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Open Society and Violence in the Media, The

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Article

The Open Society and Violence in the Media

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I. INTRODUCTION

The hijacking of the planes that assailed the World Trade Center and the Pentagon on September 11, 2001 projected images of death and destruction on the television screen that many of us will remember always. These visual images brought the horrific reality of that day to millions of Americans who lived far away from both New York and Washington. Recollection of these terrible images of people running and jumping from crumbling skyscrapers reminds us of the power of the television screen to project the reality of violence. The capacity of television to do this is not doubted. But those who produce violent programming for purposes of entertainment contend that its impact is different and does not influence their viewers or otherwise affect them. Social scientists in response tell us that violent content does indeed have an impact, particularly on children. If we take this research seriously, we have to ask a basic question. Is American society, governed as it is by a First Amendment regime which treasures freedom of expression, ready to confront the problem of violence in the media? In answer to this question, I suggest to you that our First Amendment law is presently in a state of great ferment and transition and that now our society may be willing to confront this issue.

In the legal academy and in the courts of the United States, there is currently a revolution in traditional ways of thinking about First Amendment theory. Part of this First Amendment revisionism centers on hate speech on campus and on female pornography.[1] The recent literature on these subjects focuses not on the impact regulation would have on free speech, but on the harm done to those who are victimized by such expression. There is almost a generational divide in First Amendment scholarship between the scholars who insist that all content-based regulation is invalid under the First Amendment and a new generation who are no longer as confident as their elders that free speech is, and should be, the ultimate constitutional value for society.

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1. For a discussion of racist speech, see Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991). For an examination of feminist pornography, see Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

Professor Richard Delgado explains the case for regulation of racist speech from the victim's perspective: "Minority protectors see the injury of one who has been subject to a racial assault as not a mere isolated event, but as part of an interrelated series of acts, by which persons of color are subordinated, and which will follow the victim wherever she goes."[2] Delgado concedes that there is an equally strong argument against allowing regulation of racist speech. He acknowledges that a claim for protection of the racist's right to speak "is part of the never-ending vigilance necessary to preserve freedom of expression in a society that is too prone to balance it away."[3]

Delgado's there-is-justice-in-both-your-houses attitude sounds temperate and mild. However, in terms of traditional First Amendment thinking, it is revolutionary since he concludes as follows: "Nothing in constitutional or moral theory requires one answer rather than the other. Social science, case law, and the experience of other nations provide some illumination."[4] But, in fact, American constitutional theory does not treat both these positions as possessing equal authority. The tradition against the recognition of controls on racist speech is much stronger than solicitude for the victims of that speech. But there is undeniably a new debate in the United States. Should First Amendment law also focus on the harm speech causes rather than just on the harm regulation of speech will cause? Expression which causes specific harms to groups within society who are in a subordinate power position may be more subject to regulation than was previously thought either possible or desirable.

With respect to racist speech, the Supreme Court of the United States has generally adhered to the classic First Amendment position that emotional harms suffered by the targets of racist expressive activity cannot justify regulation. This position was the essential message of those cases protecting the right of Nazis to march through Skokie, Illinois, a predominantly Jewish Chicago suburb.[5] As recently as 1992, a St. Paul, Minnesota hate speech ordinance was struck down by the United States Supreme Court in *R.A.V. v. City of St. Paul.*[6] Justice Scalia, speaking for the Court, invalidated the St. Paul ordinance on the grounds that it was underinclusive and that it discriminated on the basis of content. The St. Paul ordinance was deemed defective for singling out for punishment only those fighting words which were based on race, creed, color, or religion.[7] Fighting words reflecting other kinds of hostility such as political affiliation, sexual preference, or union membership were not sanctioned. Nevertheless, ten years before *R.A.V.*, the Supreme Court excluded an entire category of expression from

2. Delgado, *supra* note 1, at 347-48.

3. *Id.* at 348.

4. *Id.*

5. *See* Village of Skokie v. Nat'l Socialist Party, 373 N.E.2d 21 (Ill. 1978); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

6. 505 U.S. 377 (1992).

7. *Id.* at 393-94.

First Amendment protection. In 1982, the Supreme Court simply excluded child pornography from First Amendment protection.[8] The child pornography decision is explained as follows:

> Justice White, for the Court, in justifying categorical exclusion of child pornography, stressed the compelling state interest in protecting minors, the close relation of the distribution of the films and photographs to the sexual abuse of children and the motivation for the production of such materials resulting from sales and advertising revenues.[9]

A focus on the harm speech can cause is exemplified by the writings of Professor Catharine MacKinnon. Professor MacKinnon powerfully joins the themes of harm and equality in an effort to remove female pornography from the realm of First Amendment protection: "What pornography *does* goes beyond its content: It eroticises hierarchy, it sexualizes inequality. It makes dominance and submission sex. Inequality is its central dynamic."[10] In her view, pornography is not harmless; rather, she contends: "[Pornography] institutionalizes the sexuality of male supremacy, fusing the eroticisation of dominance and submission with the social construction of male and female."[11]

However, those who ask that hate speech and female pornography be removed from the domain of protected speech are not responsible for the increase in legal redress for the consequences of violence in the media. But these liberal writers have contributed to weakening the previously impregnable citadel of First Amendment absolutism. There is a strong conservative values-oriented critique of First Amendment absolutism that is more responsible for developments designed to bring violence in the media to some kind of accountability. The success of this conservative critique in the past is evidenced in the longstanding exception for obscenity to First Amendment protection and is further illustrated by the complete exception for child pornography. I shall discuss the impact of this conservative critique in securing redress for violence in the media when I discuss the opinions of Judges Michael Luttig and Edith Jones.

A further indication that the classic North American position on the inviolability of free expression is being challenged is found in the recent decision of the Supreme Court of Canada on female pornography, *Regina v. Butler*.[12] The

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8. New York v. Ferber, 458 U.S. 747 (1982).

9. *See* JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 375 (2d. ed. 1991) (referring to New York v. Ferber, 458 U.S. 747 (1982)).

10. MacKinnon, *supra* note 1.

11. *Id.*

12. Regina v. Butler, [1992] S.C.R. 452. An American case, on the other hand, invalidated an Indianapolis, Indiana ordinance prohibiting female pornography as violative of the First Amendment. Am. Booksellers Ass'n. v. Hudnut, 771 F.2d 323 (7th Cir. 1985). The latter was defined by the ordinance as "the graphic sexually explicit subordination of women, whether in pictures or in words. . . ." *Id.* at 324. Speaking for the Seventh Circuit, Judge Easterbrook said: "The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents." *Id.* at 325.

Supreme Court of Canada held in 1992 that such material can be regulated.[13] It should be noted that one part of the statute at issue in the Canadian case declared that: material which represents or portrays explicit sex with violence is obscene. Similarly, the Supreme Court of Canada, unlike the Supreme Court of the United States in the *R.A.V.* case, has upheld in the *Regina v. Keegstra* case the regulation of racist propaganda on a harmful effect rationale, which was also deeply rooted in the idea of equality.[14]

II. ALTERNATIVES FOR LEGAL CONTROLS ON VIOLENT CONTENT

The significance of this radical change in First Amendment theory in the United States from both the left and the right has the most important implications for the development of legal controls on violence in film and television. The findings of social science research—the relationship between exposure to violent programming and aggressive or antisocial behavior—could possibly find greater expression in legal controls than was previously thought possible. Given the influence of music, film, and television programming created in the United States around the world, changes in First Amendment theory merit serious attention.

