THE COST OF ERRORS IN THE DEBATE OVER MEDIA HARM TO CHILDREN

Kevin W. Saunders


TABLE OF CONTENTS

INTRODUCTION ....................................................... 771
I. MEDIA VIOLENCE AND SOCIAL SCIENCE .................... 772
II. ERROR ANALYSIS ............................................. 782
CONCLUSION ........................................................ 793

INTRODUCTION

Much of the debate over children and the media turns on the issue of whether the media negatively impact children. I say much of the debate, because many would object to exposing children to sexual images even without a showing of any harm. It might simply be seen as greatly inappropriate. There are, in fact, laws limiting children's access to sexual materials that would be seen as appropriate for an adult audience, and such limitations have been found constitutional. 1

While it might be speculated that children exposed to sexual images may become prematurely sexually active, that has not been established. Even if a demographic study demonstrated a correlation between exposure to sexual materials and sexual activity in youth, the direction of any possible causation would be unclear. The sort of laboratory study that best demonstrates causation—exposing one group to the images of interest and comparing the later behavior of that group to a control group—would not only be inappropriate for sexual images, it may well be illegal. But again, for this particular subject matter, the Supreme Court had not required a scientific demonstration of harm. 2 Sexually provocative images simply do not enjoy the protection of the First Amendment, when distributed to children. 3

---

2. See id.
3. See id.
Advertising may also be seen as harmful to children. At least with regard to tobacco products—products children cannot legally purchase—the Supreme Court has recognized a strong enough interest in preventing tobacco usage by children and a tie between advertising and such use sufficient to allow restrictions on advertising.\(^4\) There have also been those who would find harm in advertising unhealthy foods to children,\(^5\) but bans on ads for these legal products may be more suspect, at least absent scientific justification.

By far the greatest interest in limiting children’s access to media on the basis of harm has been with regard to images of violence. This has been the subject of active debate for decades. From concerns over comic books and crime magazines in the 1950s,\(^6\) through concerns involving violent films,\(^7\) to recent concerns over violent video games,\(^8\) the issue has been the same: whether these influences cause children to become violent or otherwise injure them psychologically. The next section examines that issue.

I. MEDIA VIOLENCE AND SOCIAL SCIENCE

Media violence has been the subject of research by social scientists for decades. Most of that research has been on the passive media of film and

\(^4\) See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001). The Lorillard case struck down advertising bans but did so on the grounds that adult access to commercial information was unacceptably constrained and on the basis that some of the regulations at issue would have been ineffective at preventing the exposure of children to the ads. See id. at 540-53.

\(^5\) See, e.g., Ass’n of Nat’l Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979) (concerning an attempt by the FTC to adopt rules limiting advertising of heavily sugared products on children’s television and includes strongly expressed views by a commissioner as to harm).

\(^6\) Comic books were investigated by a committee of the U.S. Senate led by Senator Estes Kefauver in 1954; the concerns were over both sexual and violent contents. See COMIC BOOKS AND JUVENILE DELINQUENCY: INTERIM REPORT OF THE COMMITTEE ON THE JUDICIARY, S. REP. NO. 84-62, at 7 (1955). Also of interest is Kingsley Books v. Brown, 354 U.S. 436 (1957), a case still cited for the proposition that injunctions may issue against obscene material, but actually growing out of charges based on the distribution of a series of violence-filled paper booklets titled Nights of Horror.

\(^7\) See Video Software Dealers Ass’n v. Webster, 968 F.2d 684 (8th Cir. 1992); Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520 (Tenn. 1993). Both cases struck down restrictions on the rental of violent videos to minors.

\(^8\) See Interactive Digital Software Ass’n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003); Am. Amusement Mach. Ass’n v. Kendrick, 244 F.3d 572 (7th Cir. 2001); Video Software Dealers Ass’n v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004). These cases all struck down attempts to limit the access of children to violent video games. See also infra notes 50-63 and accompanying text.
television, rather than the more active medium of video games. That research has been recounted in a variety of sources, and it will not be repeated here. Instead, I will simply cite to the conclusions of the major health organizations to have examined the issue.

In July of 2000, a joint statement by six major professional organizations in the health field indicated that the science on causation is conclusive. The American Psychological Association, the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Medical Association, the American Academy of Family Physicians, and the American Psychiatric Association concluded that "well over 1000 studies . . . point overwhelmingly to a causal connection between media violence and aggressive behavior in some children." The American Academy of Pediatrics's earlier policy statement said that "[t]he vast majority of studies conclude that there is a cause-and-effect relationship between media violence and real-life violence," calling the link "undeniable and uncontestable." A representative of the same pediatrics group also testified before a 2000 session of the United States Senate Commerce Committee that there were more than 3,500 studies on the relationship between media and real-world violence, that "[a]ll but [eighteen] have shown a positive correlation between media exposure and violent behavior[,]" and that epidemiological studies conclude that "exposure to violent media was a factor in half of the 10,000 homicides committed in the United States the [year studied]."

There seems no longer to be any real debate on the issue in the scientific community, and there is a consensus view that there is a connection between media violence and aggression in the real world. The Surgeon General's report *Youth Violence* notes that ethical considerations bar using the randomized laboratory studies that best establish causation, but the report reaches the conclusion that "a diverse body of research provides strong evidence that exposure to violence in the media can increase children's

---

12. *Id.*
aggressive behavior in the short term." 14 Although less secure in concluding that there is a long-term causal connection, the report does conclude that there is a "small but statistically significant impact on aggression over many years." 15

While the conclusions of the scientific community are based on research on the passive media, it would seem reasonable that the more active involvement of video games would enhance the violence or aggressiveness inducing effect. The player is also a viewer, so effects on viewers would also be effects on players, but the player is more involved, and that would seem likely to increase the effect. But, the more recent vintage of video games, particularly those that include extreme violence set in an environment of realistic graphics, means that the social science has not had as long to develop.

