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MEDIA SELF-REGULATION OF DEPICTIONS OF VIOLENCE: A LAST OPPORTUNITY

KEVIN W. SAUNDERS*

The past several years have seen a great increase in frequency and stridency in the debate over media violence. There have been calls to limit the exposure of children to televised violence by, among many others, the American Medical Association, the American Academy of Pediatrics, the National Parent Teacher Association, and the National Foundation to Improve Television. Members of Congress have also expressed concern over violence in video games, and several states have attempted to address the access of youth to violent films on videotape.

The debate over the acceptability of violence in the media is not new. At least since the later Roman era, violence has entertained. As new media have emerged, depictions of violence have served to attract consumers to that new form of entertainment. Each new medium's use of violence has raised concerns over the effect of such depictions on readers, viewers, or now, players. While late nineteenth century concern led to the adoption of statutes, and indeed states continue to attempt to ban by statute certain forms of violent depictions, the national approach has been one of reliance on voluntary restraint on the part of the media. That reliance has not been well placed. Despite media assurance that they would police themselves, the level of violence, perhaps after an initial decrease, has often returned to unacceptable levels. There is little reason to believe that voluntary restraint will be any more successful in the future.

Despite the very real question of the efficacy of voluntary restraints, Congress seems to have believed that it had, and has, no other choice. The First Amendment is usually seen as providing protection to such depictions and anything beyond gentle cajoling is thought to be a constitutional violation. With no power to order a reduction in levels of violence, persuasion is all that is available, and the good will of Congress and public advocacy groups seem unable to counter the profits found in such depictions.

This article will trace the development of depictions of violence in various media from the later half of the nineteenth century through the present. The governmental response will also be examined, as will the success of voluntary controls. Lastly, the necessity of the voluntary aspect of such controls will be examined. It will be suggested that media violence may be unprotected by the First Amendment and that mandatory controls may be proper. If such controls are constitutional, any

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remaining attempts by the media to police themselves must prove more successful than prior attempts have so far proven to be, or self-regulation will become a thing of the past.

I. Media Violence and Voluntary Controls

A. Crime Magazines and Crime or Horror Comics

The American states, in the late 1800s, seem to have faced a growth in the existence of magazines devoted to tales of crime and bloodshed. The history of the development of such publications is not clear, but the legislative response is. The magazines themselves may well be of somewhat older vintage, and the late 1800s simply the era in which concern developed. In fact, even the concern may be of older vintage. Prior to that time, statutes and case law proscribing obscenity may have been applicable to depictions of violence. It was in the late 1800s that those statutes began to focus on sexual material, and the anti-violence statutes of the era may have been an attempt to fill a suddenly apparent hole.

Whatever the genesis of the problem or the concern, statutes addressing the distribution of stories of crime and bloodshed began to appear in 1884. A New York statute, passed that year, barred the distribution of "any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports or accounts of criminal deeds or pictures and stories of deeds of bloodshed, lust or crime ...." While the 1884 statute was aimed at the protection of minors from such material, it was amended in 1887 to ban the dissemination of such material to adults.

The following year, 1885, saw nine more states pass similar legislation. Six of the states banned only distribution to minors. Massachusetts, Minnesota, Missouri, Maine, Ohio and Oregon all used language similar to that employed by New York in protecting minors from such material. The remaining three states addressed publication or distribution to adults as well as minors. Michigan and Connecticut did so employing language similar to that in New York's statute. Colorado used somewhat different language, but to the same end, banning the publication "by pictures or descriptions, indecent or immoral details of crime, vice or immorality, calculated to corrupt public morals, or to offend common decency, or to make vice and crime, immorality and licentiousness attractive ...."
In 1886, Iowa\textsuperscript{12} and Kansas\textsuperscript{13} enacted their own statutes. Again, both used descriptions like New York's, and while the Iowa statute was limited to distribution and exhibition to minors, the Kansas statute included a ban on distribution to adults. In 1887, Nebraska\textsuperscript{14} and Pennsylvania\textsuperscript{15} passed similar statutes aimed at the distribution of such materials to minors. Between 1889 and 1913, nine more states passed similar statutes, some addressed only to minors and others including adults: Illinois\textsuperscript{16} in 1889, Montana\textsuperscript{17} in 1891, Kentucky\textsuperscript{18} in 1893, Maryland\textsuperscript{19} in 1894, North Dakota\textsuperscript{20} and Indiana\textsuperscript{21} in 1895, Wisconsin\textsuperscript{22} in 1899, Washington\textsuperscript{23} in 1909, and South Dakota\textsuperscript{24} in 1913. While there is also an 1897 Texas statute\textsuperscript{25} that may be seen as directed towards similar ends, the statute's focus on crime is not as clear as it is in the other statutes.

The New York statute reached the United States Supreme Court in the 1947 term. Winters, a book dealer, was convicted for distributing the magazine \textit{Headquarters Detective, True Cases from the Police Blotter} containing what were said to be stories of real police cases. The Appellate Division of the New York Supreme Court described the magazines as "a collection of crime stories which portray in vivid fashion tales of vice, murder and intrigue. The stories are embellished with pictures of fiendish and gruesome crimes, and are besprinkled with lurid photographs of victims and perpetrators."\textsuperscript{26} The Appellate Division affirmed the conviction and noted that similar statutes had been upheld by state courts in six other states. Winters appealed to the New York Court of Appeals, and the conviction was again affirmed.\textsuperscript{27}

Winters appealed once again, this time to the United States Supreme Court, where the case was argued three times before a decision was reached. Finally, in \textit{Winters v. New York},\textsuperscript{28} the conviction was reversed. However, while the statute was struck down, it was struck down on vagueness grounds, and the Court did not preclude the possibility of a state barring the distribution of violent publications under a sufficiently precise statute. In fact, the Court stated that "[n]either the states nor

\begin{footnotes}
\item 13. 1886 Kan. Sess. Laws 137.
\item 15. Act of May 6, 1887, No. 38, 1887 Pa. Laws 84.
\item 17. Act of March 4, 1891, 1891 Mont. Laws 255.
\item 18. 1893 Ky. Acts 3-4.
\item 19. Act of Apr. 6, 1894, ch. 271, 1894 Md. Laws 360.
\item 20. Act of Mar. 6, 1895, ch. 84, 1895 N.D. Sess. Laws 122.
\item 22. Act of May 2, 1901, No. 361, 1901 Wis. Acts 348.
\item 27. People v. Winters, 63 N.E.2d 98 (N.Y. 1945).
\item 28. 333 U.S. 507 (1948).
\end{footnotes}
Congress are prevented by the requirement of specificity from carrying out their duty of eliminating evils to which, in their judgment, such publications give rise.\textsuperscript{29}

Despite the possibility the Court held out that a properly detailed statute could survive attack, most states did not rise to the challenge, and only two states retain such statutes today. However, both those statutes probably remain unconstitutionally vague. Illinois law still bars distributing to minors "any book, pamphlet, magazine, newspaper, story paper or other printed paper devoted to the publication, or principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of deeds of bloodshed, lust or crime."\textsuperscript{30} Michigan similarly retains a statute against the distribution of "any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication or principally made up of criminal news, police reports or accounts of criminal deeds or pictures, stories of deeds of bloodshed, lust or crime . . . ."\textsuperscript{31} The constitutionality of these statutes would require a construction by state courts to overcome the vagueness problem.

While the development of police and crime magazines may be unclear, the history of comic books is more certain. The first comic strip is said to have been introduced in 1896. The comic book, as an expansion of the comic strip, did not appear until 1911, with the publication of a series of \textit{Mutt and Jeff} reprints. The first original material to appear in comic book format appeared in 1935. In 1940 there were 150 comic book titles published, and the publications grew slowly to double both in number and revenue by 1950. The 1950s showed stronger growth, with a doubling of publications again in the three years from 1950 to 1953. In 1953 the comic book industry printed about 650 titles and had annual income of about $90 million. While that in itself may not be troubling, the years between 1945 and 1954 also saw an increase in the number of crime and horror comics, featuring brutality, violence and sadism, usually with sexually suggestive illustrations. By mid-1954 there were over 30 million copies of crime or horror comics printed each month.\textsuperscript{32}

This growth in crime and horror comics led to legislation regulating such comics, or comics in general, in several states and municipalities. For example, in 1957, Maryland enacted the Crime Comic Books Act.\textsuperscript{33} The statute, in language reminiscent of the earlier crime magazine statutes, made it unlawful to distribute to minors "any book, pamphlet, magazine or other printed paper principally composed of pictures and specifically including but not limited to comic books, devoted to the publication and exploitation of actual or fictional deeds of violent bloodshed, lust or immorality . . . ." The State of Washington had already passed its Comic Book Act in 1955.\textsuperscript{34}

The act defined comic books as:

\textsuperscript{29} Id. at 520.

\textsuperscript{30} ILL. ANN. STAT. ch. 720, par. 670(1) (Smith-Hurd 1993).

\textsuperscript{31} MICH. COMP. LAWS ANN. § 750.41 (West 1993).


any book, magazine or pamphlet . . . a major part of which consists of
drawings depicting or telling a story of a real or fanciful event or series
of events, with a substantial number of said drawings setting forth the
spoken words of the characters with pointers, or brackets, or enclosures,
or by such other means as will plainly indicate the character speaking
such words . . . .35

Anyone selling comic books was required to be licensed, but there was an
exemption for comic sections of regularly published daily or weekly newspapers.
Prohibited was the distribution of

any comic book . . . devoted to the publication or exploitation of
fictional or actual deeds of violent bloodshed, lust, crime or immorality
by characters depicted either as real or fanciful, human or inhuman, so
massed as reasonably to tend to incite minors to violence or depraved
or immoral acts against the person.36

The statute also created a presumption that all comic books appeal to minors.

An even more detailed ordinance was adopted by Los Angeles County. The
ordinance stated that there was a clear and present danger that the distribution of
crime comics to minors would incite children to commit crimes, and distribution of
crime comics to minors was made a misdemeanor.37 The increased detail was in
the ordinance's definitions of crime comic books, and crimes, in what appears to
have been an attempt to avoid vagueness concerns.

