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Wile E. Coyote, Acme Explosives and the First Amendment: The Unconstitutionality of Regulating Violence on Broadcast Television

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NOTES

WILE E. COYOTE, ACME EXPLOSIVES AND THE FIRST AMENDMENT: THE UNCONSTITUTIONALITY OF REGULATING VIOLENCE ON BROADCAST TELEVISION

INTRODUCTION

In a pastel colored desert mesa somewhere in the southwest, a hungry and hapless coyote devises new and ingenious ways to catch a small, bony road runner. Despite his best efforts, the coyote runs afoul of the contraptions he employs to capture the bird and usually meets a violent end. This scene is typical of the depiction of violence on broadcast television, thought by many to have a negative and causal effect on children and society. For example, in Ohio, a mother of two blamed a cable television cartoon program for prompting her five-year-old son to set their trailer park home on fire, thereby leading to the death of his two-year-old sister.[1] In different parts of the country, several high school students were killed or seriously injured while imitating a stunt they viewed in a film: they laid on the median of roads as cars drove by on either side of them.[2] Incidents such as these have caused proposals to control and restrict violence on television to gain ground both in government and among the public.

Since the invention of broadcast radio and television, Congress, the courts and the public, grappling with the perceived negative effects of broadcast media, have tried to control and

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[1] *See The Week in Review* (CNN television broadcast, Oct. 24, 1993).

[2] *See* Caryn James, *If Simon Says "Lie Down in the Road," Should You?*, N.Y. TIMES, Oct. 24, 1993, at D2; David Van Biema, *Lie Down in Darkness*, TIME, Nov. 1, 1993, at 49.

shape that medium's messages through regulation.[3] These regulations have involved a range of issues including debate over broadcast signal strength, ownership rules and operating procedures,[4] as well as control of the content of the broadcasted material.[5] Government restrictions have included prohibitions on everything from political editorials and endorsements by licensees to obscenity and indecent speech.[6]

Despite these restrictions, pressure has increased for greater control and regulation over the type and quantity of

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[3] For purposes of this Note, the term "broadcasting" refers to the transmission of messages, information and entertainment via electromagnetic waves. Consequently, this Note will not discuss, except where necessary, the regulation of cable television ("cable") and direct broadcast satellite transmission. The federal government exercises control of both radio and television broadcasting. Originally, control rested with the Secretary of Commerce, as set forth in the Radio Communications Act of 1912, Pub. L. No. 62-264, 37 Stat. 302 (1912), then with the Federal Radio Commission pursuant to the Radio Communications Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927) (repealed 1934), and finally with the Federal Communications Commission ("FCC") pursuant to the Federal Communications Act of 1934, 48 Stat. 1064 (current version at 47 U.S.C. § 301 (1988)).

Radio and television broadcasts utilize different parts of the electromagnetic spectrum. The "spectrum" refers to the range of frequencies from zero cycles per second through billions of cycles per second. AM and FM radio and broadcast television each occupy a separate slice of the spectrum. *See generally* Arthur S. De Vany et al., *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 STAN. L. REV. 1499 (1969) (proposing that the broadcast spectrum be parceled out in a system more closely related to that of property rights); Edmund L. Andrews, *The Ground Rules for Wireless*, N.Y. TIMES, Sept. 29, 1993, at D5 (discussing the FCC's announcement of rules regulating the auction of slices of the broadcast spectrum for use by wireless communications operators).

[4] Several sources detail the federal government's role in regulating television and radio. *See, e.g.*, Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982). Messrs. Fowler and Brenner were, respectively, the Chairman of the FCC and the Legal Assistant to the Chairman during the 1980s. Their article helped set the groundwork for the deregulation of the communications industry in the 1980s. *See also generally* ERIK BARNOUW, TUBE OF PLENTY (2d ed. 1982) (discussing the growth and social effects of broadcasting since its invention in the 19th century).

[5] *See generally* Fowler & Brenner, *supra* note 4, at 217; Donald E. Lively, *Modern Media and the First Amendment: Rediscovering Freedom of the Press*, 67 WASH. L. REV. 599 (1992) (arguing that broadcasting should be granted full first amendment protection); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990 (1989) (arguing that the current regulatory philosophy should be changed to one that more closely resembles that of property rights).

[6] *See, e.g.*, 18 U.S.C. § 1464 (1988) (barring obscene broadcasts); Spitzer, *supra* note 5, at 997-1006.

televised violence.[7] Although traditionally a target of interest groups, violence on television has become a favorite target of a much wider range of people.[8] The call for reducing television violence has begun to focus on ways government can mandate restrictions on the amount, type and timing of violent programming on American broadcast stations and networks.[9]

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[7] Violence on television recently has received a great deal of attention. In the 103d Congress, several bills were introduced to legislate control of the level and type of violence on television. One of these bills called for the FCC merely to review and report on the violence contained in television programs. H.R. 2159, 103d Cong., 1st Sess. (1993). Another called for the FCC to establish standards to reduce the amount of programming that contains violence. Television and Radio Program Violence Reduction Act of 1993, H.R. 2837, 103d Cong., 1st Sess. (1993). A third would have instructed the FCC to institute a ban on violent programming during hours when children are reasonably likely to comprise a substantial portion of the audience. Children's Protection from Violent Programming Act of 1993, S. 1383, 103d Cong., 1st. Sess. (1993). The most interesting piece of legislation mandated the inclusion of a computer chip inside all new television sets that, in conjunction with a signal sent by the broadcaster, would allow parents to lock-out certain programs that have been rated violent. H.R. 2888, 103d Cong., 1st Sess. (1993).

With the election of a new Congress in November, 1994, two bills have been introduced: Television Violence Reduction Through Parental Empowerment Act of 1995, S. 306, 104th Cong., 1st Sess. (1995) (proposal to require inclusion of circuitry in all television sets that will enable viewers to block the reception of violent programming) and The Children's Media Protection Act of 1995, S. 332, 104th Cong., 1st Sess. (1995) (proposal to establish television violence rating code and eliminate violent programming during certain hours of the day).

[8] Critics of television violence protest its perceived negative effect on the behavior of children and society generally. *See, e.g.*, Paul Simon, Remarks Before the National Press Club, Sept. 16, 1993 (noting that television violence is "one of the causes of crime and other anti-social behavior"), *available in* LEXIS, News Library, FEDNEW File; Janet Reno, Remarks Before the Senate Commerce, Science and Transportation Committee, Oct. 20, 1993 ("in high crime areas, television violence and real violence have become so intertwined that they may well feed on each other. . . . [V]iolence has become the salt and pepper of our television diet. Fictional shows and movies feature dozens of killings of bad guys or innocents."), *available in* LEXIS, News Library, FEDNEW File.

Two FCC commissioners recently expressed concern over the amount of violence on television. James Quello identified "the ever-growing public outcry against excessive graphic sex and violence on T.V. and cable, particularly the growing public outcry against glamorized violence and brutality" as evidence of the need to regulate televised violence. James H. Quello, Remarks at the Wertheim Schroder/Variety Seminar, Mar. 23, 1993, *available in* LEXIS, News Library, FCC File. Commissioner Ervin Duggan commented that he is encouraged that "citizens and officials of the broad center . . . have launched [the television violence] debate." Ervin S. Duggan, Remarks Before the ICA Panel on the Public Interest, May 28, 1993, *available in* LEXIS, News Library, FCC File.

[9] *See supra* note 7. Senator Ernest Hollings argues that Congress must ban "the broadcast of violent programming during hours when children make up a

Government regulation of violence on television raises novel and complex constitutional issues that neither courts nor scholars have addressed adequately.[10] Regulating violence on television presents a deceptively simple and popular way to address the extremely high societal levels of violence and the perceived moral degradation of American society. Such regulation, however, implicates first amendment concerns that limit government's ability to restrict televised violence.

Those who advocate restricting violence on television have maintained that violence, like indecency or obscenity, may be restricted by the Federal Communications Commission ("FCC" or "Commission"). In effect, these advocates argue that restrictions on television violence carry similar legislative justifications and social goals as do the prohibitions on indecency and obscenity.[11] The Supreme Court, however, has neither articu-

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substantial share of the audience." Ernest F. Hollings, *TV Violence: Survival vs. Censorship: Save the Children*, N.Y. TIMES, Nov. 23, 1993, at A21.

[10] Up until 1992, few articles addressed the constitutionality and policy implications of regulating violence on television. *See* James A. Albert, *Constitutional Regulation of Televised Violence*, 64 VA. L. REV. 1299 (1978) (arguing that the First Amendment should not bar application of regulatory measures restricting violence on television); Emily Campbell, *Television Violence: Social Science vs. the Law*, 10 LOY. ENT. L.J. 413 (1990) (reviewing social science data and concluding that such data cannot be used to support government regulation of violence on television); Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123 (1978) (concluding that social science data that suggest a correlation between violence on television and societal violence do not satisfy constitutional scrutiny and should not be used to justify restrictions on television violence). Recently, however, there has been increasing interest in the subject. *See, e.g.*, Stephen J. Kim, *"Viewer Discretion is Advised": A Structural Approach to the Issue of Television Violence*, 142 U. PA. L. REV. 1383 (1994) (arguing that reductions in televised violence can be effectuated through the removal of structural constraints on the television industry rather than through content-based restrictions on programming); Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL RTS. J. 107 (1994) (arguing that certain violent expression can be treated the same as sexual obscenity and should therefore be unprotected by the First Amendment); Julia W. Schlegel, *The Television Violence Act of 1990: A New Program for Government Censorship?*, 46 FED. COMM. L.J. 187 (1993) (concluding that the Television Violence Act of 1990 is constitutionally sound, but unlikely to reduce violence on television).

[11] See Reno, *supra* note 8, where the Attorney General concluded that several Senate bills introduced in the 103d Congress to control violence on television were constitutional. In support of this conclusion, Reno cited the Supreme Court's decision in FCC v. Pacifica, 438 U.S. 726, 748 (1978), which upheld restrictions on the broadcast of sexually indecent speech. *See also Television Violence: Hearing of the Senate Commerce, Science and Transportation Committee*, 103d Cong., 1st Sess.

lated a precise definition for violence nor addressed whether depictions of violence could constitute a category of speech subject to state restriction, similar to indecent, offensive or obscene speech. The unusual and ill-defined status of broadcasting within first amendment doctrine further complicates the issue of restricting violence on television.

This Note examines the constitutionality of regulations which seek to curtail depictions of violence on television. The examination focuses on the assertion by regulation advocates that "violence" comprises a category of speech susceptible to regulation similar to those regulations surrounding sexually explicit materials. The fundamental differences between the violent and sexual aspects of human behavior, however, render government-imposed restrictions on television violence unconstitutional. The definitional uncertainties surrounding the term "violence" make regulations restricting violence on television unconstitutional and unwise. For example, socially deconstructive depictions of violence and those that carry socially positive messages often are blurred together. Moreover, when combined with the presence of violence in virtually all forms of programming and both the positive and negative messages that violence can carry, these definitional uncertainties invalidate the constitutionality of restrictions on television violence.

Part I surveys the history of regulation of broadcast media with a brief discussion of the difficulty in defining "violence." This section also sets forth the reasons for limiting this discussion to broadcast television. The historical overview serves as a foundation for Part II's more detailed examination of the case law that has delineated constitutionally protected speech outside of the broadcast medium. Finally, Part III demonstrates that any attempt to apply the analysis used for indecent, offen-

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(1993) ("I'm not a lawyer, but I don't believe that the framers of the Constitution ever envisioned that their document, written for freedom, written in the blood of the revolution, ever intended protection for pornographers or the purveyors of a steady stream of violence.") (statement of Senator Exon (D.-Neb.), Oct. 20, 1993), *available in* LEXIS, News Library, FEDNEW File; Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418 (1975) (discussing constitutionality of restrictions on violence and sex on broadcast television); Saunders, *supra* note 10, at 107 (arguing that the same factors which "justifly] the channeling of indecent non-obscene sexual and excretory references . . . could justify the channeling of indecent violent material").

sive or obscene material to television violence must fail because of definitional, legal, doctrinal, and policy infirmities.

I. PRELIMINARY DEFINITIONAL AND SCOPE ISSUES

The debate surrounding the regulation of televised violence has not adequately addressed the scope government controls may have and the definitions that will be employed to effectuate any restrictions. Although the terms "violence" and "television" are constantly used, neither word has been adequately defined. Before debate begins over the form such regulations should take, it is essential to set forth both a definitional framework for "violence" and to delineate the type of media to which such regulations will apply.

Despite having allocated a great deal of attention to the subject, Congress has yet to offer any concrete definition of violence beyond that found in the dictionary.[12] *Webster's Dictionary* defines violence as "an exertion of any physical force so as to injure or abuse (as in warfare or in effecting an entrance into a house)".[13] Bills pending in Congress that seek to regulate or prohibit violence on television, define violence as broadly and vaguely as does *Webster's*.[14] These bills provide little or no guidance to the FCC or the courts as to specific situations

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[12] Canadian broadcasters recently have adopted a voluntary code that bans programs with "gratuitous violence" and limits those shows that include violent scenes to hours after 9:00 P.M. Elizabeth Kolbert, *Canadians Curbing TV Violence*, N.Y. TIMES, Jan. 11, 1994, at C15. The code, however, does not define either "gratuitous" or "violent scenes." *Id.* It also does not cover cable television. More importantly, the Canadian Constitution does not grant as much emphasis on the value of free speech. Instead, free speech must be balanced against other social concerns.

[13] WEBSTER'S 3D NEW INTERNATIONAL DICTIONARY 2554 (unabridged) (1981).

[14] One bill defined violence as:

> any action that has as an element the use or threatened use of physical force against the person of another, or against one's self, with intent to cause bodily harm to such person or one's self. For purposes of this Act, an action may involve violence regardless of whether or not such action or threat of action occurs in a realistic or serious context or in a humorous or cartoon type context.

H.R. 2837, *supra* note 7, at § 3 (proposal to require the FCC to establish standards to reduce the amount of programming that contains violence from broadcast television and radio); *see also* S. 943, 103d Cong., 1st Sess. § 2 (1993) (proposing that broadcasters and cable operators be required to insert warning labels and voice-overs on violent programming). Of the two bills thus far introduced at the 104th Congress, neither contains a definition of violence. *See supra* note 7.

or contexts in which "violent" acts rise to a level that warrants regulatory intervention. Moreover, when Congress's proposed definition of violence is compared to the judicial and regulatory definitions used in indecency and obscenity cases, the danger of limiting the number and types of violent acts on television becomes apparent.[15]

Over the past several decades, there have been a number of attempts to define violence and to catalogue its prevalence on television. One of the more prominent and controversial researchers in this area is George Gerbner, a psychology professor at the University of Pennsylvania. Professor Gerbner has been active in the campaign against violence on television and has compiled statistics on the number of violent acts shown in various television programs. Gerbner employs an expansive definition of violence that includes any act that is a "clear-cut, unambiguous, and overt episode of physical violence—hurting or killing or the threat of hurting and/or killing in any context."[16] Gerbner's definition, however, fails to account for either the substantive aspects of the violent acts—such as whether the acts are humorous slapstick or chain-saw massacres—or the dramatic context of violence—such as when the acts appear in documentaries, news stories and works designed to demonstrate the negative social consequences of violence.[17]

The inadequacy of Gerbner's and other current definitions of violence is further demonstrated by the fact that in 1993 both the television networks and cable broadcasters commissioned studies to define, analyze and report on televised violence. For example, Jeff Cole, the Director of UCLA's Center for Communication Policy is currently working on defining violence for the network-sponsored study his group is conducting.[18] Cole notes that "[m]ost studies simply count violent

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[15] *See infra* notes 250-320 and accompanying text.

[16] Kim, *supra* note 10, at 1441 n.19.

[17] Gerbner has been severely criticized for his definitional framework and methodological techniques. *See* Krattenmaker & Powe, Jr., *supra* note 10, at 1170 (arguing that the social science data that suggest a correlation between violence on television and societal violence should not be used to justify restrictions on television violence).

[18] Daniel Cerone, *A New Effort Under Way to Define Violence on T.V.*, L.A. TIMES, Sept. 3, 1994, at F1.

acts . . . and all acts are lumped together with nothing to distinguish either the context in which the violence occurs or whether the violence is appropriate or justified. Under that system, a pinch is fairly equated with a decapitation."[19] As an illustration of how absurd current definitions of violence are, Cole recounts that according to one study, "the most violent show on television last year was a 'Laugh-In' retrospective."[20]

The widespread failure to define violence hampers attempts to analyze and assess the impact and constitutionality of restrictions on violent television programming. The definition one chooses will impact the nature of the analysis and the resulting legal conclusions. A broad definition of violence will encompass a wide variety of activity and therefore, will raise more constitutional questions than a narrow definition. Moreover, the historical concern that definitionally infirm restrictions on speech will chill freedom of expression, is particularly relevant to restrictions on violent speech. Without a specific and well-recognized definition, individuals—such as writers, producers and network executives—will not be able to conform their behavior to comply with regulations restricting violence. Instead, these individuals may choose not to write, produce or broadcast meritorious programs that contain violence simply out of fear and uncertainty that such programs would trigger regulatory sanctions.

The number of proposed definitions of violence make restrictions upon it difficult to analyze. Consequently, in lieu of a recognizable and commonly accepted definition of violence, commentators must rely primarily on the definitions laid forth in various legislative proposals. Although these definitions are uniformly broad and raise immediate vagueness and overbreadth concerns, they provide useful starting points for an analysis of restrictions on television violence. Of course, as the analysis of violence restrictions becomes more complex and intricate, it will be necessary to formulate narrower definitions. It will become clear, however, that even relatively narrow definitions lead to the same conclusion: restrictions on television violence are unconstitutional.

The current debate surrounding violence on television has

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[19] *Id.*
[20] *Id.*

also failed to distinguish between the various types of media that would be restricted. Television is a far more complex medium than it was just a few years ago. In addition to the traditional broadcast networks of ABC, CBS and NBC, the FOX network has made significant inroads in viewership.[21] There also has been significant growth in the number of independent stations.[22] These independent stations broadcast both network and syndicated programming.[23] All of these broadcast outlets, both network and independent stations, carry a variety of programming, some produced by the networks, some by independent production companies, and some by Hollywood studios.[24] Hollywood produces a combination of material both for immediate distribution on television as well as for theater distribution followed by television broadcast at a later date.[25]

Even more significant than the growth and independence of traditional broadcasting outlets has been the explosion of cable television subscriptions.[26] In addition to the various networks and independent television stations carried on thousands of various cable systems nationwide, dozens of cable-only stations exist, such as the Turner Broadcast System, Cable News Network, Discovery Channel, and American Movie Classics. Several premium channels, such as Home Box Office and Cinemax, as well as pay-per-view channels, complete the spectrum of recently developed broadcasting outlets.

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[21] FOX, launched in 1987 and considered an "emerging network" by the FCC, now has over 150 full-time broadcast affiliates. *In re* Review of the Prime Time Access Rule, 9 F.C.C.R. 6328, 6338 (Oct. 25, 1994) (noting "it is clear that the three major TV networks face more competition in today's marketplace than they did in 1970 or even in 1980"). Two other networks recently have entered the fray. UPN, backed by Viacom, and the Warner Brothers network ("WB") each began broadcasting in January 1995. UPN began with 96 affiliates, while WB had 60 affiliates. Walt Belcher, *New Networks Join the Fray*, TAMPA TRIB., Jan. 11, 1995, at 1.