That does not mean, however, that there is a complete lack of scientific research. In a study published in 2000, Professors Craig Anderson and Karen Dill used a combination of a study using correlational/demographic data and a laboratory study to examine the effects of violent video games. 16 As they saw it, the combination of the results from the two different sorts of study supported the conclusion that violent video game play causes violence in the real world. 17 They also expressed a belief that violent video games are of more concern than violent television or films, because the player identifies with the game aggressor and actively, if virtually, participates in the violence. "In a sense, violent video games provide a complete learning environment for aggression, with simultaneous exposure to modeling, reinforcement, and rehearsal of behaviors. This combination of learning strategies has been shown to be more powerful than any of those methods used singly." 18

Even in 2001, there was enough research to provide a basis for a meta-analysis on the issue of violent video games and real-world violence. 19

15. Id.
17. Anderson & Dill, supra note 16, at 787 ("The convergence of findings across such disparate methods lends considerable strength to the main hypothesis that exposure to violent video games can increase aggressive behavior.").
18. Id. at 788 (citations omitted).
Professor Anderson and Professor Brad Bushman, at that time were able to identify thirty-five research reports, and their meta-analysis led them to conclude that "[v]iolent video games increased aggression in males and females, in children and adults, and in experimental and nonexperimental settings."\(^{20}\) The experimental studies showed that "short-term exposure to violent video games causes at least a temporary increase in aggression,"\(^{21}\) while the nonexperimental, demographic studies showed that "exposure to violent video games is correlated with aggression in the real world."\(^{22}\)

A more recent article by the leading researchers in the field, published in 2003 in the American Psychological Association’s journal *Psychological Science in the Public Interest*,\(^{23}\) discussed media violence generally, reaffirming the conclusions of the health organization already presented, but also looked at the continuing research on violent video games. The authors had available, in addition to the sort of demographic and laboratory studies that had been available earlier, recently completed longitudinal studies.\(^{24}\) The authors examined two such studies, one published in 2003 and the other then still in press, showing a positive, statistically significant relationship between—in one case violent and in the other general—video game play and later aggressiveness.\(^{25}\)

Longitudinal studies are useful in studying the question of whether violent media causes real-world violence or whether those who are already violent simply choose to play violent games or watch violent films and television. By examining levels of aggressiveness at both ends of the study, the previously existing level of aggressiveness may be factored out of the aggressiveness level found at the conclusion of the study. Using such controls, the studies showed that playing the games was correlated to later aggressiveness.\(^{26}\) The authors did note that the conclusions may not have the greatest strength, given the fairly short term of the study, but called the studies

\(^{20}\) *Id.* at 357.

\(^{21}\) *Id.* (emphasis added).

\(^{22}\) *Id.*


\(^{24}\) See *id.* at 90-91.

\(^{25}\) See *id.* at 91 (citing Michael D. Slater et al., *Violent Media Content and Aggressiveness in Adolescents: A Downward Spiral Model*, 30 *Comm. Res.* 713 (2003); N. Ihori et al., *Does Video Game Use Grow Children’s Aggressiveness?: Results From a Panel Study*, in *Social Contributions and Responsibilities of Simulation & Gaming* 221 (K. Arai ed., 2003)).

\(^{26}\) See Anderson et al., *supra* note 23, at 91.
“strongly suggestive.” Adding the recent studies to the conclusions drawn from the earlier studies, they concluded:

These studies offer support for a connection between playing violent video games and increased likelihood of engaging in aggression. The experimental studies demonstrate that in the short term, violent video games cause increases in aggressive thoughts, affect, and behavior; increases in physiological arousal; and decreases in helpful behavior. The cross-sectional studies link repeated exposure to violent video games with aggressive and violent behavior in the real world. The longitudinal studies further suggest long-term effects of repeated exposure to violent video games on aggression and violence.28

A more recent group of studies was published in an issue of the Journal of Adolescence devoted to video game effects. One study of eighth and ninth graders concluded that those exposed to more video game violence “were more hostile, reported getting into arguments with teachers more frequently, were more likely to be involved in physical fights, and performed more poorly in school.”29 Interestingly, and relevant to the question of whether violent video game play causes aggressiveness or instead already aggressive people simply choose to play violent games, the study showed that “low-hostile students who have the highest exposure to violent video games are more likely to have been involved in fights than high-hostile students who have the lowest exposure to violent video games.”30

Professor Anderson also published in the issue an update of his meta-analysis of the body of violent video game research.31 He found three conclusions he thought important.

First, as more studies of violent video games have been conducted, the significance of violent video game effects on key aggression and helping-related variables has become clearer. Second, the claim (or worry) that poor methodological characteristics of some studies has led to a false, inflated conclusion about violent video game effects is simply wrong. Third, video game studies with better methods typically yield bigger effects, suggesting that heightened concern about deleterious effects of exposure to violent video games is warranted.32

27. Id.
28. Id. at 93.
30. Id. at 18.
32. Id. at 120.
The conclusions of the social scientists with regard to the passive media seem in the process of carrying over to video games and demonstrating the validity of concerns with that medium.

As an aside, there is important work by Lt. Col. Dave Grossman, who formerly taught psychology at the United States Military Academy, that should raise concerns even among those who are reluctant to accept conclusions drawn from psychological studies. Between World War II and the Vietnam War, the military increased the willingness of soldiers to fire on the enemy from roughly 20 percent to over 90 percent. This impressive result was accomplished through the use of simulators, with the current variety of simulation being very similar to the video games played by children. The major difference is that children are not taught military discipline to go along with the willingness to use a weapon.