Crime comic books were defined as:

Any book, magazine, or pamphlet in which an account of crime is set
forth by means of a series of five (5) or more drawings or photographs,
in sequence, which are accompanied by either narrative writing or
words represented as being spoken by a pictured character, whether
such narrative or words appear in 'balloons,' captions or on or immedi­
ately adjacent to the photograph or drawing.38

The ordinance also attempted to define "crime" for purposes of the statute.
"Crime" was defined as:

The commission or attempted commission of an act of arson, burglary,
kidnapping, mayhem, murder, rape, robbery, theft, trainwrecking, or
voluntary manslaughter; or the commission of an act of assault with
cautious chemicals or assault with a deadly weapon[,] includ[ing] but .
. . not limited to, acts by human beings, and further includ[ing] acts by

35. Id. § 3(4), at 1232.
36. Id. § 9, at 1233.
37. Id. § 1, at 1231.
38. The ordinance is reproduced in Katzev v. County of Los Angeles, 341 P.2d 310, 313 (Cal.
1959).
animals or any non-human, part human, or imaginary beings, which if performed by a human would constitute any of the crimes named.\textsuperscript{39}

These, and other such statutes, were challenged in court and were found constitutionally flawed. The Maryland statute was struck down in \textit{Police Commissioner v. Siegel Enterprises},\textsuperscript{40} based on the same vagueness grounds that had led to the defeat of the late 1800s statutes which used similar language. The Maryland statute was also seen as violating the Equal Protection Clause of the Fourteenth Amendment through its exemption for newspaper comics and cartoons. There was no reason to believe that such material was less likely to incite crime, and crime avoidance had been the legislature's stated purpose.\textsuperscript{41}

The Washington statute was also struck down. In \textit{Adams v. Hinkle},\textsuperscript{42} the state supreme court held the licensing requirement to be an unconstitutional prior restraint. Furthermore, while the statute rested on the claim that crime comic books contribute to juvenile delinquency and were a source of crime, the legislation reached comics other than crime comics and applied to sales to adults, as well as to minors.\textsuperscript{43} The court was also troubled by the presumption that all comics appeal to minors. Furthermore, the slight expansion of the definition of the material banned did not overcome the problem of vagueness. Lastly, Washington, too, had provided an exemption for newspaper comic sections, and that exemption was held to be an equal protection violation.\textsuperscript{44}

The last of the examples, the Los Angeles County ordinance, was also declared unconstitutional, this time by the Supreme Court of California in \textit{Katzev v. County of Los Angeles}.\textsuperscript{45} While the ordinance had tried to avoid the vagueness difficulties that had led to the demise of the other statutes, that attempt only led to other problems. The court, operating under the assumption that such material was entitled to First Amendment protection, failed to find a clear and present danger to overcome that protection, because no close, causal connection between juvenile delinquency and the circulation of crime comic books in general had been presented.\textsuperscript{46} Particularly troublesome was the ordinance's broad application to all fictional crime, excepting true stories and stories of crime in religious works. Further, the exemptions raised equal protection concerns, and the court found no reason to conclude that accounts of real crime, or of crime in religious works, would have a less harmful effect than stories of fictionalized crime.

Even the ordinance's attempt at more precise definitions did not overcome vagueness concerns. Many books of fairy tales and folk tales contain illustrations that would fit the parameters of the ordinance. While such books seemed outside

\textsuperscript{39} \textit{Id.}
\textsuperscript{40} 162 A.2d 727 (Md. 1960).
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} 322 P.2d 844 (Wash. 1958).
\textsuperscript{43} \textit{Id. at 854.}
\textsuperscript{44} \textit{Id. at 857.}
\textsuperscript{45} 341 P.2d 310 (Cal. 1959).
\textsuperscript{46} \textit{Id. at 315.}
the intent of the ordinance, no standards were provided for how such lines were to be drawn. The court also objected to the inclusion of "acts by animals . . . which if performed by a human would constitute any of the crimes named." The court pointed out that this would seem to include a shark biting off a person's arm, since a similar attack by a person would constitute mayhem or cannibalism, or a dog shown eating food left on a porch, since it would constitute theft, if done by a human.

One case involving horror and crime comics did make it to the United States Supreme Court, but the case, *Kingsley Books v. Brown*, simply examined the propriety of issuing injunctions against the sale and distribution of obscene material. The horror comics involved, the *Nights of Horror* series, were assumed to be obscene, and the sole question raised was issuance of an injunction. While the material did have its pornographic aspects, the real objections to the comics were over their depictions of violence. These objections were shown by the fact that the complaint was filed in September 1954, just one month after New Yorkers were stunned to learn of the wanton savagery of four Brooklyn teen-agers who horsewhipped, beat, kicked, and burned their several victims, allegedly drowning one of them — all for amusement. The eighteen-year-old leader . . . boasted of having read every volume in the *Nights of Horror* series. A psychiatrist who examined him found "the parallelism is complete" between *Nights of Horror* texts and pictures and the methods used by the youthful killers.

The issue of whether such material could be regulated, consistent with the Constitution, was not reached by the Court.

While states and municipalities at least attempted to take action against the growth of crime and horror comics, the federal response was more restrained. Crime and horror comics did, however, attract the attention of Congress. In 1954, Sen. Estes Kefauver's (D.-Tenn.) Subcommittee to Investigate Juvenile Delinquency in the United States began to look into the effects of comic books on youth. The following year, the Subcommittee issued its report *Comic Books and Juvenile Delinquency*. While some of the comics at issue had some sexual flavor, the focus was on crimes of violence, the sexual context arising from the fact that the victims were often scantily clad females. The Subcommittee's concern with the violence present is evidenced by the Subcommittee's outlines of the plots of several stories and the focus of those outlines on the violence involved.

One of the stories concerned an alcoholic father, whose negligence results in the death of his son. His wife hacks him to pieces with an ax. The drawings depict

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47. *Id.*
49. *Id.* at 438.
50. RICHARD H. KUH, FOOLISH FIGLEAVES? PORNOGRAPHY IN AND OUT OF COURT 44 (1967) (footnote omitted).
spurting blood and the agony on the victim's face. The wife then cuts the body into smaller pieces, places the pieces in the victim's bottles of bootleg liquor and returns the liquor to the bootlegger for resale. Another comic involved an eight- to ten-year-old girl, who wished to live with her aunt rather than with her abusive, alcoholic father and inattentive mother. The girl shot and killed her father and framed her mother, who was electrocuted for the crime. Another depicts the decapitation of a hotel keeper by one of the hotel guests.

In all seven story summaries included in the report, the focus was clearly on violence. The Subcommittee saw the possibility of a connection between crime and horror comic books and delinquency and concluded that "this country cannot afford the calculated risk involved in feeding its children, through comic books, a concentrated diet of crime, horror, and violence." The tenor would seem to have indicated a willingness to take some action against such materials, but the Subcommittee decided not to recommend the regulation of comic books but instead recommended reliance on industry self-regulation.

This willingness to rely on voluntary standards arose despite the fact that earlier attempts at self-regulation by the Association of Comic Magazine Publishers in the late 1940s had failed. However, once the Senate determined to investigate the area, the comic book publishers promised renewed action to limit violent content. The industry adopted the Comics Code and provided for the printing of a seal indicating approval by the Comics Code Authority on comics meeting code requirements.

The Subcommittee, mollified by the industry's assertions that it would improve its comics, determined to continue to rely on this self-regulation. Any resort to governmental censorship was rejected as "totally out of keeping with our basic American concepts of a free press operating in a free land for a free people." Industry and public pressure, on the other hand, were seen to raise no freedom-of-the-press problems and had the approval of the Subcommittee. Industry self-regulation did have the desired effect, at least in the short to intermediate term. Wholesalers refused to distribute comics not having the seal of the Comics Code Authority, and many publishers of crime and horror comics simply went out of business.

The long-term efficacy of self-regulation is more questionable. After about twenty years of limitation, violence began to make a comeback. Some publishers chose not to comply with the Code and avoided distribution problems by leaving the wholesaler out of the scheme and shipping directly to comic book specialty stores. Even some of the major publishers in the field began to produce non-Code compliant comics in addition to their Code-approved wares.

Observers of the industry contend that the level of crime, horror and violence in present day comics is as bad today as it was in 1955 when the Senate opted for

52. Id. at 32.
53. Id. at 23.
industry self-regulation. Modern comic heroes are not content to arrest criminals but instead make a practice of breaking their backs or hitting them in the face with a nail-studded board.\textsuperscript{55} Complaints are again being voiced with regard to the content of comics. The \textit{New York Times Magazine}, \textit{Larry King Live}, and the \textit{Today Show} have all noted the resurgence of comic book violence.\textsuperscript{56} The complaints may not have the volume of those in the 1950s, but that may not be the result of any lessening in the level of violence. Rather, the availability of violent images in so many other media — media that may even have more impact on children than comics do — may simply make comic book violence not seem so bad.

\textbf{B. Motion Pictures and Videos}

The development of the Comics Code was similar to the development of rules for industry self-regulation of motion picture production.\textsuperscript{57} As with comic books, self-regulation in film also lost efficacy. Film producers found greater profits in refusing to abide by the industry's rules. In 1968, the film industry abandoned its self-imposed limitations and adopted, in their stead, a rating system.\textsuperscript{58} While the levels of sex and violence would not decrease, and indeed would increase, potential audiences, and the parents of potential viewers, would at least be forewarned.

The abandonment of self-regulation in the motion picture industry may not be of quite the same concern as the demise of the Comics Code. Public perception that comic books are aimed at minors leads to greater concern when that medium depicts graphic violence. Motion pictures are seen as aimed at a variety of audiences, and warnings and age limitations on admission policed by theater operators may seem adequate. What concern has arisen recently is in the rental of videotapes with violent content and the accessibility of such tapes to minors.

Missouri enacted a statute banning the distribution of violent videos to minors. Under that statute, videos could not to be rented or sold to persons under seventeen, if:

\begin{itemize}
  \item[(1)] Taken as a whole and applying contemporary community standards, the average person would find that it has a tendency to cater or appeal to morbid interest in violence for persons under the age of seventeen; and
  \item[(2)] It depicts violence in a way which is patently offensive to the average person applying contemporary adult community standards with respect to what is suitable for persons under the age of seventeen; and
\end{itemize}

\textsuperscript{55} See David Altaner, \textit{Super (Violent) Heroes Plain Old Justice is Out; Brutality is In. Today's Comic Book Good Guys Don't Just Hurt Crooks, They Slaughter Them}, Ft. LAUDERDALE SUN SENTINEL, Aug. 7, 1993, at 1D.