[22] Since 1970, the total number of commercial and non-commercial television stations has increased by 76% from 862 stations to 1520 stations. Of these 1520 stations, more than 450 are independent stations, up from 67 in 1970. *In re* Review of the Prime Time Access Rule, 9 F.C.C.R. 6328, 6337.

[23] *Id.* at 6331. Independent stations air some locally produced programming, but buy most of their programs from syndicators, program producers, and previously aired network programs ("re-runs").

[24] *Id.* at 6332.

[25] *Id.*

[26] In 1975, only 13.2% of television households subscribed to cable television, but by 1994 the number had increased to 62.5%. *Id.* at 6338.

With this increase in outlets for television programming, not surprisingly, the debate surrounding televised violence has become more complicated and confused. Indeed, it is common for legislators, policymakers and the public to speak of regulating violence on television without identifying whether the programs subject to regulation will be aired on broadcast television or cable television.[27] These discussions, therefore, fail to recognize the different levels of constitutional protections applicable to these different mediums. Any discussion concerning violence on television must carefully distinguish between different media.

With this complex and diverse situation in mind, this Note will focus solely on broadcast television—i.e., television that appears via transmission of signals through the electromagnetic spectrum. Unlike cable television, broadcast television first amendment law has been fairly well developed. Although some of the rules governing violence on broadcast television were created to regulate radio transmissions, most of them are readily adaptable to the television medium and are relevant to the analysis of regulations that purport to restrict televised violence. In addition, even though the virtual monopoly broadcast television once had has ended, the networks and independent stations are still enormously influential and provide a majority of the populace with televised images.[28]

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[27] *See Nightline: The Problem of Violence in TV and Movies* (ABC television broadcast, Oct. 20, 1993) (discussing the cable television show *Beavis and Butthead*, the film *The Program*, and the broadcast television show *NYPD Blue* as examples of violent shows that negatively effect behavior). Dick Wolf, producer of the television programs *Miami Vice* and *Law and Order*, summed up the problem: "Congress does not differentiate between television and the networks, and when you talk about television you're really talking about . . . networks . . . independents . . . cable . . . [and] premium channels, and they all serve different masters and they're all being lumped together." *Id.*

[28] A.C. Nielsen reports that 98% of United States households have televisions, 38% have two or more sets, 28% three or more sets, and 62% subscribe to cable. COMM. DAILY, Oct. 5, 1993, at 7. The prime-time viewing share of the three broadcast networks for October, 1994, was 58%, down from 63% for the same period one year earlier. COMM. DAILY, Oct. 13, 1994, at 10.

II. BROADCASTING: A CONSTITUTIONAL TWILIGHT ZONE

A. *What's the Frequency? Basic First Amendment Principles and the Context of Broadcasting*

The First Amendment is clear that "Congress shall make no law abridging . . . the freedom of speech."[29] This stricture, however, has been narrowed in a variety of ways by both Congress and the Supreme Court. This narrowing has taken on a variety of forms, ranging from upholding restrictions based on certain categories of speech—such as obscenity and indecency—to allowing regulations aimed at limiting the non-communicative effects of speech—such as noise and disruption. In addition, the means by which speech is transmitted has been determinative of the constitutionality of regulations.

The constitutionality of restrictions on speech is best analyzed by examining whether the restriction is "content-based" or "content-neutral." Content-based restrictions are those restrictions that seek to proscribe or regulate words because of their perceived impact on the listener or on society as a whole.[30] Content-based restrictions are subject to the highest level of judicial scrutiny, and normally are held unconstitutional unless the government demonstrates that the restriction is a "narrowly tailored means to achieve a compelling state end."[31] Although this burden is difficult for the government to sustain, certain content-based restrictions designed to restrict particular categories of speech may be constitutional under a reduced form of judicial scrutiny.[32] These categories generally include fighting words, libel, defamation, incitement to riot, slander, obscenity, profanity and indecency.[33]

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[29] U.S. CONST. amend. I.

[30] *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 56 U. CHI. L. REV. 46, 47 (1987).

[31] R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2543 (1992) (striking down a municipal ban on hate speech); Widmar v. Vincent, 454 U.S. 263, 270 (1981) (striking down a state university ban on religious worship).

[32] *See* Chaplinsky v. New Hampshire. 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."); *R.A.V.*, 112 S. Ct. at 2543 (obscenity and defamation are forms of expression "not within the area of constitutionally protected speech").

[33] *Chaplinsky*, 315 U.S. at 572.

When the government restricts speech because of its non-communicative impact it is considered a content-neutral restriction.[34] Such regulations are subject to a lower standard of review than content-based restrictions. The government need only show that the restriction is narrowly tailored to serve a significant governmental interest, and that alternative channels exist to communicate information.[35] Content-neutral restrictions are often characterized as "time, place, or manner" restrictions.[36] For example, regulations affecting the use of sound trucks and amplification equipment have been upheld as valid time, place or manner regulations.[37]

In addition to the content-based versus content-neutral inquiry, the medium used to transmit speech also may subject speech to regulation.[38] Broadcasting is the quintessential example of a medium that has been subjected to relatively high degrees of governmental control. "[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection."[39] Even with this seemingly settled constitutional framework for broadcasting, new modes of communication and new social and political concerns challenge the precise shape of this framework and make the future scope of broadcasting's first amendment freedoms unpredictable.[40] Televised violence is an example of an issue that does not fit neatly into the current legal framework surrounding broadcasting.

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[34] *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984) (upholding National Park Service ban on sleeping in public parks); Stone, *supra* note 30, at 48.

[35] *Clark*, 468 U.S. at 293.

[36] *Id.*

[37] Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (upholding New York City requirement that all concerts in public parks use city-owned and operated sound equipment); Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (upholding restriction on the use of sound trucks).

[38] "We have long recognized that each medium of expression presents special first amendment problems." FCC v. Pacifica, 438 U.S. 726, 748 (1978) (upholding FCC restriction on indecent broadcasts) (citing Joseph Burstyn v. Wilson, 343 U.S. 495, 502-03 (1952)).

[39] *Pacifica*, 438 U.S. at 748.

[40] Until 1994, cable television's placement in the first amendment hierarchy was unclear. In Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994), the Court refused to extend the less rigorous first amendment standard reserved for broadcasting and instead held that regulations affecting cable television must satisfy strict scrutiny.

Although concern over violence on television is not new,[41] the jurisprudence concerning restrictions on the dissemination of violent speech and imagery remain underdeveloped.[42] Consequently, judicial assessment of the constitutionality of restrictions on broadcast television violence must weave the legal principles derived from past efforts to impose general regulations on broadcasting as an industry with those principles surrounding restrictions on the content of speech that is transmitted through broadcasting medium. The history, current status and efficacy of these restrictions provide a window onto the contours of the First Amendment as it applies to restrictions on the amount of violence on broadcast television.

B. *Birth of a Medium: The Early Regulatory Framework*

As early as 1912, broadcasting presented the courts and Congress with a regulatory dilemma.[43] Initial concerns revolved around the creation of a radio system that was relatively free from interference and provided the quality necessary to attract listeners and provide for growth.[44] As the radio

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[41] Congressional investigations regarding the behavioral effects on television have a long history. The Senate Subcommittee on Juvenile Delinquency conducted investigations in 1954, 1955, 1961-62 and 1964. In 1971, the Senate Communications Subcommittee held hearings on the issue of sex and violence on television. Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418 (1975). Moreover, the FCC reported that it had received 2000 complaints in 1972 regarding violent and sexually oriented programming. By 1974, that number had increased to 25,000. *Id.*

[42] Cases that have addressed dissemination of violence are few. *See* Winters v. New York, 333 U.S. 507, 518-20 (1948) (striking down New York statute which forbade the sale or distribution to minors of violent material which was considered likely to stimulate juvenile delinquency); Video Software Dealers Ass'n v. Webster, 773 F. Supp. 1275, 1281-83 (W.D. Mo. 1991) (finding unconstitutionally overbroad and vague a Missouri statute that restricted the dissemination to minors of video cassettes depicting violence), *aff'd*, 968 F.2d 684 (8th Cir. 1992); Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 533 (Tenn. 1993) (finding constitutional a statute that barred the display for sale or rental materials harmful to minors, but the term "excess violence" void for vagueness). For a discussion of *Winters*, see *infra* notes 225-32 and accompanying text.

[43] *See* Radio Communications Act of 1912, 37 Stat. 302 (setting forth the initial governmental regulation of radio). *See generally* NBC v. United States, 319 U.S. 190, 227 (1943) (holding that the FCC had the authority to regulate chain broadcasting pursuant to the public interest standard); BARNOUW, *supra* note 4, at 17-24.

[44] *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377 n.5 (1969). Con-

industry matured, however, the imperative to regulate the mechanics of broadcasting expanded to include the perceived need to promulgate content-based restrictions.[45] This new regulatory interest concerns regarding the constitutional propriety of regulating content in broadcast media.[46]

The Federal Radio Act of 1927 marked the first modern regulation of the broadcast spectrum.[47] This Act served as the basis for the establishment of the Federal Radio Commission ("FRC") and began modern regulation of the electromagnetic

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gress first attempted to formulate a regulatory system through the Radio Communications Act of 1912, which forbade the operation of a radio station without a license, allocated certain frequencies for the use of the government, and imposed restrictions upon distress signals and similar messages. *See* Radio Communications Act of 1912, 37 Stat. 302; *see also Red Lion*, 395 U.S. at 377 (upholding constitutionality of requiring broadcasters to air both sides of controversial issues); Fowler & Brenner, *supra* note 4, at 213; Spitzer, *supra* note 5, at 1043.

The 1912 Act worked well, until the number of broadcast stations multiplied following World War I. By 1923, there were several hundred stations nationwide with more stations competing for the limited number of wavelengths each year. *NBC*, 319 U.S. at 227 (upholding regulations concerning chain broadcasting). In an effort to provide some order to this rapid growth, the Secretary of Commerce, Herbert Hoover, selected two frequencies and licensed all stations to operate on one or the other frequency. *Id.* at 211. Eventually, however, the field became too crowded, forcing Hoover to assign frequencies and hours of operation to each station. *Id.* By 1925, there were 600 stations nationwide with 175 applications for new stations pending. *Id.*

Hoover's system survived until 1926, when the District Court for the Northern District of Illinois issued its decision in United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926). In *Zenith*, the court held that the 1912 Act did not give the Secretary of Commerce the power to set conditions on licensees regarding wavelength or hours of operation. *Id.* at 616; *see also* BARNOUW, *supra* note 4, at 57; Spitzer, *supra* note 5, at 1044. After the Attorney General, at Hoover's request, investigated the matter and decided that the result in *Zenith* was correct, Hoover conceded defeat and did not appeal the decision. *Id.* Chaos reigned in the immediate aftermath of the *Zenith* decision as stations indiscriminately increased their power, arbitrarily set broadcast wavelengths and extended their hours of operation. 319 U.S. at 212. Within seven months of the *Zenith* decision, almost 200 new stations flooded the airwaves. *Id.* Pressure from the public as well as the radio industry quickly mounted on Congress for a regulatory solution to the confusion that had engulfed the airwaves. *Id.*

[45] *See infra* notes 50-141 and accompanying text.

[46] *See* Trinity Methodist Church v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932) (affirming the Federal Radio Commission's authority to review past content of broadcasts when determining suitability for license renewal), *cert. denied*, 288 U.S. 599 (1933); Great Lakes Broadcasting Co. v. Federal Radio Comm'n, 3 F.R.C. Ann. Rep. 32, 33 (1929) (Federal Radio Commission has authority to alter broadcast times and frequencies based on nature of broadcasts), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. denied*, 281 U.S. 706 (1930).

[47] Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927).

spectrum.[48] Congress gave the FRC authority over wavelength settings, hours of operation, and power levels.[49] Although the Act specifically forbade the FRC from engaging in censorship, it nonetheless gave the FRC the power to regulate "in the public interest, convenience and necessity."[50] This broad congressional grant of power to the FRC proved crucial to the FRC's functioning and its self-perceived mission. Because Congress had delegated to the FRC the power to determine virtually all aspects of broadcasting, the FRC became the sole arbiter of what constituted the "public interest." Indeed, the public interest standard became the hook upon which the FRC, its successor, the FCC, and the courts justified the government's ability to regulate the content of broadcasts.[51] It was not until the court cases spawned by the 1927 Act, and later the 1934 Act, that "public interest" was given at least a limited judicial definition.[52]

In 1931, *KFKB Broadcasting Ass'n v. Federal Radio Commission*[53] was the first significant case to address the meaning of regulating in the "public interest." In *KFKB*, the District of Columbia Circuit Court held that the FRC's refusal to renew KFKB's license based on the content of that station's past programming did not constitute censorship in violation of Section 29 of the Radio Act of 1927.[54] In making its decision,

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[48] *See* NBC v. United States, 319 U.S. 190, 213-14 (1943); Fowler & Brenner, *supra* note 4, at 214.

[49] 44 Stat. at 1163.

[50] *Id.* at 1170.

[51] See *infra* notes 52-81 and accompanying text.

[52] *See, e.g.*, Trinity Methodist Church v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933); KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931); Great Lakes Broadcasting v. Federal Radio Comm'n, 37 F.2d 993 (D.C. Cir.), *cert. denied*, 281 U.S. 706 (1930). The resulting framework from these cases laid the legal foundation for the current governmental regulation of the broadcast spectrum.

[53] 47 F.2d 670 (D.C. Cir. 1931).

[54] KFKB was a powerful 5000 watt station that enjoyed both wide geographical coverage throughout the midwest and a high number of dedicated listeners. The licensee of KFKB was Dr. John Brinkley, who operated his own clinic and pharmacy, and dispensed medical advice to listeners who wrote in about various ailments they were suffering. Conveniently, the cure for the listener's ailments included prescriptions that were available only at Dr. Brinkley's clinic or through the mail order business he had established. Dr. Brinkley also achieved notoriety because of his unusual procedures to improve the male sex drive. His prescribed therapy included the implantation of a young Goat's gonads into the scrotum of his male patients. By 1928, Dr. Brinkley had a gross annual income $150,000. *See*

the court granted great deference to the FRC's administrative ruling. The court reasoned that, because of the limited availability of broadcasting frequencies, the FRC was entitled to consider the "character and quality of the service being rendered."[55] The court found that by giving the FRC the power to regulate in the public interest, Congress intended that stations "should not be a mere adjunct of a particular business but should be of a public character."[56] The exercise of the public interest standard, the court concluded, required the FRC to examine a station's past conduct. Such a review, they found, "is not censorship."[57]

The following year the FRC gained another victory and further judicial support for its regulatory review powers in *Trinity Methodist Church v. Federal Radio Commission*.[58] In *Trinity Methodist*, the FRC again relied on the public interest standard of the 1927 Act to deny a license renewal to radio station KGEF on the basis of the content of its programming.[59] The court found that KGEF's broadcasts were not in

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LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT, 23-30 (1987).

[55] *KFKB*, 47 F.2d at 672.

[56] *Id.*

[57] *Id.* Knowingly or not, the court in *KFKB* enunciated the "scarcity doctrine," which would publicly justify virtually all future governmental intrusions into broadcasting content. The scarcity doctrine holds that because the number of frequencies in the electromagnetic spectrum is finite, only a limited number of stations can broadcast at any particular time. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388-89 (1969). Therefore, the government must license stations in such a way as to maximize the public benefit achievable through broadcasting. FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 805 (1978). This maximization can be achieved, it is argued, only through a governmental body vested with the power to license, re-license and revoke licenses. *Id.* ("the physical scarcity of broadcast frequencies [allows the FCC] to allocate broadcast frequencies in the 'public interest'"). As part of this decisionmaking process, the regulatory body must be able to consider the content of the broadcasts so that it may compare the "quality" of these broadcasts with competing stations or with others vying for a license to broadcast on the same frequency.

It is difficult to argue that governmental regulation or oversight is unnecessary to establish and maintain a coherent radio and television broadcasting system. The confusion that followed the *Zenith* decision indicated that a governmental system of oversight and licensure was needed. *Id.* at 617. The key question, however, is the discretion the government should have when granting or revoking licenses when technical considerations are constant but when the content of broadcasts is controversial or anti-majoritarian.

[58] 62 F.2d 850 (D.C. Cir. 1932).

[59] *Id.* at 851. KGEF was owned by Reverend Doctor Shuler, whose radio pro-

the public interest because they "obstruct[ed] the administration of justice, offend[ed] the religious susceptibilities of thousands, inspire[d] political distrust and civic discord, . . . [and] offend[ed] youth and innocence by the free use of words suggestive of sexual immorality."[60]

Unlike the ruling in *KFKB,* where there was a legitimate issue as to whether the licensee's program was detrimental to the public health, the standard set forth in *Trinity Methodist* for license renewal became more vague and intangible. Based on *Trinity Methodist*, the FRC could deny licenses because of a licensee's failure to conform with accepted, popular standards of speech and morality. The *Trinity Methodist* court noted that broadcasting, "this great science," should serve a higher purpose than to simply entertain or become "a theater for the display of individual passions and the collision of personal interests."[61] *Trinity Methodist* expanded the FRC's discretion to determine the scope of the "public interest." After *KFKB* and *Trinity Methodist*, the definition of public interest included both the protection of the public's health as well as the protection of its sexual, religious and political character.

Congress implicitly ratified the holdings of *KFKB* and *Trinity Methodist* when it retained the public interest standard in the Federal Communications Act of 1934.[62] This legislation transferred power from the FRC to the newly created FCC.[63] Over the next sixty years, the FCC developed guidelines, restrictions, mandates and prohibitions which broadcasters were required to follow in order to retain their license and avoid fines and sanctions.[64] As the need to exert power over the now-mature radio industry increased, the FCC faced new regu-

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grams included attacks on Jews, Catholics and local political leaders. *Id.* at 850, 852; *see also* POWE, *supra* note 54, at 13-23.

[60] *Trinity Methodist*, 62 F.2d at 852-53.

[61] *Id.* at 853.

[62] 47 U.S.C. § 309(2) (1988) ("the Commission shall determine . . . whether the public interest . . . will be served by [the] application").

[63] NBC v. United States, 319 U.S. 190, 213-14 (1943) (upholding FCC's authority to regulate "chain broadcasting").

[64] There is extremely well-developed literature regarding the FCC's various regulatory mechanisms and policies. *See generally* POWE, *supra* note 54 (arguing that first amendment rights of broadcasters should be equal to those of the print media); Fowler & Brenner, *supra* note 4 (arguing for the deregulation of broadcasting); Spitzer, *supra* note 5 (favoring a system of private property rights for the broadcast spectrum).

latory challenges that tested the breadth of the previous judiciary holdings. Since the Supreme Court had never explicitly validated the FCC's powers, the FCC's efforts to regulate network broadcasting, contractual rights between networks and their affiliates, and to control content of certain broadcasts came into question.