If that still seems too much a psychological conclusion, Grossman also notes the actions of the shooter in the Paducah, Kentucky school shootings. A child with virtually no firearms training, but with extensive experience on video games, managed to inflict eight head and chest wounds on eight separate victims with only eight or nine shots. That is a phenomenal display of accuracy that astounded law enforcement officers. He also did so in a manner that Grossman says contradicts natural inclinations to empty the weapon's magazine at the target perceived to be the greatest threat. Instead, the shooter took one shot at each victim, before moving on to the next, a practice that leads to success in video games. One need not have much faith in social science research to appreciate the skill training that would make one more deadly, without regard to the origin of the homicidal urge.

Returning to the psychological studies, those who might be reluctant to accept any causal connection between media violence and real-world violence can argue that all the experiments really demonstrate is correlation, rather than causation. Of course all that can ever be directly observed is correlation, and causation is always an inference from that correlation. When the correlation or conjunction is constant, that inference is made with great confidence.

34. See id. at 250-51.
35. For more description of the Paducah shootings, see Saunders, supra note 16, at 53-54 (also citing to newspaper accounts).
36. See Dave Grossman & Gloria DeGaeatao, Stop Teaching Our Kids to Kill: A Call to Action Against TV, Movie & Video Game Violence 4 (1999) ("The FBI says that the average experienced law enforcement officer, in the average shootout, at an average range of seven yards, hits with approximately one bullet in five.").
37. See id. at 75-76.
Where the correlation is less than constant, causation may seem less sure. Yet, we conclude that there is causation between tobacco use and lung cancer, despite the fact that not everyone who smokes gets lung cancer and some who suffer from lung cancer never smoked. We also accept as causative the relations between secondhand smoke and lung cancer, lead exposure in children and lower IQs, use of the nicotine patch and smoking cessation, calcium intake and bone mass, and a number of other correlations, all of them less strongly established than that between media violence and real-world aggression.  

The continued reluctance to accept causation in the psychological context, while accepting it in the areas of physical conditions, may stem from an inability to understand the causal route. While few of us understand the causation of lung cancer sufficiently to explain the cellular effect of tobacco smoke on the tissue of the lungs, it seems plausible that such regular irritation could cause cellular changes. Effects on the mind or brain seem more mysterious. There is, however, recent work that indicates how this sort of psychological causation could work. While it had been thought that the construction of the brain was complete in early childhood, that turns out to be true only of the cognitive regions. Babies are born with as many synaptic connections between the nerve cells in the cognitive regions as adults have, and increase to a level twice that of adults at a point between one and two years of age. At that point, as the child's basic understanding or construction of the world develops, this over-blooming of synapses is pared to again match the adult level. Recent science has shown that there is a similar over-blooming of synapses in the prefrontal cortex—the region of the brain prominent in judgment and inhibition—in the years around puberty, followed by a similar paring in the teen years. The synapses that survive, in both cases, are those that are reinforced by interactions with the environment.

38. See Anderson & Bushman, supra note 19, at 357-58 (establishing the correlation between media violence and real world aggression).

39. For a general presentation of the recent science, see Barbara Strauch, The Primal Teen: What the New Discoveries About the Teenage Brain Tell Us About Our Kids (Bantam Books 2004).

40. See id. at 19-21.

41. See id.

42. See id.

43. See id. at 20-21.

44. See, e.g., Peter R. Huttenlocher & Arun S. Dabholkar, Regional Differences in Synaptogenesis in Human Cerebral Cortex, 387 J. COMP. NEUROLOGY 167, 176-77 (1997) ("Stabilization of randomly made synapses appears to be activity-dependent. Synaptic contacts that are not included in neuronal circuits are gradually eliminated. . . . Synapse elimination, in contrast to synaptogenesis, seems to be at least to some extent environmentally regulated.")
conclude that an environment heavily infused with violence, even of a virtual sort, would have an effect on the synapses that remain and are used in exercising judgment in the future, seems with this new understanding less difficult to comprehend than the genesis of lung cancer.

Despite the science backing the claims of media violence causation of real-world violence and the acceptance of the health profession, there are those who remain unconvinced. Professor Jonathan Freedman is perhaps the leading skeptic within the social science community. He finds fault with the methodology and conclusions of the studies purporting to establish causation. A participant in this Conference, Marjorie Heins, also firmly rejects any causal impact for media violence.

The courts also have expressed skepticism over the asserted dangers of media violence. In the cases of the passive media, statutes prohibiting the rental of violent videos to minors were declared unconstitutional in cases arising in Missouri and Tennessee. The same skepticism has carried over to the first cases arising from attempts to limit youth access to violent video games.

In the first case based on an attempt to limit youth access to violent video games, the ordinance was also eventually declared unconstitutional. An ordinance passed in 2000 by the combined city and county council for the City of Indianapolis and Marion County required that video arcades not allow those under eighteen to play violent games, unless accompanied by a parent, guardian, or custodian. The ordinance was challenged by the video games industry but did fare well in federal district court. The district court relied primarily on an extension of the variable obscenity doctrine of *Ginsberg v. New York*, stating that "the court is not persuaded there is any principled constitutional difference between sexually explicit material and graphic violence, at least when it comes to providing such material to children."

45. Professor Freedman is a long time skeptic; for an example of his early work, see Jonathan L. Freedman, *Effect of Television Violence on Aggressiveness*, 96 PSYCHOL. BULL. 227 (1984). More recent conversations with Professor Freedman show that he remains just as strongly skeptical and that his skepticism carries over to video games.


