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ON PROTECTING CHILDREN—FROM CENSORSHIP: A REPLY TO AMITAI ETZIONI

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INTRODUCTION

Concerns about sex and violence in the media, and their possible ill effects on young people, continue to drive our cultural politics. The topic has intrigued me for at least a decade—ever since, as an ACLU lawyer in the 1990s, I began to wonder about the underlying basis for the widespread assumption that minors are harmed by sexual or violent content in art and entertainment.

This curiosity eventually led me to leave the ACLU and begin writing Not in Front of the Children: "Indecency," Censorship, and the Innocence of Youth.[1] My comments here in response to Amitai Etzioni's[2] thoughtful, well-intentioned, but ultimately superficial argument for Internet filters and other restrictions aimed at youth are partly drawn from my research for Not in Front of the Children. I have also continued to think and write about the youth censorship issue as part of my work at the Free Expression Policy Project ("FEPP").[3]

Before I begin, a word about terminology. Some readers object to the term "censorship" when applied to restrictions that are aimed at youth, or that simply burden disfavored speech rather than suppressing it completely. They are right that "censorship" has acquired

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1. MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH (2001) [hereinafter NOT IN FRONT OF THE CHILDREN].

2. Amitai Etzioni, On Protecting Children from Speech, 79 CHI.-KENT L. REV. 3 (2004).

3. See, e.g., Brief of Amici Curiae Thirty-Three Media Scholars, Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003) (No. 02-3010) (expressing scholars' concern that courts should not rely on commonly held but mistaken beliefs about a proven causative link between violent entertainment and violent behavior to uphold a censorship law), available at www.fepproject.org/courtbriefs/stlouis.html; Marjorie Heins, A Psychologist Surveys the Wreckage, www.fepproject.org/bookreviews/mediaviolenceJF.html (June 19, 2002) (reviewing JONATHAN FREEDMAN, MEDIA VIOLENCE AND ITS EFFECT ON AGGRESSION: ASSESSING THE SCIENTIFIC EVIDENCE (2002)).

a pejorative connotation in U.S. politics today, but I use the term in a descriptive, rather than an accusatory, sense. Censorship means suppressing *or* restricting speech based on disapproval of its content, even if only one group is targeted or if the silencing is less than complete.[4] Parents censor their children all the time, and society generally approves of their right to do so. Teachers properly control class discussions, and thereby censor extraneous subjects as well as uncivil forms of address.

The subject of this symposium, however, is government-imposed censorship—in the form of mandatory Internet filters, rating systems, and "harmful-to-minors" laws—and whether such restrictions are wise or justified. Hence, I use the terms "censorship," "suppression," and "restriction" more or less synonymously, and without necessarily adverse connotations.

Etzioni's argument for government censorship—that is, restrictions on the art and information available to minors—rests on a series of false premises and a reductive use of language which assumes the thing to be proven. I will start, then, by unpacking the premises and the language of Etzioni's argument. After that, I will review some salient facts that Etzioni seeks to minimize regarding both the operation of Internet filters and the social-science research on media effects. Next, I will discuss the First Amendment rights of youth and the competing interests of (many) parents and political leaders in shielding minors from expression that they believe to be offensive, vulgar, age-inappropriate, or an impetus for bad attitudes and behavior. Finally, I will suggest some non-censorial approaches to society's widespread and legitimate concerns about the effects of media content on young people.[5]

These non-censorial approaches are critical to my argument. Often, those who oppose Internet filters and other presumed solutions to the problem of minors and controversial expression are accused of being oblivious to the very real and understandable concerns of parents and others involved with the upbringing of youth. To the contrary, I would suggest that affirmative, speech-enhancing

4. *See*, *e.g.*, United States v. Playboy Entm't Group, 529 U.S. 803, 812 (2000) ("It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree.").

5. I use the terms "minors," "youth," or "young people" to refer to both children and adolescents. As Etzioni points out, those who are skeptical of censorship tend to use these terms; on the other hand, those who favor censorship tend to refer to "children," though they generally advocate restrictions on the material available to adolescents as well.

approaches—media literacy; sexuality education; public funding of alternative media—are far more likely to be effective in combating the nefarious influences of vulgar, irresponsible, or just plain stupid mass-media entertainment than are speech-restrictive approaches such as ratings, V-chips, Internet filters, and "harmful-to-minors" laws.

I. REDUCTIVE LANGUAGE AND FALSE PREMISES

A. "Protection" and "Harm"

In Etzioni's very first paragraph (indeed, in his title), his choice of language assumes that no question exists that sex and violence in the mass media are harmful, so that minors must be protected from them. This assumption immediately puts those skeptical of censorship on the defensive by casting them as ideologues who are at best unconcerned about children, and at worst child abusers.

Choice of language, of course, is a rhetorical device. In fact, the assumption that minors overall are psychologically harmed by exposure to sexual or violent content is unproven and probably unprovable. In section III, I outline the distortions and misrepresentations that have been perpetrated over the years by some proponents of the "causal hypothesis" (the view that sex or violence in the media cause bad attitudes and behavior). At bottom, words like *protection* and *harm* mask moral or normative judgments about what is appropriate for youth.

But why quibble about social science or the validity of the causal hypothesis, I'm often asked, when it's obvious that much mass-media entertainment is vulgar, reflects irresponsible attitudes about sex and violence, offends majoritarian standards of good conduct, and is inappropriate for young children? There are two answers.

First, there is value in intellectual honesty. We should not base public policy on false propositions about social-science research. And if in fact the real issue is not proven psychological harm, but offense to sexual or social morality, combined with fear (albeit unverifiable) that youngsters will imitate what they see onscreen, then censorship becomes both less politically justifiable and less likely to resolve our anxieties. If the real concern is with the upbringing of youth—inculcation of good sexual values and socialization into acceptable behavior (including alternatives to violence)—then education, not

censorship, is the only remedy for what's troublesome in mass media entertainment.