In 1943, *National Broadcasting Co. v. United States*[65] ("*NBC*") gave the Court the opportunity to clarify and limit the public interest standard. In *NBC*, the Court examined the legality of the Commission's chain broadcasting regulations[66] and concluded that the Communications Act of 1934 conferred the requisite authority upon the Commission to promulgate such regulations.[67] In reaching this conclusion, the Court analogized the Commission to a "traffic cop," vested with the power to police the wavelengths and prevent stations from interfering with each other.[68] The Court added, however, that the 1934 Act "puts upon the Commission the burden of determining the composition of that traffic," and that "[i]n the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers."[69] The public interest, the Court continued, "is . . . the interest of the listening public in 'the larger and more effective use of radio."[70] The Court noted that radio frequencies, unlike other modes of communication, are limited and therefore not available to all.[71] It is precisely the finite nature of the spectrum, according to the *NBC* court, that subjects it to government regulation.[72]

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[65] 319 U.S. 190, 216 (1943).

[66] Chain broadcasting was defined in the Communications Act of 1934 as the "simultaneous broadcasting of an identical program by two or more connected stations." 47 U.S.C. § 153(p) (1988). Chain broadcasting was achieved largely by transmitting programs via telephone lines from the original station to other stations in the network. For an interesting discussion of the American Telephone and Telegraph Company's early interest in facilitating chain broadcasting, see BARNOUW, *supra* note 4, at 43-48.

[67] *NBC*, 319 U.S. at 216.

[68] *Id.*

[69] *Id.* at 219.

[70] *Id.* at 216 (quoting 1934 Act). Significantly, the Court in *NBC* largely sidestepped the network's contention that the chain broadcasting rules impinged on their first amendment freedoms. *Id.* at 226.

[71] *Id.* at 216.

[72] *NBC*, 319 U.S. at 216.

For twenty-five years following the *NBC* case, the Supreme Court remained largely silent regarding the regulation of broadcast media. In 1969, however, in the seminal case, *Red Lion Broadcasting Co. v. FCC*, the Court unanimously upheld the constitutionality of the "fairness doctrine."[73] This doctrine, which had been promulgated in different forms and with a varying number of corollaries since 1929, required broadcasters to present both sides of controversial issues that were the subject of broadcasts.[74]

Unlike previous decisions such as *KFKB*, *Trinity Methodist*, and *NBC*, the Court in *Red Lion* focused on the first amendment rights of broadcasters.[75] The Court found that although broadcasters have first amendment rights, these rights are not as extensive nor as inviolable as those of the print media.[76] The scarce nature of the wavelength spectrum, the Court argued, limits the number of voices that can be heard at any given time and therefore gives government the ability to set content requirements in order to maximize the

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[73] 395 U.S. 367 (1969).

[74] The fairness doctrine has been the subject of numerous articles, commentaries and FCC reports. *See, e.g., In re* Inquiry into Section 73.1910, 102 F.C.C.2d 142 (1985) (report by FCC detailing history and status of the fairness doctrine and concluding that the doctrine serves the public interest); Federal Communications Comm'n, *Laying the Fairness Doctrine to Rest: Was the Doctrine's Elimination Really Fair?*, 58 GEO. WASH. L. REV. 994 (1990) (discussing District of Columbia Circuit Court cases that affirmed the FCC's decision to eliminate the fairness doctrine); Thomas G. Krattenmaker & L.A. Powe, Jr., *The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream*, 1985 DUKE L.J. 151 (arguing that the fairness doctrine is incoherent and unworkable).

[75] *Red Lion*, 395 U.S. at 369-71. The Red Lion Broadcasting Company operated radio station WGCB in Pennsylvania. *Id.* at 371. On November 27, 1964, WGCB carried a broadcast by the Reverend Billy Hargis in which Hargis attacked Fred Cook, the author of a book entitled *Goldwater—Extremist on the Right*. *Id.* Hargis alleged that Cook had been fired by a newspaper because he levied false charges against city officials, worked for a Communist affiliated magazine, the *Nation*, had defended Alger Hiss, and attacked J. Edgar Hoover and the Central Intelligence Agency. *Id.* at 371 & n.2. Following this broadcast, Cook demanded an opportunity to respond to Hargis. Cook also requested a tape, transcript and summary of the broadcast. *Id.* at 371-72. WGCB refused this request and the FCC declared that the Hargis broadcast was a personal attack on Cook and that Red Lion had failed to meet its obligations under the fairness doctrine. *Id.* at 372.

[76] *Id.* at 386-87. This double standard became crystal clear with the Court's decision in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), which struck down a Florida statute that required newspapers to provide reply space for persons who had been discussed in an unfavorable light. *Red Lion* made this type of regulation permissible in relation to broadcasters.

public benefits derived from broadcasting.[77] By imposing requirements on broadcasters to air opposing viewpoints, the fairness doctrine increased overall discussion, thereby serving the purpose of the First Amendment.[78] Consequently, through the Commission, the federal government has the power not only to license stations and choose between competing applicants, but to require that stations present both sides of controversial topics and to mandate on-air replies by persons who may have been attacked on a previous program.[79]

Red Lion marked the culmination of forty years of legislation, regulation and jurisprudence concerning broadcasting. In *Red Lion*, the Court affixed its seal of first amendment imprimatur on the scarcity doctrine and determined broadcasting's lower status in the hierarchy of first amendment protections. In effect, the Court, Congress and the FCC created a separate and lower level of first amendment protections for broadcasting. Unlike the print media, for example, where most restrictions on the content of publications had been struck down,[80] by the late 1960s the broadcast media were far more limited in their ability to air anti-majoritarian viewpoints.[81]

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[77] *Red Lion*, 395 U.S. at 387-88.

[78] *Id.* at 389-90. The Court stated that "the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Id.* at 390.

[79] *Id.* at 369. With the expansion of broadcast television stations, the widespread availability of cable television, and the development of satellite-based television, it is questionable whether the spectrum scarcity argument is still persuasive. *See generally* Fowler & Brenner, *supra* note 4, at 221; Spitzer, *supra* note 5, at 1018-19. *But see* Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2457 (1994) ("Although courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence." (citations omitted)).

[80] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (to recover for libel one must demonstrate actual malice); *see also* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1973) (striking down a fairness doctrine corollary for print media); Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697 (1931) (striking down a state procedure for preventing the publication of "malicious, scandalous and defamatory newspapers"); Lee C. Bolinger, Jr., *Freedom of the Cross and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. (1976) (comparing print and broadcast media and arguing that the latter should be subject to greater restriction than the former).

[81] *See generally* Trinity Methodist Church v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932); KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931).

Perhaps nowhere else are the limitations placed on broadcasters first amendment rights more apparent than in the restriction of indecent and offensive broadcasts. The intellectual support for these limitations rests on the scarcity doctrine as well as on explicit and implicit assumptions about the purpose, power, and potential of the broadcast media. Analyzing these restrictions and their justifications provide a framework and mechanism for examining the constitutionality of restrictions on violence on television.

C. *Indecency, Offensiveness and Television*

From the late 1960's to the mid-1970's, indecency on television emerged as a national issue. Although national attention previously had turned to the issue of television and its negative effects on society as a whole[82]—and on children in particular—during this period attention focused on the subject of indecency. In response, Congress directed the FCC to issue a report detailing its efforts to control the prevalence of violence, sex and obscenity on broadcast television.[83]

Consequently, in 1975, the FCC issued a Report and Opinion that set forth a definition for "indecent" material and articulated the reasons for restricting indecent programming.[84] The Commission defined indecent as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a

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[82] *See supra* note 41.

[83] *See* BARNOUW, *supra* note 4, at 474. The Commission met informally with network executives to propose methods to reduce the amount of sex and violence on television. *Id.* The result of these meetings was the "Family Viewing" period that the television networks adopted in 1975. *Id.* at 475. This policy directed that between the hours of 7:00 and 9:00 P.M., the television networks would schedule programs that were free of violence and sexually explicit material. *Id.* The networks never assiduously enforced the policy and the "Family Viewing" period ultimately was declared unconstitutional because the FCC had applied pressure on the networks to institute the policy without a public hearing or other statutorily mandated administrative procedures. Writers Guild of America v. FCC, 423 F. Supp. 1064, 1140, 1153 (C.D. Cal. 1976).

[84] Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418 (1985); *In re* Citizen's Complaint Against Pacifica Found., 56 F.C.C.2d 94 (1975).

reasonable risk that children may be in the audience."[85] The FCC claimed that its primary regulatory interest was to protect children from words and ideas it believed most parents would find offensive.[86]

The FCC's actions and the national debate over "indecent" broadcasts culminated with *FCC v. Pacifica Foundation*.[87] This case involved an administrative judgment against WBAI, a New York radio station, for broadcasting an "indecent" monologue by comedian George Carlin.[88] In *Pacifica*, a plurality of the Court found that the Commission had the power under statutory law to regulate indecent speech over the airwaves.[89] Unlike earlier decisions, however, the Court did not rest its reasoning solely on the fairness doctrine or the limited first amendment rights of broadcasters.[90]

The plurality articulated additional justifications for treating broadcasting differently from other forms of communication. First, Justice Stevens noted that "broadcast media have established a uniquely pervasive presence in the lives of all Americans."[91] Therefore, he surmised, the rights of the listener to be left alone in the "privacy of the home" outweigh the First Amendment rights of the broadcaster.[92] Second, Justice

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[85] 56 F.C.C.2d at 98.

[86] Action for Children's Television v. FCC, 932 F.2d 1504, 1506 (D.C. Cir. 1991).

[87] 438 U.S. 726 (1978).

[88] *Id.* at 730. The broadcast of Carlin's monologue occurred at 2:00 P.M on Tuesday, October 30, 1973. The substance of the broadcast included:

> "you couldn't say on the public, ah, airwaves, um, the ones you definitely would's [sic], ever. . . . The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands . . . and maybe, even bring us, God help us, peace without honor . . . um, and a bourbon."

In re Pacifica, 56 F.C.C.2d at 100 (appendix).

[89] *Pacifica*, 438 U.S. at 737-38. The Commission had acted pursuant to both 18 U.S.C. § 1464 (1976), which forbids the use of "any obscene, indecent, or profane language by means of radio communication," and 47 U.S.C. § 303(g), which requires the Commission to "encourage the larger and more effective use of radio in the public interest."

[90] *Pacifica*, 438 U.S. at 742, 748. The Court, however, relied on the decisions in *KFKB*, *Trinity Methodist*, *NBC*, and *Red Lion*, all which cited the scarcity doctrine as support for the Commission's general regulatory power.

[91] *Id.* at 748.

[92] *Id.* at 748 (referring to the broadcaster in this context as an "intruder"). In his dissent, Justice Brennan cited the circuit court decision, which analogized the listener in *Pacifica* with the courthouse visitor in Cohen v. California, 403 U.S. 15

Stevens maintained that broadcasting is "uniquely accessible to children" and the content of such broadcasts may be restricted to protect children from indecent broadcasts.[93] Finally, Justice Stevens proposed that certain forms of speech—such as indecent and offensive speech—are less valuable than other forms of speech—such as political speech or "core" speech—and therefore should be subject to greater regulation.[94] Although this "lower value speech" rationale was joined by only two other justices, it has appeared in other cases[95] and is useful in analyzing proposed regulations restricting violence on television.[96]

Pacifica signalled the natural culmination of the Court's previous rulings regarding the Commission's powers to regulate and limit speech in the broadcast spectrum. Coming on the heels of *Red Lion*, *Pacifica* marked the continuation of the line of cases broadcasting which assigned a lower status in the first amendment hierarchy. Yet in relation to indecency cases not involving broadcasting, the *Pacifica* decision represented a departure from emerging first amendment law.[97] Although

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(1971) (finding a jacket emblazoned with the words "Fuck the Draft" to be protected speech) and the passerby in Erznoznik v. Jacksonville, 422 U.S. 205 (1975) (striking down an ordinance as overbroad even though nudity displayed on an outdoor screen was visible to a passerby). *Pacifica*, 438 U.S. at 764-65 (Brennan, J., dissenting). Justice Brennan noted that the listener elects to receive radio broadcasts and can merely turn the radio off or change the station if the listener is offended. The "minimal discomfort" suffered by an offended listener does not outweigh the "broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection." *Id.* at 765-66.

[93] *Id.* at 749-50.

[94] *Id.* at 746-47.

[95] Justice Stevens's "lower value of speech" argument first surfaced in Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (upholding a Detroit ordinance that required adult movie theaters to be geographically distributed); *see also* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49 (1986) (upholding municipal ordinance that concentrated adult theaters into particular zones of the city); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 548 (1980)(First Amendment bar to New York regulatory agency's prohibition on inclusion of inserts that discussed public policy into customer's monthly electric bills) (Stevens, J., concurring) (striking down a regulatory agency's prohibition on inclusion of inserts that discussed public policy issues into customers' monthly electric bills). In *Barnes v. Glen Theatre, Inc.*, Justice Souter noted that "protection of sexually explicit expression may be of lesser societal importance than the protection of other forms of expression." 501 U.S. 560, 586 n.3 (1991) (Souter, J., concurring) (upholding an Indiana ban on public nudity).

[96] *See infra* notes 285-95 and accompanying text.

[97] *See* Cohen v. California, 403 U.S. 15 (1971); *see also* Erznoznik v. Jackson-

the FCC had dealt with indecency cases previously by imposing fines or revoking licenses,[98] *Pacifica* signalled the Supreme Court's validation, albeit narrowly, of the agency's constitutional authority to regulate indecent speech.

In the years following *Pacifica*, the FCC narrowly construed the decision as only allowing it to punish those broadcasters who repetitively used any of the "seven dirty words" before 10:00 P.M.[99] As a result, the Commission did not significantly exert its power to restrict potentially indecent broadcast material.[100] In fact, between 1975 and 1987, the FCC did not find any broadcasts to be actionable on the basis of indecency.[101] Then in 1987, the Commission issued three decisions that indicated new-found vigor in the restriction of broadcasts it deemed indecent.[102] In these decisions, the Commission announced that it was resurrecting its pre-*Pacifica* definition of indecent broadcasting and would bring actions against violators of that revived standard.[103] The Commission

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ville, 422 U.S. 205 (1975); *infra* notes 142-76 and accompanying text.

[98] *See, e.g., In re* WUHY-FM, 24 F.C.C.2d 408 (1970) (forfeiture imposed for use of indecent language); *In re* Jack Straw Memorial Found., 21 F.C.C.2d 833 (1970) (license reduced to short term renewal status due to indecent language); *In re* E.G. Robinson, 33 F.C.C. 250 (license revoked due to a pattern of using indecent language), *aff'd sub nom.*, Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964).

[99] Action for Children's Television v. FCC, 852 F.2d 1332, 1336 (D.C. Cir. 1988) (holding that FCC's definition for indecency was not overbroad, but also finding that the FCC failed to consider adequately alternatives and offer reasoned support for its regulation channeling indecent broadcasts to between midnight and six A.M.) [hereinafter *"ACT I"*].

[100] Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) (holding that FCC's order implementing a 24-hour ban on all indecent broadcasts was unconstitutional), *cert. denied*, 112 S. Ct. 1281 (1992) [hereinafter *ACT II*].

[101] *Id.* at 1506.

[102] *See ACT I*, 852 F.2d at 1336. The three decisions that marked the FCC's new enforcement policies were *In re* Infinity Broadcasting Corp., 2 F.C.C.R. 2705 (1987) (finding that portions of Howard Stern's talk-show broadcast between 6:00 and 10:00 A.M. was actionable); *In re* Regents of the Univ. of Cal., 2 F.C.C.R. 2703 (1987) (broadcast of a song with explicit lyrics, *Makin' Bacon*, on a Saturday night after 10:00 P.M. was actionable); *In re* Pacifica Found., 2 F.C.C.R. 2698 (1987) (broadcast of excerpts of play entitled *Jerker* broadcast between 10:00 and 11:00 P.M. were indecent). *Id.*

[103] *See* New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees, 2 F.C.C.R. 2726 (1987); *see also ACT II*, 932 F.2d at 1506. The definition for indecency adopted by the FCC was identical to that which appeared in its 1975 report: "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community

justified its change of direction by claiming that the old "seven dirty words" standard was too narrow to prevent the broadcast of material that may be injurious to children.[104]

These three FCC decisions as well as the FCC's Public Notice summarizing its new enforcement policy[105] and the Reconsideration Order affirming it[106] were challenged by several broadcasters.[107] The broadcasters asserted that the new standards were inherently vague and overbroad. Furthermore, they argued that the channeling portions of the decisions (directing broadcasters to restrict indecent broadcasts to late hours thus limiting the risk that children are in the audience) were arbitrary and would "reduce adults to seeing and hearing material fit only for children."[108]

In particular, the FCC's new-found vigor for enforcing its pre-*Pacifica* indecency standards led to an extended legal battle between the FCC and the District of Columbia Circuit Court. In *Action for Children's Television v. FCC* ("*ACT I*"), a decision written by then-Judge Ruth Bader Ginsburg, the District of Columbia Circuit Court affirmed, remanded and vacated in part the actions of the FCC.[109] The court agreed with the FCC that the "seven dirty words" standard was too narrow and could "yield anomalous, even arbitrary, results."[110] The court also found that the FCC's revised definition for "indecent" speech was substantially the same as that affirmed in *Pacifica*.[111] The court accepted the FCC's justification for its new approach, finding it acceptable to channel indecent material, "in order to shelter children from exposure to words and phrases their parents regard as inappropriate for them to hear."[112] The court, however, found there to be too little information on children's viewing habits to allow meaningful re-

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standards for the broadcast medium, sexual or excretory activities or organs." Report on the Broadcast of Violent, Indecent and Obscene Material, 51 F.C.C.2d 418, 425 (1975).

[104] *ACT I*, 852 F.2d at 1338.

[105] *New Indecency Enforcement Standards*, 2 F.C.C.R. at 2726.

[106] *Id.*

[107] *See ACT I*, 852 F.2d at 1338.

[108] *Id.* at 1338-41.

[109] *Id.*

[110] *Id.* at 1338.

[111] 852 F.2d at 1338.

[112] *Id.* at 1340.

strictions on the times at which indecent material could be aired.[113] Thus, the court remanded this issue and concluded that, although indecent speech is constitutionally protected, the FCC may restrict it to protect children through reasonable and "securely grounded" restrictions.[114]

The Commission never had the opportunity to reformulate or provide rational support for its channeling policies. Instead, two months after the court's decision in ACT I, Congress passed and the President Bush signed legislation that directed the Commission to enforce a twenty-four hour ban on indecent, obscene and profane speech.[115] After a hearing, the Commission issued its opinion that a blanket ban on indecent speech was constitutional because there was a "'reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times.'"[116] Therefore nothing but a total ban would serve the government's "compelling interest in protecting children from broadcast indecency."[117]

The District of Columbia Court of Appeals, in *Action for Children's Television v. FCC* ("*ACT II*"), examined the constitutionality of a total ban on broadcast indecency.[118] Opponents of the FCC's plan argued that the FCC's indecency definition was unconstitutionally vague and overbroad.[119] The court,

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[113] *Id.* at 1342.

[114] *Id.* at 1344.