47. See Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992); Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520 (Tenn. 1993).


49. *Id.*

50. *Id.*


court coupled that conclusion with a recognition that there is a strong
government interest in limiting what it saw as harmful effects of violent video
games on children, in refusing to enjoin enforcement of the ordinance.\footnote{3. See Kendrick, 115 F. Supp. 2d at 943.}

The United States Court of Appeals for the Seventh Circuit was less
sympathetic to the city/county’s arguments. The court rejected the inclusion
of violent material with sexual material for purposes of an application of the
variable obscenity approach of \textit{Ginsberg.} \footnote{4. See \textit{Am. Amusement Mach. Ass’n v. Kendrick}, 244 F.3d 572 (7th Cir. 2001).} More important for the purposes
of this Essay, the court, with Judge Posner writing, rejected any connection
between violent video games and real-world violence. In the court’s view of
the social science, “The studies do not find that video games have ever caused
anyone to commit a violent act, as opposed to feeling aggressive, or have
causd the average level of violence to increase anywhere.”\footnote{5. \textit{ld.} at 578-79.} In spite of the
body of empirical evidence the health care professions and the military seem
to find convincing, Judge Posner concluded that “[c]ommon sense says that
the City’s claim of harm to its citizens from these games is implausible, at best
wildly speculative.”\footnote{6. \textit{ld.} at 579.}

The second attempt was a St. Louis County ordinance, also passed in
2000, that similarly limited arcade play by minors without a parent’s
permission, but also limited sales and rentals.\footnote{7. See \textit{Interactive Digital Software Ass’n v. St. Louis County}, 200 F. Supp. 2d 1126
(E.D. Mo. 2002), rev’d, 329 F.3d 954, 959 (8th Cir. 2003).} This time, the limitation was
on those younger than seventeen.\footnote{8. \textit{ld.} at 1141.} Here, too, the federal district court refused
to enjoin enforcement.\footnote{9. \textit{ld.}} The court concluded that video game play is not
protected by the First Amendment, a position that may seem odd but can
actually be defended.\footnote{10. \textit{See Saunders, supra note 16, at 93-105.}} With regard to the harm issue, the court took as
opposite a position from Judge Posner’s as may be maintained, saying, “For
plaintiffs to . . . argue that violent video games are not harmful to minors is
simply incredulous.”\footnote{11. \textit{Interactive Digital Software Ass’n}, 200 F. Supp. 2d at 1138.}

When the case reached the Eighth Circuit, the court was not as skeptical
as the Seventh Circuit had been, but still rejected the claims of danger. The
court examined what seemed to be a limited submission of psychological
research and called the conclusion of the science submitted a “vague
generality [that fell] far short of a showing that video games are
psychologically deleterious," and the studies "ambiguous, inconclusive, or irrelevant." Since the science has advanced, even in the period since the Eighth Circuit opinion, and the court's objection did not seem to express the skepticism of the Seventh Circuit, it is not clear how that court might currently react to a well-supported claim.

The most recent court challenge to video game restrictions grew out of a prohibition in the State of Washington against distributing to minors video games in which the player shoots law enforcement officers. The state had sought to enact a more limited statute, seemingly in hope that a statute narrowly tailored to concerns over police safety would be constitutionally acceptable. The state had also said it wanted "to foster respect for public law enforcement officers." Interestingly, it was this limited approach that led to the statute's rejection. With regard to general concern over media, and especially video game violence, the court seemed sympathetic. The court found that the state had presented research and expert opinions from which one could reasonably infer that the depictions of violence with which we are constantly bombarded in movies, television, computer games, interactive video games, etc., have some immediate and measurable effect on the level of aggression experienced by some viewers and that the unique characteristics of video games . . . makes video games potentially more harmful to the psychological well-being of minors than other forms of media. In addition, virtually all of the experts agree that prolonged exposure to violent entertainment media is one of the constellation of risk factors for aggressive or antisocial behavior . . . .

The statute was, nonetheless, held unconstitutional, because there was no evidence that games in which the player shoots law enforcement officers are any more dangerous than other first person shooter games. While the court still found fault with the studies submitted, it indicated that a statute aimed at the most violent depictions, rather than one based on the identity of the virtual victim, and with more support from scientific evidence could be held constitutional.

---

62. Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 959 (8th Cir. 2003).
63. Id.
65. Id. at 1186.
66. Id. at 1188.
67. Id. at 1191.
68. See id. at 1190. The court said that it could not offer advisory opinions, but indicated that "[k]ey considerations" in analyzing future violent video game statutes will be:

- does the regulation cover only the type of depraved or extreme acts of violence that
It is interesting to note that the district courts seem to have been more receptive to claims that violent video games are harmful. Since this issue is primarily one of fact—the danger of the games—even if in combination with a question of law—whether the First Amendment must give way to that danger—it would seem odd for appellate courts to reject the district court findings, but that is clearly what has happened. What must be emphasized, however, is the contingent nature of the conclusions of the appellate courts and of any general impact of the district court in the Washington case. The social science in the area continues to develop, and the conclusion of a court two years ago or even six months ago that the science is inadequate to justify a restriction does not mean that it remains inadequate today. It is a conclusion that, as long as it is negative, has no precedential effect and is an issue that must be relitigated every time a violent video game ordinance or statute is passed and challenged. Since these efforts are continuing,69 the courts will have to look at the impact of violent video games with some regularity.