The second answer also relates to intellectual honesty. How are we to identify and define what we think (even if we can't prove) is harmful? All censorship schemes, whether direct ones like obscenity laws and Internet filters or indirect ones like V-chips and ratings, founder on this intractable problem of defining what it is we want to restrict. Etzioni avoids this massive definitional problem, asserting that "which kinds and forms" of violent content should be restricted "is an issue we face only once we move away" from First Amendment absolutism.[6] But the problem is inherent in any attempt to restrict such broad and vague categories of expression as sex and violence. As countless pundits have observed, both are as plentiful in Shakespeare, Homer, and the Bible as in Bruce Willis movies or Bugs Bunny cartoons.

If you are proposing a censorship system, you cannot avoid the challenge of defining what it is you want to suppress or restrict. And because the effects of human expression are varied, and depend upon a host of variables including ambiguity, irony, humor, style, and context, the definitional challenge is formidable. It is a challenge that has not been and probably cannot be met, either by scholars who favor censorship of the information available to youth, or by social science researchers who seek to prove harm from such broad categories of expression as "violent" media content.

B. "Civil Libertarians"

Another misuse of language involves a dichotomy that Etzioni sets up early in his article between "civil libertarians" and "many social conservatives"—with the author, of course, representing the reasonable middle ground. But neither "civil libertarians" nor "social conservatives" are a uniform or undifferentiated group. Indeed, many civil libertarians are also social conservatives. And when it comes to censoring fantasy violence—as opposed to sex—it is usually social *liberals*, not conservatives, who are leading the charge. In short, the political landscape is more complicated than Etzioni suggests.

Here are a few examples. Civil libertarians are badly split on the issue of campaign finance. In 1998, all but one of the ACLU's former, still-living presidents, executive directors, legal directors, and legisla-

6. Etzioni, *supra* note 2, at 40.

tive directors publicly took issue with the organization's continuing opposition to campaign finance reform despite ever-more compelling evidence of the need for controls on wealthy contributors' corruption of the democratic process.[7]

Similarly, civil libertarians differ on the constitutionality of laws prohibiting cross-burning with the intent to intimidate.[8] Not all civil libertarians are "First Amendment absolutists," and many believe that where tangible harm is shown (cross-burning and uncontrolled campaign contributions being two examples), restrictions on expression are justified.

The problem with the media violence debate is that real harm hasn't been shown, and can't be. As I discuss in section III, the ways in which art and entertainment influence human attitudes and behavior are far too complex and multi-faceted to lend themselves to simple cause-and-effect analysis. You don't necessarily have to be a civil libertarian to see that there ought to be demonstrable harm from an identifiable and definable category of speech before it is restricted or suppressed.

II. INTERNET FILTERS

A. *How Filters Work*

Etzioni describes five cases involving censorship of the information, art, and ideas available to youth. Three of the five concern Internet filtering. It is clear that Etzioni believes filtering is an important and needed response to widely shared concerns about minors' access to vulgar, violent, or other controversial online content. But his account obscures Internet filters' two fundamental flaws: their broad and subjective categories of disfavored content, and their irrational, keyword-based operation. The consequence of these flaws is that filtering, whether deliberately or inadvertently, blocks an immense amount of valuable expression. These are not failures that can be

7. *See* Brennan Center for Justice, *Former ACLU Leaders Break From ACLU Position on Constitutionality of Campaign Finance Reform*, www.brennancenter.org/presscenter/releases_1998/pressrelease_1998_0619.html (June 19, 1998).

8. The Supreme Court faced this issue recently in *Virginia v. Black*, 123 S. Ct. 1536 (2003). *See* Marjorie Heins & Stephanie Hershkovitz, Free Expression Policy Project, *The FEPP Supreme Court Page: Free Expression Cases in the 2002–2003 Supreme Court Term*, http://www.fepproject.org/fepp/supremecourt.html#black (last updated Oct. 29, 2003).

corrected, and Etzioni's hope that technological improvements will make filters defensible is therefore misguided.

Regardless of what the marketing departments of the companies that produce them claim, Internet filters by necessity depend on keywords or phrases to identify potentially inappropriate Internet sites. Examples are: "over 18," "sex," "pussy," and other words or word combinations that are likely to appear on sites containing pornography but are also found on artistic, literary, and informational sites of all kinds. And because there are more than an estimated two billion Web pages, many of them changing daily,[9] there is no way that filtering companies can review even a fraction of the sites that are flagged through keyword searches as possibly troublesome in order to eliminate false positives.

The results have been well-documented. As FEPP found when it surveyed more than seventy tests and studies, filters routinely blocked countless legitimate Web sites. These included the home pages of the Traditional Values Coalition and Massachusetts Congressman Edward Markey; part of the City of Hiroshima site; Georgia O'Keeffe and Vincent Van Gogh sites; numerous gay and lesbian sites; the Declaration of Independence; Shakespeare's complete plays; *Marijuana: Facts for Teens* (a brochure published by the National Institute on Drug Abuse); the University of Kansas's Archie R. Dykes Medical Library (upon detecting the word "dykes"); the "Let's Have an Affair" catering company; searches for *Bastard Out of Carolina* and "The Owl and the Pussy Cat;" and, after detecting the phrase "least 21," a news item on the Amnesty International site. (The offending sentence read, "Reports of shootings in Irian Jaya bring to at least 21 the number of people in Indonesia and East Timor killed or wounded.")[10]

9. *See* Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 419 (E.D. Pa. 2002).

10. Marjorie Heins & Christina Cho, Free Expression Policy Project, *Internet Filters: A Public Policy Report*, www.fepproject.org/policyreports/filteringreport.html (2001) (summarizing more than seventy tests and studies); *see also* ELECTRONIC PRIVACY INFORMATION CENTER, FILTERS AND FREEDOM 2.0: FREE SPEECH PERSPECTIVES ON INTERNET CONTENT CONTROL (David Sobel ed., 2001); NOT IN FRONT OF THE CHILDREN, *supra* note 1, at 181–200; Victoria Rideout et. al., Henry J. Kaiser Family Foundation, *See No Evil: How Internet Filters Affect the Search for Online Health Information* (Executive Summary), http://www.kff.org/content/2002/3294/Internet_Filtering_exec_summ.pdf at 6–7 (Dec. 2002) (stating that even at the least restrictive settings, filters block 1.4 percent of health information sites and 9 percent of sexual health sites; at more restrictive settings, they block up to 24 percent of health sites). Thus, claims by filtering companies that filters are "more than 99% accurate," Etzioni, *supra* note 2, at 20, even if correct, (which they are not—even the government's expert in *American Library Association v. United States* found error rates of 6–15 percent, 201 F. Supp.