[115] Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988); *see also Act II*, 932 F.2d at 1507. Enforcement of the ban was stayed pending judicial review. *See* Action for Children's Television v. F.C.C., No. 88-1916 (D.C. Cir. Jan. 23, 1989). During this review, the Supreme Court held that a blanket ban on indecent commercial telephone messages ("phone sex") was unconstitutional because there were less restrictive alternatives available to prevent children from accessing these messages. Sable Communications, Inc. v. F.C.C., 492 U.S. 115 (1989). Believing that part of the rationale behind the *Sable* decision—that if there were no other less-restrictive ways to prevent access by children such messages could be used to justify a total ban—the Commission sought and obtained a remand from the Court of Appeals for the D.C. Circuit to marshal evidence showing that a 24-hour ban was the only viable means to prevent children's exposure to indecent speech. *ACT II*, 932 F.2d at 1507. Following solicitation of public comment on the ban, the Commission issued its report enforcing a total ban on indecent speech over the airwaves. *Id.*

[116] *ACT II*, 932 F.2d at 1507.

[117] *Id.*

[118] *Act II* came to the Circuit Court after a previous restriction that barred the airing of indecent broadcasts before midnight had been struck down. *ACT I*, 852 F.2d 1332, 1338-40 (D.C. Cir. 1988).

[119] 932 F.2d at 1507.

however, refused to review the issues of vagueness and overbreadth and concluded that "our holding in *ACT I* precludes us from now finding the Commission's generic definition of indecency to be unconstitutionally vague."[120] Yet the court also reaffirmed the first amendment protection of indecent speech provided and held that a *blanket* ban on indecent speech, in any medium, is unconstitutional.[121]

Responding to the *ACT II* decision, Congress passed section 16(a) of the Public Telecommunications Act of 1992.[122] Through this Act, Congress retreated from its earlier insistence on a total ban of indecent programming. It directed the FCC to promulgate regulations prohibiting indecent programming on any public radio or television station between 6:00 A.M. and 10:00 P.M., and between 6:00 A.M. and 12:00 midnight on commercial radio and television stations.[123] In the resulting administrative order, the FCC justified the channeling of indecent broadcasts to specific times as necessary to protect children and unreceptive adults from indecent language and programs.[124] Relying on *Pacifica*, the Commission maintained that the government had a compelling interest in protecting children from the harmful effects of indecent television and radio broadcasts, and that channeling offered a narrowly tailored means to achieve this end.[125] Parroting the plurality in *Pacifica*, the FCC contended that "a requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."[126]

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[120] *Id.* at 1508.

[121] *Id.* at 1508-09. The court argued that the Supreme Court's decision in Sable Communications v. FCC, 492 U.S. 115 (1989), supported this conclusion and that the fact that Congress mandated the 24-hour ban did not change the unconstitutional nature of the restriction. *Sable* struck down a congressionally imposed ban on indecent phone messages ("phone sex") because there was no showing that a total ban was justified as a means to protect minors. *See infra* notes 132-35 and accompanying text.

[122] Action for Children's Television v. FCC 11 F.3d 170, 173 (D.C. Cir. 1993) [hereinafter *Act III*].

[123] *In re* Enforcement of Prohibitions against Broadcast Indecency, 8 F.C.C.R. 704 (1993).

[124] *Id.* at 706.

[125] *Id.* at 706.

[126] *Id.* at 710 (quoting FCC v. Pacifica, 438 U.S. 726, 743 18 (1978)).

A third challenge to the FCC's assertions was brought in 1993, in the Circuit Court for the District of Columbia. Once more the court struck down the FCC indecency regulations.[127] The FCC argued that its 6:00 A.M. to 12:00 midnight ban on indecent broadcasts should satisfy judicial scrutiny because it was narrowly tailored.[128] The FCC also maintained that this regulation was necessary to help parents supervise their children's television habits and to satisfy the government's interest in protecting children from harmful influences.[129]

The court rejected these arguments and held that in drafting its regulations the FCC had not adequately considered the rights of adult viewers. Furthermore, the court stated that it was "at a loss to detect any reasoned analysis supporting the particular safe harbor mandated by Congress."[130] The court concluded that in order to secure approval of such regulations, Congress and the FCC must explain the scope of the government's interest, produce a well-reasoned definition of "children," provide information indicating when children are reasonably likely to be in the viewing audience, and provide station- and program-specific audience data reflecting the age of viewers.[131]

Prior to the circuit court's decision in *ACT II*, the Supreme Court accorded significant weight to the precedential value of *Pacifica* when it struck down a twenty-four hour ban on indecent telephone messages (commonly known as "phone sex") in *Sable Communications v. FCC*.[132] Although the Court rejected the government's contention that *Pacifica* gave the FCC

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[127] *ACT III*, 11 F.3d 170.

[128] *Id.* at 173-74.

[129] *Id.* at 176-77. The FCC also argued that there was an independent governmental interest in protecting adult viewers from exposure to indecent broadcasts. The court rejected this argument on two grounds: first, that despite the government's contention, *Pacifica* could not be read to create a compelling governmental interest in protecting adults from exposure to indecent speech and that such a holding would "run counter to the fundamental principle of the First Amendment that debate on public issues should be uninhibited, robust and wide-open." *id.* at 175 (citation omitted) and second, the government's stated interest in protecting adults is undermined by the regulation's provision that submission of data showing no appreciable child audience is a valid defense to a charge of airing indecent broadcasts outside of the safe harbor time period. *Id.* at 176.

[130] *Id.* at 177.

[131] *Id.* at 183.

[132] 492 U.S. 115 (1989).

power to regulate indecent telephone messages,[133] it echoed *Pacifica* when it distinguished broadcasting from telephone communications. Broadcasting, noted the court, is "'uniquely pervasive'" that is, it can "intrude on the privacy of the home without prior warning as to program content and is 'uniquely accessible to children.'"[134] Consequently, the court held that broadcasting can be regulated to a greater degree than, for example, an indecent telephone conversation that requires the listener to take greater affirmative steps to receive the communication.[135] Thus, in striking the restriction on telephone speech the Court reaffirmed the vitality of *Pacifica*, a decision that allowed significant restrictions on broadcasted speech.

Concurrently with the debate surrounding indecent television and radio broadcasts, Congress regained interest in limiting violence on television. In 1988 and 1989, congressional hearings exploring legislative actions to reduce the level of televised violence resulted in the Television Progam Improvement Act of 1990 ("T.V. Act").[136] This Act exempted broadcasters from anti-trust laws for three years. To facilitate meetings between the three major networks, Fox Broadcasting, cable operators and independent stations, for the purpose of helping Congress devise ways to reduce television violence.[137] The T.V. Act ultimately proved to be largely ineffective in its goal to bring these different companies together. In fact, ABC, CBS and NBC did not meet until two years after passage of the Act.[138] At that time, they announced that they had agreed on various "guidelines" to reduce violence on television.[139] These guidelines, however, were broad, undefined and failed to satisfy Congress.[140] Consequently, Congress reconvened hear-

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[133] *Id.* at 127.

[134] *Id.* (quoting FCC v. Pacifica, 438 U.S. 726, 748-40 (1978)).

[135] *Id.* at 127-28 (citing *Pacifica*, 438 U.S. at 748-49).

[136] 47 U.S.C. § 303c (Supp. III 1991).

[137] *See* Julia W. Schlegel, *The Television Violence Act of 1990: A New Program for Government Censorship?*, 46 FED. COMM. L.J. 187 (1993) (arguing that despite constitutionality of the Television Violence Act it is unlikely to reduce violence on television). Prior to passage of this Act, anti-trust laws had barred these television companies from cooperating with each other in developing programming guidelines. *Id.* at 240.

[138] *Id.* at 194.

[139] *Id.*

[140] The guidelines proposed by the broadcast networks were designed to "prohibit depicting violence as glamorous or using it to shock or stimulate the audience."

ings on the issue in 1993 when numerous bills were introduced to force broadcasters to reduce violence on television.[141]

In the past eighty years, the courts, Congress and the FCC have carved a separate legal niche for television broadcasting. Within this niche, the FCC has been granted enormous power to determine the means, the mode and the content of broadcasts. The courts have largely deferred to the FCC's judgment regarding both technical issues—such as chain broadcasting and frequency settings—and substantive issues—such as restrictions on the dissemination of certain political and social ideas or the expression of obscene, indecent and offensive speech. The courts' rationale for such restrictions has been based upon the scarcity of the spectrum, the pervasiveness and power of the medium, and children's accessibility to television and radio. The courts have largely deferred to the FCC when the FCC acts to protect children, even when such regulations deprive adults access to indecent, though protected, material.

The constitutional status of broadcasting and the government's ability to regulate the content of broadcasts is crucial to discerning the constitutionality of regulations that restrict violence on television. Any legislation directed at regulating televised violence must comport with the special rules that have developed around television.

III. RESTRICTIONS ON SPEECH: THE NON-BROADCASTING CONTEXT

The separate constitutional niche created for broadcasting does not exist in a vacuum. Instead, it coexists with general principles of first amendment law which have developed concurrently with the widespread use of broadcasting. In order to understand and evaluate the constitutionality of restrictions on violence, the contours of first amendment law outside of the broadcasting context must be explored. This discussion is valuable for understanding the peculiar first amendment status of broadcasting and the regulations involving violence and broadcast media. It also provides several different analytical frameworks and core principles of first amendment law that will be

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Id. at 194.

[141] *See supra* note 7.

used to examine and dissect the issues surrounding the efforts to regulate violence on television.

Several different lines of cases affect the constitutionality of efforts to regulate violent television programming. These cases can be roughly divided into three areas of first amendment law: 1) offensiveness and indecency; 2) obscenity; and 3) the state's interest in protecting children. In each of these areas, the Court's rationale for allowing certain speech restrictions and the state interests involved create the first amendment framework that surrounds restrictions on speech and highlight the differences between broadcasting and non-broadcasting content-based regulations.

A. *Indecent and Offensive Speech*

As noted earlier, the efforts to control the amount and type of violence on television are largely based on the arguments used to justify the general regulation and restriction of indecent and offensive speech.[142] Indeed, advocates of restricting indecent and offensive speech typically group violent and sexual behavior together when trying to justify the control of both.[143] Thus, it is necessary to examine the first amendment status of indecent and offensive speech to assess whether regulations directed at limiting the amount and types of violence on television are constitutional. Although this issue has been examined in the context of broadcast regulations, it is useful to explore the protection afforded to indecent and offensive speech in settings other than broadcasting.

Generally, indecent and offensive speech is given complete protection by the First Amendment.[144] The current constitutional status of indecent and offensive speech, however, includes restrictions on this speech in a number of situations. In addition to restrictions on broadcasting indecent speech, restrictions have been upheld where local economic development and quality of life is threatened,[145] where children's social de-

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[142] *See supra* note 11.

[143] *See supra* note 11.

[144] *See* Sable Communications v. FCC, 492 U.S. 115 (1989) (sexual expression that is indecent but not obscene is protected by the First Amendment); Cohen v. California, 403 U.S. 15 (1971) (upholding right of anti-war protestor to publicly wear jacket emblazoned with the phrase "Fuck the Draft").

[145] *See, e.g.*, Young v. American Mini Theatres, 427 U.S. 50 (1976) (upholding

velopment is perceived to be at risk,[146] or where the rights of adults not to be confronted with indecent or offensive speech, within certain contexts, are thought to be in jeopardy.[147] The regulations that the Court approves for limiting speech when these interests are threatened provides a view as to how violence on television may be regulated through a similar approach.

The modern seminal case addressing offensive and indecent speech is the 1971 case of *Cohen v. California*.[148] In *Cohen*, a student walked into the municipal court wearing a jacket with the inscription "Fuck the Draft."[149] Cohen defended his action by arguing that this message constituted speech and that the state's efforts to restrict that speech because of its perceived offensiveness violated the First Amendment.[150] The Court agreed, and rejected the state's contention that Cohen's jacket had thrust offensive words on unsuspecting and unwilling members of the citizenry.[151] Significantly, the Court concluded that although a citizen has a right not to be confronted with offensive messages in the privacy of one's home,[152] such a right does not necessarily exist when a citizen is in a public place.[153] This is particularly true, noted the Court, where of-

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ordinance that required geographical dispersion of adult theaters).

[146] *See* Ginsberg v. New York, 390 U.S. 629 (1968) (upholding a statute that barred the sale of indecent material to minors); *see also* New York v. Ferber, 458 U.S. 747 (1982) (upholding constitutionality of a ban on child pornography constitutional even where that pornography was not legally obscene).

[147] Primarily, the Court has demonstrated an interest in protecting the privacy of one's home and in contexts where the audience cannot easily avoid exposure. *See* Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (upholding federal law that allowed an addressee to prevent the mailing of materials that the addressee found personally offensive); *see also* Frisby v. Schultz, 487 U.S. 474 (1988) (upholding a city ban designed to protect residents from unwanted directed picketing). *But cf.* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (striking down municipal ordinance that banned hate speech).

[148] 403 U.S. 15 (1971).

[149] *Id.*

[150] *Id.* at 18-20.

[151] *Id.* at 21-22.

[152] *Id.* at 21; *see also Rowan*, 397 U.S. at 733. In *Rowan*, the Court placed great emphasis on an individual's right to be "let alone," even in contexts where the material is non-offensive to the majority of people and even when those materials contain "good" ideas. *Id.*

[153] 403 U.S. at 21. The differences between *Cohen* and Saia v. New York, 334 U.S. 558 (1948) and *Rowan* are apparent. One cannot avoid listening to a sound truck broadcasting a political or commercial message. *Saia*, 334 U.S. at 563

fended persons can avoid further "bombardment of their sensibilities simply by averting their eyes."[154] In effect, the Court held that without a showing of "substantial privacy interests," a person in a public place must expect to encounter a certain degree of offensiveness but that the exercise of First Amendment rights outweighed any discomfort an offended person may suffer.[155]

The acceptableness of the burden on the public to avoid exposure to offensive language or images was further elucidated in *Erznoznik v. Jacksonville*.[156] In striking down an ordinance that prohibited the showing of nudity on any drive-in movie screen visible to the public, Justice Powell argued that without showing an invasion of substantial privacy interests, the First Amendment severely restricted a state or municipality's power to censor offensive speech.[157] "[T]he Constitution," continued the Court, "does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."[158] The limited privacy interest of a person

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(Frankfurter, J., concurring). Similarly, although to a lesser degree, one cannot avoid an obscene or indecent message that arrives in the mail at one's home, a place where one has a strong privacy interest. *Rowan*, 397 U.S. at 736. Alternatively, Cohen's message, a written slogan with a clear political point embroidered on the back of a jacket, could easily be avoided or might even go unnoticed.

[154] 403 U.S. at 21.

[155] *Id.* at 23. Despite the fact that the Court in *Cohen* noted that "the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us," in FCC v. Pacifica, 438 U.S. 726, 744 (1978), the Court argued that "there are few, if any, thoughts that cannot be expressed by the use of less offensive language." 438 U.S. at 743 n.18. In *Pacifica*, the Court attempted to distinguish *Cohen* by arguing that broadcasting is a unique medium. *Id.* at 762. Whereas, "Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant." *Id.* at 749.

The Court's efforts to distinguish *Cohen* and *Pacifica* illustrate the difficulties in applying separate standards for ideas disseminated through broadcasting and those disseminated through print media. To a large degree, the Court's justification for this difference rests with the effectiveness of broadcast media to distribute information and affect thought and behavior. If this is the case, then the underlying philosophy of the First Amendment, that society benefits when there is a free and robust exchange of ideas, is ill-served by a rule that restricts a speaker who chooses the broadcast media to engage in the advocacy of ideas and viewpoints.

[156] 422 U.S. 205 (1975).

[157] *Id.* at 210.

[158] *Id.*

on a public street, concluded the Court, cannot serve as justification for government-sponsored censorship of protected speech.[159]

Unlike *Pacifica*, the *Erznoznik* Court rejected the state's argument that the banning of nudity from films visible to the public was a reasonable means of protecting minors from deleterious influences.[160] Even though the state had greater latitude in adopting controls to protect minors, the Court maintained that minors are still entitled to "significant" First Amendment protection:[161] "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[162] Jacksonville's ordinance, observed the Court, was not directed at sexually explicit nudity, but all nudity "irrespective of context or pervasiveness."[163] Because the ordinance banned all nudity, whether sexually explicit or not, the Court concluded that the ordinance was broader than permissible and, therefore, void.[164]

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[159] *Id.*

[160] *Id.* at 212.

[161] *Erznoznik*, 422 U.S. at 213.

[162] *Id.* at 213-14. For a more detailed discussion of the First Amendment and controlling the flow of information to minors, see *infra* notes 211-41 and accompanying text.

[163] *Id.* at 213.

[164] *Id.* at 217. The dissent derided the majority for failing to provide adequate support for the proposition that the burden falls on the public to ignore offensive materials. Chief Justice Burger argued that different media, such as film, should be judged by different standards so as to "'meet the problems generated by the need to accommodate the diverse interests affected by the motion pictures in compact modern communities.'" *Id.* at 220 (Burger, C.J., dissenting) (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 518 (1952) (Frankfurter, J., concurring)). Chief Justice Burger rejected the majority's contention that this case was similar to either *Cohen* or Spence v. Washington, 418 U.S. 405 (1974) (hanging an altered American flag from window is protected expression). He argued that large, illuminated, color screens are designed to hold the attention of all observers, and asserted that whereas "[t]he radio can be turned off," the "billboard or street car placard" are always on. *Erznoznik*, 422 U.S. at 221 (quoting Packer Corp. v. Utah, 285 U.S. 105, 110 (1932)).

For the dissent, the difference in media used to project a nude image justifies a greater level of governmental restriction on the images projected. If those images are "capable of revealing and emphasizing the most intimate details of human anatomy," then the state may adopt measures to restrict them from public view. *Id.* at 223. The dissent did not, however, offer any legitimate state reason, other than traffic safety, for the restriction of nude images. Nowhere in the dissent is

In striking down Jacksonville's ordinance, the Court relied on the "overbreadth" doctrine.[165] This doctrine holds that a statute that bars constitutionally proscribable material but also sweeps within its coverage protected speech can be found void on its face.[166] The rationale behind this doctrine is that in their efforts to restrict unprotected speech, overbroad statutes and ordinances may deter or chill the legitimate exercise of first amendment rights.[167] For example, the challenged ordinance in *Erznoznik* could encompass all forms of nudity, whether or not they were in an obscene context, including a "baby's buttocks, the nude body of a war victim, or scenes from

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there an explication as to why nude images pose a danger to public mores or children's morality. Instead, the dissent merely maintains that because persons viewing the drive-in movie image from outside of the drive-in facility cannot hear the sound of the picture or view the entire work, the communicative value of such speech is lost. *Id.* at 222. This argument misses the rationale underlying *Cohen*, that in a complex and diverse society that values free expression, the First Amendment protects the rights of speakers even if some of that speech offends the sensibilities of some members of the public.