II. ERROR ANALYSIS

While those who favor restrictions on children's access to media may or may not rest their positions on harm, any findings of harm certainly strengthen the call and justification for limitations. On the other hand, those who advocate a regime in which the access of children is more wide open seemingly must deny that media may do harm to children. While there is nothing logically contradictory in arguing that violent media harms children but that they should be allowed exposure anyway, it would seem an unpalatable position. Thus, Marjorie Heins denies any causative effect for media violence in arguing for allowing children to experience that variety of media.70 And courts that have struck down statutes limiting children's play of violent video games cases have denied any causative effect, or they have at least found the social science unconvincing.71

---

69. A list of current attempts to limit youth access to violent video games is maintained by the Child Responsible Media Campaign. See Child Responsible Media Campaign, http://www.medialegislation.org (last visited Sept. 27, 2005).

70. See HEINS, supra note 46.

71. See supra notes 54-68 and accompanying text.
Perhaps the debate would benefit from an analysis of the effects of possible errors in the two positions. After all, social science is an inexact science. Correlations are found, and causation might be asserted, under certain conditions, although the jump from correlation to causation raises objections. 72 Even the conclusions of correlation are based on statistical analysis that is by its nature probabilistic. Statistical significance is found in a correlation for which the chance is less than 5 percent that the results noted are simply the result of chance. Mathematical or probabilistic techniques are used to measure the likelihood that a group that saw a violent film and was then more aggressive than a control group was simply the more aggressive group in the first place. If that chance is less than 5 percent, the result is significant. Furthermore, there are always opportunities to criticize the design of a study. Thus, there may be seen to be a lack of certainty for these conclusions, and there is certainly room for some to refuse to accept those conclusions. Even if a lack of certainty might be taken to suggest caution in basing policy on the results, those who deny the validity of the conclusions derived from the social science should also recognize the possibility that they are wrong.

Statisticians recognize two types of error that may occur in a study. In an experiment in which a hypothesis is tested, there are two possibilities as to the statistical conclusion drawn. The study may lead the researcher to accept the hypothesis or to reject the hypothesis. There are also two possibilities regarding the actual truth of the hypothesis. There are then four possibilities. The experiment may lead to the acceptance of a hypothesis that is in fact true of the world. The experiment may also lead to the rejection of a hypothesis that is in fact false. In neither of these cases has an error been made. The other two combinations represent errors. A Type I error involves the rejection of a hypothesis that is actually true, while a Type II error involves the acceptance of a hypothesis that is in fact false. 73 What may prove to be of interest is an examination of the consequences of the two types of error in the context of expression and children.

What is the cost of erroneously rejecting the hypothesis that the media cause harm to children? The most dramatic answer is in the case of media violence. If the science is right as to media violence causing violence in the

72. See supra notes 38-44 and accompanying text.
73. Error types are discussed in any introductory statistics text and at thousands of websites. See, e.g., Intuitor.com, Type I and Type II Errors, http://www.intuitor.com/statistics/T1T2Errors.html (last visited Sept. 27, 2005). There are differences between precisely what is meant in the statistical probabilities of wrongful rejection of acceptance of a null hypothesis and the acceptance or rejection at issue here, but using the categorization seems helpful.
real world, the cost is psychologically damaged and, perhaps, murdered children. If media experience teaches children to react to certain situations with violence, that alone is psychological damage. A person who reacts too readily with violence, when some other option is feasible, cannot be considered a healthy individual. That violence will also have a victim, and that too is a cost of the error of rejecting the current science.

That is, of course, not the only possible cost, even if it is the best established scientifically. There is also the possibility that advertising negatively affects the health of children by making unhealthy foods attractive and by Interesting children in alcohol and tobacco. If social scientists can establish that link, and it is erroneously rejected, these unhealthy results will be the cost of the error.

Another concern may be the effects of hate speech, especially hate-filled or supremacist music. The science on this issue has yet to develop, but hate groups recognize, or believe, that this music has its effect on racial attitudes. Resistance Records is at the forefront of this effort and has been described by the Anti-Defamation League as “a thinly disguised mouthpiece for the most dangerous organized hate group in America,” the National Alliance.74 Resistance Records’s catalog includes hundreds of hate-filled music CDs by groups such as Nordic Thunder, Angry Aryans, Blue-Eyed Devils, and RaHoWa, a contraction of “racial holy war[s].”75

The National Alliance uses this music as a tool to recruit the next generation of racists. Speaking of the Alliance’s leader, the Anti-Defamation League says, “Pierce believes hate music—with its racist, anti-Semitic and anti-government messages—can be used... effectively to attract troubled youths. His stated goal is to fill the ranks of the National Alliance with a new generation of haters.”76 The ADL quotes Pierce in explaining how hate music serves his goal.

As hate rock bands subtly infiltrate mainstream youth culture, they capitalize on teenage rebelliousness and channel it into enmity and fury against “non-Aryans.” Pierce has explained, “My aim with resistance music is to give them a rationale for alienation, to help them understand why they’re alienated, to help them understand the programs and policies behind these alienating conditions, and to give them a target, a purpose for their anger and rage.” Coupled with these organizations’ slick and enticing Web sites, hate rock is part of a multimedia approach that packs a powerful and seductive punch. Therein lies the most dangerous threat.77

76. Id.
77. Anti-Defamation League, The Role of Hate Rock in the Plans of the National
Again, there is not the science that there is for media violence, but it seems racists recognize the efficacy of this music for recruitment. It would, in fact, seem unlikely that there ever would be such science. Demographic studies are certainly possible, but the sort of laboratory experiment best used to demonstrate causation, exposing children to racist music and comparing the children's later racist sentiments to those of a control group, would be unethical. While there may never be social science adequate to show causation, the hypothesis that there is causation may still be erroneously rejected. The cost of that rejection will be the proliferation of racism.