\textsuperscript{57} Blanchard, \textit{supra} note 54, at 792.

\textsuperscript{58} \textit{Id.} at 797.
(3) Taken as a whole, it lacks serious literary, artistic, political, or scientific value for persons under the age of seventeen. 59

The statutory classification was an attempt to mirror the Miller v. California 60 test for sexual obscenity. Tennessee 61 and Colorado 62 also adopted statutes restricting the dissemination of violent material to minors, although the Colorado statute did not apply to simulations of violence but only to actual violence resulting in serious bodily injury or death.

The state attempts to limit access to media depictions of violence, even though limited to minors, were not well received by the courts. The Missouri statute was declared unconstitutional in Video Software Dealers Ass'n v. Webster. 63 The court recognized a compelling state interest in protecting the physical and psychological well-being of minors but concluded that the statute was overly broad because it might regulate material depicting types of violence that are not detrimental to minors. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's ruling of unconstitutionality. 64 The appellate court expressed additional concerns of vagueness in the statute's definition of the material addressed. 65

The Tennessee statute's ban on distributing violent videos to minors was also declared unconstitutional, in Davis-Kidd Booksellers, Inc. v. McWherter. 66 The Supreme Court of Tennessee thought the statutory focus on "excess violence" to be unconstitutionally vague and insufficient to provide fair notice or guidance to those dealing in visual materials. The Colorado statute appears, thus far, not to have been challenged.

C. Television

The loudest recent public outcry has been over television violence. The American Psychological Association estimates that by the time a child who watches two to four hours of television per day is twelve, the child has observed 8000 murders and 100,000 other acts of violence. 67 That exposure, together with psychological evidence that media violence leads to an increase in aggressive behavior, has raised great concern that television is causing an increase in violence in our society. 68

This is not the first era in which such concern has been expressed. In the early 1960s, psychologists began to study the possibility that television might cause violence, and in 1968, the National Commission on the Causes and Prevention of
Violence concluded that there was a link between television violence and violent behavior in viewers. The Staff Report to the Commission concluded that, at least under some circumstances, exposure to media violence stimulates violent behavior. This conclusion was reaffirmed by a 1982 National Institute of Mental Health study and has the further support of a 1994 meta-analysis that examined over two hundred methodologically sound studies on the subject.

Congress, the Federal Communications Commission (FCC), and other governmental agencies have also been participants in the public debate for more than forty years. The first congressional hearings on televised violence were conducted in 1952 by the House Interstate and Foreign Commerce Subcommittee. Between 1952 and the most recent congressional inquiries, a number of congressional hearings have been held, and the National Commission on the Causes and Prevention of Violence, the Surgeon General, the National Institute of Mental Health, and the Attorney General's Task Force on Family Violence have conducted studies.

The FCC examined the issue in the early 1970s. Between 1972 and 1974 the volume of complaints to the FCC over violent or sexually-oriented material increased from near 2000 to over 25,000, and in 1974 Congress directed the FCC to take "specific positive action ... to protect children from excessive programming of violence and obscenity." In response the FCC issued its 1975 Report on the Broadcast of Violent, Indecent, and Obscene Material. While the Report recognized the need for governmental action with regard to violent material and for the determination of what material was appropriate for children, the FCC deferred to the broadcast industry to regulate itself.

The FCC's unwillingness to take action was motivated by statutory and constitutional concerns over its authority to do so. However, the decision to defer may also have been based on the industry's willingness to regulate itself. Prior to the FCC's report, Chairman Wiley initiated discussions with executives of the three major television networks. Wiley suggested a commitment to reduce the level and intensity of violent material, limiting the hours of broadcast of material not suitable for young children and accompanying such broadcasts with warnings. The networks found this self-regulation acceptable, and each developed guidelines to govern

73. CHARLES CLARK, TV VIOLENCE, 3 CQ RESEARCHER 165, 175 (no. 12, Mar. 26, 1993).
75. REPORT ON THE BROADCAST OF VIOLENT, INDECENT, AND OBSCENE MATERIAL, 51 F.C.C.2d 418 (1975).
programming. The National Association of Broadcasters (NAB) also amended the NAB Television Code to include similar guidelines.

Industry self-regulation was, however, short-lived. Soon after they were adopted by the networks and the NAB, a group of television writers and production companies challenged the guidelines in federal court. The court declared the plan unconstitutional in *Writers Guild of America v. Federal Communications Commission.*\(^76\) The court treated the FCC as a party to an agreement between the three networks and the NAB, concluding that the FCC had pressured the networks and the NAB into adopting the policy. What the court saw as FCC pressure was held to be a violation of the First Amendment.\(^77\) The court would have allowed truly voluntary plans on the part of broadcasters, but the plans adopted had not been voluntary. The court also found antitrust law problems in the agreement of the NAB and networks to so limit broadcasts.\(^78\)

Whatever self-regulation remained after the court's decision has not been sufficient to reduce violence to levels acceptable to the public or to Congress. Congress passed the Television Program Improvement Act of 1990\(^79\) to provide an exemption from antitrust laws for any industry discussion or agreement to limit violent material on television. The act, however, maintained a voluntary approach and did not require such limits. More recently, Congress has been willing at least to bring public pressure to bear on the television industry.

In 1993, the Senate Judiciary Committee's Subcommittees on the Constitution and on Juvenile Justice conducted joint hearings on the issue. The heads of the major television networks were called before the subcommittees to answer for their depictions of murder and mayhem. Rather than lead to new promises of self-regulation, the immediate response on the part of the entertainment industry was to invoke the protection of the First Amendment. As Jack Valenti, President of the Motion Picture Association of America, warned the Senate Judiciary Committee, "If you push and shove people, they're going to shove back. And remember, they have the armor of a thing called the First Amendment."\(^80\) Thomas Murphy, Chairman of Capital Cities/ABC similarly asserted constitutional protection: "[T]he government must exercise restraint in interfering with the content of the programming the media portrays. Our founding fathers had the wisdom to recognize the importance of freedom of expression to democratic self-governance. We must guard the freedom zealously."\(^81\)

Congress has been willing to consider some legislation in the area, but the proposals do not impose controls. In 1993, bills were introduced in both houses of

\(^77\) Id. at 1142.
\(^78\) Id. at 1145.
Congress to establish a "Television Violence Report Card." The bills would have required that the FCC evaluate and rate the violence on television programs and rate sponsors based on the violence of the programs on which they advertise. The results would be published in the Federal Register, but there was no provision, other than potential public reaction to the reports, for decreasing violence on television. Another 1993 bill would have required that warnings on the nature of the material about to air accompany any broadcast of violent material. Again, the bill would not limit violence, but it would provide an opportunity for parents to control the exposure of their children to such depictions.

Still another 1993 bill would have required the development of "V-chip" technology to allow television owners to block out violent programming. Televisions would be equipped with an electronic chip that would detect a signal accompanying violent programs and, if the owner desired, could be set not to display the program. That approach provides a tool for parental control but would do nothing, once again, to limit directly the amount of violence on television. Any limits would result from producers reducing violence so as not to decrease exposure of, and advertising fees from, their programming.

Another pair of 1993 bills would ask the FCC to limit violent programming during hours when children are likely to be watching television. This approach is the only one that would not rely on the voluntary cooperation of others, either the industry or parents, to reduce the exposure of children to televised violence.

Congressional action appears to have been at least postponed by yet another promise of industry self-regulation. Representatives of the three major television broadcast networks met in 1992 to consider the adoption of guidelines. The summer of 1993 saw a second meeting. The networks did agree to joint standards to limit glamorized or gratuitous violence and to accompany violent programming with content warnings. The Fox Network also agreed to the standards, and cable networks announced that they would include warnings. The weakness of this attempt at voluntary self-regulation is in the fact that each network determines for itself what violence is glamorized or gratuitous or excessive.

When principles run up against economics, it is questionable whether the guidelines will have any effect. Sen. Paul Simon (D.-Ill.) expressed concern that a reduction in violence in the fall of 1993 would be short-lived. As he noted: "If the [ratings] show a violent program doing well, the herd will follow." If that occurs, he threatens renewed efforts at legislation. Attorney General Janet Reno has also called for legislation. Any inclination she may have had toward relying on industry

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87. Kathleen Best & Tim Poor, Flood Washed Away Last year's Priorities: Area Congressional Delegation Returning to Other Issues, ST. LOUIS POST DISPATCH, Jan. 23, 1994, at 1B.
self-regulation appears to have been weakened by a recognition of the number of past unkept promises of media to impose limits on violence. 88

Here too self-regulation has not worked, and unless the threat of legislation is seen as real, there is little reason to think that it will work in anything other than the short term. It is possible that the threat will seem credible. Attention may not turn away from televised violence, unless as happened with comic books, a new medium is seen as a greater threat. Video games and online information services could serve that role, but it is unlikely that television's influence will wane in the foreseeable future, and public pressure is likely to remain high.

D. Video Games

Congressional attention to media violence has recently turned to violent video games. Sen. Joseph Lieberman (D.-Conn.) has expressed strong concern over games like Mortal Kombat, Lethal Enforcers and Night Trap in which the game player actually participates in violent situations. In Mortal Kombat the character the player controls engages in a martial arts competition with another character. The player may "finish" his opponent by tearing off his head, complete with spinal column and accompanied by the appropriate loss of blood. The characters in Mortal Kombat are digitized, providing greater realism than would pure animation. In Lethal Enforcers the player uses a piece of hardware that looks like an oversize handgun and is called "The Justifier." The player uses the gun to participate in the action, killing characters on the screen, again complete with blood splatters. Night Trap provides much greater realism through interactive video using human actors and actresses. In that game the character the player controls tries to prevent a group of hooded men from doing violence to a group of sorority women.

The relationship between violent video games and aggressive behavior is not as well established as that between television violence and aggression. It would seem that aggression is more likely to follow from the player's direct and active involvement in video game violence than from passive involvement in televised violence. That conclusion has, however, not been demonstrated. The question has received little attention, compared to the effort devoted to the study of the effects of televised violence. What studies have been done were done in a different era. A study comparing the effects of playing Pac-Man to the effects of playing Missile Command 89 says little with regard to the effects of playing games in virtual reality. While not yet proven, it would seem reasonable that, as the simulated participation in violence becomes more realistic, the effect is likely to be greater.