It also is worth noting that Chief Justice Burger's distinction between a projected image on a screen that cannot be turned off by an unwitting viewer and the ability of a listener to turn off the radio vanished three years later in FCC v. Pacifica Found., 438 U.S. 726 (1978). In *Pacifica*, Chief Justice Burger and Justice Rehnquist joined in Justice Stevens's opinion, which relied on the unique nature of radio and the asserted inability for a listener to avoid unexpected program content as a justification for restricting Carlin's monologue. 438 U.S. at 748. In so holding, they sharply differed with Justice Brennan's dissenting argument that an individual voluntarily lets radio into his home and can easily turn it off. *Id.* at 765 (Brennan, J., dissenting).

[165] *Erznoznik*, 422 U.S. at 213. This doctrine should be distinguished from the similar though slightly different "void for vagueness" doctrine. A "void for vagueness" analysis examines primarily the definitions used to describe prohibited conduct, and is derived from notions of due process and notice, whereas the overbreadth doctrine focuses more on the type of conduct that the statute or ordinance seeks to limit. *See infra* notes 224-31 and accompanying text. *See generally* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991); Lili Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49 (1992/93) (reviewing the FCC's regulatory policy on broadcast television's sex-talk shows).

[166] *See* Thornhill v. Alabama, 310 U.S. 88 (1940).

[167] *Erznoznik*, 422 U.S. at 216. The contours of this doctrine are unclear. It would appear that statutes that affect "conduct" are subject to the "substantial overbreadth" doctrine. This doctrinal variation was announced in Broadrick v. Oklahoma, 413 U.S. 601 (1973) (statutes that affect expressive conduct must be "substantially overbroad" to be held unconstitutional). Statues that affect "speech," however, apparently are still subject to standard overbreadth doctrine. *See, e.g.*, Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987) (striking down ordinance that banned "all First Amendment" activities at Los Angeles International Airport).

a culture in which nudity is indigenous."[168] Thus, the ordinance restricted both protected and unprotected material. Similar concerns about overbreadth arise with efforts to restrict violence on television.[169]

Even though *Erznoznik* found Jacksonville's ordinance facially invalid on overbreadth grounds, the case extended the principle of *Cohen*—that a speaker's first amendment rights can outweigh a citizen's right not to be offended, whether by printed words or visual images.[170] Ultimately *Erznoznik* was the most protection provided to a speaker using an electronic means of communication for public speech or conduct that some might find offensive or indecent.[171] Although *Erznoznik* allowed a drive-in movie theater which was visible from the street to display some nudity, and thus, possibly offend some members of the public, three years later in *Pacifica* the Court ruled that this principle does not necessarily apply to other forms of media such as radio and television.

With the constitutional contours of indecent and offensive speech largely established, the Court turned next to the constitutionality of local efforts to use zoning ordinances to channel or distribute "adult" movie theaters into special locations. Legislative justifications for establishing such ordinances, and the Court's acceptance of such rationales, are analogous to the FCC's early efforts to regulate the time during which indecent broadcasts could be shown. Similarly, such zoning ordinances are parallel to current efforts to channel televised violence into particular times of the day.

Proponents of regulations to zone "adult" theaters argue that these "content-neutral" restrictions are necessary to preserve the character of a community and prevent unwanted "secondary effects" that these theaters bring such as crime and declining property values.[172] The Court in *Young v. American*

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[168] *Ernoznik*, 422 U.S. at 213.

[169] *See infra* notes 263-84 and accompanying text.

[170] Cohen v. California, 403 U.S. 15, 25 (1971).

[171] It is important to note that this limitation does not necessarily extend to movie theaters not visible to the general public. In these contexts, the Court has displayed extreme wariness of governmental efforts to bar the showing of allegedly indecent films. *See* Freedman v. Maryland, 380 U.S. 51 (1965) (requiring strict procedural safeguards for film licensing schemes).

[172] Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 530 n.3 (9th Cir. 1984) (upholding zoning regulations aimed at adult theaters), *aff'd*, 475 U.S. 41

Mini Theatres, Inc.,[173] agreed that, because a "city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect," the "city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems."[174] The Court noted that, unlike the facts in *Erznoznik*, the Detroit ordinance at issue in *American Mini Theatres* was not directed at the content of the speech contained in the movies being shown at the theaters in question, but at the effect that such theaters had on general community development and character.[175] Detroit's attempt to limit these negative secondary effects, did not totally preclude adult theaters, but instead was a legitimate attempt on the part of the Detroit Common Council to address problems brought on by the presence of such theaters in the community.[176]

The issue of secondary effects and the zoning of adult theaters arose ten years later in *Renton v. Playtime Theatres, Inc.*,[177] where the Court upheld efforts to concentrate adult theaters into specific zones. In both *American Mini Theatres* and *Renton*, the zoning regulations at issue centered on "adult" theaters and the purported secondary effects that such theaters had on the surrounding communities. Significantly, in each case, the ordinances defined adult theaters as those theaters that presented visual depictions of specified "anatomical areas" or "sexual activities."[178] These specified areas and activities clearly described which types of materials fell within the zoning proscription.[179]

(1986).

[173] 427 U.S. 50 (1976).

[174] *Id.* at 71.

[175] *Id.* at 71 n.34. The Court also distinguished *Erznoznik* in two other ways. First, by pointing out that the secondary effects—impact on traffic—that Jacksonville purportedly sought to address through its ban on displays of nudity on drive-in theater screens was not sufficiently supported by a factual basis. Second, the Court noted that the statute in *Erznoznik*, which prohibited all nudity, was extremely broad, whereas the statute in *American Mini Theatres* carefully specified the types of sexual activity that would trigger the zoning constraints. *Id.* at 71-72, nn. 34-35.

[176] *Id.* at 71.

[177] 475 U.S. 41 (1986).

[178] *Id.* at 44.

[179] The ordinance in *Renton* defined "Specified Sexual Activities" as: "a) Human genitals in a state of sexual stimulation or arousal; b) Acts of human masturba-

In *Renton*, the Court also accepted the city's argument that its zoning regulations were content-neutral, seeking merely to prevent the secondary effects that such theaters have on the community.[180] By agreeing that the city's regulations were content-neutral, the Court could apply a reduced level of scrutiny. Thus, a community only needs to demonstrate that such regulations serve a substantial and legitimate governmental interest and do not unreasonably limit alternative avenues of communication.[181]

Finally, in *Boos v. Barry*,[182] the Court further clarified its secondary effects approach. In *Boos*, the Court struck down a District of Columbia ordinance that barred any picketing critical of embassies of foreign governments within 500 feet of that particular country's embassy.[183] In so holding, Justice O'Connor, joined by Justices Scalia and Stevens, distinguished *Renton* by arguing that the listener's reaction to speech is not considered a secondary effect.[184] Specifically, the Court noted that although the regulation in *Renton* had applied to a "particular category of speech," the justification for such regulation "had nothing to do with that speech."[185] The Court noted that if the ordinance "was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based

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tion, sexual intercourse or sodomy; c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast." Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 529 n.1 (9th Cir. 1984), *rev'd*, 475 U.S. 41 (1986). The ordinance also defined "Specified Anatomical Areas" as: "a) Less than completely and opaquely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and b) Human male genitals in a discernible turgid state, even if completely and opaquely covered." *Id.* The ability to describe and delineate those theaters exempt from zoning regulations is important. Indeed, this distinction is a key difference between the efforts to restrict programming that contains violence and the zoning regulations present in both *American Mini Theatres* and *Renton*. See *infra* notes 298-321 and accompanying text.

[180] *Renton*, 475 U.S. at 49 (citation omitted).

[181] *Id.* at 50. Justice Souter relied on the secondary-effects rationale of *Renton* in his concurring opinion in the indecency case, Barnes v. Glen Theatre, Inc. 501 U.S. 560, 580-81 (1991) (Souter, J., concurring) (upholding state statute that prohibited public nudity in general and nude dancing in clubs in particular).

[182] 485 U.S. 312 (1988).

[183] *Id.*

[184] *Id.* at 321.

[185] *Id.* at 320.

statute would have been appropriate."[186]

The Court's approach to secondary effects analysis raises questions about whether similar regulations to limit the showing of violent movies—whether on a movie screen or on a private television—would be constitutional because of their perceived tendency to encourage violence and promote social degradation. Although the secondary effects window allows the state to restrict speech that it perceives as increasing urban or community blight, the precise size of this window and the types of prohibitions that can fit through it are still undetermined.

What emerges from the Court's treatment of indecent and offensive speech is the conclusion that offensive and indecent speech, when removed from the context of broadcasting, is entitled to a relatively high degree of protection. Whereas the public has a limited right not to be confronted with indecent or offensive speech in the home, there is a limited burden to be exposed to such speech outside the home. This burden, however, does not necessarily prohibit local governments from seeking to control the secondary effects of indecent or offensive speech.

The nature of the protections and restrictions placed on indecent and offensive speech provide principles and frameworks that must be incorporated into any analysis of the violence on television debate. Thus, regulations that purport to reduce or restrict violent imagery must balance the burden placed on the citizenry to expect and tolerate offensive messages in public with the public's right to be free from such images while at home. In addition, the secondary effects argument can be extended to include the societal violence as a secondary effect of televised violence. This extension is useful and illustrates many of the hazards of equating proscriptions on indecency with proposed restrictions on violence.

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[186] *Id.* at 321. Justice Brennan agreed with Justice O'Connor's description of *Renton* up to the point that secondary effects cannot include listeners' reaction to speech. *Id.* at 334 (Brennan, J., concurring opinion). But he disagreed with Justice O'Connor's application of *Renton* to a political speech case such as *Boos* and took the opportunity to highlight the flaws in the *Renton* approach. Justice Brennan argued that *Renton* creates "a possible avenue for governmental censorship whenever censors can concoct 'secondary' rationalizations for regulating the content of political speech." *Id.* at 335.

B. *Obscenity*

Unlike indecent and offensive speech which is protected but subject to a variety of restrictions, obscene speech has been completely removed from first amendment safeguards.[187] By analyzing the Court's approach to obscenity one can begin to understand some of the problems with regulating violence on broadcast television.

The Court's struggle to define and restrict obscene speech has been one of the most controversial areas of first amendment law.[188] A number of decisions have set forth the standards for determining what is sexually obscene and have claimed to articulate the justifications for restricting obscene material. For example, in *Roth v. United States*,[189] the Court addressed the constitutionality of criminal obscenity statutes.[190] The Court acknowledged that, although this was the first time the issue of whether obscenity was protected speech had "squarely presented" itself to the Court, previous cases had indicated that obscenity was not entitled to first amendment protection.[191] The author of the opinion, Justice

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[187] *See* Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1956).

[188] *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73, 79 (1973) (upholding a ban on obscene material displayed to consenting adults).

[189] 354 U.S. 476 (1956).

[190] *Roth v. United States* incorporated two challenges to a criminal obscenity statute. First, Roth contested the constitutionality under the First Amendment of the federal obscenity statute, which stated, in pertinent part: "[e]very obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character . . . . [i]s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier." *Roth*, 354 U.S. at 479 n.1 (quoting 18 U.S.C. § 1461 (1940)).

The second challenge centered on the constitutionality of the obscenity provisions of the California Penal Code, which stated, in pertinent part, that a person commits a misdemeanor if she:

> . . .
> 3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or,
> 4. Writes, composes, or publishes any notice or advertisement or any such writing, paper, book, picture, print or figure . . . .

Id. at 479-80 n.2 (quoting CAL. PENAL CODE § 311 (West 1955)).

[191] *Roth*, 354 U.S. at 481.

Brennan, turned to history and after reviewing obscenity statutes dating back to colonial America, concluded that obscenity is not protected speech.[192] The Court found that the "implicit" history of the First Amendment dictates that obscenity is "utterly without redeeming social importance" and therefore is not entitled to first amendment protections.[193] Aside from a focus on historical precedent, the need to protect minors,[194] and the assertion that obscenity is "utterly without redeeming social importance,"[195] the Court was unwilling or unable to derive a clear state interest in the prohibition of obscenity.

One of the principle problems with prohibiting a class of speech like obscenity is the difficulty in defining what precisely *is* obscene. In *Roth,* the Court recognized that not all expressions or publications containing sexual themes could be judged obscene and therefore subject to restriction.[196] The Court adopted a test for determining what is obscene and thus not deserving of constitutional protection.[197] Instead of ending the debate over obscenity, however, *Roth* marked the beginning of years of struggle to define obscenity adequately and to provide justifications for restricting its dissemination.[198] Over

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[192] *Id.* at 482-85.

[193] *Id.* at 484. To support its contention that obscenity is unprotected speech, the Court relied on its decision in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In *Chaplinsky*, the Court presented a list of those classes of speech that do not carry first amendment protection. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ." *Id.* at 571-72.

[194] The need to protect minors from sexually explicit material was best articulated by Justice Marshall in Stanley v. Georgia, 394 U.S. 557 (1969) (striking ban on the possession of obscene materials).

[195] *Roth*, 354 U.S. at 484.

[196] *Id.* at 476.

[197] The Court adopted the following test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489.

[198] *Id.* at 509 (Douglas, J., dissenting). In dissent, Justice Douglas argued that the "community standard" adopted by the majority was "inimical . . . to freedom of expression" because it would allow juries to restrict matter related to "'sexual impurity'" and establish a moral code that the government has no constitutional authority to protect. *Id.* at 510-12. Justice Douglas compared *Roth* to Dennis v. United States, 341 U.S. 494 (1951), where the Court upheld an anti-subversion law and stated that courts "must ask whether the gravity of the 'evil', discounted by its improbability, justifies . . . invasion of free speech as . . . necessary to avoid the danger." He concluded that the danger feared in *Dennis* could not be

time, the Court's dissatisfaction with *Roth*'s standard became evident. For sixteen years after *Roth*, the Court struggled with the issue of obscenity. "No fewer than 31 cases" were disposed of by "per curiam reversals of convictions for the dissemination of materials" that were deemed not to be obscene.[199]

Finally, in *Miller v. California*,[200] the Court altered the test it had enunciated in *Roth*.[201] *Miller* involved the constitutionality of a California statute that barred the making of obscene materials. In rendering its decision the court set forth a three-part test to determine whether a particular work should be judged obscene.[202] The test is: 1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; 2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and 3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[203] Like *Roth*, the Court in *Miller*, did not articulate a state interest to justify the exclusion of obscenity from protected speech. Instead, the Court relied on a combination of Brennan's historical analysis in *Roth*, precedent set by earlier obscenity cases and on the broad assertion that minors needed protection from obscene materials.[204]

One of the few instances where the Court has discussed the state interest at stake in obscenity cases was in *Miller*'s companion case, *Paris Adult Theatre I v. Slaton*.[205] In uphold-

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analogized to something both as obtuse and as omnipresent as sexual thoughts. *Roth*, 354 U.S. at 510.

Justice Harlan highlighted the connection between speech, thought and action, yet maintained that a State could reasonably conclude that "pornography" needs to be restricted because of its effect on the "moral fabric of society." *Roth*, 354 U.S. 476 (Harlan, J., concurring). Protecting morality, he believed, was a legitimate state interest and could warrant restrictive state regulations. *Id.*

[199] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82-83 n.8 (1973) (Brennan, J., dissenting).

[200] 413 U.S. 15 (1973).

[201] *Id.* at 47-48.

[202] *Id.* at 24.

[203] *Id.* at 47 (Brennan, J., dissenting). The bulk of Brennan's dissent to the Court's stance on obscenity was expressed in *Miller*'s companion case, *Paris Adult Theatre*, 413 U.S. at 70, where he argued that even with this test, obscenity cannot be defined so as to avoid problems of overbreadth. *Id.* at 83-84.

[204] *Miller*, 413 U.S. at 19-20, 35.

[205] 413 U.S. 49 (1973).

ing a Georgia ban on the public showing of an obscene film, the Court pointed to the "arguable correlation between obscene material and crime," and asserted that the nation and the states have the right to "'maintain a decent society.'"[206] Significantly, the Court rejected the argument that the state needed to demonstrate conclusively that obscene material has adverse effects on adults. In such a situation, the state must only show that it could reasonably determine that such a connection exists.[207]

The dissent argued that even though the majority opinions in both *Paris* and *Miller* had proffered a few state interests and a method to determine the obscene nature of a particular work, the dissent argued that obscenity is a class of speech that is "incapable of definition with sufficient clarity to withstand attack on vagueness grounds."[208] Specifically, the concepts of "prurient interest," "patent offensiveness" and "serious literary value" are too indefinite to provide adequate notice and therefore create too great a risk of a chilling effect on protected speech.[209]

Throughout the obscenity case, one of the few articulated state interests justifying the prohibition of obscenity is the belief that such speech harms the social and moral development of children.[210] This argument, in turn, focuses attention on the availability of such speech to children and the risk that they might be accidentally or inadvertently exposed to such material. Clearly, dissemination of obscenity by any means is prohibitable because the entire category of obscene speech has been proscribed.[211] With other types of speech that may be

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[206] *Id.* at 59-60 (quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)).

[207] *Id.* at 60. Considering the thousands of studies on the asserted connection between televised violence and societal violence and the different conclusions that can be derived from these studies, *Paris Adult Theatre I* is especially important. If Congress, based upon its years of debate on this issue concluded that some form of regulation was necessary, then it is unlikely the Court would strike down such a regulation based on the question of causality.

[208] *Id.* at 85-86 n.9 (Brennan, J., dissenting).

[209] *Id.* at 84.

[210] *See* Stanley v. Georgia, 394 U.S. 557, 567 (1969) (striking down state law that prohibited the possession of obscene materials).

[211] *See* Sable Communications v. FCC, 492 U.S. 115, 124 (1989) (upholding ban on obscene telephone messages); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69, 93 (1973) (holding that first amendment protection of does not extend to obsceni-

dangerous to children's development, however, the accessibility of such speech to children becomes a relevant factor. Indeed, the ubiquitous presence of television is used as an argument for the strict control of programs containing violence in the violence on television debate.[212]

C. *Protection of Children*

Many of the decisions involving indecent and obscene material are founded upon a desire to protect minors from material deemed by adults to be injurious to children's social development.[213] This same concern is a primary reason behind support for a ban or restriction on televised violence.[214] Over the years, the Court has balanced the state's desire to protect children—deemed a "compelling interest"—with the constitutional imperative of protecting the dissemination of material to consenting adults.[215]

The first amendment right of minors to receive protected material, however, is limited. This limitation has its modern genesis in *Prince v. Massachusetts*,[216] where the Court upheld a Massachusetts statute that prohibited boys under the age of twelve and girls younger than eighteen from selling magazines, and barred parents or any adults from supplying, compelling or permitting the sale of such material by children.[217] The Court noted that "a democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies" and, therefore, the legislature could adopt measures to protect the growth and development of children even when those measures limit parental freedom in matters regarding conscience and religious conviction.[218]

These first amendment limitations on sexually indecent

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[212] *See, e.g.*, S. 1383, *supra* note 7 (recognizing that television "has established a unique pervasive presence in the lives of all Americans").

[213] *See, e.g*, FCC v. Pacifica Found., 438 U.S. 726, 749 (1978).

[214] *See supra* notes 8-9 and accompanying text.

[215] *See* Ginsburg v. United States, 383 U.S. 463 (1966) (upholding a variable obscenity standard for minors).

[216] 321 U.S. 158 (1944).

[217] *Id.* at 161-63.