It is important to note that these costs are likely greater, when youth are involved, than are the analogous costs for adults. While violence may have effects on adults, it is the effect in the formative years that is of most concern. The same would be true for advertising, although clearly advertisers are also quite good at appealing to adults. Adults, however, are at least capable of recognizing the nature of advertising in a way children may lack. Similarly, instilling racist attitudes in children, before they may have come to have friends of other races, presents particular concerns.

Turning to the other possible error, what are the costs of accepting the hypotheses and limiting children’s access to media thought harmful, when it is in fact not harmful? Answering that question is best answered by looking to the values furthered by the First Amendment.\textsuperscript{78} While the costs of any errors in limiting adult access would be unacceptably high, the cost of an erroneously imposed limitation on youth is nowhere near as high.

The most important function served by the First Amendment is the protection of the political speech necessary for democratic self-government. Self-government requires that the individual have the right to speak to others and attempt to convince them of the wisdom of his or her position on matters of public concern. The individual also has an interest in receiving information as part of coming to a decision on how to vote on the issues of the day. As Alexander Meiklejohn put it,

\begin{quote}
It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed. The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.\textsuperscript{79}
\end{quote}

\begin{footnotes}
\textsuperscript{78} This examination is undertaken in considerably more detail in KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 19-42 (2003).
\textsuperscript{79} ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT 26-27 (1948).
\end{footnotes}
It is clear that limits on adult speech bear at least the risk of serious damage to this political basis for free expression. But, the risk is nowhere near as great when the expression to children is limited.\textsuperscript{80} Turning once again to Meiklejohn, we find the additional explanation of speech in the political process: “Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good.”\textsuperscript{81} Children are, of course, not among those who make political decisions, so the importance Meiklejohn sees for free speech is lessened. Since children do not have the franchise, there is not the same importance in their being fully informed.\textsuperscript{82}

It is, however, important to recognize that, as children approach eighteen, the self-government rationale for free expression does begin to become important. Children become voters on turning eighteen, and if they are not informed at that point, they cannot be competent voters. They need to learn their participatory roles, both gaining information and adding new voices to the political debate.

This growing interest has been recognized by a number of scholars. Dean John Garvey writes of “spring training” interests in older children’s speech.\textsuperscript{83} Just as baseball players prepare for the regular, real season with spring training games, children need training for the real political world.\textsuperscript{84} As Garvey notes, the training interest, while it may be important, is not as important as society’s interest in the free expression of those who are already full participants, and the balance between expression interests and harm may be different for children than for adults.\textsuperscript{85}

Professor Franklin Zimring suggests that adolescents should be seen as at a “learner’s permit” stage between infancy and adulthood, with more freedom than young children but less freedom than adults enjoy.\textsuperscript{86} Adolescents need enough freedom of expression to develop the skills

\footnotesize
\begin{itemize}
\item \textsuperscript{80} There are also issues of expression by children; those issues are not present in this effort, which is aimed at justifying limits on expression to children. Expression by children is also addressed in \textit{Saunders, supra} note 78.
\item \textsuperscript{81} \textit{Meiklejohn, supra} note 79, at 26.
\item \textsuperscript{82} There may be importance in hearing from children, especially older children who may have a perspective on issues involving them, that would benefit the adult community in making political decisions.
\item \textsuperscript{83} See \textit{John H. Garvey, What Are Freedoms For?} 106-11 (1996).
\item \textsuperscript{84} See \textit{id}.
\item \textsuperscript{85} See \textit{id}.
\item \textsuperscript{86} See generally \textit{Franklin E. Zimring, The Changing Legal World of Adolescence} (1982) (describing the process of growing up using a “phasing approach”).
\end{itemize}
necessary for their future participation as full members of the political community.  

The recognition of these training interests speaks in favor of allowing older children greater access to expression. Seventeen-year-olds must have access to political tracts, but that does not mean that twelve-year-olds or even sixteen-year-olds should have access to anything they may want. Society may decide that, for these children, the potential for harm is not outweighed by the political role of free expression.

Closely related to the political role of free expression is the idea of the marketplace of ideas. The marketplace metaphor is broader than, but includes, the political basis for free expression. The search for truth occurs not only in politics but in science and any other intellectual endeavor. The marketplace metaphor asserts that the test for truth is the acceptance of a position in the marketplace of ideas. As with markets for goods, the public will eventually discover the better products. Almost tautologically, the product that dominates the market, determined by individual decisions, is the best product. In the same vein, the result of millions of individual decisions as to what position or opinion to accept is taken as the best test of the truth.

The theory was famously expressed by Justice Holmes in his explanation of the freedom of expression in Abrams v. United States. He recognized that people have a desire to suppress what they see as incorrect opinion, but suggested it is unreasonable to think of oneself as infallible and able to determine the falsity of the positions asserted by others. As Holmes put it,

When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

While Holmes deserves credit for applying the marketplace of ideas justification to the First Amendment’s freedom of expression, the idea is of older vintage.

---

87. See id. at 89-96.
88. I do argue that the final decisions should be in the hands of the parents, absent strong reasons otherwise. The restrictions argued for are only on the direct provision of harmful materials to other people’s children. See SAUNDERS, supra note 78, at 91-95.
89. 250 U.S. 616 (1919) (Holmes, J., dissenting).
90. See id. at 630.
91. Id.
John Stuart Mill, in his 1859 work *On Liberty*, argued that there is value in protecting expression, whether the position taken in the expression is true, false, or a bit of both. If the position is true, an attempt to suppress the expression is the suppression of the truth and contrary to the goal of the search for the truth. While one might argue that the opinion in question is not in fact the truth, and so suppression is not harmful, that would be to assert an infallibility Mill sees as unreasonable. If the asserted position is partially true and partially false, allowing its expression and its interaction with other opinions contributes to the thesis-antithesis-synthesis process that may lead to a better approximation of the truth. Mill also says that even when the asserted position is actually false, allowing its expression has value, because coming to understand its falsity leads to a better understanding of why the opposing opinion enjoys its acceptance.