The three-judge court that struck down the Children's Internet Protection Act ("CIPA")[11] in 2002 made similar findings.[12] It explained in detail how filters work: first, by "harvesting" potentially troublesome sites; then by "winnowing," a process that involves human review of some sites but nevertheless blocks tens of thousands of valuable, non-controversial ones. Although the decision was overturned by the Supreme Court in June 2003, the justices took no issue with the three-judge court's extensive fact-findings.[13]

The three-judge court found that 10,000 to 30,000 Web pages enter the "work queue" at filtering companies each day, to be reviewed, theoretically, by staffs of between eight and "a few dozen" people. "Given the speed at which human reviewers must work to keep up with even a fraction of the approximately 1.5 million pages added to the publicly indexable Web each day," the court said, "human error is inevitable."[14] Thousands of pages are blocked that are not reviewed by company employees. For many sites or groups of sites, filters block all pages, no matter how innocent, based on a "root URL." Likewise, one item of disapproved content—for example, Salon.com's sexuality column—results in blockage of the entire site. The court gave numerous examples of blocking that was obviously caused by mindless keyword algorithms—from a Knights of Columbus site, misidentified by CyberPatrol as "adult/sexually explicit" to a site on fly fishing, misidentified by Bess as "pornography."[15]

In addition to these mechanical mishaps, and to the extent that human review plays a role in the process, filtering depends on quick, subjective judgments by company employees. These judgments are driven by the political and moral views of the company owners. Hence, within already broad and vague blocking categories such as

2d at 419), would still mean, given over two billion Web pages, that more than 20 million of them are erroneously blocked.

11. CIPA requires all schools and libraries receiving federal aid or E-rate discounts for Internet connections to install filters on all computers. Pub. L. 106-554, 114 Stat. 2763A-335 (codified as amended at 20 U.S.C. § 9134 (2000); 47 U.S.C. § 254(h)(5)(b) (2000)). Given that the law restricts adults' Internet access, calling it the "Children's Internet Protection Act" reflects a familiar political strategy of imposing widespread censorship using the rhetorical appeal of child protection.

12. *Am. Library Ass'n*, 201 F. Supp. 2d 401.

13. Am. Library Ass'n v. United States, 123 S. Ct. 2297, 2306 (2003).

14. *Am. Library Ass'n*, 201 F. Supp. 2d at 433.

15. *Id*. at 431–48. The court noted dozens of other religious, health, sports, and career-related sites that were mistakenly blocked, including a guide to allergies (blocked by Bess filter as "Adults Only, Pornography"); a health question and answer site sponsored by Columbia University (blocked by Bess as "Sex"); and a job-search site for social workers (blocked by Cyber Patrol as "Adult/Sexually Explicit"). *Id*. at 446–47.

"sex acts," "drugs," "hate/discrimination," or "alternative lifestyles," companies make decisions that discriminate against non-sexually explicit sites relating to gays and lesbians; non-mainstream religions such as Wicca or paganism; and sites dealing with free expression and censorship—especially if they are critical of Internet filtering.[16]

That these crude, often mindless filters are seriously considered as an acceptable means of classifying art and information is a sad commentary on our body politic. Even putting aside the tens of thousands—perhaps millions—of wrongly blocked pages, the underlying premise of filtering is an absurdly reductive view of human expression. Under this view, identifying suspect words divorced from their context, and consigning different types of expression to a cyber-purgatory of Web inaccessibility based on those words, is perfectly fine, because nuance, ambiguity, and context no longer matter. Instead, access to information and culture depends on mechanistic devices manufactured by private companies that are eager for sales and oblivious to the intellectual process—of minors or anybody else.

B. The Dangers of CIPA

Before we leave the world of filters, it's also necessary to take issue with Etzioni's characterization of CIPA. The law, he says, is "rather modest"; it "merely" adds one little requirement—installing filters—to the existing conditions for E-rate discounts or federal funding for Internet connections. If schools and libraries don't like the condition, they can refuse the federal aid.[17]

The problem here is that conditioning government aid on suppressing speech, especially when the condition is imposed on libraries and schools, raises serious concerns about equity and, indeed, about the democratic process. Like universities and museums, libraries and schools are society's centers of imagination, culture, and intellectual growth. Libraries in particular are the great equalizers; historically, they have provided "free access to books, ideas, resources, and information for education, employment, enjoyment and self-

16. *See Internet Filters: A Public Policy Report*, *supra* note 10, at App. A (listing blocked sites by subject); Brief of Amici Curiae Partnership for Progress on the Digital Divide et al. at 17, United States v. Am. Library Ass'n, 123 S. Ct. 2297 (2003) (No. 02-361) (referring to instances of viewpoint discrimination including blocking of sites critical of filtering companies or of Internet censorship generally), *available at* www.fepproject.org/courtbriefs/cipabrief.pdf.

17. Etzioni, *supra* note 2, at 16.

government."[18] In today's digital age, public libraries provide information and knowledge for all citizens, especially those on the wrong side of the digital divide, who do not have Internet access at school, home, or work. To force libraries, as CIPA does, "to choose between remaining true to their mission as public information gateways" or else "acting as the agents of private corporate information gatekeepers,"[19] is bad public policy, and fundamentally inconsistent with First Amendment values.

Conditions on government funding are thus particularly suspect when imposed on institutions like libraries that are dedicated to the acquisition of knowledge. As the Supreme Court has said, "even in the provision of subsidies, the Government may not 'aim at the suppression of dangerous ideas.'"[20] The condition imposed by CIPA is especially insidious—indeed, it is irrational—because the actual decisions about what to suppress are delegated to for-profit companies that have conservative ideologies, that make countless errors because of the nature of keyword-based blocking, and that do not even disclose what they block.