[218] *Id.* at 168.

materials were further elucidated in *Ginsberg v. New York*.[219] In *Ginsberg*, the Court upheld a New York statute that made it a crime to knowingly sell to a minor any picture depicting nudity.[220] Despite the fact that the pictures sold were not obscene for adults, the Court adopted a variable obscenity standard for minors. The Court maintained that the state had an independent interest in the well-being of its youth and, by denying sexually explicit, though constitutionally protected materials to minors, the state was merely protecting the ethical and moral development of youth.[221] The Court did not require the state to demonstrate a causal link between obscene material and the degradation of the morals of youth.[222] Instead, it adopted a low standard of review and concluded that New York's statute was rationally related to protecting minors from harm.[223]

Although the Court has adopted a more lenient approach to laws that seek to restrict otherwise protected material from being viewed by minors, several cases struck down these laws because of their overbreadth or vagueness.[224] These cases

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[219] 390 U.S. 629 (1968).

[220] *Id.* at 645-46.

[221] *Id.* at 641.

[222] *Id.* at 641-42. Indeed, the Court acknowledged the fact that no causal link between obscenity and the ethical and moral development of children had been scientifically established. The Court noted that "[w]e do not demand of legislatures 'scientifically certain criteria of legislation.' We therefore cannot say that [a statute], in defining the obscenity of material on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm." *Id.* at 642-43 (citation omitted).

[223] *Id.* at 642-43. Although these cases address the protection of children's moral and social development, they must be distinguished from the effort to ban child pornography. The Court has upheld legal restrictions on the distribution and possession of materials that depict children in sexually explicit settings. *See* Osborne v. Ohio, 495 U.S. 103 (1990) (upholding ban on the possession of child pornography); New York v. Ferber, 458 U.S. 747 (1982) (upholding ban on the distribution of child pornography). In so holding, the Court has rejected first amendment challenges to such laws on the ground that the state interest in protecting the immediate and future well-being of children involved in the pornography industry far outweighs any first amendment value of such material. *Osborne*, 495 U.S. at 108-11. Unlike statutes that purport to protect children as an undefined societal group from possible deleterious influences of sexually explicit or violent materials, child pornography statutes clearly protect a well-defined group of children from exploitation and almost certain psychological and physical harm.

[224] *See generally* Sable Communications v. FCC, 492 U.S. 115, 126 (1989); Winters v. New York, 333 U.S. 507, 509-10 (1948).

provide interesting and informative parallels between the present debate regarding violence on television and the historical concern over the exposure of minors to printed and pictorial material deemed to be harmful. Specifically, these cases expose certain basic principles that will impact any consideration of legislation restricting violence on television.

A case from the mid-1940s provides an early glimpse to some of the arguments and definitional infirmities of restricting "violent" material because of its perceived effect on juveniles. In *Winters v. New York*, the Court struck down a law that forbade selling or distributing to minors any material likely to stimulate juvenile delinquency.[225] The Court "recognize[d] the importance of the exercise of a state's police power to minimize all incentives to crime,"[226] but held that New York's statute was too vague because it required "men of common intelligence . . . to guess at the meaning of the enactment."[227] Consequently, the Court concluded, the statue provided no notice to the public, making it impossible for the "actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications."[228]

The Court reached this conclusion even though the statute had been narrowed in an earlier decision by the New York Court of Appeals. The New York Court's limiting construction of the statute had rested in part on extending the definition of indecent or obscene speech[229] to include "collections of criminal deeds of bloodshed or lust . . . so massed as to become

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[225] 333 U.S. at 508-09. The New York statute being challenged was included in the "indecency" article of the New York Penal Law and made it a misdemeanor if a person

> Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, 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, or stories of deeds or bloodshed, lust or crime . . . .

Id. at 508 (quoting N.Y. PENAL LAW § 1141 (Consol. 1940)).

[226] *Id.* at 509.

[227] *Id.* at 515.

[228] *Id.* at 519.

[229] *Winters*, 333 U.S. at 514.

vehicles for inciting violent and depraved crimes."[230] The Supreme Court, however, found that the terms of this definition—"massed" and "vehicles for inciting violent and depraved crimes"—were clauses that required no "intent or purpose," and that they proscribed a particular type of indecency or obscenity that heretofore had "no technical or common law meaning."[231]

This refusal to extend the concepts of indecency and obscenity to include depictions of violent acts presaged the current debate concerning violence on television. Although the *Winter* Court had based its decision on vagueness grounds and had largely avoided a prolonged investigation of the substantive first amendment issues involved, the problem presented to the Court is not dissimilar to the definitional uncertainties and problems raised by the debate on television violence. Unlike other cases discussing statutory vagueness, *Winters* is distinct because it is the only Supreme Court case to specifically discuss extending the definition of indecent or obscene material to include depictions of violence.[232]

A decade after *Winters*, another Supreme Court case, *Butler v. Michigan*,[233] enunciated a key principle that still effects the constitutional assessment of many of the proposals to restrict violence on television. In *Butler*, the Court struck down a Michigan statute that barred making available to the public any book that may have a deleterious influence on youth.[234] The Court concluded that such a broad statute was "not reasonably restricted to the evil which it is said to deal" and has the effect of reducing the adult population to reading only what is fit for children.[235] This final concern, that to safeguard children adults also could be prevented from accessing

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[230] *Id.* at 513-14.

[231] *Id.* at 519.

[232] Recently, however, two cases have addressed the extension of indecency and obscenity to include depictions of violence. *See* Video Software Dealers Ass'n v. Webster, 773 F. Supp. 1275 (W.D. Mo. 1991) (striking down Missouri statute that barred the dissemination of video cassettes depicting violence to minors), *aff'd*, 968 F.2d 684 (8th Cir. 1992); Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520 (Tenn. 1993) (upholding state statute that restricted the display of materials harmful to minors but finding the term "excess violence" to be void for vagueness).

[233] 352 U.S. 380 (1957).

[234] *Id.* at 383.

[235] *Id.*

protected material, surfaces in other cases and is central to any analysis of restrictions on television violence.[236]

Indeed, the concerns mentioned in *Butler* also were raised over thirty years later by the Court in *Sable Communications of California v. FCC*,[237] where the Court held that a ban on indecent telephone messages (so-called "dial-a-porn" services) far exceeded that necessary to prevent minors from being exposed to such messages.[238] Although the Court upheld a ban on obscene telephone messages contained in the same legislation, it rejected Congress's attempt to institute a complete ban on indecent messages. In so doing, however, the Court reiterated its belief that the state has a "compelling interest in protecting the physical and psychological well-being of minors."[239]

In seeking to restrict minors' access to indecent media, however, the *Sable* Court was clear that the restrictive means used must be narrowly drawn so as not to interfere with the adult population's right to receive such messages.[240] The Court rejected arguments by the FCC and Congress that a twenty-four hour ban on indecent telephone messages was the only means available to insure that children were not exposed to these messages.[241] The only supportive evidence the Court could find for such an assertion was conclusory statements made by proponents of the bill.[242] Moreover, the Court noted that the twenty-four hour ban was instituted despite the presence of other, less extreme means to control access to indecent messages.[243] Thus, in finding Congress's total ban on indecent phone messages unconstitutional, the Court reaffirmed its commitment to both the role government should play in securing the moral well-being of children and to the constitutional

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[236] *See, e.g.*, Sable Communications of California v. FCC, 492 U.S. 115 (1989); *infra* notes 295-302 and accompanying text.

[237] 492 U.S. 115 (1989).

[238] *Id.* at 131.

[239] *Id.* at 126 (citing Ginsberg v. New York, 390 U.S. 629, 639-40 (1968)); *see also* New York v. Ferber, 458 U.S. 747, 756-57 (1982) (upholding state statute that banned child pornography).

[240] *Id.* at 131.

[241] *Id.* at 128.

[242] *Id.* at 129.

[243] *Sable Communications*, 492 U.S. at 128. These other means included restricting access to credit card holders or those with a pre-designated access code.

requirement that restrictions be narrowly tailored so as not to unduly impede adult access to indecent messages.[244]

The four different areas of constitutional law discussed above—broadcasting restrictions, indecency, obscenity regulations and efforts to protect children—provide the groundwork necessary to analyze proposals surrounding restrictions on television violence. The present nature and status of broadcasting, various definitional issues, secondary effects analysis, the goals of the state and the means to achieve those goals are all fundamental to a discussion of violence on television.

IV. ANALYSIS

First amendment law as it applies to broadcasting provides a framework to analyze the constitutionality of efforts to regulate televised violence. The legal procedures, regulations and substantive rules that guide the FCC, broadcasters and the courts in determining the nature and content of broadcasts, however, do not operate independent of other areas of first amendment law. Rules applied to broadcasters must be analyzed in relation to general first amendment doctrine. Any analysis of televised violence must consider the specific nature of restrictions on it, including the terms used to define violence, the role of violence in media generally and the value of violence as a means of expression.

A. *Madonna and The Terminator: The Inapplicability of Extending the Sexual Indecency Framework to Violence*

As illustrated above, certain types of speech have been classified by the Court as falling outside the scope of first amendment protections and, therefore, subject to restriction.[245] Obscene speech falls entirely outside of first amendment protections.[246] Indecent and offensive speech is protected, although this protection is limited especially within the context of broadcasting.[247] Moreover, indecent and offensive

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[244] *Id.*

[245] *See, e.g.*, Miller v. California, 413 U.S. 15 (1973) (obscene speech); *see also* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words); *supra* notes 187-212 and accompanying text.

[246] 413 U.S. at 20.

[247] FCC v. Pacifica Found., 438 U.S. 726 (1978) (indecent speech subject to re-

speech has been defined to include only explicit sexual and excretory activities, whereas depictions of violence heretofore have been undefined and unrestricted.[248] Yet, the current debate over televised violence revolves around the assumption that televised violence can be restricted in a manner similar to sexual indecency or sexual obscenity, and that these restrictions on violence can be justified with the same reasoning as that used to regulate broadcast reference to sexual and excretory functions.[249]

Placing one's analysis of violence on television within an indecency framework provides a deceptively alluring fit. Not only do some of the cases that address indecency and offensiveness involve electronic media, including broadcasting,[250] but many of the proposed restrictions on violence have similar objectives as those that seek to restrict indecency.[254] Additionally, many of the means offered to limit violence in broadcasting are identical to those used to regulate indecent speech.[255] Upon closer analysis, however, these surface simi-

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striction when broadcast over radio or television).

[248] *See* Winters v New York, 333 U.S. 507, 514 (1948) (rejecting a New York statute that defined indecent or obscene as including materials "so massed as to become vehicles for inciting violent and depraved crimes"); *see supra* notes 142-86.

[249] *See supra* notes 7-9, 11 and accompanying text.

[250] *See, e.g.*, Sable Communications v. FCC, 492 U.S. 115 (1989) (telephone messages); FCC v Pacifica Found., 438 U.S. 726 (1978) (radio); Erznoznik v. Jacksonville, 422 U.S. 205 (1975) (drive-in movies).

[254] The proponents of restricting violence on television argue that televised violence contributes to high societal levels of violence by leading children to imitate the violence they see and by destroying the moral fabric of the nation. *See generally, This Week with David Brinkley* (ABC television broadcast, Nov. 7, 1993) (Professor Charles Ogletree stated "I think it adds up because we see those [violent] images and we try to emulate them in some way."); Simon, *supra* note 8, at *3 (stating that television violence "is one of the causes of crime and other anti-social behavior"); *Hundt Challenges Industry to do Much More to Curb Televised Violence*, COMM. DAILY, Jan. 25, 1994, at 1 (FCC Chairman Hundt claiming that violence on television "inflames young minds").

Similarly, the traditional reasons for sustaining laws that deal with indecency, offensiveness and obscenity have centered on the perceived damage that such speech inflicts on the moral and social climate and, in particular, on the development of children. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629 (1968) (well-being of minors justify regulation of otherwise protected expression by controlling distribution of sexually explicit materials).

[255] *See, e.g., ACT I*, 825 F.2d 1338 (1988) (restrictions on the broadcast of indecent material when children are likely to be watching); S. 1383, *supra* note 7 (proposal to ban violent programming during hours when children are reasonably likely to comprise a substantial portion of the audience).

larities between regulations of sex and violence cannot be sustained. Instead, it becomes clear that violent acts depicted on television cannot simply be considered another category of speech deserving a lower level of first amendment protection.

In effect, those who advocate restricting violence on television attempt to expand traditional notions of indecency and offensiveness to include violence. The mere similarity between the rationales behind the regulations does not inexorably lead to the conclusion that the governmental regulation of violence and sex—two very different aspects of human behavior—are both constitutional. This is particularly true when violence is significantly harder to define and delimit than is sex.

1. Catching the Road Runner: Trying to Define and Identify Prescribable Violence

Examining violence within the context of indecency, offensiveness and obscenity case law illustrates the difficulty of considering violence as an extension of indecent or offensive speech. The uncertainty surrounding definitions of violence raises serious concerns of overbreadth and vagueness. The proposed restrictions on violence encounter vagueness and overbreadth problems similar to those encountered with the ordinance in *Erznoznik v. Jacksonville*,[256] and the statute in *Winters v. New York*.[257] The definition of violent acts, whether defined by currently proposed legislation, by an adaptation of the FCC's definition for sexual indecency, or through a modified *Miller* analysis, do not rectify the constitutional barriers to regulations of violence on television.

In 1993, ten bills seeking to restrict television violence were presented to Congress. In her testimony before the Senate Commerce, Science and Transportation Committee,[258] Attorney General Janet Reno stated that three of the bills would pass constitutional muster. Of these three bills, only one con-

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[256] 422 U.S. 205 (1975) (ordinance barring on-screen nudity at drive-in theaters).

[257] 333 U.S. 507 (1948) (statute barring dissemination of "violent" material to minors).

[258] *See* S. 1383, *supra* note 7; S. 973, 103d Cong., 1st Sess. (1993) (requiring FCC to evaluate and report on the violence contained in television programs); S. 943, *supra* note 14; *see also T.V. Violence: Hearing of the Senate Commerce, Science and Transportation Committee*, *supra* note 11.

tains a definition of violence,[259] whereas the two other bills delegate definitional tasks to the FCC. The bill that includes a definition of violence, like a fourth proposed bill not addressed by the Attorney General,[260] broadly defines violence to include any act or threatened harm to another person or one's self.[261] The bill defines violence as "any action that has as an element the use or threatened use of physical force against the person of another, or against one's self, with intent to cause bodily harm to such person or one's self."[262] This definition is both unconstitutionally overbroad and vague.

A statute or law is overbroad if, in addition to regulating speech that may constitutionally be restricted, it seeks to regulate constitutionally protected speech, thereby chilling free expression.[263] In *Erznoznik*, for example, the Court found that Jacksonville's blanket ban on the display of nudity at drive-in movie theaters not only barred restrictable speech, such as indecency and obscenity, but also barred scenes of permissible nudity,[264] such as a baby's buttocks. An expansive definition of violence carries dangers of overbreadth similar to those dangers noted in *Erznoznik*. By including virtually all physical force exerted against oneself or another, the proposed statute encompasses a breathtaking array of protected expression. Such a definition would include scenes not only from violent mobster movies such as *GoodFellas*,[265] but also

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[259] S. 943, *supra* note 14 ("For purposes of this Act, an action may involve violence regardless of whether or not such action or threat of action occurs in a realistic or serious context or in a humorous or cartoon type context."). It should be noted that this bill instructs the FCC to require warning labels on shows that contain violence. *Id.*; *see infra* notes 322-28 and accompanying text. At this juncture, however, the definition employed by this proposed legislation is highlighted to demonstrate the difficulties in establishing a definition of violence that meets constitutional strictures, not to analyze the constitutionality of using such a definition for a labeling requirement.

[260] *See* H.R. 2837, *supra* note 7 (directing the FCC to promulgate regulations to reduce the amount of violence on all television, radio and cable outlets).

[261] *See supra* note 259.

[262] *See supra* note 259.

[263] *See* Thornhill v. Alabama, 310 U.S. 88, 97-99 (1940); *see also supra* notes 165-69 and accompanying text.

[264] 422 U.S. 205 (1975).

[265] *GoodFellas* (Warner 1990) depicts the story of an Irish-Italian boy who grew up to become a gangster. The film has been called a "brilliant, unsparing delineation of the sub-culture of crime and the corruption of the spirit it entails." HALLIWELL'S FILM GUIDE 490 (John Walker ed., 1994).

scenes from virtually all war movies, such as *Platoon*,[266] comedies, such as *A Fish Called Wanda*,[267] or the slapstick comedy of Charlie Chaplin and most Bugs Bunny cartoons.

A broad definition of violence also implicates the vagueness doctrine. The vagueness doctrine requires that a statute will be void for vagueness if persons of "common intelligence [must] guess at [its] meaning."[268] For instance, in *Winters*, the Supreme Court rejected New York's attempt to limit dissemination of material to minors that was likely to stimulate juvenile delinquency. Similarly, under the proposed definition of violence, a television producer, network executive or script writer would be unable to discern which types of violence could trigger a restriction or regulation. For example, if the threshold for triggering a regulation is the depiction of an intentional act designed to inflict bodily harm on another, then would depictions of violent acts where the mens rea of a particular character is unclear be barred? Indeed, it is difficult to think of a regulation that is more unclear than one that requires authors and directors to discern and depict the intent of fictional characters.

Even if the scope of a definition of violence is narrowed to fit within a modified version of the FCC's definition for sexual and excretory functions, this does not remedy the constitutional infirmities surrounding restrictions on violence. The FCC's definition of indecent or offensive speech, affirmed in *Pacifica* and *ACT I*, holds that "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities," may be regulated.[269] When this standard is applied to violence, serious questions are raised about the permissibility and the efficacy of proposed regulations.

Although the Court and the FCC have acknowledged that the term "indecent" as applied to sexual and excretory functions is inherently vague and, as such, must carefully consider context,[270] sexual and excretory depictions are self-defining

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[266] PLATOON (Hemdale 1986). *Platoon* presents the experiences of infantrymen during the Vietnam War.

[267] A FISH CALLED WANDA (Metro-Goldwyn-Mayer 1988).

[268] *See* Winters v. New York, 333 U.S. 507, 512 (1948).

[269] *ACT II*, 852 F.2d 1332, 1335 (D.C. Cir. 1988).

[270] *See id.*

and self-limiting. Sexual organs are limited to genitalia and portions of women's breasts.[271] Similarly, excretory activity is limited to defecation and urination.[272] In contrast, simply inserting the term "violence" into the FCC's definition does not generate similar controls. Unlike sex or excretion, violence has no inherent limits and is a far more intangible human activity. With violence one cannot simply point to a portion of anatomy and proscribe that image from being portrayed. Rather, the lines between acceptable and unacceptable levels of violence can vary widely depending on context and imagery. Does one prohibit five gunshots? Ten gunshots? One pint of blood? What about violence committed in self-defense or within the context of a news program? It is difficult to imagine a regulatory scheme that could be specific and predictable enough to provide broadcasters with adequate notice of what material the FCC would consider actionable. Unfortunately, neither the proposed legislation nor the debate surrounding this issue provide any clarity.