In short, the whole issue of what are appropriate legal controls on violence in film and television in particular must take account of this phenomenon—the decline of absolutism in First Amendment theory in the United States. There is, increasingly, great concern about the harm that speech can do to individuals. Similarly, there is less reflexive dismissal of those harms than was the case in the past. Those victimized by certain categories of speech are not deemed automatically less important than the inflexibility of the free speech principle. A new sensitivity to the relationship of the free speech principle to individual harm has emerged. This phenomenon will have great influence in charting the development of responses to the problem of violence in film and television.

If our society is at last willing to confront the issue of legal controls on violent content in the media, what responses can law offer to address this problem consistent with our tradition of free expression? On this question, I will discuss three possible alternatives. First, I will discuss the channeling alternative. Next, I will address the tort liability alternative. Finally, I will discuss indirect controls and self-regulation.

A. The Channeling Alternative

One way to deal with the problem of the violence quotient in film and television is by way of analogy to obscenity. The United States Supreme Court's approach to obscenity has been to create a definition sufficiently exact to be able

13. *Butler*, S.C.R. at 455-56.

14. Regina v. Keegstra, [1990] S.C.R. 697. See Kathleen Mahoney, R. v. Keegstra: *A Rationale for Regulating Pornography?*, 37 MCGILL L.J. 242 (1992) for a discussion of *Keegstra*.

to narrowly target the material which society decides to proscribe without jeopardizing the full and free discourse which society desires to encourage.[15] The treatment in our law of sexually-oriented content transcends the specific issue of obscenity. Our law has developed very subtle and complex distinctions among the varieties of sexually-oriented content. Indeed, sexually-oriented content may be divided into at least four separate categories, each of which receives different First Amendment treatment. These categories are (1) obscenity, (2) indecency, (3) child pornography, and (4) pornography that degrades and debases women. Child pornography, like obscenity, receives no First Amendment protection.[16] Attempts have been made to place female pornography—pornography which degrades and debases women—in a similarly unprotected category of speech. Efforts in this direction have been particularly active at the local level, but none of these efforts have survived a First Amendment challenge.[17] Indecent expression can be channeled, even sanctioned, but it cannot be prohibited absolutely.

Clearly, in our society and in our law, sexually-oriented content is highly regulated and highly scrutinized. The process by which our legal system divides sexually-oriented content into distinct categories illustrates the high degree of regulation and scrutinization of such content. Our law has not made similar distinctions within the broad category of violent programming. Indeed, our law basically does not regulate violent programming at all. Why have we been so willing to subject sexually-oriented content to dissection and regulation and so unwilling to regulate violent programming? Two reasons suggest themselves. The first reason is the Puritan tradition and its heritage of sexual inhibition and moral rectitude. The other reason is that the musket and the rifle were formidable factors in the settling of this country.

May we treat the problem of violence on television similarly to the way we treat the various forms of sexually-oriented expression? Could we craft a definition of violence sufficiently exact to target excessively violent material and leave the stream of public discourse otherwise untrammeled? Is violence susceptible to such treatment? The answer to these questions is hardly clear. Some may say we should not even explore this question. Why? They say that we would be regulating content and that the state has no business regulating content. In the United States, this latter position represents the classic First Amendment position. Like all absolutes, there is something impressive about the scope of this statement. Again, like many absolutes, upon examination it turns out that this absolute is less encompassing than advertised. The very existence of a law of obscenity and a law of indecent expression demonstrates that we do make distinctions in our law. Some categories of content enjoy less First Amendment protection than others.

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15. *See* Miller v. California, 413 U.S. 15 (1973).

16. *See* New York v. Ferber, 458 U.S. 747 (1982).

17. *See* Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, Hudnut v. Am. Booksellers Ass'n, 475 U.S. 1001 (1986).

Indecency, in particular, receives rather unusual and elaborate treatment in the law affecting television. Indeed, the treatment by our law of indecent expression offers the most helpful analogy to the problem of violent content on television. Indecency has a special status in First Amendment law. It is protected speech, but it may be regulated. Indecency, unlike obscenity, may not be absolutely barred or prohibited, but it may be channeled. What channeling means is that indecent programming is permissible if it is televised at an hour when the great mass of children cannot be expected to be in the television audience. Indeed, defined perimeters have established what is called a "safe harbor," whereby broadcasters and cable casters are assured that if they limit indecent programming to the safe harbor of 10:00 p.m. to 6:00 a.m., they will not be subject to the sanctions which the Federal Communications Commission (FCC) otherwise applies to enforce its policy against indecent programming.[18]

Creating a safe harbor for indecency in broadcasting, or to put it another way—barring indecent content for much of the broadcast day—has been defended as follows:

> The data on broadcasting that the FCC has collected reveal that large numbers of children view television or listen to the radio from the early morning until late in the evening, that those numbers decline rapidly as midnight approaches, and that a substantial portion of the adult audience is tuned into television or radio broadcasts after midnight. We find this information sufficient to support the safe harbor parameters that Congress has drawn.[19]

If a similar safe harbor policy were applied to violent programming, would such a safe harbor policy withstand First Amendment attack? So far, the American courts which have considered whether the safe harbor policy for indecent programming violates the First Amendment have concluded that such a policy is valid. Certainly, one alternative to the violence quotient in television programming is not to prohibit such programming, but rather to channel it.

In fact, the Telecommunications Act of 1996 requires television manufacturers starting in 1998 to equip all sets with a screen of thirteen inches or more with a device to enable viewers to block all programs with a common rating. This is the celebrated V-Chip.[20] We are all now quite familiar with these common ratings for cable movies: (1) "V" for "violent content," (2) "S" for "sexual content," (3) "L" for "coarse language," and (4) "D" for "suggestive dialogue."

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18. *See* Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992), *upheld as modified*, in Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, Pacifica Found. v. FCC, 516 U.S. 1043 (1996).

19. Action for Children's Television, 58 F.3d at 665 (quoting Judge Buckley writing the opinion for the majority).

20. Telecommunications Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 56, 139 (1996) (codified in 47 U.S.C. §§ 303(w), 303(x) (2001)).

A parent with a television set equipped with a V-Chip can now simply block out or ban from her household programming rated "V" for violent content. The V-Chip enables the parent to exercise control over the programming that comes across the household television screen. V-Chip technology gives parents channeling authority.[21] Interestingly, existing data tells us that the V-Chip has been little used by the households that own one.[22]

Channeling violent content in television is theoretically an alternative legal control. But, it is not a legal control that government is likely to adopt. Violent content is a porous and imprecise term. Critics of the indecency concept contend that the term "indecency" is hopelessly vague and subjective and is therefore totally inadequate for use as a category in First Amendment law. That view has not prevailed. The term "violent content" is, if anything, even more elusive than the indecency concept. The difficulties inherent in justifying the channeling of violent content come readily to mind. If someone is stabbed in a televised opera, is that violent content? Is Hamlet so suffused with violent content that it must be channeled beyond the bedtime hours of children? If a historical drama is presented on television portraying the famous duel between Aaron Burr and Alexander Hamilton, a duel where Hamilton was killed, should such a portrayal be channeled? Violent content may arguably be an adequate basis for editing the television viewing of children in the hands of parents. But it is certainly too clumsy and too restrictive a tool in the hands of the state.