Thus, the view of the Supreme Court plurality in the CIPA case—that Internet filtering is no different from the professional judgments librarians make when they choose not to purchase certain books for their collections[21]—is off-base, both factually and legally. Factually, as one of the plaintiffs' briefs pointed out, it is the policy of most libraries to make available as much information as possible, without professional screening; librarians do not view themselves as moral guardians, restricting access to material that is "unworthy." It is only cost and space that prevent libraries from acquiring all of the books and periodicals in the world—problems that are conspicuously absent with the Internet.[22]

Secondly, and most important factually, delegating Internet blocking to third parties has nothing in common with the professional selection decisions of librarians; instead, it *deprives* them of professional discretion by forcing them to install software that blocks tens of

18. Brief of Appellees Multnomah County Public Library et al. at 24, United States v. Am. Library Ass'n, 123 S. Ct. 2297 (2003) (No. 02-361), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/02-361/02-361.mer.resp.mcpl.pdf.

19. Brief of Amici Curiae Partnership for Progress on the Digital Divide et al., *supra* note 16, at 25–26.

20. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998) (quoting Regan v. Taxation With Representation of Wash., 461 U.S. 540, 550 (1983)).

21. *Am. Library Ass'n*, 123 S. Ct. at 2306 (Rehnquist, C.J., plurality opinion).

22. Brief of Appellees Multnomah County Public Library et al., *supra* note 18, at 3–4, 26.

thousands of useful Web sites on every conceivable subject and also discriminates against viewpoints disfavored by filter manufacturers. Moreover, CIPA does not mandate a selection system, for it is in the nature of the Internet that once it is offered, all of it has been selected. As Justice Souter, dissenting from the Supreme Court's CIPA decision, found, requiring filters is the functional equivalent of "buying an encyclopedia and then cutting out pages with anything thought to be unsuitable for adults."[23]

As a matter of law, CIPA should have been found unconstitutional under any standard of First Amendment scrutiny. Because the Internet has the quintessential characteristics of a public forum, especially when made available in libraries, strict scrutiny should have applied, as the three-judge court found in striking down the law.[24] But even if—as the Supreme Court plurality concluded—Internet access in libraries does not create a public forum,[25] the operation of filters is so mindless and bizarre that requiring them on all computers should not have passed even rational-basis scrutiny.

None of this means that (as supporters of the law might phrase it) the government is required to fund pornography in public libraries. Some conditions on funding are constitutional, and if filters only blocked the categories of expression explicitly targeted by CIPA—"obscenity," "child pornography," and "harmful to minors" material—the legal and public policy problems with the law would be much reduced. But there is a massive gap between the content targeted by CIPA and the operation of filters, even at their least restrictive settings. Neither keyword algorithms nor filtering company employees are able to make legal judgments about whether a Web site meets the obscenity or "harmful to minors" standard.[26] Filters thus censor huge amounts of valuable material that is not even close

23. *Am. Library Ass'n*, 123 S. Ct. at 2321–22 (Souter, J., dissenting). Justice Ginsburg joined in Souter's dissent; Justice Stevens filed a separate dissent that focused on the impermissibility of requiring censorship as a condition of government funding for a wide range of private expression. *Id*. at 2312–18.

24. Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 454–70 (E.D. Pa. 2002); *see also* Reno v. ACLU, 521 U.S. 844, 868, 870 (1997) (the Internet is a "vast democratic forum," with content "as diverse as human thought").

25. *Am. Library Ass'n*, 123 S. Ct. at 2304–05 (Rehnquist, C.J., plurality opinion). Justice Kennedy, concurring, did not address the public forum issue, and Justice Breyer, concurring, would have applied heightened—but not "strict"—scrutiny because libraries serve such an important function in the marketplace of ideas. *Id*. at 2309–10, 2311.

26. The current three-part obscenity test is set out in *Miller v. California*, 413 U.S. 15, 24 (1973). The "harmful to minors" test originated with the standard approved in *Ginsberg v. New York*, 390 U.S. 629, 639–41 (1968), which then evolved to become a variant of *Miller*.

to the three banned categories. It is central to the nature and function of libraries to make such material available, especially to the elderly, lower-income citizens, residents of rural areas, and others on the wrong side of the digital divide.[27]

Etzioni's argument for filtering, in the end, relies on emotion rather than legal or policy analysis. He asks why "civil libertarians" don't at least admit that "hard-core pornography in the hands of young children is harmful, wrong, and ought to be stopped."[28] Hard-core pornography is certainly not edifying for young children; it is also incomprehensible to most of them. Whether it is psychologically harmful, should they come upon it, remains in doubt. And even if we believe it "ought to be stopped," Internet filters are not an acceptable way to go about it.

III. THE SOCIAL-SCIENCE RESEARCH

A. The Bogus Claims of Proven Harm

Although Etzioni acknowledges at one point that it is overly simplistic to claim that the media are "'the' cause of violence and sexually inappropriate conduct," he repeatedly asserts that "significant harm is caused" and that "the social science data strongly support the need to protect children from harmful material, especially from exposure to violence in the media and on the Internet."[29] To support these statements, he relies heavily on the work of two leading researchers, Leonard Eron and Rowell Huesmann, without noting that their claims have been seriously challenged. Nowhere does he acknowledge the critiques of his favored researchers' methodology or the studies showing that, even accepting the methodology, most experiments seeking to demonstrate adverse effects of media violence have yielded *negative* results.

Fantasy violence is an eternal theme in art, literature, and entertainment. In the past century, with the advent of social science, some researchers have attempted to prove adverse effects. In the 1950s, psychiatrist Fredric Wertham asserted that his informal research with

27. See Brief of Amici Curiae Partnership for Progress on the Digital Divide et al., *supra* note 16, at 21–25, for a description of the various demographic groups disadvantaged by the digital divide.

28. Etzioni, *supra* note 2, at 19.

29. *Id*. at 35, 36, 39.

juvenile delinquents proved that violent comic books caused crime. Wertham's methods were anecdotal; he had no control groups; and he mistakenly relied on correlations as proof of causation. But his assertions resonated with a public eager for answers to concerns about crime.[30]

By the 1960s, television became a target as well. Soon after its emergence, politicians began to stoke public anxieties about violent content. At the same time, a new "social learning" school of psychology posited that children imitate media violence. These psychologists believed that such effects could be measured through laboratory experiments, but these were by definition artificial constructs, did not replicate the real-world context in which art and entertainment are experienced, and used proxies or substitutes for the real-world aggressiveness they sought to measure.