The FCC's definition of sexual indecency is drawn in part from the *Miller* test for obscenity.[273] The *Miller* test calls for the trier of fact to apply contemporary community standards to determine whether a work, taken as a whole, appeals to the prurient interest.[274] Indecency and obscenity both deal with sexual activity and therefore carry many of the same indicia necessary for their identification.[275] Although the FCC's adoption of a *Miller*-type test for indecency passed constitutional scrutiny in *Pacifica*, the substantive differences between violence and indecency make the use of a *Miller*-type test to identify prescribable violence problematic.[276] Nonetheless, apply-

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[271] *See, e.g.*, American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014, 1016 (6th Cir. 1975) (state statute defines "specified anatomical areas as being: a) human genitals, pubic region, b) buttock, and c) female breast below a point immediately above the top of the areola"), *rev'd*, 427 U.S. 50 (1976).

[272] *See* Pacifica Found., 56 F.C.C.2d 94, 98, 100 (1975).

[273] *See* Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418, 425 (1975) (following *Miller*, definition for indecency "clarified" by dropping requirement of "utterly without redeeming social value").

[274] Miller v. California, 413 U.S. 15, 24 (1973).

[275] These indicia can include genitalia, women's breasts and various sexual situations. *See supra* note 271 and accompanying text; *see also infra* note 279.

[276] It should be noted that determinations as to indecent broadcasts are made by the FCC, not by a jury or judge. 47 U.S.C. § 303 (1988).

ing the *Miller* test to violence provides a rough framework for analysis, highlighting the differences between sex and violence, and demonstrating the extreme difficulty of identifying broadcasts subject to restrictions of violence.

The first part of the *Miller* test focuses on the appeal to the "prurient interest in sex." No such corollary exists, however, for violent behavior. Instead, a trier of fact would presumably need to determine whether viewing a film or broadcast appeals to one's morbid or violent interest[277] or whether the work incites persons to commit crimes. This is hard to determine considering that, whereas prurience has a common reference point—"sex" and sexual stimulation—the same is not true of violence. Violence may evoke a variety of emotional reactions. Some persons may be stimulated by violent images, others, however, may be disgusted or revolted. Still others, may discern social commentary or sarcasm from the scenes of violence.

The second part of the *Miller* test—whether the work depicts or describes in a patently offensive way, sexual conduct as specifically defined by state law—also highlights the incompatibility of an obscenity analysis to violent acts.[278] Unlike state laws that describe in detail what constitutes "patently offensive" conduct, no such standards exist to define which violent acts are patently offensive.[279] Violence presents a far more diffuse range of acts than does sexual activity. Although most persons could probably agree on what is patently offensive, it would be harder to reach a consensus about what is *not* patently offensive. There are many different types of violence, including humorous, sarcastic, sardonic, brutal and playful, engaged in by a variety of characters, both live-action and car-

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[277] This conclusion is based on the standard elucidated in the statute struck down in Winters v. New York, 333 U.S. 507 (1948). Even though the Supreme Court rejected this formulation on vagueness grounds it is nonetheless useful as a tool to analyze the "violence on television" debate. This is particularly true considering that the statute in *Winters* was the first and only time the Supreme Court analyzed an anti-violence statute that bears any resemblance to violence on television restrictions currently under consideration.

[278] *Miller*, 413 U.S. at 24.

[279] *See, e.g.*, N.Y. PENAL LAW § 235.00 (McKinney 1993) ("obscene" is defined as any depiction, in a patently offensive manner, of "actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion, or lewd exhibition of the genitals); *see also supra* note 271 and accompanying text.

toon. While sex also can be depicted in a variety of ways, the common definitional characteristics of sex provide a rough framework to guide legal and factual determinations. Patently offensive sex can be described with specific reference to organs and acts, regardless of dramatic context. The same limiting references, however, cannot be applied to violence. There are no corollaries to sexual organs or acts that would help the trier of fact determine whether or not certain violent acts are offensive under the second prong of *Miller*. Quite simply, there are too many variations of violence to derive a consistent, predictable and constitutionally sound determination of what is *too* violent.

The difficulties of applying the second part of the *Miller* test to violence become even more pronounced when one tries to apply the third part of the test—whether the work taken as a whole lacks serious, artistic, political or scientific value.[280] Works or images involving violent material can certainly contain many artistic, political or scientific elements that hold social or entertainment value. However, this part of the *Miller* test could exclude valuable films or programs simply because they contain scenes of violence. After all, if the goal of the anti-violence legislation is to reduce the number of violent images being shown, and not the overall message of the work, many popular films and programs would be censored.

Of course, one could adapt *Miller*, for example, by adopting a narrow definition of violence which included only the most heinous and graphic acts. A definition, for instance, that bars explicit scenes of dismemberment, mutilation and similar acts might be more defensible. Even with an extremely narrow definition, however, problems still arise.[281] First, unlike sex and excretion there is no body of law and no constitutional precedent to justify restricting violent scenes of any kind.[282]

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[280] *Miller*, 413 U.S. at 24.

[281] *See, e.g.*, Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 523 (Tenn. 1993) (finding void for vagueness the state's definition of "excess violence" as "the depiction of acts of violence in such a graphic and/or bloody manner as to exceed common limits of custom and candor, or in such a manner that it is apparent that the predominant appeal of the material is portrayal of violence for violence's sake").

[282] Winters v. New York, 333 U.S. 507, 519-20 (1948) (finding state law that barred dissemination of "stories of deeds of bloodshed, lust or crime" has no technical or common law meaning and is void for vagueness). As the *Winter* Court

Second, a regulation that narrowly defines violence could limit only an extremely small number of programs and would not affect the common network programs and scenes that contain violence. Although certain extremely violent programs might be kept off the air, other programs that have varying amounts of violence would not be proscribed because they would not satisfy all the elements of a *Miller*-type test. Indeed, the programs that advocates of violence regulations object to—such as *NYPD Blue* and films like *Terminator II*—would be unaffected by such restrictions.[283] Thus, such a system would have the effect of restricting the first amendment rights of writers, directors, producers and broadcasters while permitting much of the violence currently on television to remain.

Ultimately, it is not so much the weakness of the *Miller* test as the inherent difficulties in its application to regulate violence on television that lead to its failure to provide a tool to proscribe violence.[284] Unlike matters regarding more readily defined sexual behaviors or excretory functions, violence takes many different forms, some of which may be construed as harmful to children, but most of which are embedded in stories that can offer both entertainment and political or social messages.

2. The Seven Dirty Words Versus the *Seven Samurai*: Is Violence Lower Value Speech?

Implicit in the arguments to restrict violence on television is the assumption that violence, as a form of speech, is less valuable than other forms of non-violent or non-sexual speech. In *FCC v. Pacifica*, *Young v. American Mini Theatres*, *Renton v. Playtime Theatres, Inc.*, and *Barnes v. Glen Theatre, Inc.*, a plurality of the Court consistently suggested that indecent and

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noted, obscenity and indecency are limited to sexual acts and there is no precedent to include violence in those descriptions.

[283] TERMINATOR 2: JUDGMENT DAY (Guild/Carolco 1991); *NYPD Blue* (ABC television broadcast).

[284] Interestingly, former FCC Chairman Richard E. Wiley understood the problem of proscribing violence and remarked that "the lack of an acceptable objective standard [for violence] is one of the best reasons why—the Constitution aside—I feel that self-regulation is to be preferred over the adoption of inflexible governmental rules." Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418, 419 n.5 (1975).

profane speech occupies a lower place in the hierarchy of First Amendment protection.[285] Put simply, under this view, because such speech is not political in nature and does not constitute material that "[we] would march our sons and daughters off to war to preserve" it is less worthy of protection.[286]

When applied to violence on television, however, this argument carries all of the definitional overbreadth and vagueness concerns that can arise with restrictions on indecency, and also presents additional dangers of restricting the production and broadcast of "high value" speech. In an effort to cleanse the airwaves of images that may spark some future, undefined, amorphous violence by unidentifiable viewers, broadcasters who present programs that contain violence or carry significant messages *about* violence would be dissuaded from presenting such programs. Out of fear that programs containing violence could result in increased regulation, fines or channeling restrictions, broadcasters will be dissuaded from presenting programs containing any violence.

A finding that violence is "low value" speech would lead to a reduction in the amount of "high value" programming. First, various films and programs may address topics in different ways. Humor, dialogue, sex and violence may be used to send messages about various social or political issues. The context in which violence occurs can be crucial to a story or to creating a desired effect. Censoring violent scenes could have significant deleterious effects on the message and value of many programs. There is a risk that a range of news programs, documentaries, dramatic presentations or comedies could be scrutinized and restricted or the producers and writers of such programs will censor themselves in order to comply with federal regulations.

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[285] In Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976) Justice Stevens stated "it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." Stevens also raised this argument in *Pacifica*, commenting that "the broadcasting of patently offensive references to excretory and sexual organs and activities. . . . lie at the periphery of First Amendment concern." FCC v. Pacifica Found., 438 U.S. 726, 743 (1978). Justice Souter in *Barnes v. Glen Theatre, Inc.*, also noted that "the protection of sexually explicit expression may be of lesser societal importance than the protection of other forms of expression." 111 S. Ct. 2456, 2471 (1991) (Souter, J., concurring) (citation omitted).

[286] *American Mini Theatres*, 427 U.S. at 70.

The consequence of such restrictions would be sanitized versions of important events or issues for which violence is essential to conveying the severity, seriousness or tragedy of an event. A brief survey of films and programs that could be affected by regulation of violence illustrates the dangers that such regulations pose to the dissemination of valuable and significant ideas, concepts and events. The film *Schindler's List*, for example, presents startling images of ferocious violence during the Holocaust. Under a regulatory regime that dissuades or prohibits the airing of violent imagery, a network or independent station may be prohibited or dissuaded from airing the film or may decide to severely edit the film for television.[287] Considering that the overall goal of restricting violence on television is to reduce societal levels of violence, it is particularly ironic that a film condemning violence could be edited, restricted or discouraged from being broadcast.

Films made for television that deal with violence in a socially positive manner would be particularly vulnerable to restrictions on television violence. Unlike films such as *Schindler's List*,[288] which make their profits from ticket sales, made-for-television movies are produced solely for television and derive revenues from advertising sold during commercial breaks. If restricti2ons on television violence are adopted, movies made for television will be more timid about addressing important social and political issues because of concern that films with violent content will be edited or barred from certain time slots. With no other revenue source other than television, those movies with "high value" commentary but with violence might never be made. For example, the television mini-series *The Day After*,[289] which depicts the effects of a full scale nuclear war, could be edited or discouraged from being broadcast because of its violent content.

Furthermore, films or programs with graphic violence but with less explicit political or social messages, may nonetheless contain subtle ideas or concepts which may be curtailed by the proposed regulations on broadcast violence. For example, in

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[287] For a discussion of the specific means by which Congress seeks to control violence see *infra* notes 296-321 and accompanying text.

[288] SCHINDLER'S LIST (Universal Pictures 1993).

[289] *The Day After* (ABC 1983).

the film *Die Hard*,[290] terrorists attempt to take over a Los Angeles skyscraper. The movie, in addition to being extremely violent, offers cynical and biting commentary on the role of the FBI and questions the ethics of the media. Without violent scenes, *Die Hard* would not only be less entertaining, but its cynical message would be muted.

Additionally, films use violence as a tool to generate emotional and psychological reactions among viewers. Here, the message of the film is not carried by its violence, but by the juxtaposition of violence with other dramatic tools such as humor or sarcasm. For example, in the film *Pulp Fiction*,[291] writer and director Quentin Tarantino presents several vignettes involving a boxer and two hitmen. One film critic noted that the movie "offsets violent events with unexpected laughter . . . [creating a] contrast of moods [that] becomes liberating, calling attention to the real choices the characters make. Far from amoral or cavalier, these tactics force the viewer to abandon all preconceptions while under the film's spell."[292] Simply applying a lower-value-of-speech framework to *Pulp Fiction* would disregard the catalytic role that violence plays in the film.

Finally, by adopting a lower-value-of-speech rationale there is a risk that majoritarian points of view will be perpetuated. Speech perceived as risking the moral fabric of society, but in fact doing no more than threatening the social status quo would be suppressed. *Pacifica*'s holding that George Carlin's monologue was indecent and proscribable illustrates this principle.[293] In reaching that conclusion the Court offhandedly noted that "a requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."[294] This comment illustrates the Court's failure to

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[290] DIE HARD (Fox/Gordon Co./Silver Pictures 1988).

[291] PULP FICTION (Miramx 1994).

[292] Janet Maslin, *Pulp Fiction; Quentin Tarantino's Wild Ride on Life's Dangerous Road*, N.Y. TIMES, Sept. 23, 1994, at C1.

[293] FCC v. Pacifica Found., 438 U.S. 726 (1978).

[294] *Id.* at 743 n.18. The Court missed the point of Carlin's monologue. It was precisely the words themselves and the undue importance society places on them that Carlin was trying to highlight.

recognize that Carlin's monologue was designed to dramatically expose the absurdity of common linguistic and social conventions.

In the context of regulations on violence on television, the dismissive attitude of *Pacifica* invites the restriction of programs that are anti-majoritarian but contain violence. Thus, if a writer or a director wishes to raise or propagate unpopular views about violence or uses violence as an expressive tool to illustrate a particular subject, *Pacifica*-type reasoning would countenance the restriction of that program. Although the negative effect on some programs' contents could be minor, restrictions on violence could seriously weaken some show's political or social message. For example, the movie *The Accused*[295] presents the true story of a woman who had been gang-raped in a New England bar. The movie contains violent scenes without which the overall message of the film—the serious social problem of violence against women—would be diminished.

The inability to separate violent acts from the content and message of a film demonstrates the inadequacy of the low value/high value framework as applied to restrictions on broadcast violence. Moreover, this method of analysis highlights the inapposite nature of sex and violence as forms of human behavior that can be analogized and treated with the same regulatory approach.

C. *Congress's T.V. Guide: Specific Regulatory Proposals to Restrict and Reduce Violence on Television*

Although constitutional and methodological problems and inconsistencies exist in defining and delimiting violence on television, several different legislative proposals to limit televised violence have been seriously considered by Congress. Not surprisingly, many of the proposals are merely adaptations of earlier and ongoing efforts to restrict sexually indecent broadcasts. Moreover, many of the constitutional issues and policy considerations that make those regulations suspect also make the regulations that seek to proscribe television violence constitutionally suspect. When the proposed regulations are consid-

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[295] THE ACCUSED (UIP/Paramount 1988).

ered in light of the problems raised in the previous sections, deeper concerns about the efficacy and the wisdom of regulations of televised violence develop.[296]

The FCC's broad goals surrounding the restriction of sexually indecent material are useful when discussing specific proposed regulatory mechanisms. The two most relevant FCC goals used to construct its regulatory scheme are: 1) ensuring that parents have an opportunity to supervise their children's viewership habits, and 2) ensuring the well-being of minors regardless of parental supervision.[297] By and large, the goal of aiding parental supervision is reflected in efforts to require warning labels and "voice-overs" before and during programs, or to offer computer chips that allow parents to block programs that have been labeled as violent. The government's second goal of protecting the social and moral development of minors is more closely related to efforts to channel violent programs to hours when children are not watching television. Both goals may have merit, but neither justifies the methods proposed to address televised violence.

1. It's Ten P.M.—The Government Is Watching Your Children

In 1993, members of Congress as well as various public interest groups proposed a ban, during certain hours, on television broadcasts that contain violence.[298] Advocates of such a ban argued that the only way in which a law could ensure that children will be prevented from viewing material perceived to be harmful or causing anti-social activity would be to restrict

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[296] In the previous section, both the obscenity and indecency frameworks to regulations were analyzed and applied to the violence context. This was necessary to illustrate fully the definitional limitations, constraints and ambiguities that surround violence. Because the proposed regulations primarily adapt sexual indecency restrictions to violence and do not bar all violent imagery from television, the need to apply an obscenity analysis is no longer needed. *But see* Saunders, *supra* note 10 (arguing that certain violent expression, like sexual obscenity, is unprotected by the First Amendment). Instead, discussion will revolve around the limitations placed on sexually indecent speech as they relate to proposed restrictions on violence.

[297] A third goal, protecting the rights of adults to be free from indecent materials while in their homes, has not been stressed in the debates surrounding violence on television and therefore will not be addressed here.

[298] S. 1383, *supra* note 7, at § 2.

such programming to those hours when children are reasonably likely to comprise a substantial portion of the audience.[299] Whether or not this particular legislation is enacted, it mimics various traditional proposals offered to limit the airing of sexually indecent material and, therefore, carries many of the same constitutional and policy infirmities.[300]

a. *Television Fit For Children: The Impossibility of Constitutionality Applying Channeling Restrictions*

Restrictions on television violence, like other restrictions on speech, must fit within established constitutional law boundaries. *Pacifica*, *Sable* and *ACT I*, *II* and *III* highlight the constitutional latitude and constraints placed on any legislation designed to channel the broadcasting of violent imagery. Although *Pacifica* provides support for broadcast restrictions based on the time periods when children are likely to be viewing,[301] *Pacifica*'s holding is limited by cases such as *Butler*, *Sable*, and *ACT I*, *II*, and *III*, which require such content-based restrictions on protected speech be narrowly tailored to assure adult access to protected material.[302] Therefore, to avoid the legal entanglements that have ensnared the FCC in its efforts to restrict indecent broadcasts, Congress or the FCC must fashion rules that assure adult access to promotional materials, carefully derive its conclusions as to who "children" are, at what times those children are likely to comprise a substantial portion of the audience, and the precise hours during which violence will be barred from being broadcast.[303] A mere assertion by Congress or the FCC that children of a particular age range are most likely to constitute a substantial portion of the audience during certain hours will not pass constitutional

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[299] S. 1383, *supra* note 7, at §§ 2, 3(b); *see also supra* notes 5-7 and accompanying text.

[300] *See, e.g.*, Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 8 F.C.C.R. 704 (1993).

[301] *ACT I*, 852 F.2d 1332, 1341 (D.C. Cir. 1988)

[302] *Id.* at 1341-42; *see also* Sable Communications v. FCC, 492 U.S. 115, 126 (1989) (striking down 24-hour ban on indecent phone messages).

[303] *ACT I*, 852 F.2d at 1341. In this case, the FCC had determined that indecent broadcasts could only be aired between the hours of 12:00 A.M. and 6:00 A.M. *Id.* at 1334.

muster.[304]

Based on past FCC regulations and the definition of children contained in the proposed legislation, the threshold age between childhood and adulthood would be either seventeen or eighteen years old.[305] Although this definition of childhood may comport with past Supreme Court precedent,[306] it does not recognize the complexities of restrictions on broadcast violence. Specifically, a definition of children that includes a class of people who legally can gain access to violent imagery defeats, or runs counter to, the government's purported goal of protecting all children from such imagery. After all, seventeen- and eighteen-year-olds can enter movies rated NC-17, are able to drive to a video store and rent films, and typically may stay up late to view violent programs even during non-regulated hours. Consequently, the efficacy of such an age delineation is suspect.