B. Tort Liability Alternative

Despite the new First Amendment theorists and the emphasis on harms to the victim and to society caused by some categories of speech, the established law in the United States with respect to tort liability for violent content is, of course, still reflective of the older classic First Amendment theory. In this conception, the harms to the victim caused by speech are outweighed by the risks that government intervention would present to the overall maintenance of free speech in the society. But some dramatic changes have occurred, changes which mirror the arguments of the theorists I mentioned earlier.

In the United States, tort liability has generally not been imposed against television companies for harms caused by their programming. An incitement test has played a major role in limiting—indeed, in immunizing—television and film companies for the harms caused by programming. Perhaps the most influential case is *Olivia N. v. NBC*,[23] one of the so-called "copycat" cases.

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21. DONALD M. GILLMOR, JEROME A. BARRON & TODD F. SIMON, MASS COMMUNICATION LAW: CASES AND COMMENT 841-42 (6th ed. 1998).

22. *See* Clay Calvert & Robert Richards, *Larry Flynt Uncensored: A Dialogue with the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMM. LAW CONSPECTUS 159, 168 n.74 (2001).

23. 178 Cal. Rptr. 888 (Ct. App. 1981).

In *Olivia N.*, a television viewer perpetrated upon a female minor an act suggested to him by an artificial rape scene he had seen in a television movie, *Born Innocent*.[24] The California Court of Appeals considered and discussed most of the arguments that have been used for subjecting, in some circumstances at least, television companies to liability. It discounted the view accepted by the United States Supreme Court in *FCC v. Pacifica Foundation*[25] that regulation of indecency did not violate the First Amendment.[26] In *Pacifica*, the Supreme Court upheld the imposition of a sanction on the use of indecent speech.[27] The *Pacifica* holding was grounded on the pervasive effects of television and the unique access of children to television. The *Pacifica* Court reasoned that these realities necessitated a different rule than one that might obtain in other media.[28]

According to the California Court of Appeals, the consequences of applying the *Pacifica* approach to harms such as criminal behavior allegedly caused by television programming would reduce the adult population of the United States to viewing only what is suitable for children.[29] The court also considered whether the act perpetrated in the television movie was an incitement.[30] This was an important question since incitement to unlawful actions are not protected under the First Amendment. But the court held that the film did not advocate or encourage lawless action.[31] In *Olivia N.*, the California Court of Appeals set forth the reasons why as a general proposition it chose not to permit negligence actions to succeed against television companies for harms caused by television broadcasts:

> Realistically, television networks would become significantly more inhibited in the selection of controversial materials if liability were to be imposed on a simple negligence theory . . . . The deterrent effect of subjecting the television networks to negligence liability because of their programming choices would . . . dampen the vigor and limit the variety of public debate.[32]

Let us turn to yet another "copycat" case. The scene is Boston in 1979. A sixteen-year-old, Martin Yakubowicz, has died from a knife wound intentionally inflicted on him by one Michael Barrett.[33] Michael had just come from a movie theater after viewing the movie *The Warriors*.[34] This stabbing occurred after

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24. *Id.* at 891.
25. 438 U.S. 726 (1978).
26. *Olivia N.*, 178 Cal. Rptr. at 894.
27. *Pacifica Found.*, 438 U.S. at 750.
28. *Id.* at 748-49.
29. *Olivia N.*, 178 Cal. Rptr. at 893.
30. *Id.*
31. *Id.*
32. *Id.* at 892.
33. Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067, 1068 (Mass. 1989).
34. *Id.*

youth "gangs" in both Boston and California reacted violently and with threats of violence after seeing the movie. The movie theater in Boston was operated by Saxon Theater Corporation and Paramount Pictures. Both the movie theater operator and Paramount Pictures were aware of this behavior by youth gangs seeing the picture. The father of the slain boy now sues the movie theater operator and Paramount Pictures for wrongful death. Should there be liability? The Massachusetts Supreme Judicial Court ruled that there should be no liability.[35]

Justice O'Connor of the Massachusetts Supreme Judicial Court described the film, *The Warriors*:

> The film includes numerous scenes of juvenile gang-related violence in which youths battle with knives, guns, and other weapons as they pursue one gang, the "Warriors," through the subways of New York City. Advertising for the film depicted menacing youths wielding baseball bats.[36]

Three days before Martin Yakubowicz was slain, two youths were killed in Palm Springs and Oxnard, California near theaters which were showing *The Warriors*. Paramount then ordered each of the theaters around the country showing *The Warriors* to hire extra security guards. Paramount offered to pay for extra security. Saxon Theaters accepted the offer of extra security and indicated that problems with vandalism had been reported at showings of *The Warriors.* Following the stabbing of Martin Yakubowicz, Paramount offered to release theater owners from their contractual obligation to show *The Warriors*. In its telegram to the exhibitors of *The Warriors*, Paramount stated: "Please be advised that in the event you believe that the exhibition of this motion picture in your theatre poses a risk to persons or property, then Paramount will relieve you of your obligation to exhibit the picture. . . ."[37]

Although Saxon received this telegram, it continued to exhibit *The Warriors* through April 5, 1979. The *Born Innocent* and *The Warriors* cases raise a threshold question on the issue of causation. Did the violent content of a television program or film actually cause the violence complained of? It is interesting that Paramount Pictures was not in doubt on the causation issue in *The Warriors* case. The exhibitors were told that in case they believed the picture, *The Warriors*, posed a risk to persons or property, Paramount would release them from showing the picture. The Massachusetts Supreme Judicial Court, in *The Warriors* case, held that the exhibitor and the producer were not liable. Did the court hold that Paramount and Saxon were not negligent in exhibiting the film in the circumstances? Not really. Basically, what the court said is "that the defendants could not properly be found to have violated their duty of reasonable care by exercising protected rights

35. *Id.*
36. *Id.* at 1069.
37. *Id.* at 1070.

of free speech."[38] This is not, therefore, a conclusion that due care was exercised. It is rather a conclusion that the First Amendment should not permit the courts to resolve whether due care was exercised. This, of course, is the dominant First Amendment ideology: free expression is more important than the safeguarding of human life that the imposition of tort liability would further. Why? Presumably, it is because such liability would result in self-censorship by film and television producers in the future—all to the detriment of innovation and experimentation in film and television in the future. The Massachusetts Supreme Judicial Court also held that the film, *The Warriors*, did not constitute an incitement: "Although the film is rife with violent scenes, it does not at any point exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of viewers."[39]

I mention *The Warriors* case because I think it is illustrative: American law on the whole has been unwilling to deal with the consequences of violence in film and television. If the test of liability in negligence cases such as these is incitement, then immunity from liability for the producers of television and film is virtually assured. Clearly, television and film producers did not intend either generally or specifically to incite a particular individual to imitate in life the violent acts which they see perpetrated in front of them as entertainment. The incitement test is simply inadequate to cope with the harms that may flow from the violent quotient in film and television.