Congress has not waited for the development of more psychological evidence. In December 1993, Senator Lieberman and Sen. Herb Kohl (D.-Wis.) convened a joint hearing of the Subcommittee on Juvenile Justice of the Senate Judiciary Committee and the Subcommittee on Regulation and Government Information of the Senate


89. See Joel Cooper & Diane Mackie, Video Games and Aggression in Children, 16 J. APPLIED SOC. PSYCHOL. 726 (1986).
Committee on Government Affairs. The hearing was to consider a bill establishing a National Independent Council for Entertainment in Video Devices, an independent agency of the federal government assigned to oversee development of voluntary standards to warn parents of the content of video games. The bill would also provide an exemption from the antitrust laws to allow the industry to develop such standards.

On the day of the hearings, in an effort to restrict regulation to self-regulation, the industry announced its intent to create its own rating and warning system. What has worked so well to avoid regulation of television and comic books has also helped the industry avoid the imposition of government regulation. Once again, it is questionable whether such self-regulation will have any more than a short-term effect.

II. First Amendment Protection

Much of the media's history of imposing and then ignoring self-regulation is probably based on the belief that there is little that government can do to impose its own regulations. If nothing other than public pressure and expressions of congressional disapproval are allowable, meetings and promises will serve as a holding action until interest wanes. Any real regulation is seen as barred by the First Amendment. The vagueness issues and high burdens of persuasion imposed by the First Amendment would appear to make governmental imposition of standards difficult, if not impossible, to formulate and justify.

This section questions the belief that depictions of violence are protected by the First Amendment. Specifically, it is suggested that depictions of violence can be sufficiently explicit and offensive so as to be considered obscene and to fall, therefore, within the obscenity exception to First Amendment protection. That conclusion would also raise the possibility of variable obscenity analysis applying to material not sufficiently violent so as to be obscene as to adults but violent enough so as to be obscene when distributed to youth. There would also be a parallel to the near-obscene material that is considered indecent for purposes of FCC rules. If material may be obscene because of its violent content, violence that does not reach the point of being obscene may still be near-obscene and thus indecent.

While the Supreme Court has not directly ruled that violent material is protected or is non-obscene, the definitions the Court has employed in its obscenity cases focus on sexual or excretory activities. Lower courts have taken that language as the basis for conclusions that violent material is protected and cannot be considered obscene, except to the degree that additional sexual content makes it obscene. If the Court's language is interpreted instead as providing a definition of when sexual material becomes obscene, the lower court decisions are unjustified. If, however, the Court meant that only sexual or eliminatory material can be obscene, the Court was unjustified in its own conclusion.
A. Obscenity in Case Law and Statute

The Supreme Court established the obscenity exception to First Amendment protection in *Roth v. United States*. In doing so, it examined the history of the freedoms of speech and press in the United States. The opinion begins by noting that those freedoms were never considered absolute and that at the time of the Bill of Rights libel could be prosecuted. The Court also cites to statutes punishing speech that predate the Bill of Rights and quotes a Massachusetts statute of the era which criminalized publication of "any filthy, obscene, or profane song, pamphlet, libel or mock sermon' in imitation or mimicking of religious services." The statutes cited are examined in detail elsewhere, and that examination shows that they were all blasphemy or heresy statutes. They lacked any focus on obscenity and certainly did not distinguish between sex and violence for obscenity purposes. The Massachusetts statute was intended to show that profanity and obscenity were related offenses, but that statute did not define obscenity and only barred the obscene when used in a blasphemous context.

*Roth* also cites a New York case along with the statutes cited for the state of the law at the time of the Bill of Rights. Since the cited case is post-Bill of Rights, its relevance appears only as an explanation of the pre-Bill of Rights statute cited. *People v. Ruggles* upheld the criminal conviction of an individual, who loudly proclaimed to a large crowd that "Jesus Christ was a bastard, and his mother must be a whore." The charge was blasphemy, and the court determined that the First Amendment, while protecting discussion of religious views, did not protect blasphemy. Once again, the case provides no support for an obscenity law distinction between sex and violence.

The second step in the Court's historical journey was the claim that "[a]t the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press." All the statutes and cases cited are later than the adoption of the Bill of Rights but what is more telling is the fact that they fail to define obscenity in terms of sex or excretion.

The earliest statute cited, New Jersey's Act for Suppressing Vice and Immorality, is very broad, banning from the "public stage ... or other place whatever, any interludes, farces or plays of any kind, or any games, tricks, juggling, slight of

90. 354 U.S. 476 (1957).
91. *Id.* at 482.
92. *Id.* at 482 n.12.
93. *Id.* at 483 (citing Acts and Laws of the Province of Mass. Bay, ch. 105, § 8 (1712); Mass. Bay Colony Charters & Laws 399 (1814)).
95. 8 Johns. 290 (N.Y. 1811).
97. *Id.* at 483 n.13.
hand, or feats of uncommon dexterity and agility of body, or any bear baiting, or
bull baiting, or any like shews or exhibitions whatsoever. . . . " The next earliest
statute cited, Connecticut's 1821 Act Concerning Crimes and Punishments, makes it illegal to "print, import, publish, sell, or distribute, any book, pamphlet, ballad, or other printed paper, containing obscene language, prints or descriptions
. . . . " The statute, however, fails to define "obscene" and provides no support for
any limitation of obscenity to the erotic.

The other statutes and cases cited are similarly indefinite as to the variety of
material considered obscene. The most telling of the cites is to an 1808
Connecticut case, Knowles v. State. Knowles was convicted of violating the
state's restrictions on plays and public performances by displaying a "horrid and
unnatural monster." The description offered of the monster in question fails to
establish any focus on sex but is instead better matched to a concern with human
dignity, a concern arguably invoked more by violence than by sex. This description
was:

And the head of said monster, represented by said picture, resembles
that of an African, but the features of the face are indistinct: there are
apertures for eyes, but no eyes; his chin projects considerably, and the
ears are placed unnaturally back, on or near the neck; its fore legs, by
said picture, are here represented to lie on its breast, nearly in the
manner of human arms; its skin is smooth, without hair, and of dark,
tawny, or copper colour.

While the conviction was reversed, any lessons intended by the Court's inclusion
of this case law do not speak solely to sex. Some of the other, later cases cited do
involve sexual indecency, but there is nothing in the opinions limiting the concept
of obscenity to sexual material.

The Roth Court also cited some of its own opinions and various federal statutes.
The opinions, showing that the "Court has always assumed that obscenity is not
protected by the freedoms of speech and press," date from 1877 to 1953, and
the statutes from 1842 to 1956. As with the state statutes and the case law cited,
the older the federal statute the less clear the focus. In fact, it is generally agreed
that only with the 1896 case Swearingen v. United States did the concept of
obscenity focus on sexual depictions.

99. Id. § 12 at 331.
100. 1821 Conn. Spec. Acts 69 (codified at CONN. GEN. STAT. § 109 (1824)).
101. See Saunders, supra note 94.
102. 3 Day 103 (Conn. 1808).
103. Id. at 103.
104. Id.
106. Id. at 485.
107. 161 U.S. 446 (1896).
Swearingen raised an issue of statutory construction rather than constitutional law, but that is not the only weakness in support the case reveals. The date of the case, 1896, is in a constitutionally irrelevant period. Whatever obscenity exception from the freedoms of speech and press existed at the time of the Bill of Rights did not speak solely to sexual material. For that matter, whatever exception existed at the time of the 1868 adoption of the Fourteenth Amendment, which applies the First Amendment to state regulation, did not speak solely to sex.

B. An Historical View of Obscenity in Entertainment

The fact that obscenity included more than sex at all constitutionally relevant periods does not, in itself, prove that violence was or is among the other categories included. However, an historical analysis of the varieties of depiction that have been proscribed in entertainment leads to the conclusion that violence has traditionally been considered at least as obscene as sex.

One of the suggested derivations of "obscene" is from "ab scaena" or "off the stage." This derivation has the advantage of making claims that obscene material does not enjoy the protection of the First Amendment almost tautological. If obscene material is that material that has been banned from the stage, then such material has not been protected. If that is the derivation, a look at the materials historically banned from the stage is required. Doing so will demonstrate that violence enjoys at least as strong an historical claim as does sex to obscene status. Furthermore, if obscenity was proscribed and there was no legal definition of "obscene," this history will also provide an insight as to the focus of such a proscription.

In looking to the origins of Western drama in the Greek theater, the Greeks were quite tolerant of sexual and scatological themes in comedies but intolerant of violence. The Greeks were tolerant of descriptions of violence, as shown by their narrative poetry and drama. In Aeschylus' Persians, combat occurs offstage but a narrator describes the battle. Homer's Iliad is quite descriptive of the violent deaths that occur. In fact, even some audience exposure to violence was tolerated. In Sophocles' Electra, Clytemnestra is killed by Orestes, her son. The murder occurs in a house out of the audience's view, but Clytemnestra's voice is heard, as she pleads to no avail for her son to have pity. She is heard to say, "Oh, I am smitten!" Orestes' sister Electra urges, "Smite, if you can, once more!" and Clytemnestra is heard to say, "Ah, woe is me again!"

What Greek drama did not accept was the visual depiction of violent death. According to Professor Flickinger, "[t]he Greek theater suffered no scene of

112. Id. at 71.
bloodshed to be enacted before its audience. When the plot of the play . . . required such an incident, the harrowing details were narrated by a messenger who had witnessed the event.\textsuperscript{114} Professor Arnott agrees: "We are led up to the point where some violent deed is going to take place, given the motives for the deed and the story behind it, but the deed itself takes place off stage."\textsuperscript{115}

It has been suggested that the lack of violence in Greek drama may have been simply due to the small number of actors typically involved. With no curtain, an actor who died onstage would have to arise at the end of the scene. The actor was also likely to appear later in another role.\textsuperscript{116} An example of this sort of staging difficulty is presented by Euripides' The Medea.\textsuperscript{117} Medea murders Creon and Creon's daughter by sending the daughter a dress the fabric of which is impregnated with poison. The effects of the poison are not seen. A messenger reports to Medea that, when Creon's daughter put on the dress, the poison in the fabric caused the dress to stick to her skin, while the poison burned her and caused her death. When Creon found his daughter and fell on her corpse, the dress also stuck to and killed him. Some of the staging difficulty could have been overcome by having the beginnings of the daughter's death occur onstage with her leaving in agony to die offstage. However, if Creon is to die onstage, the daughter's corpse must be there, so Creon's and his daughter's bodies would both have to be removed or would have to arise at the end of the scene and leave the stage. Furthermore, since Creon's daughter appears nowhere in the play, another actor might be required. The actor playing Creon might also have to appear as another character after Creon's death. The only later dialogue is between Jason and Medea, but Jason and Creon seem never to appear onstage together, so, conceivably, one actor could play both roles.