This marketplace of ideas metaphor also finds voice in the opinion of another justice of the Supreme Court. Justice Brandeis, in his concurrence in *Whitney v. California*, said that, rather than suppression, the remedy for bad speech is correcting speech. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

A consideration of the marketplace and children may, however, lead to a different conclusion. More speech may not adequately remedy bad speech. Our system of government may require that we assume that an adult, having heard both sides, will come to the right result, but the assumption need not carry over to children. The suppression of speech to adults out of concern that it will lead them astray is an assertion of intellectual superiority, even an infallibility, not acceptable under our theory of government. When it comes to children, however, there is less reason to assume that they will, having heard all the competing views, come to the best conclusion. Telling a child that he or she is wrong is not to assert an absolute infallibility but only a relative infallibility. It is not the denial of an assumed equality of views of adults but a recognition that children may be more easily led astray.

A younger child is in the process of constructing a working model of the world. The project requires guidance, and the issue is who will provide that

93. *Id.*
94. *Id.*
95. *Id.*
guidance. Clearly the parents should play the primary role. The state, through the schools, will also play a role for those children who attend public school. But, does the video game dealer also have to be allowed a role in guiding the construction? To allow that role may well cause harm, while denying it seems to have little effect on the search for truth.

The last role for free expression to be considered here is one of fostering autonomy. Professor Edwin Baker argues that a fundamental purpose behind the First Amendment is fostering “individual self-fulfillment.”98 He argues that every individual has a right to self-realization—self-determination of self-definition—and that part of this is the right to express one’s thoughts and to have access to the media that help define you.99

Professor David Richards100 also finds a basis for free expression in autonomy.

People are not to be constrained to communicate or not to communicate, to believe or not to believe, to associate or not to associate. The value placed on this cluster of ideas derives from the notion of self-respect that comes from a mature person’s full and untrammeled exercise of capacities central to human rationality... Freedom of expression... supports a mature individual’s sovereign autonomy in deciding how to communicate with others; it disfavors restrictions on communication imposed for the sake of the distorting rigidities of the orthodox and the established. In so doing, it nurtures and sustains the self-respect of the mature person.101

Note, however, that Richards would seem to recognize that children might be treated differently, that it is the autonomy interests of the “mature individual” that requires freedom of expression. An autonomy basis for a freedom to obtain information or expression is based on the belief that that adult is in the best position to determine his or her own best interests. That is an unreasonable assumption where younger children are involved. They are not the best judges of their own interest; others may know far better what is in their real interest.

For Baker and Richards, free expression seems to be one facet, even though an important one, of a more general right to be free from government interference in making decisions that define us as individuals. These autonomy-based arguments also find earlier expression in the philosophy of John Stuart Mill. Just as Mill bases his free speech position on its usefulness...

99. See Baker, Human Liberty, supra note 98; Baker, Scope, supra note 98.
101. Id. at 62 (emphases added).
in reaching the truth, he also argues that utility may be advanced by allowing individuals to make their own decisions on self-regarding behavior.\textsuperscript{102} Experimentation may lead to a better lifestyle that others will come to accept as superior.\textsuperscript{103}

In \textit{On Liberty}, Mill asserts that society’s attempts to control the individual’s lifestyle decisions are unjustified, except when necessary to prevent harm to others.\textsuperscript{104} If there is no harm to others, Mill says “neither one person, nor any number of persons, is warranted in saying to another human creature of ripe years, that he shall not do with his life for his own benefit what he chooses to do with it.”\textsuperscript{105}

Here, too, note Mill’s limitation to humans of “ripe years.” Mill was more willing to impose restrictions on the decision-making rights of children. In examining possible rationales for paternalistic behavior toward adults, Mill argues against punishing adult self-regarding behavior in part because society has had the opportunity to instill in its “weaker members” the standards of expected behavior.\textsuperscript{106}

Society has had absolute power over them during all the early portion of their existence: it has had the whole period of childhood and nonage in which to try whether it could make them capable of rational conduct in life. The existing generation is master both of the training and the entire circumstances of the generation to come. . . . If society lets any considerable number of its members grow up mere children, . . . society has itself to blame for the consequences.\textsuperscript{107}

Societal views on autonomy seem to comport with this distinction between children and adults. We may believe that the individual should be allowed to make the decision whether or not to smoke or drink; few would argue that the autonomy rights of children should have that same scope. Parents make decisions for children with regularity, and society is willing to back up those decisions by prohibiting the sale of cigarettes and alcohol to minors. To the degree that theories of autonomy support access to media, those arguments lose their strength when the potential consumer of the media is a child.

There are a couple of additional costs that could theoretically attach to placing limits on the distribution to minors of material thought to be harmful. While it has been argued that, since children do not participate in self-government, restrictions have no effect on that First Amendment rationale,

\begin{itemize}
  \item \textsuperscript{102} See Mill, \textit{supra} note 92.
  \item \textsuperscript{103} See id.
  \item \textsuperscript{104} See id.
  \item \textsuperscript{105} Id. at 71 (emphasis added).
  \item \textsuperscript{106} Id. at 76-77.
  \item \textsuperscript{107} Id. at 77.
\end{itemize}
that conclusion may be true only in the short run. That is, limits on what children hear have no immediate effect on politics, since children do not vote. But, what of a longer-term effect? There may be concern that government can affect future politics by indoctrinating children in the present. The process would bear fruit when the indoctrinated children reach the age of majority and begin to participate politically.