One might say that this is too pessimistic an account. It is true that in 1975, the Supreme Court of California did hold that the First Amendment would not preclude the imposition of liability against a radio station for the death of a motorist who was killed as a result of a promotion sponsored by the station.[40] The station was offering a prize to anyone who could locate the station's disc jockey.[41] In their haste to win the contest and reach the disc jockey's location, two teenagers driving separate cars forced a car off the road and thereby killed the car's driver.[42] The Supreme Court of California declared that the foreseeable results of the broadcast created an undue risk of harm and that the First Amendment would not preclude liability in such circumstances: "The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."[43]

A case that struggles with whether the harm that speech can do should permit the creation of new categories of unprotected expression is *Herceg v. Hustler Magazine, Inc.*[44] In August 1981, *Hustler Magazine* printed an article entitled

38. *Id.* at 1071.
39. *Id.*
40. Weirum v. RKO Gen., Inc., 539 P.2d 36 (Cal. 1975).
41. *Id.* at 37.
42. *Id.*
43. *Id.* at 40.
44. 814 F.2d 1017 (5th Cir. 1987).

"Orgasms of Death" which discussed autoerotic asphyxiation. This is a practice which involves "masturbation while 'hanging' oneself in order to temporarily cut off the blood supply to the brain at the moment of orgasm."[45] The article's heading stated that the story was published to increase awareness about sexual matters, to reduce readers' inhibitions, and to make readers better lovers. At the same time, *Hustler Magazine* cautioned its readers that the practice described in the article was fraught with danger and often led to fatalities. *Hustler Magazine* further warned its readers that those who sought "unique forms of sexual release [should not attempt] this method."[46] The body of the article went on to describe the "high" and the "thrill" achieved by those who indulge in this practice but at the same time, the article warned that the practice was "neither healthy nor harmless."[47]

A 14-year-old boy, Troy D., read the article and attempted to engage in autoerotic asphyxia.[48] The result was that he was found dead the next morning, hanged by the neck in his closet.[49] Young Troy read a magazine article which persuaded him to engage in an act that ended his life. Should the publisher of that magazine be held liable for civil damages? The Fifth Circuit panel of three judges decided, two-to-one, that *Hustler Magazine* should not be held liable.[50] They did so on the basis of classic First Amendment philosophy. Constitutional protection for freedom of speech and press is not predicated on the idea that speech in itself cannot inflict harm. Instead, its premise is that the benefits of the free flow of speech and ideas outweighs the costs of the harm that speech sometimes undoubtedly causes. The court pointed out that the speech involved did not fall into any of the categories that our law has recognized as unprotected:

> The Supreme Court has recognized that some types of speech are excluded from, or entitled only to narrow constitutional protection. Freedom of speech does not protect obscene materials, child pornography, fighting words, incitement to imminent lawless activity, and purposefully-made or recklessly-made false statements of fact such as libel, defamation, or fraud. Whatever the problems created in attempting to categorize speech in such fashion, the Hustler article fits none of them.[51]

Hustler is clearly a case where the written word led to the death of a young boy. The writer of the article did not know the child nor did he intend to expose him to danger, but that was the consequence of the article. In these circumstances, the majority of the court concluded that "first amendment protection is not

45. *Id.* at 1018.
46. *Id.*
47. *Id.*
48. *Id.* at 1019.
49. *Id.*
50. *Id.* at 1025.
51. *Id.* at 1020 (footnotes omitted).

eliminated simply because publication of an idea creates a potential hazard."[52] At the time of the *Hustler* decision, the result reached by the majority expressed the sense of the existing law. In short, the majority followed the law. But surely a question occurs to many of us as we think about this case. The result here may be what classic First Amendment doctrine demands. But is it just?

In an opinion in which she both concurred with and dissented from the majority opinion, Judge Edith Jones explained why she found the majority opinion troubling in some respects. She asked rhetorically why it was not within the power of a state to fashion a remedy to save the lives of its children when they were "endangered by suicidal pornography."[53] She further observed that "no federal court has held that death is a legitimate price to pay for freedom of speech."[54] She specifically addressed the issue of whether communicators of violent content can, consistent with the First Amendment, be subjected to liability. She observed that it was not impossible to delineate in this case between speech that was protected and speech that was not protected. Furthermore, she pointed out what I have stressed—that there has been in the past an indiscriminate approach to liability actions seeking damages for the harms that occasionally may flow from media content. The traditional approach has been characterized by a refusal to make distinctions. This has now greatly changed: "a hierarchy of first amendment speech classifications has in fact developed largely in the last few years, and there is no reason to assume the hierarchy is ineluctable."[55]

Clearly, there are a number of cases where plaintiffs sue on behalf of relatives who have met either serious injury or death reacting to or imitating violent images they first saw on the television screen or in a movie theater. But the response of the law to the victims and kin of these encounters has not been encouraging. Typically, these plaintiffs bring negligence suits against media defendants. Sometimes, of course, if the violent image is sufficiently egregious and the resulting injuries or death are particularly shocking, a sympathetic trial judge or jury will find a verdict or judgment for the plaintiff. In the past, these cases were almost always reversed by higher courts on the ground that the First Amendment protection enjoyed by the media defendant should trump the tort action of the individual plaintiff.

But the legal winds on these issues may be blowing in a new direction. *Braun v. Soldier of Fortune Magazine, Inc.* illustrates this point.[56] Liability was imposed on the magazine for publishing a classified ad creating an unreasonable risk of soliciting violent criminal activity. The imposition of liability was held not

52. *Id.*
53. *Id.* at 1025 (Jones, J., concurring and dissenting).
54. *Id.* at 1026.
55. *Id.* at 1027 (footnote omitted).
56. 968 F.2d 1110 (11th Cir. 1992).

violative of the First Amendment.[57] The ad created a clear risk of substantial danger of harm to the public.

Michael Savage placed an ad in *Soldier of Fortune* magazine. The ad was very explicit:

> GUN FOR HIRE: 37 year old professional mercenary desires jobs. Vietnam Veteran. Discrete [sic] and very private. Body guard, courier, and other special skills. All jobs considered.[58]

Savage ran the ad for ten months and received a surprisingly substantial response from those seeking his assistance for murder, kidnapping, and assault. Among those who responded to Savage's ad were Bruce Gastwirth and a business associate, John Horton Moore; they contacted Savage about plans to murder Richard Braun.[59] Savage, Moore, and one other, Sean Trevor Doutre, went to Richard Braun's home.[60] As Richard Braun and his son Michael were driving down their driveway, Doutre stepped in front of Richard Braun's car and fired several shots into the car with an automatic pistol.[61] The shots wounded Michael in the thigh.[62] Richard was wounded as well but managed to roll out of the car.[63] As Richard Braun lay on the ground, Doutre walked over to him and killed him by firing two shots into the back of his head.[64]

Michael Braun and his brother brought a wrongful death action in federal court against the magazine for the death of their father; Michael also brought a personal injury action. The brothers contended that *Soldier of Fortune* magazine negligently published an article that presented a risk that violent crime, including murder, would be solicited and committed. They introduced evidence which described links in the past between the magazine's personal service ads and a variety of crimes such as murder, kidnapping, assault, and extortion.[65] They also introduced evidence that prior to the publication of the Savage ad, law enforcement officers had contacted the magazine about criminal investigations of a solicitation

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57. *Id.* Judge Anderson in his opinion for the Eleventh Circuit provided a capsule summary of the case:
> Soldier of Fortune Magazine . . . [hereinafter SOF] appeal a $4,375,000 jury verdict against them in a consolidated tort action brought by Michael and Ian Braun, the sons of a murder victim. The jury found that SOF acted with negligence and malice in publishing a personal service advertisement through which plaintiffs' father's business partner hired an assassin to kill him. We affirm the judgment entered on the jury's verdict.

Id. at 1112.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Soldier of Fortune Magazine, Inc.*, 968 F.2d at 1110.