More importantly, such an age delineation and time proscription would unduly limit adults' access to protected speech. If the goal is to prevent children within the prescribed age group (up to eighteen years old) from watching violent programs, the government would be forced to adopt an extremely wide time period during which programming will be restricted. If violent programming could only be shown, for example, between midnight and 6:00 A.M. to protect teenagers from viewing violent imagery, then a large number of adults also would be precluded from viewing constitutionally protected material. Adults who work a typical 9 A.M. to 5 P.M. shift most likely are asleep or preparing for sleep by midnight and, therefore, would not be able to watch heretofore unrestricted programming. In fact, it is likely that persons awake during these hours are the teenagers the government is trying to protect.[307]

If Congress wishes to protect children under twelve years

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[304] *See id.* at 1342-43.

[305] *See* H.R. 2837, *supra* note 7 ("child" is any individual under 18); Enforcement of Prohibitions against Broadcast Indecency in 18 U.S.C. § 1464, 8 F.C.C.R. 704 (1993) (defining children as persons under the age of 17).

[306] *See* Ginsberg v. New York, 390 U.S. 629 (1968) (conviction upheld for selling obscene material to a 16-year old).

[307] This conclusion comports with the FCC's finding that only a twenty-four hour ban on indecent broadcasts would be effective in preventing minors from viewing proscribed material. *See In re* Enforcement of Prohibitions Against Broadcast Indecency, 18 U.S.C. § 1464, 5 F.C.C.R. 5297 (1990).

of age, the broadcast window for violent programming would be wider than if Congress sought to restrict access to adolescents under eighteen. This conclusion is based on the fact that younger children go to sleep earlier than older children. Even if the critical age range was dropped to twelve or thirteen, and the time during which violent programs were prohibited subject to further expansion, problems regarding effectiveness and adults' access to protected material still would arise.[308] For example, adults with non-traditional work hours would find it difficult, if not impossible, to view protected material. Additionally, the few hours of prime-time viewing not covered by restrictions could become dumping grounds for programs that contain violence, thereby creating a "violence zone" in the programming schedule.

The definition of violence also affects the scope of channeling regulations. For instance, a broad definition of violence will include a wider range of material in the regulatory web so that the hours of permitted broadcast will become narrower. Thus, if the government employs a definition for violence similar to those definitions contained within pending legislation, then many cartoons such as Bugs Bunny and The Road Runner, that are traditionally broadcasted on Saturday mornings or during the late afternoon on weekdays, could be deemed too violent to be shown outside the window allowed for "violent" programming. If a 12 P.M. to 6 A.M. restriction is employed, this leads to the odd result that Bugs Bunny, typically considered children's programming, would only be aired late at night and in the very early hours of the morning.

Of course, preventing the airing of Bugs Bunny and other programs that contain the proscribed amount and type of violence during hours when few children are watching is one goal of channeling regulations. The result, however, is that few adults will be able to watch material that heretofore has been protected. While the social and political importance of Bugs Bunny may be limited,[309] the show is only one of hundreds of

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[308] This conclusion regarding probable times when violent programming could be shown is based on the FCC's 1975 report and the actions taken by ABC, CBS and NBC to institute the Family Viewing period. *See* Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418 (1975).

[309] This "limited" first amendment view of cartoons is not entirely warranted. Many of the Bugs Bunny, Daffy Duck and Wile E. Coyote cartoons are not only

programs protected under the First Amendment that could be proscribed or restricted to certain hours. Such consequences demonstrate both the danger to constitutional freedoms and the absurdity of the proposed regulations.

b. *Zoning and Channeling: The Inapplicability of the Secondary Effects Approach to Channeling Restrictions on Violence*

Supporters of channeling restrictions on both sexual indecency and violence have argued that such restrictions are content-neutral time, place and manner restrictions[310] and therefore subject to a lower level of judicial scrutiny. One way of establishing this content-neutrality and the constitutionality of channeling restrictions would be to assert a secondary-effects argument.[311] If the government could demonstrate that it seeks only to reduce the secondary effects of violent programming, such as societal crime, then it might be able to argue that channeling is a legitimate time, place and manner restriction.

At first glance, the secondary effects reduced by the zoning ordinances in *American Mini Theatres* and *Renton* bear striking similarity to the purported effects of television violence.[312]

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examples of animation as a "significant art form" but also carry important literary and linguistic characteristics. John Canemaker, *Ovid, Meet Wile E. Coyote*, N.Y. TIMES, Oct. 30, 1994, § 7, at 38-39 (reviewing HUGH KENNER, CHUCK JONES: A FLURRY OF DRAWINGS (1994)).

[310] *See* Pacifica Found., 2 F.C.C.R. 2698-99 (1987) (channeling sexually indecent programming is content-neutral); Michael D. Rips, *Children's TV Bill Doesn't Violate Constitution*, N.Y. TIMES, Dec. 2, 1993, at A26 (arguing that restrictions on televised violence are content-neutral). *But cf. ACT I*, 852 F.2d 1332, 1343 n.18 (D.C. Cir. 1988) (rejecting FCC's contention that channeling of sexually indecent speech is a valid time, place and manner restriction).

[311] For a discussion of the standard of review that applies to content-neutral regulations see generally, Stone, *supra* note 30.

[312] The plurality in *American Mini Theatres* rested its reasoning on both the lower value of sexually expressive speech and the fact that the regulations promulgated by the city were content-neutral and wholly within the city's compelling interest of preventing the spread of secondary effects that such theaters allegedly breed. 427 U.S. 50, 70 (1976). In *Renton*, the Court rested its decision on the lower value of speech thesis, but the majority was far more explicit in its conclusion that such regulations are a content-neutral time, place and manner restriction that serves to prevent harmful secondary effects. The Court noted that Renton's ordinance was not aimed at the content of the films being shown in the theaters,

Like the municipalities in *American Mini Theatres* and *Renton*, the advocates of regulating televised violence seek to reduce crime and violence by restricting the dissemination and availability of audio-visual works.[313] Similarities of goals, however, mask serious differences between the two situations and ultimately undermine the application of secondary effects principles to violence on television restrictions.

The Court has maintained that content-neutral distinctions are permissible provided that the regulations "are justified without reference to the content of the regulated speech."[314] In both *Renton* and *American Mini Theatres*, the Court found that the regulations on adult theaters were not focused on the sexually explicit content of the material being shown within the theaters but on the negative social harm such as crime that accompanied the theaters.[315] In a later case about the constitutionality of restrictions on the display of signs critical to foreign governments, Justice O'Connor characterized *Renton* by stating: "as long as the justifications for regulation have nothing to do with content, *i.e.*, the desire to suppress crime has nothing to with the actual films being shown inside adult movie theaters, . . . the regulation [is] properly analyzed as content neutral . . . . [R]egulations that focus on the direct impact of speech on its audience . . . are not the type of 'secondary effects' we referred to in *Renton*."[316] Thus, if the municipalities in *Renton* and *American Mini Theatres* had sought to regulate adult theaters because of their deleterious effects on moral climate, sexual attitudes and gender roles, then the zoning regulations in those cases would have constituted content-based restrictions deserving of strict scrutiny.

In the case of broadcast violence, however, the government seeks restrictions precisely because of the violence that such images allegedly cause. Any regulation that purports to restrict violence on television as a means to reduce the secondary effect of violence in society, must be based upon the content of televi-

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but at the secondary effects such theaters produced. 475 U.S. 41, 47 (1986).

[313] *See supra* notes, 5-7, 145, 218 and accompanying text.

[314] *Renton*, 475 U.S. at 48 (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

[315] *See id.* at 49; *American Mini Theatres*, 427 U.S. at 61.

[316] Boos v. Barry, 485 U.S. 312, 320-21 (1988). This particular reading of the holding in *Renton* was joined only by Justices Stevens and Scalia.

sion broadcasts. The program would be regulated because of its violence and the viewers' reaction to that violence—forming the basis for the argument that violence on television must be controlled in order to prevent violence in real life.[317] Consequently, channeling violence on television, unlike zoning restrictions, constitutes a content-based restriction.

Furthermore, the nature of the limitation placed on broadcasters and on the viewing public is far more severe in a scheme that regulates violent television images than in one aimed at theater owners or the patrons of adult theaters. Instead of merely limiting the particular geographical location of a theater, thereby inconveniencing a patron, any restriction on the broadcasting of violent imagery, prevents a large segment of the population from viewing constitutionally protected material. If a regulation is instituted to restrict violent programming to times when children are not likely to be in the audience, then those persons who work at night, go to sleep early or prefer to watch television during the day would be unable to watch protected material.[318] This stands in contrast to patrons of adult theaters who merely have to travel somewhat further within the same town to find an adult theater.

Finally, the nexus between the location of the adult theaters in *Renton* and *American Mini Theatres* and the negative secondary effects was far more certain than that between televised violence and societal violence. Proponents of the adult theater ordinances pointed to specific increases in crime and "neighborhood blight" brought upon by the presence of such theaters.[319] A link between the presence of adult theaters and a concurrent rise in crime and other secondary effects is far easier to determine than a more diffuse society-wide rise in violent behavior linked to televised violence. Indeed, to argue that a secondary effect can be broad-based and indefinite opens

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[317] *See supra* note 8.

[318] The particular hours that this type of ban would encompass is currently under debate. In *ACT III*, the Circuit Court for the District of Columbia struck down the FCC's 6:00 A.M. to 12:00 P.M. ban on indecent programming. The court found that the ban was not narrowly tailored and that the government failed to find an appropriate definition for children. The court also concluded that the FCC did not adequately investigate how many children watched television at various times of the day. 11 F.3d 170, 180 (D.C. Cir. 1993).

[319] *Renton*, 475 U.S. at 51; *American Mini*, 427 U.S. at 54-55.

up an enormous area of potentially prescribable behavior. Under such a framework, any regulation that purports to deal with a secondary effect and that is content-neutral in character could be subject to control.[320]

In contrast, the indecency regulations at issue in *Pacifica* concerned fairly insulated and easily identifiable words and images. Restrictions on violence, however, do not involve clear-cut and discrete language. Instead, such regulations are broader and greatly diminish the amount of material and the number of ideas on television. The true nature of the danger posed by regulating televised violence, however, is apparent when one examines Justice Brennan's concurring opinion in *Boos v. Barry*. Justice Brennan completely rejected the secondary effects rationale and stated: "I can only hope that, when the Court is actually presented with a case involving a content-based regulation of political speech that allegedly aims at so-called secondary effects of that speech, the court will recognize and avoid the pitfalls of the *Renton* approach."[321] Similarly, the Court must recognize that restricting programs containing violence poses the substantial risk of restricting the political and social discourse they contain.

Restrictions based on channeling principles, therefore, are problematic because they unduly limit adult access to protected material while largely failing to restrict violent imagery from minors. Such restrictions also cannot be justified by simply applying a secondary-effects framework. Ultimately, these restrictions are both ineffectual and pose such a threat to the First Amendment that they invite strong criticism and harsh

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[320] Of course, it could be argued that theatres, the medium in issue in *Renton* and *American Mini Theatres*, receives more first amendment protection than television. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969). The nature of the requirements and restrictions upheld in *Red Lion* and *Pacifica*, however, are fundamentally different and narrower than many of the proposed restrictions on television violence.

Red Lion, for example, dealt with the obligation of broadcasters to air opposing opinions on issues of national concern and therefore expanded the amount of information broadcasted. The violence restrictions, however, would seriously contract the amount of information disseminated on television. Not only would time limitations on broadcasting violent material restrict information dissemination, but the definitional uncertainties inherent with violence restrictions and the inability to separate context and content from violence would severely limit the discussion and presentation of important ideas and issues.

[321] Boos v. Barry, 485 U.S. 312, 338 (1988).

judicial scrutiny.

2. Father Knows Best: Monitoring, Labeling and Electronically Tagging Violent Broadcasts

The FCC's and Congress's approach to limiting sexual and violent imagery on television is partially motivated by an interest in helping parents monitor and control their children's television diet. This concern is apparent in the numerous proposals that seek to monitor and label violent television programs to alert parents to program's content.[322] Proposals being considered by Congress include: warning labels before and during a program, advisories within television guides, monitoring committees that rate the amount of violence on different stations, and computer circuitry to allow parents to block out violent programs.[323] These efforts reflect an interest in protecting children by aiding parents in their supervisory role.

The proposed legislation is less intrusive than channeling or banning violence and, generally does not carry the same first amendment concerns.[324] On the surface, these regulatory efforts simply provide the viewer or parent with the notice necessary to avoid programs that they may find objectionable. Further analysis, however, reveals the problems and questions that arise with monitoring, labeling and electronic tagging. Although these proposals do not directly threaten free speech in the same way as channeling restrictions, they do risk chilling free expression and undermining first amendment principles.

As with more severe regulations, such as channeling, the definition one chooses for violence has a profound impact on the constitutionality and effectiveness of restrictions on violence. The symbiosis between the scope of the definition of violence and the constitutionality of regulations persists in the labeling and monitoring context: a broad definition raises overbreadth and vagueness concerns, whereas a narrow definition could limit the effectiveness of the regulation. A regulation that requires labeling of shows with violence must overcome

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[322] *See, e.g.*, S. 943, *supra* note 14 (proposing video and audio warning for all broadcasting that may contain violence).

[323] S. 943, *supra* note 14; *see also supra* note 8.

[324] For a concise constitutional analysis of labeling requirements, see generally Kim, *supra* note 10.

overbreadth and vagueness concerns similar to those that exist with channeling restrictions. The regulations must be narrow and clear enough to require labeling of only that material covered by the regulations so as to provide broadcasters with notice of which shows will be affected.

The very nature of the labeling and monitoring regulations imposed on broadcasters is different from that of channeling restrictions. Under labeling and monitoring regulations broadcasters are simply required to superimpose labels and warnings rather than being restricted from showing violent films and programs during certain times of the day as is the case with channelling. Thus, with monitoring restrictions the shows are still broadcast but a duty is imposed on the broadcaster to include these labels and warnings.[325]

In practice, however, this duty is a subtle yet effective censorship technique. Unlike a regulation that explicitly bars or channels violence to discrete hours, labeling and monitoring requirements rely on forces other than government—such as pressure from the public or advertisers—to restrict speech. As a result, television stations and networks may practice self-censorship in an effort to avoid either being publicly exposed as a "high violence station" or having their programs labeled as violent, and therefore less able to attract advertising.[326] Rather than producing a combination of meritorious shows and

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[325] A high technology variant of warning labels is the "V-chip" proposal. H.R. 2888, *supra* note 7. This proposal would require manufacturers of televisions to include electronic circuitry that would allow parents to black out programs that carry an invisible signal, inserted by the broadcaster into the transmission, that indicates programs that contain violence. *Id.* Specifically, broadcasters would transmit the signal inside the "vertical blanking interval," the black band that separates each frame of video. *See* Edmund L. Andrews, *Cable Industry Endorses Ratings and Devices to Lock Out Violence*, N.Y. TIMES, Jan. 21, 1994, at A1. Although in theory this proposal appears non-restrictive and relatively benign, it has significant limitations. First, it is unclear what standards will be utilized to determine which programs would carry the hidden signal. The legislation also does not include a definition of violence or guidelines for broadcasters as to which shows the signal should be attached. It is not hard to imagine overzealous network officials tagging large numbers of programs simply to avoid public chastisement by the FCC or Congress.

[326] *See* Kim, *supra* note 10, at 1397 n.56 (1994) (highlighting controversy surrounding *NYPD Blue* and ABC's difficulty in securing advertisers for the show, and noting that "[b]ecause advertisers generally avoid associating with programming that is offensive or controversial . . . the violence label could become a stigma that effectively repels sponsors").

non-meritorious shows with violence, networks and production companies may simply reject shows with violence, regardless of their social messages or political value. Thus, shows that need violence to realistically portray issues or events either will not be made or will be deprived of their power to effectively communicate ideas and information.

Moreover, unlike the labeling of sexually indecent programs or programs with offensive language that carry relatively few warnings, labeling of programs with violence could cover, depending upon the nature of the definition of violence, vast numbers of programs. Thus, programs and shows as diverse as *Jurassic Park*,[327] *Matlock*[328] and The Road Runner could carry warning labels. Labeling such varied and different shows would dilute the purpose and effect of labeling regulations. Instead of being alerted to and avoiding programs with violence, viewers could become desensitized to the labels and simply ignore them. Alternatively, if violence labels are required for only the most violent shows, then those labels could become advertisements, drawing viewers interested in seeing violence on television.

Another problem with this form of regulation is that it assumes that most parents have the desire and ability to regulate their children's viewing of violent programming. With increasingly complex family structures, parents who are not home to monitor their children, and the increased ability of children to access programming in many different ways, it is extremely difficult to protect children from images and programs thought to cause them harm. A further complication is that, unlike a warning on a record label, warnings on broadcasts are easily missed by persons who change channels or tune-in after the start of a program. Consequently, the purpose behind the warning, notice to the viewer, is seriously mitigated.

CONCLUSION

Unlike other categories of unprotected speech, violence is not subject to a clear definition. This definitional uncertainty

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[327] JURASSIC PARK (Universal Pictures 1993).

[328] *Matlock* (NBC).

militates against the proposition that violence can simply be added to the list of unprotected categories of speech. Violence carries many different meanings and implications. While much of what is shown on television does not contain political or social messages, the inability to separate out "good" violence from "bad" violence makes any form of regulation constitutionally suspect.

The definitional infirmities surrounding violence highlight the unconstitutional and inadequate nature of proposed legislation. Channeling programs that contain violence by forcing them into late-night or pre-dawn time periods risks depriving significant portions of adult audiences of viewing material and allowing only programs fit for children. In addition, this regulatory system would discourage networks from broadcasting or producing programs that contain violence but are nonetheless salutary. Warning labels and monitoring committees create similar risks of censorship.

Admittedly, this analysis leads to the seemingly odd and counter-intuitive conclusion that sex and not violence can be restricted from television. After all, it would appear that of the two forms of human behavior sex is more socially constructive than violence. This observation, however, masks the complexities inherent in the sex and violence debate. First, arguing that only sex should be restricted, not violence, does not necessarily mean that existing restrictions on airing sexual material are rational, well-thought out or socially desirable. Second, restrictions on sex on television carry their own definitional uncertainties and such flawed regulations should not justify incorporating violence into a similar scheme simply because of the perception that sex is a more valuable form of expression than violence. Extending these restrictions to violence would merely compound the problems surrounding restrictions on sex.

The violence on television debate illustrates the need for the First Amendment to act as a check on government overreaching. Congress and other policymakers have turned their investigatory and regulatory powers towards broadcasters in an effort to stem rising levels of violence. The First Amendment is more than simply a mantra to be recited whenever the government attempts to regulate or restrict speech. It is a principle of governance that encourages the free flow of ideas

and discourages the automatic restriction of speech in order to solve or prevent social problems.

The failure of legislators to fully address and employ other means to reduce societal levels of violence generally—not just televised violence—highlights the disingenuousness of televised violence restrictions. The violence on television debate derogates first amendment principles as well as general concepts of governance. Instead of asking why programs with violence attract large audiences, Congress has proposed poorly drafted and vague legislation that unduly restricts speech. Rather than addressing the root problems of violence, Congress is content to place warning labels on an enormously broad range of programming. By pointing an accusatory finger at broadcasters, Congress diverts attention from the more substantive, and politically less palatable, techniques for reducing violence. Such a simplistic approach of restricting television programs does not adequately cure the underlying causes and perpetuators of violence.

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