Albert Bandura, leader of the social learning school, conducted such experiments using large rubber toys called Bobo dolls. He demonstrated that some children shown films of adults hitting Bobo dolls will imitate the behavior immediately afterward. Even though Bobo dolls are meant to be hit, and aggressive play is far different from real-world harm, Bandura announced that he had proved adverse effects from media violence.[31]

The announcement resonated politically, and the federal government was soon funding other studies. The first major result of this funding was a 1972 Surgeon General's report that noted a "preliminary and tentative indication" of a causal link between TV violence and real-world behavior, but cautioned that this possible effect was "small," and only in children already predisposed to aggression.[32] As historian Willard Rowland recounts, however, legislators misrepresented the report's cautious conclusions, claiming that a definitive link had been proven.[33] Psychologist Stuart Fischoff notes that it was

30. *See* Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741 (1992); Frederic M. Thrasher, *The Comics and Delinquency: Cause or Scapegoat*, 23 J. EDUC. SOCIOLOGY 195 (1949); John E. Twomey, *The Citizens' Committee and Comic-Book Control: A Study of Extragovernmental Restraint*, 20 LAW & COMTEMP. PROBS. 621, 624 (1955).

31. Albert Bandura et al., *Imitation of Film-Mediated Aggressive Models*, 66 J. ABNORMAL & SOC. PSYCHOL. 3 (1963). Bandura popularized his claims in *Look* magazine. Albert Bandura, *What TV Violence Can Do to Your Child*, LOOK, Oct. 22, 1963, at 46.

32. Surgeon General's Advisory Comm. on Television & Social Behavior, *Television and Growing Up: The Impact of Televised Violence* 4, 7, 67 (1972), *available at* http://profiles.nlm.nih.gov/NN/B/C/G/X/_/nnbcgx.pdf.

33. WILLARD D. ROWLAND, JR., THE POLITICS OF TV VIOLENCE 135–96 (1983).

almost impossible in these years to get government funding for media research unless one was looking for harmful effects.[34]

University of Toronto psychologist Jonathan Freedman, who began studying media-effects research in the early 1980s, was astounded at the disparity between the claims being made and the actual results. In a 1984 article, he reported that although there is a small statistical correlation between preference for TV violence and aggressive behavior, there is no evidence of a causal link. Laboratory experiments, which can show short-term imitation, are too artificial to offer any insight into TV's real-world impact. And field experiments, more realistic attempts to gauge media-violence influence, had wholly inconclusive results.[35]

Freedman found several instances of researchers manipulating results to bolster their theories. A field experiment in 1973, for example, widely cited in support of the causal hypothesis, had numerous measures of aggression, all of which failed to produce any finding of adverse effects. Not satisfied, the researchers divided the children into "initially high aggression" and "initially low aggression" categories, and again compared results. Still, there were no indications of harm from viewing violent programs (such as "Batman" and "Superman"). The initially high-aggression group, for example, became somewhat less aggressive after the experiment, no matter which programs they watched. But after more number-crunching, the researchers found that the initially high-aggression children who were shown violent programs "decreased *less* in aggressiveness" than the initially high-aggression children who watched neutral programs. They seized upon this one idiosyncratic finding to claim support for the causal hypothesis.[36]

Probably the most widely cited research in these years was a "longitudinal" study—tracking correlations over time—to determine whether early preferences for violent entertainment correlate with aggression later in life. The researchers (Eron and Huesmann among them) found no correlation between violent TV viewing at age eight

34. Stuart Fischoff, *Psychology's Quixotic Quest for the Media-Violence Connection*, 4 J. MEDIA PSYCH. (1999), *at* www.calstatela.edu/faculty/sfischo/violence.html.

35. Jonathan L. Freedman, *Effect of Television Violence on Aggressiveness*, 96 PSYCH. BULL. 227 (1984).

36. Jonathan L. Freedman, *Viewing Television Violence Does Not Make People More Aggressive*, 22 HOFSTRA L. REV. 833, 843–46 (1994). The study Freeman critiqued was Lynette Kohn Friedrich & Aletha Huston Stein, *Aggressive and Prosocial Television Programs and the Natural Behavior of Preschool Children*, 38 MONOGRAPHS OF THE SOC'Y FOR RES. IN CHILD DEV. (Serial No. 151) (1973).

and aggressive behavior at age eighteen for two out of three measures of aggression. But there was a correlation for boys on a third measure of aggression: peer reports. They publicized this one statistic and claimed proof of harm from TV violence.[37]

They also later claimed a correlation between viewing violent TV in childhood and committing violent crime at age thirty. (Etzioni cites this claim twice.) Oddly, however, Eron and Huesmann did not disclose the actual numbers of violent criminals on whom they based their conclusions, and their published report did not mention a link between early violent viewing and adult crime at all. Nevertheless, Huesmann testified in 1986 before the U.S. Senate using a dramatic bar graph based on this study that purportedly showed violent TV causes violent crime. When, years later, journalist Richard Rhodes asked for the numbers, Huesmann acknowledged that the correlation shown in his bar graph was based on just *three* individuals—much too small a number to permit meaningful conclusions.[38]

Huesmann went on to write a pivotal article on media violence in the next major government report, released in 1982.[39] It was an opportunity, as Rowland observes, to "provide a resurgent call to arms" by those "disappointed in the cautious tone" of the 1972 government report.[40] But many experts disputed its claim that harmful effects had been proven. Thomas Cook and other scholars reviewing the 1982 report, for example, wrote that field experiments on TV violence had produced "little consistent evidence of effects, despite claims to the contrary."[41] Yale professor William McGuire wrote that despite the hype, two decades of media-effects research had found little or no real-world behavioral impact from violent entertainment.[42]

37. Leonard D. Eron et al., *Does Television Violence Cause Aggression?*, 27 AM. PSYCHOL. 253 (1972).

38. Richard Rhodes, *The Media-Violence Myth*, ROLLING STONE, Nov. 23, 2000, at 55, 56; E-mail from L. Rowell Huesmann to Richard Rhodes, (Mar. 13, 2000) (on file with the Free Expression Policy Project). The follow-up study was reported in L. Rowell Huesmann et al., *The Stability of Aggression Over Time and Generations*, 20 DEVELEPMENTAL PSYCHOL. 1120 (1984).