While staging problems might lead to less onstage violence, Professor Arnott argues that the convention has nonpragmatic roots.\textsuperscript{118} Flickinger agrees:

\begin{quote}
It is customary to explain the Greek avoidance of violence on aesthetic grounds; to assert that the susceptibilities of the Greeks were so refined as to have been offended by scenes of bloodshed. That which would be disagreeable or painful to see in real life should never be presented to an audience.\textsuperscript{119}
\end{quote}

Arnott's and Flickinger's position are supported by Euripides' Hecuba.\textsuperscript{120} The treatment of violence in the play is typical in that it occurs out of the audience's

\textsuperscript{115} PETER D. ARNOTT, AN INTRODUCTION TO THE GREEK THEATRE 22 (1959).
\textsuperscript{116} PETER D. ARNOTT, GREEK SCENIC CONVENTIONS IN THE FIFTH CENTURY B.C. 130 (1962); Flickinger, supra note 114, at 129 [hereinafter Arnott, SCENIC CONVENTIONS].
\textsuperscript{117} Comments are based on Rex Warner's translation. See EURIPIDES (David Grene & Richard A. Lattimore eds., 1955).
\textsuperscript{118} ARNOTT, SCENIC CONVENTIONS, supra note 116, at 22 ("It is usually held that Greek taste forbade the representation of death in view of the audience.").
\textsuperscript{119} Flickinger, supra note 114, at 130.
\textsuperscript{120} The translation employed here is that of William Arrowsmith. See EURIPIDES III (David Grene & Richard A. Lattimore eds., 1958).
view. As the play opens, the ghost of Polydorus, the son of Hecuba, describes his own murder by Polymestor, so that homicide, which is most important in the motivation it provides Hecuba, occurs offstage. When the Greeks demand the Trojan Hecuba's daughter Polyxena as a sacrifice on the grave of Achilles, that death also occurs offstage. Polyxena is led away and her death is reported by a herald. While the description of her death is detailed, it is not seen. These deaths might have presented some difficulty in staging, but the play's remaining violence seems to present no staging difficulty.

Hecuba's revenge on Polymestor takes place in a tent set up on the stage. Polymestor's sons are killed and Polymestor is blinded. There are screams of pain and the walls of the tent are battered from within. The implications of violence are strong, but again the action occurs outside of the audience's view. What is particularly telling is that the action in this scene could have occurred onstage. Polymestor survives and takes part in later dialogue, so the difficulties of removing a body and the actor playing another role do not exist. Further, Polymestor's sons' bodies are carried from the tent, placed onstage, and remain there until the end of the play. The fact that this violence occurs offstage cannot be explained by staging difficulties. Intolerance of violence onstage is, by far, the better explanation.

There are those who question the conclusion that scenes of violent death were confined to the offstage — were obscene. Professor Walton notes that not all violence occurred offstage. "Greek tragedy does contain scenes of physical assault, suffering, and even death, to be presented in full view of the audience." In support of his conclusion, Walton cites Prometheus's death in an earthquake, and the suicides of Ajax and Evadne. However, the agonies of Prometheus say nothing with regard to violence of person against person. Prometheus was a Titan, and his tormentor was not human. It was Zeus who beset Prometheus. With regard to the other examples offered, Ajax does indeed commit suicide in Sophocles' Ajax. He sets his sword, point up, in the sand and throws himself on the point. Evadne also commits suicide in Euripides' The Suppliant Women. She appears on a cliff above her husband Cephenes' funeral pyre and throws herself on the pyre.

Walton's examples show that it is not death that was barred from the Greek stage, but that is not the position of those who argue that violence was not tolerated. Even those advocating the existence of a rule against violence note an exception for suicide and death through natural events or at the hands of the gods. It was
homicide that could not be shown. It was the violence of person against person that was obscene.

Walton's examples also speak to the alternative explanation offered for a ban on violence and call into question the claim that the ban may have been based on staging difficulties. If nonhomicide deaths could be staged, homicides would seem to offer little or no increased difficulty in staging. In fact, Ajax's suicide at the seashore required a scene change to that location. That scene change is the only one in any of Sophocles' still-existing plays, so when a death could be shown, staging difficulties appear not to have stood in the way.

In contrast to the intolerance of violence, the Greeks accepted sexual content. While the toleration for sexual themes may not have encompassed the modern variety, it does not require too far a journey into our society's past to find an era in which people would have found Aristophanes shocking. In William Arrowsmith's translation of Aristophanes' The Clouds, Strepsiades is said at one point to raise his phallus to the ready. Later in the play, the same character again raises his phallus to the ready and threatens Aynias: "I'll sunder your rump with my ram!" Both references to a phallus are to a symbolic leather thong worn by the actor. Arrowsmith recognizes a dispute over whether the actor actually wore a phallus but argues that the text only makes sense, if there was such a prop. Further, the argument against the leather phallus seems to be based on the appearance of Aristophanes as a character in the play. In his monologue, Aristophanes describes the play: "She's a dainty play. Observe, gentlemen, her natural modesty, the demureness of her dress, with no dangling thong of leather, red and thick at the tip, to make small boys snigger." Even if Arrowsmith is incorrect and the thong was not worn in The Clouds, Aristophanes' description of the demureness of the play in comparison to others indicates that the use of a phallus was not unknown in Greek theater.

Still later in The Clouds, characters representing philosophy and sophistry are rolled onto the stage in large gilded cages. Arrowsmith describes them as human from the shoulders down and fighting cocks from the neck up. Again, he recognizes that there is debate over their form, but the debate is whether or not they had any nonhuman aspects. With regard to the human aspects, Philosophy is described as "large, muscular . . . , powerful but not heavy, expressing in his movements that
inward harmony and grace and dignity which the Old Education was meant to produce . . . "  

Sophistry, by contrast, is "comparatively slight, with sloping shoulders, an emaciated pallor, an enormous tongue and a disproportionately large phallus."  

Aristophanes' *Lysistrata*, as translated by Douglass Parker, also has sexual content. The plot concerns a pact by the women of Athens and Sparta to withhold sexual relations from the men, until the men reach a peace agreement. At one point, both the male and female characters remove their tunics. While the characters appear still to be wearing undergarments, the lack of a tunic makes it more obvious when Kinesias later staggers onto the stage "in erection and considerable pain." The male chorus is also so affected, and various characters attempt to conceal their excitement when they appear onstage. When the Spartan men arrive, they throw open their cloaks and their excitement is also obvious. The play also portrays Peace as "a beautiful girl without a stitch on," who appears onstage unclad and contributes to the aroused condition of the men. The nudity of the character Peace may seem surprising, but the Greeks looked on the naked body, including the sexual organs, without the slightest sense of shame.  

Robert Henning Webb's translation of *Lysistrata* has the same tone. When a Spartan herald arrives in Athens, an Athenian official asks if he is Priapus in the flesh and suggests that the Spartan is hiding a weapon in his clothing. When asked about the state of things in Laconia, the Spartan replies, "Shparta iss rampant . . . ja, und her allies . . . Dere iss a gross uprising eferyvere!" Later a group of ambassadors arrives from Sparta. When the Chorus inquires into their health, the Spartans throw open their cloaks and respond, "Vy do you esk? Vat need of verds to zay? Your eyess kann teIl you how it shtands mit US!" The Athenians then throw open their own cloaks and reveal that they are in the same state. The goddess also appears in Webb's translation, there called "Appeasement" and described as "clothed in smiles."  

Aristophanes' plays may not match the explicit sex of modern obscene films. However, the sexual content was sufficient to make the plays obscene in the early to middle parts of this century. The written version of *Lysistrata*, let alone a

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134. *id.* at 90-91.  
135. *id.* at 91.  
137. *id.* at 406-07.  
138. *id.* at 419.  
139. *id.* at 434-35.  
140. *id.* at 444-45.  
143. *id.* at 85. The German accent appears to have been employed to indicate that the Spartan dialect differed from the Athenian. See *id.* at 7 n.10. Parker's translation employs a back woods accent to the same end.  
144. *id.* at 91.  
145. *id.* at 94.
performance, was subject to customs seizure during the first thirty years of the 1900s and, as late as 1955, was considered obscene by the United States Post Office.\textsuperscript{146} While perhaps tame by current standards, material the Greeks considered suitable would have been banned from the stage, that is, would have been obscene in the Victorian and post-Victorian climate in which obscenity law focussed on the sexual.

Roman theater appears to have tolerated sexual themes to a degree at least equal to the Greeks. Richard Beacham's study of Roman drama\textsuperscript{147} considers performances from as early as the fourth century B.C. and finds comparisons between the performances of Etruscan actors in Rome and the \textit{phallica} of Greece. Each involved phallic ceremonies and invocation of the phallus to assure fertility in newlyweds. He finds even earlier indications of such themes. Terracotta figures with oversized phalluses have been found in those areas of Italy colonized by the Greeks. The figures suggest earlier Roman performances of plays with suggestive dance of a sort he characterizes as common of "stag-parties" of this era.\textsuperscript{148}

The treatment of sex continues into later eras of Rome. The late third century B.C. plays of Naevius, with titles such as \textit{Testicularia} and \textit{Triphallus}, indicate such themes. Beacham notes that \textit{Floralia} festival performances, from at least as early as 173 B.C., were noted for their license, merriment and naked female performers.\textsuperscript{149} In fact, he suggests that Roman adaptations of Greek plays, particularly those by Terence and Plautus, indicate an outlook on sex freer than that of the Greeks.\textsuperscript{150}

While the Romans may have shared the Greek tolerance for sexual themes, Beacham suggests that they did not share the intolerance of violence. He finds a common theme in slaves being verbally abused and threatened with great violence.\textsuperscript{151} He cites as an example Plautus' play \textit{Casina} where two slaves exchange insults "underscored by a variety of escalating knock-about abuse; slaps, blows, trips, and the like."\textsuperscript{152} He also notes "verbal violence and descriptive gore" in the plays of Accius.\textsuperscript{153} Beacham suggests that this increase in violence is due to a need for increased dramatization to appeal to a less sophisticated audience accustomed to lively, less thoughtful, entertainment.\textsuperscript{154}

Despite this suggestion of increased toleration for violence in early Roman theater, the violence cited may not really violate the Greek view of obscenity. Beacham does not cite to any onstage homicides or to any actual infliction of

\begin{thebibliography}{99}
\bibitem{146} HYDE, \textit{supra} note 141, at 40 (citing JAMES C.N. PAUL & MURRAY L. SCHWARTZ, \textit{FEDERAL CENSORSHIP} 104 (1961)).
\bibitem{147} RICHARD C. BEACHAM, \textit{THE ROMAN THEATRE AND ITS AUDIENCE} (1951).
\bibitem{148} \textit{Id.} at 4-5.
\bibitem{149} \textit{Id.} at 129.
\bibitem{150} \textit{Id.} at 54.
\bibitem{151} \textit{Id.} at 30.
\bibitem{152} \textit{Id.} at 91.
\bibitem{153} \textit{Id.} at 124.
\bibitem{154} \textit{Id.} at 31.
\end{thebibliography}
physical punishment or other violence. There may be verbal abuse and "descriptive
gore," but the Greeks were not averse to onstage reports of violence.