63. *Id.*

64. *Id.*

65. *Id.* at 1112-13.

to commit murder in one state and a kidnapping in another—both of which had connections with *Soldier of Fortune* personal service ads.[66]

The management and editor of *Soldier of Fortune* denied any awareness of crimes associated with the magazine's personal service ads prior to running the ad placed by Michael Savage.[67] The magazine's advertising manager contended that she had understood the term "Gun For Hire" to mean bodyguard or protection service personnel.[68] The judge charged the jury that in order to prevail, the plaintiff had to prove that the ad presented a "clear and present danger of causing serious harm to the public from violent criminal activity."[69] In addition, the judge cautioned the jury that a publisher was not under a general obligation to investigate an ad.[70] The plaintiffs therefore had to prove that the offer in the ad communicated to the reader that an unreasonable risk to commit a violent crime including murder had been created by the advertiser.[71] The trial court referred to this standard as a "modified" negligence standard. Finally, the judge asked the jury to consider the facts and the instructions in light of the fact that the First Amendment "protects the free flow of truthful and legitimate information even when it is of a commercial rather than a political nature."[72]

The jury awarded over $2,375,000 in compensatory damages and $10 million in punitive damages to the brothers.[73] But the trial judge ruled that he would order a new trial unless the brothers would agree to accept two million dollars in punitive damages rather than the ten million dollars the jury awarded. *Soldier of Fortune* magazine agreed to the reduction in punitive damages and judgment was entered in the brothers' behalf. *Soldier of Fortune* then appealed. On appeal, the Eleventh Circuit held that the trial judge's instructions were correct and affirmed the judgment.[74]

The *Soldier of Fortune* case is extremely important. Judge Anderson for the Eleventh Circuit rejected powerful First Amendment arguments that were made by counsel for the publisher. Thus, it was argued that "imposing liability on publishers for the advertisements they print indirectly threatens core, non-commercial speech to which the Constitution accords its full protection."[75] If all advertisements which were ambiguous in terms of the potential harm they might engender had to be refused, the economic impact from such refusals would inevitably adversely impact on the editorial content of the publication. Indeed, counsel for *Soldier of Fortune* contended "that payment of the jury's verdict

66. *Id.* at 1113.
67. *Id.*
68. *Soldier of Fortune Magazine, Inc.*, 968 F.2d at 1113.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 1114.
74. *Soldier of Fortune Magazine, Inc.*, 968 F.2d at 1119.
75. *Id.* at 1118.

would force the magazine to close and, consequently, would deprive public debate of [*Soldier of Fortune*'s] protected, non-commercial speech."[76]

The Eleventh Circuit said it was mindful that it had to reconcile the state interest in imposing liability on publishers who run ads which relate to criminal activity with the First Amendment objective that state law not be permitted to chill protected expression. The Eleventh Circuit said that the district court's modified negligence standard did exactly that. The district court had stressed that the jury could find *Soldier of Fortune* negligent only if Savage's advertisement "on its face" would have alerted a reasonably prudent publisher "that the ad in question contained a clearly identifiable unreasonable risk, that the offer in the ad is one to commit a serious violent crime."[77] The Court of Appeals held that the First Amendment permitted the use of this "modified" negligence standard.[78]

An even more dramatic case involving violent content resulted in liability for the publisher of two books with provocative titles. One book was entitled *Hit Man: A Technical Manual for Independent Contractors,* and the other was entitled *How to Make a Disposable Silencer.* James Perry bought and read both books.[79] Perry was hired by a man to kill the man's ex-wife, his eight-year-old paraplegic son, and the son's nurse.[80] The apparent motivation for the killings was to permit the husband to collect two million dollars that had been awarded in a settlement for injuries to his son.[81] The media defendant placed all of its trust on the First Amendment. The parties stipulated that the publisher would be civilly liable for aiding and abetting James Perry in his triple murder unless the First Amendment presented an absolute bar to the imposition of liability on the publisher for its role in assisting the commission of the crimes.[82] The media defendant lost its gamble. Judge Luttig for the court held "that the First Amendment does not pose a bar to a finding that Paladin [the publisher] is civilly liable as an aider and abetter of Perry's triple contract murder."[83] The federal district court had held that *Hitman* was protected advocacy. Judge Luttig for the Court of Appeals said this ruling was the result of misunderstanding the governing standard of *Brandenburg v. Ohio*[84] "as having distinguished between 'advocating or teaching' lawlessness on the one hand, and 'inciting or encouraging' lawlessness on the other, any and all of the former being entitled to First Amendment protection."[85] The district court failed to understand the kind of teaching which was protected under *Brandenburg*: "[I]t is not teaching simpliciter, but only 'the mere

76. *Id.*
77. *Id.* at 1113.
78. *Id.* at 1119.
79. Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 241-42 (4th Cir. 1997).
80. *Id.* at 239.
81. *Id.*
82. *Id.* at 241 n.2.
83. *Id.* at 243.
84. 395 U.S. 444 (1969).
85. *Rice,* 128 F.3d. at 263.

abstract teaching . . . *of the moral propriety or even moral necessity*' for resort to lawlessness, or its equivalent, that is protected under the commands of *Brandenburg*."[86]

The Court of Appeals did not think that the so-called *Brandenburg* test, the standard test for media liability when media defendants are sued for the consequences of the violent quotient in media content, was a bar to media liability in this situation. *Brandenburg*, decided in 1969, was the last incarnation given by the Supreme Court to what originally was called the "clear and present danger" doctrine. Arising in the context of a Klan rally—and what we would call today hate speech—and thus far afield from the criminal syndicalism and Communist cases where the "clear and present danger" doctrine was originally applied, the test enunciated by the Supreme Court in *Brandenburg* is notable both for its brevity and for its abiding influence in media liability cases. The Court in a *per curiam* opinion said that its prior precedents

> fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[87]

Professor Rodney Smolla describes the approach he took on behalf of the plaintiffs in the *Hitman* case as follows: "*Brandenburg* does not insulate a defendant from liability when the defendant's speech goes beyond the bounds of abstract advocacy and into the realm of providing specific instruction that aids and abets another in the commission of a criminal offense."[88] Smolla's argument—abstract teaching or advocacy of unlawful action was protected expression but that "concrete preparation and instruction to aid and abet crime" was not protected expression—succeeded.[89] The court ruled that the *Hitman* manual fell in the latter category."[90]

Many media organizations filed *amici* briefs to the court prior to the decision in the *Hitman* case. These organizations warned that if the court reached a result adverse to the publisher, freedom of speech and the press would be severely chilled. Judge Luttig was startled by this argument:

> That the national media organizations would feel obliged to vigorously defend Paladin's assertion of a constitutional right to *intentionally and knowingly* assist murderers with technical information which Paladin admits it intended and knew would be used immediately in the

86. *Id.* at 263-64 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).

87. *Brandenburg*, 395 U.S. at 447.

88. Rodney A. Smolla, *Should the* Brandenburg v. Ohio *Incitement Test Apply in Media Violence Tort Cases?*, 27 N. KY. L. REV. 1, 38-39 (2000).

89. *Id.* at 39.

90. *Rice*, 128 F.3d at 264-65.