39. L. Rowell Huesmann, *Television Violence and Aggressive Behavior*, *in* TELEVISION AND BEHAVIOR: TEN YEARS OF SCIENTIFIC PROGRESS AND IMPLICATIONS FOR THE EIGHTIES 126 (David Pearl et al. eds., 1982).

40. Willard Rowland, Jr., *Television Violence Redux: The Continuing Mythology of Effects*, *in* ILL EFFECTS: THE MEDIA/VIOLENCE DEBATE 102, 113 (Martin Barker & Julian Petley eds., 1997).

41. Thomas D. Cook et al., *The Implicit Assumptions of Television Research: An Analysis of the 1982 NIMH Report on* Television and Behavior, 47 PUB. OPINION Q. 161, 181–82 (1983).

42. William J. McGuire, *The Myth of Massive Media Impact: Savagings and Salvagings*, *in* 1 PUBLIC COMMUNICATION AND BEHAVIOR 173, 174 (George Comstock ed., 1986).

Meanwhile, research was emerging that undermined the causal hypothesis. In 1986, Steven Messner reported negative correlations between exposure to violent TV and violent crime in 281 metropolitan areas. Messner stated: "The data consistently indicate that high levels of exposure to violent television content are accompanied by relatively low rates of violent crime."[43]

Psychologist Joyce Sprafkin, initially a believer in the causal hypothesis, changed her mind after conducting her own experiments, which found more aggressive behavior associated with nonviolent shows like "Sesame Street" and "Mr. Rogers' Neighborhood." Sprafkin later described her reaction: "I decided to look back carefully at the field and say, well, what have other people really found?" For pre-school children, the field studies simply "did not support a special significance for aggressive television."[44]

An ambitious cross-national study coordinated by Huesmann and Eron found no significant correlations over time between children's media violence viewing and aggressive behavior in six countries. The only strong correlations were for two groups of Israeli city dwellers. Yet in this case, as Freedman recounts, most of the researchers "tried to put the best face on it that they could" in the book that resulted. "[T]hey hedged, did other analyses, and tried to make it sound as if the results supported the initial prediction that television violence would increase aggression." The Dutch researchers, however, "came right out and said that there was no evidence of an effect." Huesmann and Eron refused to publish their chapter unless they revised their conclusions.[45]

In 2002, Freedman published a review of some 200 experiments or studies—all that he could locate—attempting to test the causal hypothesis. (There are not "thousands" of empirical studies, as proponents of the causal hypothesis often claim.) Freedman found that

43. Steven F. Messner, *Television Violence and Violent Crime: An Aggregate Analysis*, 33 SOC. PROBS. 218, 228 (1986).

44. Transcript of Civil Cause for Hearing Before the Honorable Michael L. Orenstein at 112–13, Eclipse Enters. v. Gulotta (No. CV-92-3416) (E.D.N.Y. Mar. 28, 1994) (testimony of Joyce Sprafkin); *see also* Joyce Sprafkin et al., *Effects of Viewing Aggressive Cartoons on the Behavior of Learning Disabled Children*, 28 J. CHILD PSYCHOL. & PSYCHIATRY 387, 394 (1987); Kenneth D. Gadow & Joyce Sprafkin, *Field Experiments of Television Violence With Children: Evidence for an Environmental Hazard?*, 83 PEDIATRICS 399, 404 (1989).

45. Freedman, *supra* note 36, at 849–51. The Dutch researchers published their report separately; they wrote: "The hypothesis, formulated on the basis of social learning theory, that television violence viewing leads to aggressive behaviour could not be supported." Oene Wiegman et al., *A Longitudinal Study of the Effects of Television Viewing on Aggressive and Prosocial Behaviours*, 31 BRIT. J. SOC. PSYCHOL. 147, 147 (1992).

most had negative results, even accepting as positive some experiments that used poor, almost ridiculous, proxies for aggression (such as popping balloons or hitting Bobo dolls). Of eighty-seven laboratory experiments, 37 percent supported the causal hypothesis, 22 percent had mixed results, and 41 percent were non-supportive. After Freedman factored out experiments using "the most doubtful measures of aggression," only 28 percent of the results were supportive, 16 percent were mixed, and 55 percent were non-supportive of the causal hypothesis. For field experiments, the lack of proof was even more striking: "[o]nly three of the ten studies obtained even slightly supportive results," and even this weak showing gave "a more favorable picture than is justified," for several of the studies with null results actually consisted of many separate studies. Counting the results of these separate studies, three field experiments found some support; twenty did not.[46]

Freedman was not alone in his conclusions. In 1999, the British medical journal *The Lancet* criticized American professional associations for falsely claiming proven harmful effects from media violence. The editors wrote: "It is inaccurate to imply that the published work strongly indicates a causal link between virtual and actual violence."[47] Similarly, in 2000, the Federal Trade Commission conducted a thorough review of media-violence research. It reported that no firm conclusions about adverse effects could be drawn.[48]

B. The Wrong Methodology

Despite the overall failure to prove harmful effects, some media violence studies have reported positive findings. A number of factors probably explain these occasional positive results.

The first relates to the fundamental definitional problem that I've already noted. Both violence and aggression are broad concepts. Researchers have used vastly different examples of violent content in the cartoons, film clips, or games that they study. Their generalizations about violence in art or entertainment from these differing, spe-

46. JONATHAN L. FREEDMAN, MEDIA VIOLENCE AND ITS EFFECT ON AGGRESSION: ASSESSING THE SCIENTIFIC EVIDENCE 56, 62–63, 106–07 (2002).

47. Editorial, *Guns, Lies, and Videotape*, 354 LANCET 525, 525 (1999).

48. 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* app. A (2000), *available at* http://www.ftc.gov/reports/violence/appendicesviorpt.pdf.

cific examples are not trustworthy, and they fail to account for the many different contexts in which violence is presented.