This appears to be the danger Judge Richard Posner had in mind in his opinion in *Kendrick*. He argued against the claim that the city and county could help parents enforce their wishes with regard to what is appropriate for their children.108 As Judge Posner, writing for the court, explained:

Children have First Amendment rights. This is not merely a matter of pressing the First Amendment to a dryly logical extreme. The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion. Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech before they turn eighteen, so that their minds are not a blank when they first exercise the franchise. And since an eighteen-year-old's right to vote is a right personal to him rather than a right that is to be exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either. People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.109

This view may seem in conflict with that of the Supreme Court in *Ginsberg*. There the Court noted two state interests justifying limits on distributing indecent material to children. The state had its own interest in the well-being of youth, but the Court also recognized a parental interest, saying that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society" and concluding that the state may support the parents in filling that role.110 The reason for the claim that this is only possibly a conflict is that the statute in *Ginsberg* was aimed at distribution to those under seventeen, while the limits in *Kendrick* were aimed at those under eighteen.111 Indeed, this age difference seemed to make a

109. Id. at 576-77 (citations omitted).
111. Id. at 629; *Kendrick*, 244 F.3d at 572. It is, of course, also true that the statute in *Ginsberg* addressed sexual material, long accepted as unprotected by the First Amendment when obscene, and adjusted the test for obscenity to take into account the age of the audience, while the ordinance in *Kendrick* addressed violence. Nonetheless, where the issue is the right of the parent versus the child, it is not clear that this should make a difference.
difference in the Court's consideration in the Internet regulation case *Reno v. American Civil Liberties Union*, where the Court, in part, distinguished *Ginsberg* from the Internet regulations under consideration on the basis of a seventeen-versus eighteen-year-old-based regulation. If allowing limitations only for those under seventeen would answer Judge Posner's concerns, that may be a reasonable requirement. Children under seventeen would be protected. Children seventeen and older, perhaps less in need of protection, would still have an opportunity to play violent video games and do whatever else it takes to become a competent voter.

There is one other response to Judge Posner's orthodoxy/Nazism concern. First, it is true that the Nazis recognized the potential for indoctrinating children, as did the communist youth movement. Lenin is reputed to have said: "Give me four years to teach the children and the seed I have sown will never be uprooted," and Hitler said: "Give me [your] children, [and] I will give you a nation." But the difference in those cases and the present situation in the United States is that in Nazi Germany and communist Russia there was the threat of parents who had the temerity to disagree with the government being turned in for expressing their contrary views to their children. In the United States, the rights of parents to control the education of their children would mitigate any abuse by the government. So long as parents remain free to expose their children to media disapproved of by society, the pluralism of one generation will carry over to the next.

Another possible danger to media limitations is that children may be denied access to material to which they must have a right. For example, children may not be denied access to contraceptives, at least not by the government. Furthermore, children have certain rights regarding abortion; they may have abortions without parental permission, if they convince a judge that they are mature enough to make the decision themselves or that the

115. These rights are firmly established; they were first recognized in cases involving parental rights to choose the education their children receive. See *Pierce v. Soc'y of the Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). In more recent times, the Court, in *Reno*, distinguished *Ginsberg*, at least in part, on the basis that the statute at issue in *Ginsberg* did not prevent parents from providing the objectionable material to their own children, while the Internet statute at issue in *Reno* could have applied to parent-child communication. See *Reno*, 521 U.S. at 864-67.
abortion would be in their best interests.117 Given that those rights are constitutionally recognized, information relevant to their exercise would also seem constitutionally protected.118 Beyond the limited class of speech that might claim to be on topics regarding the constitutional rights of children, wise policy would dictate that other information important for the psychological development of children be accessible to them and that restrictions be based on good evidence of harm to that psychological development and well-being.

Not all might trust the government to make such wise choices, but again remember what the two alternatives are. If the government is allowed to impose restrictions, parents who disagree may still obtain the materials for their children. If government is not allowed to impose restrictions, vendors may provide whatever they wish to children, with of course the exception of sexually explicit material, and good luck to parents who try to limit what their children receive.

CONCLUSION

There is still debate over what the social science demonstrates regarding media harm to children. While the majority of social scientists and health professionals believe that, at least with regard to violent media, harm is established, there are those who believe that the social science fails to show that children are hurt. The operative word here may be “believe,” and the skeptics are not in the same vein as those who might believe that the world is flat. The nature of social science and psychology, based as they are on probability and given the seemingly mysterious qualities of the mind, makes them more subject to skepticism. While I strongly agree with the health community, I do not see those who disagree as being the equivalent of those who would deny other scientific evidence.

If the debate is not resolved, perhaps there needs to be a reconsideration of possible consequences of errors by either side. If those who deny the social science are wrong, children are being harmed in ways that might be avoided by allowing media restrictions. If the health community is wrong but restrictions are nonetheless allowed, then children would be denied access to media that actually does them no harm. I am willing to live with my potential error. Children don’t get to play violent video games and may have to play

117. This has been the law since Planned Parenthood v. Danforth, 428 U.S. 52 (1976).
118. Even in the era in which the Court held that advertising for legal activities could be prohibited, the restrictions were aimed at advertising vices such as gambling. See, e.g., Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986). The restrictions were with regard to acts that were far from the protections of the Constitution.
soccer, go swimming, or read books appropriate to their age instead. As they approach and reach majority they have the opportunity to experience whatever is necessary to make the competent voters and autonomous human beings. Should those who deny, including the courts, be so willing to live with the results of their possible errors?