> commission of murder and other crimes against society is, to say the least, breathtaking.[91]

Paladin argued that if liability is imposed for aiding and abetting, liability would soon be extended to so-called "copycat" conduct where the actor imitates what is seen on television or read in print. Judge Luttig denied that the decision could have any such far-reaching adverse impact on freedom of expression. In the "copycat" situation, the disseminator does not intend to assist someone else in committing a violent crime. "Copycat" conduct occurs in situations where "the information for the dissemination of which liability is sought" has been misused.[92] In the aiding and abetting situation, the information is being used exactly as intended. The significance of this distinction would surely limit media liability.[93] Furthermore, Judge Luttig speculated that it would be a rare case indeed where there would be a situation where a publisher would stipulate in "almost taunting defiance that it intended to assist murderers" and where there would also be "evidence extraneous to the speech itself which would support a finding of the requisite intent."[94]

The *Hitman* case clearly breaks new ground in our First Amendment law. It either places detailed teaching on how to commit a crime on the incitement side of the line and hence such activity is not protected, or it creates a new unprotected category of expression—detailed teaching about crime in itself constitutes aiding and abetting. Either interpretation creates a new category of unprotected expression. Judge Luttig does not acknowledge that he is taking First Amendment law in a new direction. Indeed, he insists that the effect of this decision will be slight. I think the *Hitman* decision charts a new path altogether. The decision tells us that some violent content, even though it may not constitute an incitement, still does not receive First Amendment protection. *Hitman* is thus an important chapter in the development of a new category of unprotected expression—violent content albeit in the area of civil liability for aiding and abetting the commission of a crime.

Cases like *Hitman* and *Soldier of Fortune* illustrate the waning influence of First Amendment absolutism. The law in the area of tort liability for the consequences of violent media content is taking a new direction. The traditional understanding that media content, unless it falls into one of the unprotected categories, is immune from legal redress for the consequences of that content has been shaken. This does not mean, and it should not mean, that copycat cases will now result in liability as they did not in the past. But it does mean that in some circumstances, tort liability for violent media content is possible.

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91. *Id.* at 265.
92. *Id.*
93. *Id.*
94. *Id.*

C. *Indirect Controls and Self-Regulation Alternative*

The question of identifying and developing controls which can appropriately be directed to the problem of violence on television and film is complex. But any discussion of this issue must consider voluntary controls or industry self-regulation as a third alternative. In movies and television, rating systems have been voluntarily arrived at by the affected industries. In the case of violent content, particularly in very recent times, what we witness is the use by government of these systems as indirect controls. These indirect controls do not, however, arrive as described; instead, they are presented by government officials or agencies as exhortations or, more commonly, as recommendations. They are sermons to the industry, but they have more immediate clout than most sermons. Usually, the government agency putting out a sermon in the form of a report can, if it wishes, ultimately wield a club—and the affected industry knows it. Furthermore, once the agency provides the sermon, legislators in Congress are often prompted to try to enact the sermon into law.

Controversy about whether government advice to the media industry should be looked at as indirect government controls is hardly new. In 1974, Committees of both the House and Senate directed the FCC to submit a report indicating how they planned to protect children from excessive violence and obscenity in broadcasting. The course of action that Richard Wiley, Chairman of the FCC, decided to employ was "jawboning."[95] Rather than undertake any formal FCC action, Chairman Wiley would simply urge the networks to reduce the amount of sex and violence in television programming. This jawboning included visits by the Chairman and his staff to the Washington offices of ABC, CBS, and NBC. As a result of this and many other efforts on the part of Chairman Wiley, "CBS proposed that the [Code of the National Association of Broadcasters (NAB)] be amended to [provide] that '[p]rogramming in the first hour of the network prime-time schedule should be suitable for family viewing.'"[96]

A considerable debate developed over the "family viewing hour" proposal. Chairman Wiley gave a number of speeches saying that the problem of violence on television was deemed so serious by some citizens and some members of Congress as to warrant regulatory action by the FCC. Chairman Wiley thought that in this very sensitive First Amendment area, reform by industry self-regulation was the desirable course of action. The FCC expressed similar views when it filed its Report to Congress (FCC Report).[97] Indeed, the FCC Report made a strong case against regulatory action designed to control violent and sexually-oriented programming which is neither obscene nor indecent. Regulatory action would inevitably require balancing the need to protect children and the

95. Writers Guild of Am. v. ABC, 609 F.2d 355, 359 (9th Cir. 1979).

96. *Id.* at 368.

97. Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418 (1975).

need to protect the First Amendment interest of adults in diverse programming.[98] Regulatory action might also lead to "freez[ing] present standards and could also discourage creative developments in the medium."[99]

The Television Board of Directors of NAB adopted the family viewing policy on April 8, 1975 as an amendment to the NAB Television Code.[100] A number of organizations, including the Writers Guild of America, brought suit against the FCC, the three major television networks, and the NAB to challenge the adoption of the so-called family viewing policy on a number of grounds including the First Amendment.[101] The federal district court concluded, as did the Court of Appeals, that "government pressure substantially caused the adoption of the family viewing policy."[102] This policy, the district court concluded, violated a bedrock First Amendment principle: decisions on the content of the programming to appear on the television screen belonged to the broadcast licensee and no one else.[103] The Court of Appeals had serious doubts about the district court's opinion. First, it was not a certainty that the "bedrock principle is correct."[104] Second, it was doubtful whether the "finding of causation [was] sound."[105] But the Court of Appeals chose not to resolve these issues. Instead, the Court of Appeals vacated the judgment of the district court and remanded with instructions to the district court to send the claims of the plaintiffs against the government to the FCC and to hold in abeyance the claims of the plaintiffs against the private defendants pending resolution and judicial review of the FCC proceeding.[106] The FCC soon abandoned the family viewing hour proposal.

Obviously, as the differing reactions of the two courts that considered this matter illustrate, the issue here is very much on the line. Is the jawboning done by the FCC Chairman to get the networks to adopt a family viewing hour free of sexual and violent content impermissible government action? If it is government action, is it impermissible government censorship? I mention the family viewing hour episode in broadcast media history only to contrast it with a very different kind of government action—the use of government to provide information to the public and thereby to influence media behavior.

A classic example of a report that was providing information and only making recommendations but that was also extremely influential and well-publicized, is the Federal Trade Commission (FTC) report, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practice in*

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98. *Id.* at 420.
99. *Id.*
100. *Writers Guild*, 609 F.2d at 370.
101. *Id.* at 357-58.
102. *Id.* at 360.
103. *Id.* at 360-61.
104. *Id.* at 361.
105. *Id.*
106. *Writers Guild*, 609 F.2d at 358.

the Motion Picture, Music Recording & Electronic Games Industries which was issued in September 2000 (FTC Report).[107] The background of the FTC Report is instructive. After the terrible Columbine High School shootings in Littleton, Colorado and the massive media and public outpouring of shock and outrage which greeted it, President Clinton asked the FTC to study whether several media industries were targeting their advertising of violent content directly to children and teenagers. The three industries that the FTC was directed to study were the motion picture industry, the music recording industry, and the electronic games industry. Radio and television were not included in the FTC's charge in this regard. The FTC said the President charged it with two specific inquiries. First, "[d]o the industries promote products they themselves [have identified as meriting] parental caution in venues where children [constitute] a substantial percentage of the audience?"[108] Second, "[a]re these advertisements [designed] to attract children and teenagers?"[109] The FTC concluded, based on its comprehensive study of marketing in the industries studied, that the answer to both questions for all three of the media industries studied was an emphatic "yes."[110]

The FTC noted that many media commentators had suggested that the exposure of teenagers to violent images in the entertainment media contributed to the murders at Columbine High School in Littleton, Colorado.[111] The FTC acquitted the entertainment media of sole responsibility for violence among the young. But the FTC pointedly noted that the entertainment industry itself used the violent quotient of a product as a factor in their parental advisory labeling and rating systems. The FTC Report stated that its objective was to aid the entertainment industries in improving their existing self-regulatory systems in order to achieve the goal of those systems to "help parents make decisions about which entertainment products their children should and should not view, listen to, or play."[112]

The FTC noted that the present motion picture industry rating system is the product of a number of factors. Two Supreme Court cases in 1968 upheld the power of the states to regulate access to materials by children when access to those same materials for adults could not be restricted.[113] One of these cases suggested that a rating or classification system, if narrowly drawn, would not offend First Amendment standards.[114] In order to avoid an idiosyncratic pattern of

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107. FEDERAL TRADE COMMISSION, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES (Sept. 2000) [hereinafter FTC REPORT].

