would it necessarily meet the same fate as the various state laws that unsuccessfully sought to regulate video games? The FCC doesn't think so. In its *Report on Televised Violence* issued last April, the Commission urged Congress to take action, and it suggested that such measures would survive judicial scrutiny.

First, it suggested that developing an appropriate definition of excessively violent programming would be possible, and that such language "needs to be narrowly tailored and in conformance with judicial precedent." However, it is not possible to discern the basis for the Commission's conclusion. It does not offer a working definition of "excessively violent programming," and it overlooks the fact that none of the state governments thus far has been able

to come up with a sustainable definition. The FCC failed even to cite the growing body of case law in this area that reached a contrary conclusion.

Second, the FCC concludes that the less rigorous constitutional protections that are accorded the broadcast medium would allow the government more of an opportunity to regulate in this area. In particular, it claims that "the Supreme Court's *Pacifica* decision and other decisions relating to restrictions on the broadcast of indecent content provide possible parallels for regulating violent television content." If the FCC's indecency rules were used as the model for regulating "violent" content, this would not result in a ban of violent shows. Instead, the Commission would implement what it calls a "time channeling" solution or "safe harbor," in which the restricted shows could only be aired later at night, probably after 10 p.m.

It certainly is possible to dispute the FCC's speculation that its authority to regulate indecent speech could be extended to limit pictures of violence. The video game cases have unanimously rejected the argument that the "harmful to minors" standard can be expanded to encompass violence, and the same reasoning applies to the FCC's assumption that the concept of indecency is infinitely elastic. Indeed, cases currently in litigation will determine how far the FCC can go in expanding indecency enforcement, even as that term is currently defined. Under these circumstances, it may be overly ambitious to engage in regulatory mission creep into the realm of violence before the results of the existing cases are in.

But there is a more basic flaw in the FCC's claim that anything would be accomplished by regulating the content of over-the-air television before 10 p.m. The proposal simply fails to take into account the reality of today's diverse media marketplace. It is, however, a touching tribute to the memory of Andre-Louis-Rene Maginot.

Maginot was France's Minister of Defense from 1928 to 1931. In that capacity, he convinced his government to build a fixed line of bunkers and gun turrets on the border between France and Germany, stretching for over 150 miles. Built between 1930 and 1940, it was called, naturally, the "Maginot Line." It was finished just as World War II was beginning, and it promised to make France impregnable against Germany, its adversary from World War I.

Unfortunately, it didn't work out that way. The German Army simply bypassed the invincible Maginot Line. Since then, the very term "Maginot Line" has become synonymous with a comically ineffective solution to a problem.

And so it is with the notion of using "time channeling" to regulate violent imagery on television. Such a rule would be an "electronic Maginot Line." Limiting the time of day "violent" programs appear on broadcast television would have no effect on the programs shown on other media, starting with cable television and satellite TV. Additionally, network television programs can now be downloaded onto personal computers, and this does not even begin to consider other video sources, such as YouTube. There is also an increasing array of portable personal video devices, including wireless phones, iPods, and game consoles. And if that wasn't enough, a growing percentage of the population has digital video recorder services, such as TiVo. As a consequence, people watch television programs – even those appearing on broadcast television – when they wish, and not at the times those programs happen to be scheduled.

The Commission's suggestion that subscription channels should be made available "a la carte" is no more likely to help. Under an a la carte requirement, subscribers could purchase channels individually, and would not be required to acquire programming as part of large tiers or bundles. But whether or not a given show is "excessively violent" can only be determined program by program, not channel by channel. Moreover, under existing federal law, cable

subscribers must receive all local broadcast channels as part of the basic tier of service. They have no choice about it.

If Andre Maginot could be judged by the comparative effectiveness of the FCC's proposed "time channeling" and "a la carte" solutions for televised violence, history would regard him as a visionary.

The Kids Are Alright

So what are we to do? Are we to give up on protecting our children because it is possible to poke holes in some of the proposed solutions? The answer to that question – of course – is "no." It is a primary job of parents to try to control the forces that inform and influence their children, and it is not an easy job. Fortunately, when it comes to the media, there are now more technological tools than ever to assist parents with that task.

But I would take issue with the premise that if we decline to empower the government to regulate certain types of expression, then our children will be harmed. From dime novels to the talkies, and from television to interactive games, we have been told by the professional moral crusaders that our children will be doomed if we fail to act. Certain social scientists will tell you that kids in a laboratory experiment will beat up a Bobo doll if they watch too many episodes of *Gunsmoke*, or that test subjects will experience "aggressive feelings" if they play *Halo 3*.

I think it is time for a reality check. Despite the media explosion of the past twenty years and the availability of more intense games and video programming, we have not seen the types of adverse effects that have been predicted – at least not in the real world. By most important measures, the kids are alright.

Start with general social indicators:

- Alcohol and drug abuse among high school seniors has generally been falling and is currently at a 20-year low;

- Teen birth rates hit a 20-year low in 2002 and fewer teens are having sex today than they were 15 years ago;

- High school dropout rates continue to fall steadily, as they have for the past 30 years;

- Teenage suicide rates rose steadily until the mid-1990s and then began a dramatic decline.

The same positive results have occurred with respect to violent crime:

- Between 1994 and 2003, violent crime rates declined about 55 percent, the lowest level ever recorded;

- In 2004, the Justice Department reported the lowest crime rate since it began conducting the survey in 1973;

- The estimated volume of violent crime increased by 1.9 percent between 2005 and 2006. But the 5-year trend for violent crime showed a 0.4 percent decline, and a drop of 13.3 percent over 10 years.

The same trends show up even when you focus on the youth demographic:

- Juvenile murder, rape, robbery and assault all declined significantly over the past decade. Overall, aggregate violent crime by juveniles fell 43 percent from 1995-2004;

- There are fewer murders at school today and fewer students report carrying weapons to school or anywhere else than at any point in the past decade;[*]

- The number of high school students who had been in a physical fight dropped by 25 percent between 1991 and 2003.

If depictions of violence had anywhere near the adverse impact that is attributed to them by the advocates of new laws, these trends should run in the opposite direction.

The Last Word

Unfortunately, facts such as these are unlikely to blunt the trend toward greater regulation of the media, or dissuade legislators from engaging in demagoguery about protecting children. Even Governor Arnold Schwarzenegger, no stranger himself to stories that portray fictional

[*] Obviously, this does not include the incident at Virginia Tech, but instead reflects the overall trend of school violence.

violence, announced last month that California would appeal the district court ruling enjoining that state's video game law.

So it is safe to predict that there will be more court battles to address these issues. In that regard, I think we can rely on the federal judiciary to continue to uphold constitutional protections in the face of contrary political pressures. As Judge James M. Rosenbaum put it in his order enjoining the Minnesota video game law:

> The Court will not speculate as to the motives of those who launched Minnesota's nearly doomed effort to 'protect' our children. Who, after all, opposes protecting children? But, the legislators drafting this law cannot have been blind to its constitutional flaws.

I couldn't have put it better myself.