Another serious problem is that researchers testing responses to media violence have not always made their nonviolent excerpts equivalent to their violent ones in respect to other variables such as general level of interest or excitement. Freedman gives a striking example: an early, much-cited experiment that compared subjects' behavior after watching either an exciting film clip of a prizefight or a soporific clip about canal boats. Since the canal boat film was not as exciting as the prizefight film, it was likely that the subjects' general arousal level, not their imitation of violence onscreen, accounted for a statistical difference in their subsequent lab behavior.[49]

Measuring aggression is a further problem. Proxies for aggression in lab experiments range from dubious (administering noise blasts to an opponent, striking Bobo dolls, or killing characters in a video game) to ludicrous (popping balloons, interpreting ambiguous stories in a way that coders consider "more hostile", or recommending a grant termination).[50] Psychologist Craig Anderson, testing the effects of violent video games, measured "aggressive cognition"—the speed with which one recognizes aggressive words on a computer screen. Based in part on small differences in reaction time, he claimed to have shown that violent video games have adverse effects.[51]

In many of these situations, experimenters are actually measuring aggressive play, which is quite different from real-world aggression. Indeed, aggressive play (as in sporting events) often provides a socially approved outlet for impulses that otherwise might take dan-

49. *See* FREEDMAN, *supra* note 46, at 79. The study Freedman critiqued was Leonard Berkowitz et al., *Film Violence and Subsequent Aggressive Tendencies*, 27 PUB. OPIN. Q. 217, 223 (1963).

50. The grant termination example is from Fischoff, *supra* note 34; the "more hostile" interpretation example is from Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life*, 78 J. PERSONALITY & SOC. PSYCHOL. 772, 784–85 (2000). *See also* Ellen Wolock, *Is There a Reasonable Approach to Handling Violence in Videogames?*, CHILDREN'S SOFTWARE & NEW MEDIA REVUE, July/Aug. 2002, at 24, 25 (occasional findings of short-term effects are questionable, given how "aggressivity" is measured—"increase in heart rate and blood pressure, negative responses on questionnaires, toy choice, etc."), *available at* http://www.childrenssoftware.com/pdf/violence.pdf; Craig E. Emes, *Is Mr Pac Man Eating Our Children? A Review of the Effect of Video Games on Children*, 42 CAN. J. PSYCHIATRY 409, 413 (1997) ("the reliability and validity of the procedures used to measure aggression are questionable").

51. *See* Anderson & Dill, *supra* note 50, at 784–86. This experiment also used the intensity and duration of "noise blasts" that the subjects administered as a proxy for aggression. When the two groups showed no difference in intensity of blasts administered, Anderson and Dill dropped that measure and focused only on duration. *Id*.

gerous forms. Professor Jeffrey Goldstein notes: "In the rare study that measures both aggressive play and aggressive behavior, violent video games affect the former and not the latter."[52]

Thus, the argument that the statistical link between media violence and aggression is as strong as the link between cigarette smoking and cancer (or other physiological analogs that are often used), even if it were true empirically, which it is not, would be meaningless, because while scientists can measure the presence or absence of disease, psychologists cannot measure real aggression through the proxies used in lab experiments.

A final problem is the "experimenter demand" factor. Not only are behaviors permitted and encouraged in experiments that would be disapproved outside the lab, but subjects generally know what the researcher is looking for. Numerous scholars have noted this problem.[53]

Why have many media-violence researchers ignored these problems, or acknowledged them and then proceeded as if their claimed results were still meaningful? Why have they exaggerated or just plain misreported the results of media-violence research? And why do politicians, professional associations, and many scholars who should know better continue to rely on these misrepresentations?

One can posit various theories. On a superficial level, the causal hypothesis seems to make sense. Indeed, we all can summon up anecdotal evidence of children imitating violent entertainment (even if it is play and not real-world imitation). More generally, it seems obvious that the overall cultural atmosphere does affect adolescents and children; indeed, it affects all of us. The problem remains that we cannot measure what the various effects are. Finally, social-science researchers are subject to the usual human frailties, including the desire for prestige, career advancement, grant money, and recognition for announcing results that political leaders and at least a portion of the public want to hear.

52. Jeffrey Goldstein, *Does Playing Violent Video Games Cause Aggressive Behavior?*, http://culturalpolicy.uchicago.edu/conf2001/papers/goldstein.html (Oct. 27, 2001) (citation omitted).

53. *E.g.*, FREEDMAN, *supra* note 46, at 49–51; Guy Cumberbatch, *Video Violence: Villain or Victim?*, www.videostandards.org.uk/video_violence.htm (n.d.) (quoting "one shrewd four year-old who, on arriving at the laboratory . . . was heard to whisper to her mother 'Look mummy! There's the doll we have to hit!'").

C. More Sensible Approaches to Media-Effects Research

The causal hypothesis has received great attention, but it represents only one view of media effects. Other scholars take more nuanced and less simplistic approaches to both the media and human aggression. Theorists of aggression look to social conditions, family environment, brain chemistry, and variations in human character.[54] Humanist media scholars, as Professor David Buckingham explains, look at "the diverse and active ways in which children and young people use the media for different social and psychological purposes."[55]

There is a large literature reflecting this humanist, non-quantitative approach to media effects, an approach that emphasizes the cognitive and social processes by which children and adults *interpret* media representations. Professor Christina Slade describes this methodology as being "sensitive to the ways people actually use television" and thus avoiding "the worst excesses of earlier research" (such as Bandura's Bobo doll experiments).[56]

For example, contributors to the anthology *Why We Watch* report that some children "seek out violent programming that features heroes triumphing over villains in an effort to control their anxieties."[57] They observe that historically, as real-world violence in daily life has decreased, "representations" have "supplanted actual experience" as a way for youngsters to cope with their desires, fantasies, and fears.[58] Similarly, psychologist Jeffrey Arnett, studying a correlation

54. *See*, *e.g.*, ERICH FROMM, THE ANATOMY OF HUMAN DESTRUCTIVENESS (1973); JONATHAN KELLERMAN, SAVAGE SPAWN: REFLECTIONS ON VIOLENT CHILDREN (1999); KONRAD LORENZ, ON AGGRESSION (Marjorie Kerr Wilson trans., 1966); ROLLO MAY, POWER AND INNOCENCE: A SEARCH FOR THE SOURCES OF VIOLENCE (1972); DEBRA NIEHOFF, THE BIOLOGY OF VIOLENCE: HOW UNDERSTANDING THE BRAIN, BEHAVIOR, AND ENVIRONMENT CAN BREAK THE VICIOUS CYCLE OF AGGRESSION (1999).