108. *Id.* at i.

109. *Id.*

110. *Id.*

111. *Id.* at 2.

112. *Id.* at 3-4.

113. *See* Ginsberg v. New York, 390 U.S. 629 (1968); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968).

114. *Interstate Circuit*, 390 U.S. at 690.

widely varying and restrictive local classification standards, the motion picture industry developed a single national ratings standard.[115]

The current ratings are well known, but I shall list them and then indicate what the Motion Picture Association of America (MPAA) and the National Association of Theatre Owners (NATO) say about them in terms of violence. The current ratings are: (1) "G" for "general audiences" where all ages are admitted (violence is minimal); (2) "PG" for "parental guidance suggested," which indicates that "some material may not be suitable for children" (horror and violence do not exceed moderate levels); (3) "PG-13" for "parents strongly cautioned," which means that "some material may be inappropriate for children under thirteen" (rough or persistent violence is absent); (4) "R" for "restricted," wherein anyone "under seventeen [this age varies among jurisdictions] requires accompanying parent or adult guardian" (this rating may be assigned due to, among other things, a film's use of violence); and (5) "NC-17" for "no one seventeen and under admitted" because "the film may contain scenes of excessive violence" (this rating does not, however, signify that the rated film is obscene or pornographic in terms of sex, language, or violence).[116]

Although the FTC was careful not to evaluate the content of the industry rating system, the FTC Report suggests that, as far as the violence quotient in movies is concerned, the line between "PG-13" and "R" movies is not as distinct as it should be, and some movies are described as "PG-13" in ways that suggest they should be classified as "R" movies.[117] The rating system of the MPAA considers the explanation for a particular rating an integral part of the rating system. The FTC stated that an explanation such as "[r]ated PG-13 for intense horror sequences" is "as much a part of the rating as the letter symbol."[118] The MPAA provides these explanations to reviewers and theaters to aid in describing a particular picture to the public. But the MPAA does not require that this information be included in movie advertising. Indeed, the FTC reported that the movie studios do not include these explanations in their ads.[119] But the FTC's third report on marketing violent entertainment to children indicates that many movie studios include the reasons for a particular rating, such as violent content.[120]

In the FTC Report, the FTC declared that it conducted its study to address a "central question:"[121] was violent entertainment being marketed to children? In

115. FTC REPORT, *supra* note 107, at 5.

116. *Id.* at 6-7.

117. *Id.* at 8.

118. *Id.* at 10.

119. *Id.*

120. FEDERAL TRADE COMMISSION, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A ONE-YEAR FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES 9 (Dec. 2001).

121. FTC REPORT, *supra* note 107, at 12.

response to this question, the FTC answered with an unequivocal "yes."[122] Based on its findings, the FTC concluded that each of the three industries studied targeted "children under 17 as the audience for movies, music, and games" that the industries themselves acknowledged were "inappropriate for children" or warranted "parental caution due to their level of violent content."[123] The FTC then issued a damning conclusion. The FTC said that it believed "by targeting children when marketing these products, the entertainment industries undermine their own programs and limit the effectiveness of the parental review upon which these programs are based."[124]

The FTC made a number of specific recommendations, all designed to improve the workings of the self-regulatory systems already in place in each industry. But the FTC Report concluded with a warning. Self-regulatory programs require monitoring if they are to work, and they require sanctions if they are violated. For First Amendment reasons, the FTC said the affected industries were in the best position both to monitor compliance and to sanction noncompliance.[125] Is the FTC Report indirect regulation, direct regulation or no regulation at all? The FTC Report has a great deal to say with respect to recommendations that would assist the more effective functioning of the existing voluntary rating systems. But it was very laconic indeed on what sanctions were appropriate for non-compliance. Recommendations from a government agency were one thing, but proposing sanctions for media industries was quite another. Furthermore, the FTC Report on the marketing practices of several media industries in the light of their own rating systems should be contrasted with the FCC's ill-fated family viewing hour policy which was developed not by the industry, but by the FCC Chairman.

In April 2001, the FTC issued a follow-up report on industry advertising practices (2001 FTC Report).[126] The 2001 FTC Report continued to emphasize self-regulation. The 2001 FTC Report found improvements in the ad practices of the motion picture industry and the electronic game industries, but not in the music recording industry. In the 2001 FTC Report, as in its previous one, the FTC adhered to its belief that "vigilant self-regulation is the best approach to ensuring that parents are provided with adequate information to guide their children's exposure to entertainment media with violent content."[127] The FTC was particularly concerned that media advertising practices should not undermine the media industry's self-imposed rating system. Of course, FTC review of the

122. *Id.*

123. *Id.* at 52-53.

124. *Id.* at 53.

125. *Id.* at 56.

126. FEDERAL TRADE COMMISSION, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A SIX-MONTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES (Apr. 2001).

127. *Id.* at iii.

marketing of violent entertainment is not the only example of government involvement in issues concerning violent content.[128]

When the government exhorts particular media industries to adhere to their own self-regulation standards, is it actually regulating? The FCC by restricting an entire category of programming—indecent programming—to specific hours, the "safe harbor" from 10:00 p.m. to 6:00 a.m., directly regulates. The FTC's recommendation on desirable and undesirable advertising practices in the marketing of violent entertainment in light of the industry's own standards is far from this kind of direct regulation.

Robert Corn-Revere, a lawyer who represents entertainment industry clients, argues that "the real significance of the FTC report . . . was not its findings but the reactions it provoked."[129] While the FTC only sought to modify the existing self-regulatory systems, Corn-Revere points out that Congressional reactions were less restrained. Corn-Revere points out that "Vice President Al Gore threatened to institute suits for 'unfair and deceptive advertising' if the respective industries failed to mend their ways within six months."[130] Corn-Revere concludes: "Despite the FTC's more moderate recommendations, the legacy of its report may constitute direct regulation of the media."[131]

On the other hand, Professor Ray Surette has pointed out a benefit from the approach taken by the FTC in its report on the marketing of violent entertainment to children. Monitoring industry's self-imposed regulation of violent products neatly avoids the vexing problem of defining violence by focusing solely on those products that the entertainment industries themselves had designated as violent.[132] Letting the media or entertainment industry define violence does not necessarily avoid First Amendment issues. Arguably, it may simply intensify the gravity of these issues. Fear of government regulation may engender an industry response which, absent that fear, would not be forthcoming at all. The industry out of concern for its economic security may censor itself on a voluntary basis far more stringently than the government would do directly. But viewed from another perspective, government examination of the entertainment industry's self-imposed regulations is quite ingenious. The government in such circumstances does not need to develop standards, but rather to monitor those developed by private industry.