Whatever intolerance of violence there may have been in early Roman theater
does not carry over to later Roman theater. In an era that considered mortal combat
to be popular entertainment, theater became more violent. In Catullus' Laureolus a
robber is crucified and then torn to pieces by wild beasts. Death occurs on the stage
and the victim vomits blood. Beacham even notes claims that in Titus' reign a
prisoner was forced to play the role and was actually killed onstage by a bear.155
Late Roman theater included real battle scenes, so violent that there were barriers
between the stage and the audience, to prevent the accidental death of spectators.156
There seems to have been little objection to sacrificing the lives of captured slaves
to stage spectacular battle scenes, either land battles or sea battles in great water­
filled arenas.

While the concept of the obscene as that which is banned from the stage had
narrowed so as not to bar violence in the later Roman theater, the toleration of sex
also broadened. The same account of the prisoner torn apart by the bear also reports
the "faithful reenactment" of the legend of Pasiphae concealing herself in a false
cow to be mounted by a bull.157 Further, in the third century A.D., Elagabalus is
also said to have ordered that sexual scenes in performances not be simulated but
be actually enacted.158 It seems that the same availability of slaves captured in
conquest that supplied actors to fight to the death also provided slaves to engage in
the onstage performance of sexual acts.159 It cannot be said that obscenity had
shifted its focus from violence to sex. Rather, it seems that the concept of obscenity
in that era simply lost all extension.

The later theater seems not to have been so averse to violence. In religious
medieval drama, plays portraying the lives of the martyrs commonly contained great
violence.

In the name of sacred instruction and secular diversion, the Apostles
were graphically stoned, stabbed, blinded, crucified, and flayed. Other
holy men and women variously and vigorously had their teeth wrenched
out, their breasts torn off, and their bodies scourged, shot with arrows,
baked, grilled, and burned. Audiences were also treated to bestial scenes
of infanticide, and to broad comedies about divinely mutilated Jews. No
torment was too extreme or too gory for representation, as medieval
drama ignored the classical tenet, advanced by Horace, of not bringing
upon the stage what should be performed behind the scenes.160

155. Id. at 136.
156. Sheldon Cheney, The Theatre: Three Thousand Years of Drama, Acting and
157. Richard C. Beacham, supra note 147, at 136.
158. Id. at 137.
159. Cheney, supra note 156, at 103-04.
160. John S. Gatton, "There Must Be Blood": Mutilation and Martyrdom on the Medieval Stage,
in Violence in Drama, supra note 113, at 79, 79.
The religious lessons of the violent *mysteres* might justify, without really changing the rule, an exception from the classical view of the obscene. Just as death at the hands of the gods was not obscene, death for the cause of God might also be non-obscene. On the other hand, it may simply be that the "[m]iracle plays and *mysteres* were violent theatre for a violent era" and that the view of obscenity had changed.

Turning to the classical period of English drama, it must be noted that many of Shakespeare's plays were at least set against a background of violence. The story of the struggles between the Houses of York and Lancaster and between the English and the French — Bosworth Field and the Battle of Agincourt — could not be told without an atmosphere of violence. As was true of the Greek theater, there is a great deal of background violence reported through narration. The scenes shift from place to place on various battlefields, as casualty reports flow in. The suicides that were accepted in Greek drama are also found in Shakespeare — Romeo and Juliet, and Anthony and Cleopatra. Unlike the Greek theater, however, there is also armed conflict and death presented on the stage. Characters regularly enter and exit fighting, and violent deaths occur. While perhaps "[c]ompared to his predecessors ... Shakespeare seems not much addicted to violence ... rarely go[ing] in for bizarre forms of it, as do a number of earlier and later playwrights," murder is not uncommon.

Nonetheless, it is important to note that Shakespeare's plays were not as violent as they could have been, and some violence is consigned offstage. In *Titus Andronicus*, Shakespeare's "grisliest" play, the worst violence is behind the scenes. Lavinia is raped, her hands are cut off and her tongue cut out. The violence is described and she appears onstage with bleeding mouth and bloody stumps, but Shakespeare chose not to show the violence. While not showing the rape may have been based on special concerns over sexual violence, that cannot explain the exclusion of the remaining violence. Nor can that exclusion be explained by staging difficulty. Later in the play *Titus Andronicus* submits, onstage, to his hand being cut off, believing that it will save the lives of his sons. If that amputation could be staged, the amputation of Lavinia's hands could also have been staged. Furthermore, contemporaries had staged the biting off of one's own tongue, and the step to cutting out the tongue of another could not have been too difficult.

Most of Shakespeare's onstage violence involves duels or other individual combat with swords. Such scenes differ from the currently common theme of a slasher sadistically torturing and murdering a helpless victim. In Shakespeare's swordplay "a rough equality, of age and rank and status, obtains between the adversaries, so

161. *Id.* at 80.
163. *Id.*
164. *Id.* at 110.
165. See *id.* at 102.
that the encounter takes on some of the character of a trial by combat, a feudal contest conducted according to mutually understood rules.\textsuperscript{166}

There are also, however, Shakespearean killings that lack this equality and flavor of trial by combat. Sometimes the victim is physically weaker that the killer, as in the smothering of Desdemona by Othello. Professor Barish also notes a category of "sacrificial" killings in which individuals are set upon by groups.\textsuperscript{167} He includes the killing of York in \textit{The Third Part of King Henry the Sixth}, where York is subdued, taunted, and then killed. He also includes the killing of Lady MacDuff and her child by MacBeth's soldiers.

Perhaps the most frequently cited example of Shakespearean violence is the blinding of Gloucester in \textit{King Lear}. The act occurs in view of the audience. Gloucester is bound at the time and the action falls far short of equal combat. In this regard, Shakespeare stands in contrast to the Greek theater, where any blindings occurred offstage, even when self-inflicted as in Sophocles' \textit{Oedipus the King}.\textsuperscript{168}

Some of Shakespeare's contemporaries were even more prone to violent scenes. Professor Barish cites examples involving the flaying of one character, the killing and cutting out of a character's own tongue and the boiling of a character in oil in the works of playwrights more or less contemporaneous to Shakespeare.\textsuperscript{169} While even such examples may not match the goriness of the medieval theater, they do show greater tolerance for violence than was present in the Greek era.

While there may have been an increased tolerance for violence in this era, it also appears that there was, in some venues, a similar increase in tolerance for sexual displays. The psychologists Eberhard and Phyllis Kronhausen, in their study of the history, law and psychology of pornography, claim that exhibitions of human intercourse as entertainment for select audiences were not rare in France from the time of the Renaissance through part of the eighteenth century. They also note that exhibitions of copulating animals were common in that era in various European societies. These forms of entertainment were not secretive. Animal copulation exhibitions occurred at various festivals, and while the audience for human copulation may have been select, it was before mixed audiences of men and women.\textsuperscript{170}

In later continental theater, Flickinger argues that the Greek aesthetic objection to violence carried over to early twentieth century French drama.

\begin{quote}
This is the French position. . . . "A character in [French] tragedy could be permitted to kill himself, whether he did it by poison or steel: what he was not suffered to do was to kill someone else. And while nothing was to be shown on the stage which could offend the feelings through
\end{quote}

\begin{footnotes}
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.} at 104-07.
\textsuperscript{168} See Flickinger, \textit{supra} note 114, at 131.
\textsuperscript{169} See Barish, \textit{supra} note 162, at 103.
\textsuperscript{170} EBERHARD KRONHAUSEN & PHYLLIS KRONHAUSEN, PORNOGRAPHY AND THE LAW 66-67 (1964)).
\end{footnotes}
the medium of the eyes, equally was nothing to be narrated with the accompaniment of any adjuncts that could possibly arouse disagreeable sensations in the mind."\(^{171}\)

On the other hand, beginning in the same era, from 1897 to 1962, and in the same country, Paris' Grand-Guignol Theater "was devoted to horror plays designed to terrorize and amuse its audiences."\(^{172}\) Professor John Callaghan states: "[T]he Guignolers [went] happily about their business of gouging out one another's eyes, cooking villains in vats of sulfuric acid, hurling vitriol and cutting throats, all to the accompaniment of hysterical laughter and hideous shrieks."\(^{173}\)

While the classical view may have been that it was violence that was obscene, views of violence as obscene have varied with the times. The same is true of sexual activities as obscene. The focus of obscenity has changed over time. What was acceptable on the stage in one era may be unacceptable in another. What is clear is that "obscene" as "banned from the stage" does not have a sole application to sexual or excretory activities. Such activities may only be talked about in some eras, with more or less explicitness, and shown in others. The same is true of violence, it may only be described in some eras but could be shown in gory detail in others. There is no reason why the Victorian era's legal co-opting of the word "obscene" to address the era's concern with sex should, given again the constitutional irrelevance of that period, prevent the application of the obscenity exception to violence. In the long view, the historical basis for such an application is at least as strong as the basis for an application to sex. There is simply no reason to allow a shorter view, particularly one beginning in the constitutionally irrelevant Victorian view, to limit the concept to sex.\(^{174}\)

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171. Flickinger, supra note 114, at 130 (quoting Thomas Raynesford Lounsbury, Shakespeare as a Dramatic Artist 175 (1902)) (emphasis in Flickinger).