The government should not be disabled from pointing out abuses by the entertainment and media industries on the ground that the exposure of abuses

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128. On March 23, 2000, the Seventh Circuit, per Judge Posner, enjoined, on the basis of the First Amendment, an Indiana ordinance that sought to limit the access of minors to video games that depict violence. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001).

129. Robert Corn-Revere, *Getting Violent Over Media: Real Debates Not About Violence, It's About Cultural Aesthetics*, FULTON COUNTY DAILY REP., (Atlanta, Ga.), Sept. 26, 2000.

130. *Id.*

131. *Id.*

132. Ray Surette, *The Promise and the Reality—Peddling Violent Entertainment to Children*, WORLD AND I, Apr. 1, 2001, at 267.

may prompt politicians to suggest unconstitutional remedies. The idea that the First Amendment rights of these industries should be inflated to the point that the government is disabled even from pointing out what they are doing is unacceptable.

III. CONCLUSION

This article has discussed three responses to the violent quotient in media content. The first of these responses was channeling. Channeling differs from regulation conceived of as prohibition. Channeling permits programming with violent content to be televised but channels it to the later hours of the evening as is currently done with indecent programming. At the present time, the government has not employed this alternative. The government has facilitated for parents the option of prohibiting violent programming. New television sets must be equipped with a V-Chip which permits parents to block violent programming from their households. However, of those households that have new television sets equipped with the V-Chip, the number actually using it is very small indeed. The government is unlikely to channel violent programming as it has done with indecent programming. The reason for this is that violent programming is both more pervasive and more indeterminate in terms of identification than indecent programming.

The second response of the law is the use of tort liability as a remedy and as a sanction for the consequences of violent media content. The law in this area has taken a new direction. Practical consequences have followed theory. Writers, judges, and scholars who think about First Amendment issues are increasingly doubtful that a principle of the inviolability of media content should be the ultimate value in our society. Concern for the character of our society has battered the absolutist approach to First Amendment questions. Liberal scholars have pointed to the harms that flow from hate speech and female pornography. Their criticism has weakened the appeal of First Amendment absolutism. The conservative tradition, as represented by judges such as Michael Luttig and Edith Jones, has been more directly responsible for the traction for imposing legal responsibility for the harm caused by violent media images and statements. The combination of these concerns, coming from both the left and the right, is transforming traditional thinking about First Amendment law. These critics underscore the harm that words and images may sometimes cause. The importance of freedom of expression continues, as it should, to be cherished as one of the most important values in our society, but increasingly, it is understood that this does not mean that it should always trump all other values.

In the *Hitman* case, counsel for the defendants made a stipulation in order to avoid what they believed would be an unnecessary trial. Professor Smolla, counsel for the plaintiffs in the *Hitman* case, summarizes their position: "The publisher had stipulated for the purposes of a motion for summary judgment that it marketed the manual to attract and assist criminals, and that it knew and

intended that the manual would be used, upon receipt, by real murderers to plan and execute killings."[133]

The defendant in the *Hitman* case believed that even the most egregious content, content that provided a detailed recipe for violence, was fully protected under the First Amendment, and, therefore, no damages could possibly be awarded for the consequences of such a publication. This was a stipulation that truly tested the strength of First Amendment absolutism. First Amendment absolutism has always been more firmly established in the minds of media executives and their counsel than it has in the decisions of the United States Supreme Court. When First Amendment absolutism has insisted on its claims, the Supreme Court has often declined to do it homage.[134] Finally, a new skeptical approach to claims of First Amendment absolutism, where the printed word is involved, is illustrated by the *Soldier of Fortune* and *Hitman* cases. American courts are beginning to impose liability against the media in certain egregious cases for publications involving tortious conduct and criminal activity. The fact that the source of the injury is the printed word no longer grants automatic absolution.

The final response by our law to the problem of violent content in media is the use of the informing function of government. The government can provide information on matters affecting the public. The government can even take positions on controversial issues. As Chief Justice Rehnquist said in *Rust v. Sullivan*:[135]

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.[136]

In *Rust*, the government was really taking a position on a public issue—the debate about abortion—and had decided to fund the pro-life and not the pro-choice side of the debate. The FTC action in the FTC Report was much less pro-

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133. Smolla, *supra* note 88, at 30-31.

134. When Ralph Ginzburg tested the limits of the definition of obscenity and told the readers of his erotically-oriented magazine that the presence of socially important content would redeem its generally salacious content, the Supreme Court refused to grant him the immunity he insisted the First Amendment extended to him. Ginzburg v. United States, 383 U.S. 463 (1966). Later, when Ralph Ginzburg charged in one of his magazines that Senator Goldwater had psychiatric problems, which he did not have, Ginzburg insisted that the rigorous actual malice standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964), applied because Goldwater was a public official. The Supreme Court once again took up Ginzburg's dare and decided against him. Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, Ginzburg v. Goldwater, 396 U.S. 1049 (1970).

135. 500 U.S. 173 (1991).

136. *Id.* at 193.

active. The media themselves had already taken the position that some of their products should not be accessed by children. The ratings systems that the media industries themselves had developed were evidence of that. The FTC Report merely pointed out that some media industries were targeting children to access content that their ratings systems were supposedly designed to exclude.

Let us say, however, for the sake of argument that my position that all the FTC was doing was giving information on media behavior about policies that the media had adopted is rejected. Let us assume instead that the FTC is really expressing a commitment to one side of a debate. The debate is about whether the government should influence the content choices of its people. The opposing view to what the FTC is doing is that people should be allowed to choose for themselves the content that they wish without governmental interference. Parents and not the state should choose the appropriate programming for their children. This is certainly a responsible point of view. But it is hardly one that is underrepresented in the media. The idea that any governmental comment on media content is censorship is a view that is abundantly expressed in the media in particular and in our public discourse. Government-produced information in this context hardly skews the debate. Instead, it enlarges and enriches the debate. In conclusion, it seems to me that information furnished by government on the media's own self-regulatory programs is a much milder form of government intervention than either channeling violent media content or subjecting it to tort liability. Governmental information on media behavior measured by guidelines developed by the media does the least damage to First Amendment interests.

In this article, my discussion spans a broad range of violent media messages—from news images showing violence (such as the September 11, 2001 terrorist attacks), to fictional movies showing it (such as *The Warriors*), to news articles reporting on it (like the asphyxiation article), to advertisements to partake in it (such as *Soldier of Fortune*), to instructional guides for carrying it out (like *Hitman*), to advertisements about the violent content of entertainment products (the FTC Report), to nonviolent action that results in accidents (such as the radio contest leading to a car crash). Nonetheless, I think it makes sense to think of these messages together. The same First Amendment arguments are used to shield them from either liability or oversight. The overriding theme is that these arguments are increasingly less persuasive than in the past.

There are now alternatives open to society to cope with violent content in the media. These alternatives operate within our national commitment to an open society characterized by freedom of expression. I think that the sum of the various alternatives that have been developed to deal with the issue of violent content in the media show a trend. Our society and our law is less willing than it has been in the past to pay homage to First Amendment claims of absolute protection for violent content in the media. Instead, our law is now more interested in providing redress for the harmful effects of violent media content.