173. Id. (quoting Speaking of Pictures, LIFE, Apr. 28, 1947, at 15).

174. Even under the other suggested derivation of "obscene" from "ob caenum" or "on account of filth," violence is as much at the focus of the concept as sex. Professor Harry Clor has suggested an analysis that speaks to filth. He finds the core of obscenity in the treatment of human beings as less than persons. "[O]bscenity consists in making public that which is private; it consists in an intrusion upon intimate physical processes and acts or physical-emotional states; and it consists in a degradation of the human dimensions of life to a sub-human or merely physical level." Harry Clor, Obscenity and Public Morality: Censorship in a Liberal Society 225 (1969). That which is obscene is that which deprecates the value of human beings, that which "presents, graphically and in detail, a degrading picture of human life and invites the reader or viewer, not to contemplate that picture, but to wallow in it." Id. at 234.

Clor's analysis is insightful. It is the focus on the human spirit that distinguishes a romantic film, even one containing explicit sex, from the sexual depictions that might make another film obscene. The actors in the sexually obscene film are reduced to the subhuman, merely physical level, to the level of garbage or filth. It is not the sexual act, but rather the focus solely on the physical aspects of that act, that is obscene. The same should be true for a film containing violence. There is a great difference between a death scene and butchery. A death scene can focus on the human spirit, personal relationships, the meaning and intransigence of life, or a variety of other aspects of the human spirit or experience. Such a scene is not obscene. When on the other hand a scene wallows in the physical side of death, it may...
C. Obscenity and First Amendment Policy

There are various theories of the First Amendment that may be used to explain why obscene materials are denied the amendment's protection. It has been argued by such legal scholars as Alexander Meiklejohn\(^{175}\) and Vincent Blasi\(^{176}\) that the First Amendment has a core designed to protect the role of the citizen in government. While the two scholars disagree about how active a role is envisioned, that role is not furthered by protecting obscene materials, and the core protection is limited to protecting criticism of, or participation in, government. Whatever conclusions may be drawn with regard to sexual obscenity under this approach should carry over to depictions of violence. Neither ordinarily contributes to self-government — to the degree that either does, they should be protected. This protection is provided under legal obscenity requirements that material be without serious political, as well as scientific, artistic, or literary value, to be obscene.

Others have found broader protection in the First Amendment, and indeed, the Court has recognized that entertainment is due protection. Professor Frederick Schauer, in his book *Free Speech: A Philosophical Enquiry*,\(^{177}\) finds several possible sources for what he labels a "Free Speech Principle." Such a principle could be based on principles of democracy, as Blasi and Meiklejohn assert, on open debate as the best path in the search for truth, on other utilitarian grounds, or on autonomy or individuality. The source of the principle may affect the scope of the protection afforded, with a democracy-based principle having a lesser but perhaps more complete scope of protection and autonomy interests conferring a wide scope of protection.

While finding various sources and varying scope, Professor Schauer does offer some limitation on the scope of his principle. He recognizes that not all acts are speech acts protected by some variety of free speech principle.\(^{178}\) To be speech, he requires that an act be communicative. As he notes, any of the justifications for a principle of free speech rely on the communicative aspects of speech.\(^{179}\) Blasi’s and Meiklejohn’s arguments are based on the value of individuals communicating about governmental abuse of power or on issues of self-governance. The truth and marketplace of ideas approach depends on the communication of those ideas. Even autonomy and individuality arguments, which seem to include more than the protection of the mere holding of beliefs or having thoughts, must be addressed to the communication of those beliefs or thoughts.

The issue then becomes what is to count as communication. He includes most uses of language and its equivalents, such as Morse code, Braille, a Bronx cheer,

\(^{175}\) ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT (1948).
\(^{177}\) FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982).
\(^{178}\) *Id.* at 93.
\(^{179}\) *Id.* at 92-95.
or the wearing of black armbands. 180 Some uses of language, such as meaningless noise to drown out the voice of another, would be excluded by Schauer as not communicative. Key is the intent to convey a message. While "messages" may be received, where none was intended, he does not include such instances as communication. Communicative intent is necessary, if an act is to be speech for purposes of the Free Speech Principle.

Schauer addresses the status of the arts, defined broadly to include music, films, poetry, drama, and literature, as speech within the protection of his Free Speech Principle. He sees no difficulty in including some works of art, finding clear communicative intent, including explicit and intentional political communication. As examples, he cites Picasso's Guernica, the film Z and even some of Shostakovich's symphonies. 182 Works of art intended to convey political messages and that do convey such messages to viewers or listeners are the sort of speech central to the Free Speech Principle.

When Schauer turns to the consideration of sexual obscenity, he argues that such expression is completely outside the sphere of protected speech, that it is nonspeech. He discusses what he admits is "a hypothetical extreme example of what is commonly referred to as 'hard core pornography.'" 183 The hypothetical ten-minute film is nothing but a close up of sexual organs engaged in intercourse, with "no variety, no dialogue, no music, no attempt at artistic depiction, and not even any view of the faces of the participants." 184 The audience is assumed to be engaged in masturbation.

Schauer argues that:

[A]ny definition of "speech" (or any definition of the coverage of the concept of freedom of speech) that included this film in this setting is being bizarrely literal or formalistic. Here the vendor is selling a product for the purpose of inducing immediate sexual stimulation. There are virtually no differences in intent and effect from the sale of a plastic or vibrating sex aid, the sale of a body through prostitution, or the sex act itself. At its most extreme, hard core pornography is a sex aid, no more and no less, and the fact that there is no physical contact is only fortuitous. 185

180. Id. at 95-101.
181. Schauer does not argue that all communication is within the scope of his Free Speech Principle. He suggests that most performative uses of language are not so protected. In fact, it could even be argued that such utterances are not communicative or at least are only in part communicative, in which case only the communicative portion would be within the scope of the Free Speech Principle. Also excludable, he suggests, are what he calls "propositional wrongs," such as perjury or fraud.
182. SCHAUER, supra note 177, at 109.
183. Id. at 181.
184. Id.
185. Id. Joel Feinberg takes a similar position. He classifies hard core pornographic pictures as nothing more than devices designed to excite the sex organs and says "it would be as absurd to think of them as speech or art as it would to think of... mechanical devices made solely to stimulate erotic feelings, in the same manner." JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW, VOLUME
If pornography is simply a sex aid, Schauer concludes that it deserves no protection. It is to be treated the same as any physical device designed to stimulate. "The mere fact that in pornography the stimulating experience is initiated by visual rather than tactile means is irrelevant if every other aspect of the experience is the same. Neither involves communication in the way that language or pictures do."\textsuperscript{186} The analysis is similar to the conclusion of Havelock Ellis that the "stupid form of obscenity called pornography . . . is a substitute for the brothel and of the same coarse texture."\textsuperscript{187}

Schauer recognizes that serious literature, art and music can also evoke a physical response.\textsuperscript{188} Nonetheless, he says that "misconceives the issue."\textsuperscript{189}

It is not the presence of a physical effect that triggers the exclusion from coverage of that which would otherwise be covered by the principle of free speech. Rather, it is that some pornographic items contain none of the elements that would cause them to be covered in the first instance. The basis of the exclusion of hard core pornography from the coverage of the Free Speech Principle is not that it has a physical effect, but that it has nothing else.\textsuperscript{190}

Professor Schauer acknowledges that the brain plays a role in physical sensations, including sexual arousal, but it takes more than the existence of a brain event to make for a communicative act. Professor Schauer is certainly correct that there is a mental element to pornography caused sexual arousal. While the final physical effect may be hormonal, the visual images must be processed by the brain, before that effect results. While a physical stimulator does not require higher level mental information processing for its effects, the mental element to pornography-based arousal is not sufficiently distinguishing. The objection to considering sexually obscene materials as speech appears to be that the higher order regions of the brain are not its direct audience or even a coequal audience.

Schauer's position appears to be supported by current psycho-physiological theory. According to the James-Lange theory,\textsuperscript{191} stimuli that produce emotions do so without the initial input of the more evolved portions of the brain. Of course, a visual image that leads to sexual stimulation must involve the optic regions of the brain. The image must be recognized. The route to stimulation, however, is through the limbic regions of the brain and particularly the amygdala. In an emotional reaction, the limbic system sets in motion a set of physiological responses, including muscular, nervous system, and hormonal reactions. These responses occur at a level below the conscious. The individual so stimulated recognizes the stimulation.

\begin{footnotesize}
\begin{enumerate}
\item Two: Offense to Others 169 (1985).
\item Schauer, supra note 177, at 182.
\item Havelock Ellis, The Revaluation of Obscenity, in More Essays in Love and Virtue 100, 130 (1931).
\item Id.
\item Id.
\item Id.
\item See, e.g., Neil Carlson, Physiology of Behavior 350-51 (5th ed. 1994).
\end{enumerate}
\end{footnotesize}
through feedback from the systems engaged in the physiological responses. The brain recognizes an increased heart rate and a surge in sex hormones. The James-Lange theory holds that it is the brain's experience of the physiological responses that constitutes the feeling of emotion. The experience at the conscious level is, therefore, secondary. It occurs only as the chain of events set off by the stimulation passes through the brain for the second time. The target for sexually stimulating images is not the intellect or even the conscious brain. The primary target is the gonads, even though the reaction of the gonads may lead the higher brain to experience some enjoyment. While music, art, and romantic literature may stimulate, they also communicate other messages aimed at the intellect. The brain is at least a coequal audience.

Visual stimuli that cause emotional reactions of fear, horror, or anger proceed along the same route. The optical stimulus must be processed to be recognized, but the direct effect will then be in the limbic system. The physiological result will be an increased heart rate and higher hormone levels. It is the recognition of the heart rate and the reaction to the hormones that constitutes the experience of fear or anger. There are, of course, other situations, more directly involving the higher order regions of the brain, that may produce fear or anger. It may be that only by thinking about the consequences of received information that fear or anger is aroused. Whatever the role of the limbic and endocrine system in such a reaction, the higher order brain played an initial role, as well as its role in recognizing the resultant fear or anger. The same is true, however, of sexual arousal. In sexual arousal brought on by feelings of love, there will be a limbic and endocrine system role, but the higher brain will have played an initial role, in addition to its role in recognizing the sexual response. Schauer appears to be addressing the stimulus that simply bypasses the initial role of the higher brain and proceeds directly to a limbic and hormonal reaction. For Schauer that stimulus is more akin to a mechanical sex aid than it is to speech. The response to Schauer needs then only address similar stimuli of fear, horror, or anger, the visual image that causes a visceral reaction. That stimulus is also less akin to speech than it would be to a mechanical fear or anger inducing aid, such as a roller coaster ride or an assault.

Schauer's position that the brain is a superior audience to the genitals seems reasonable. It also seems reasonable, however, to conclude that the brain is a

192. Professor Carlson cites as scientific evidence for the theory studies of individuals with spinal cord injuries. Carlson, supra note 191. The intensity of their emotional feelings was weaker the higher in the spine the injury occurred and the larger the part of the body to which they were insensitive. Id. at 350. While Carlson does not explain why that effect might not be due to a lack of physical effects in the body, resulting from the spinal injury, rather than the lack of sensitivity to the effects, the conclusion would appear to be the same. The process by which emotions are felt in not self-contained within the brain but requires feedback from physiological responses.


194. Id. at 350.

195. Schauer's position has been characterized as arguing "that because pornography goes straight to the genitals without passing through intellectual processes it is better characterized as sex than speech." Deana Pollard, Regulating Violent Pornography, 43 Vand. L. Rev. 125, 135-36 (1990).
superior audience to the adrenals, and there is no reason to prefer either the genitals or the adrenals over the other. If material is violent enough to have a hormonal effect, Schauer's arguments would seem to carry over to exclude such material from the protections of the freedom of speech.

Schauer disagrees with this conclusion. He recognizes that violence might be considered obscene but states:

[T]he arguments that relate to the exclusion of pornography from the coverage of the Free Speech Principle are inapplicable to violence as such. The sex-aid approach to hard core pornography that shows such pornography to be scarcely communicative at all does not appear relevant to the depiction of violence. Although it is possible that a refined categorization approach to freedom of speech might grant publications featuring violence for its own sake (such as a martial arts movie) less protection than would be granted to, say, political speech, this would create problems because of frequent use of violence to emphasize a moral or political argument, as, for example, with the use of vivid depictions of violent death in a motion picture intended to point out the horrors of war. However, the comparison is not fairly made.

In considering hard-core pornography, Schauer hypothesized a film with absolutely no content other than close ups of sexual intercourse. There was no dialogue, no music, no artistic expression, and for Schauer, no communication. When he turns to a consideration of violence, he notes violent depictions can be used to make political or moral points. While violent material can be so used, so can pornographic material.

It is because Schauer eliminated the possibility of any political or moral message from the film in his hypothetical that his argument has power. An equivalent hypothetical of a film consisting of nothing but a person being carved up with a chainsaw, unaccompanied by music, dialogue, or artistic expression would be just as lacking in political, moral, or any other message. It would serve only to stimulate a visceral reaction. The brain would not be the audience, and the material would not come within the scope of Schauer's Free Speech Principle. Just as pornographic material begins to enjoy protection as it departs from the hypothetical genre and starts to contain a message aimed at the intellect, so too might violent material enjoy the protections of the First Amendment to the degree that it departs from the hypothetical and contains political, moral, or other messages aimed at the intellect.

Before leaving Schauer, and in particular the discussion of the James-Lange theory, it should be noted that that theory offers a response to the puzzlement expressed by some as to how the Miller test can require that to be obscene, material must be both sexually stimulating and offensive. If sexual stimulation resulting

196. SCHAUER, supra note 177, at 179.
197. Id. at 185.
198. See, e.g., CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 210 (1993). There
from a visual image occurs through the limbic system, the higher order brain can both recognize that stimulation and register disgust with either the image or the limbic reaction to the image. Even if some reactions of disgust are based in limbic responses, it would seem less odd that the higher order brain would be capable of recognizing two bodily responses than that the higher order brain would hold two conflicting attitudes.

III. The Media's Last Chance

The public may finally have reached the point where it will no longer tolerate inaction. If the media fail in the current attempts at self-regulation, the call for governmental regulation will certainly be heard again. Each renewed public outcry seems to gain strength, and Congress and the FCC will be hard-pressed to ignore public concern any longer.

The concerns expressed are not without foundation. In 1969, the National Commission on the Causes and Prevention of Violence found a link between television violence and violent behavior in viewers. The Staff Report to the Commission found, among the short-term effects of televised violence, that

\[ \text{exposure to mass medial portrayals of violence stimulates violent behavior when — (a) Subjects are either calm or anxious prior to exposure, but more so when they are frustrated, insulted, or otherwise angered. (b) Aggressive or violent cues are present (e.g., weapons of violence). (c) Subjects are exposed either to justified or unjustified violence, but more so when justified violence is portrayed.}\]

The Report also found evidence for the following long-term effects:

\[ \text{Exposure to mass media portrayals of violence over a long period of time socializes audiences into the norms, attitudes, and values for violence contained in those portrayals as . . . [among other factors] the primacy of the part played by violence in media presentations increases.} \]

\[ \text{. . . .} \]

\[ \text{Persons who have been effectively socialized by mass media portrayals of violence will under a broad set of precipitating conditions, behave in accordance with the norms, attitudes, and values for violence contained in medial presentations. Persons who have been effectively socialized into the norms for violence in the television world of violence would behave in the following manner: . . . They would probably resolve conflict by the use of violence[,] use violence as a means to}\]

are many puzzles in the Miller test. For one thing, the test seems to require an odd psychological state from the judge and jury. In order to be regulable, the materials must be simultaneously sexually arousing (the "prurient interest" part of the test) and "patently offensive." This is not an unrecognizable psychological state, but it entails a certain dissonance, and a certain attitude about sexuality, that are likely to be unusual or at least to be rarely confessed.

199. See BAKER & BALL, supra note 70.
obtain desired ends[,] use a weapon when engaging in violence[, and i]f they were policemen, they would be likely to meet violence with violence, often escalating its level.\footnote{200}

This cause-and-effect relationship between media violence and actual violence has continued to be credible. A 1981 article stated, "[T]he general consensus seems to be that there is a positive, causal relationship between television violence and subsequent aggressive behavior."\footnote{201} A more recent meta-analysis of more than two hundred methodologically sound studies on the subject reconfirmed the relationship.\footnote{202}

Interestingly, even studies of the relationship of pornography to violence against women find a correlation only for violent pornography. Professor Schauer, who served on the 1986 Attorney General's Commission on Pornography, sums up the scientific evidence on the violent effects of sexually violent and sexually explicit depictions:

The result of these experiments, which try to exclude the spurious by first isolating sex without the violence and then isolating violence without the sex, indicate most importantly that the violence is clearly not spurious. That is, if the violence disappears and we are testing only for the relationship between sex and sexual violence, there is no causal relationship, as the Report expressly announces. But if the sexualization (and not just the sexual explicitness) of the violence is eliminated, the evidence indicates that the strength of the causal relationship diminishes. Thus, although the studies indicate some relationship between non-sexualized violence and attitudes about sexual violence, or aggressive tendencies toward women, this relationship, in probabilistic terms, becomes stronger when the sexualization is added.\footnote{203}

While the studies have stressed television, the public concern over violent video games and the involvement in the action they allow would seem equally well founded, even if not yet scientifically established.

There is another way in which violence raises strong concern. It might be that sexual materials lead to earlier and more frequent sexual activities by young people, but that concern is addressable in ways in which the effects of violence are not. If warnings as to content accompany the broadcast of sexual material, parents can control what their children see. If children do happen to view material with sexual content, parents can discuss the issues that arise. Parents can at least attempt to instill in their children values that will withstand whatever the parents find objectionable in the media depiction of sex.\footnote{204}

\footnote{200. Id. at 376-77.}
\footnote{202. Comstock & Paik, supra note 72.}
\footnote{204. These values should also help the child resist peer pressure. Any forced sex or other abuse of}
The objection to violence is quite different. Warnings or v-chips would still allow parents to control their own children's access to violent programming. Parents may still be able to instill values that will prevent their own children from becoming violent through exposure to violent images. What parents cannot do is protect their children from the children of other parents who are not so vigilant. It is the fear that others are not raising their children properly and that those children will be led to violence by exposure to media violence that gives parents concern over the safety of their own children.

With sexual material the question is whether our own children's values are strong enough to withstand media images and perhaps peer pressure. With violent images the question is not solely whether our own children's values are strong enough that they are not led to be violent, but whether they will be the victims of violence by other children, whose values have been formed in an atmosphere of media violence not ameliorated by parental involvement.

These concerns are real, and the psychological literature shows that they are reasonable. The public will not tolerate another unfulfilled promise of self-regulation. In the past the First Amendment protections that were believed to attach to all nonsexual entertainment may have led Congress to defer time and again to policing by the media. If it is recognized that violent material may be obscene, without regard to its sexual content, the legal atmosphere will have changed.

It may well be that, even under a statute rewritten to include violence as obscene, little of what is broadcast or produced by major film studios would be considered obscene. Nonetheless, the recognition that violence may be obscene has corollaries that would have an impact. If violence may be obscene, the doctrine of variable obscenity would apply, so that material marketed to children could be judged by a standard of "obscene as to children," even if it were not obscene as to adults. Additionally, any argument that the FCC decency rules, approved in Federal Communications Commission v. Pacifica Foundation, are limited to the same variety of material as that included in the obscenity exception would be inapposite. If violence can be obscene, lesser degrees of violence can be indecent. If Congress comes to believe that it has the power to regulate violence, it will be difficult for it to ignore the next public outcry.

This may be the media's last chance at self-regulation of violence, and they would do well to avoid potential governmental action by making a real effort, rather than being driven off course by opportunities at greater revenue. Sex sells, but potential regulation and sanctions lead the industry to limit sexual content, at least where children may be viewing. Violence also sells, but the recognition of potential regulation and sanctions should lead the media to exercise similar discretion. If they do not, Congress and the FCC will have to set the standard.

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the child is more properly viewed as violence and, if there is a media cause, it is violent media, rather than sexual media, that is the cause. See supra notes 199-203 and accompanying text.