55. David Buckingham, *Electronic Child Abuse? Rethinking the Media's Effects on Children*, *in* ILL EFFECTS: THE MEDIA/VIOLENCE DEBATE, *supra* note 40, at 34.

56. CHRISTINA SLADE, THE REAL THING: DOING PHILOSOPHY WITH MEDIA 7–10 (2002).

57. Joanne Cantor, *Children's Attraction to Violent Television Programming*, *in* WHY WE WATCH: THE ATTRACTIONS OF VIOLENT ENTERTAINMENT 113 (Jeffrey Goldstein ed., 1998).

58. Vicki Goldberg, *Death Takes a Holiday, Sort Of*, *in* WHY WE WATCH: THE ATTRACTIONS OF VIOLENT ENTERTAINMENT, *supra* note 57, at 28; *see also* Clark McCauley, *When Screen Violence is Not Attractive*, *in* WHY WE WATCH: THE ATTRACTIONS OF VIOLENT ENTERTAINMENT, *supra* note 57, at 149 (the "violation of norms . . . holds a fascination for people to the extent that they rarely see these violations in everyday experience"); Celia Pearce, *Beyond Shoot Your Friends: A Call to Arms in the Battle Against Violence*, *in* DIGITAL ILLUSION: ENTERTAINING THE FUTURE WITH HIGH TECHNOLOGY 218 (Clark Dodsworth Jr. ed., 1998) (as actual violence in society has decreased, especially as a form of public entertainment (beheadings, mutilations, etc.), we have, perhaps, "evolved to the point where more of our violence is vicarious than actual").

between adolescents' reckless behavior and preference for violent music, found sensation-seeking to be the independent factor that accounts for both the preference and the behavior. He reported that "adolescents who like heavy metal music listen to it especially when they are angry and that the music has the effect of calming them down and dissipating their anger."[59]

Professor Henry Jenkins of MIT summed up the understanding gained from this approach to media effects when he wrote that many young people "move nomadically across the media landscape, cobbling together a personal mythology of symbols and stories, and investing those appropriated materials with various personal and subcultural meanings." Because of this wide variety of responses, Jenkins says, "universalizing claims are fundamentally inadequate in accounting for media's social and cultural impact."[60]

The National Academy of Sciences ("NAS"), in its 1993 study of the causes of violence, agreed. The NAS pointed out that the causal hypothesis is simplistic because it fails to consider either how different individuals respond to identical stimuli, or how different individuals' psychosocial, neurological, and hormonal characteristics interact to produce behavior.[61]

Violent crime rates across the United States have fallen significantly in the past decade, even while violence in entertainment has increased. Youth violence in particular has seen dramatic reductions.[62] In 1996, two criminologists reported that homicide rates in

59. Jeffrey Arnett, *The Soundtrack of Recklessness: Musical Preferences and Reckless Behavior Among Adolescents*, 7 J. ADOLESCENT RES. 313, 328 (1992); *see also* Jeffrey Arnett, *Adolescents and Heavy Metal Music: From the Mouths of Metalheads*, 23 YOUTH & SOC. 76, 83 (1991); Lawrence A. Kurdek, *Gender Differences in the Psychological Symptomatology and Coping Strategies of Young Adolescents*, 7 J. EARLY ADOLESCENCE 395, 403 tbl.4 (1987) (listening to music is useful to adolescents in purging anger).

60. Henry Jenkins, *Professor Jenkins Goes to Washington*, HARPER'S, July 1999, at 23; Henry Jenkins, *Lessons From Littleton: What Congress Doesn't Want to Hear About Youth and Media,* INDEP. SCH. MAG., Winter 2000, *available at* www.nais.org/pubs/ismag.cfm?file_id=537&ismag_id=14; *see also* Jeffrey Goldstein, *Why We Watch*, *in* WHY WE WATCH: THE ATTRACTIONS OF VIOLENT ENTERTAINMENT, *supra* note 57, at 216–20 (the appeals of violent entertainment include mood management, sensation-seeking and excitement, emotional expression, and the state of "flow" one experiences when immersed in an activity).

61. PANEL ON THE UNDERSTANDING AND CONTROL OF VIOLENT BEHAVIOR, NATIONAL RESEARCH COUNCIL, UNDERSTANDING AND PREVENTING VIOLENCE 101–02 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1993).

62. *See* MIKE A. MALES, FRAMING YOUTH: TEN MYTHS ABOUT THE NEXT GENERATION 5–6, 28–70 (1999); JIB FOWLES, THE CASE FOR TELEVISION VIOLENCE 52–53 (1999); FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2000: UNIFORM CRIME REPORTS (rates of violent crime for youths aged 10–17 at their lowest level since 1987; between 1990–2000, juvenile violence arrest rates fell 27 percent (from 433.5 per 100,000 in 1990 to 316.5 in

many countries, including the U.S., had decreased over the previous two decades despite significant increases in media violence.[63]

This does not mean that youth violence is not a serious problem—or for that matter, that media messages do not have powerful effects. In some instances, those effects include imitation. But often, the effects are cathartic, providing vicarious adventure or harmless outlets for aggression, as researchers like Buckingham, Arnett, Jenkins, and others have found. The point is that *broad generalizations* about the effects of such large categories of expression as "media violence" are bound to be crude and simplistic, and they cannot give us a true picture of the complexity and variety of media effects.

IV. THE FIRST AMENDMENT RIGHTS OF MINORS AND THE INTERESTS OF SOCIETY

Etzioni recognizes that as minors mature, it is important for older ones to have access to a wide variety of art and ideas—even controversial ones. But then, contradicting his recognition of minors' gradual maturing, he posits a familiar but false dichotomy between First Amendment rights and "protection of children." This dichotomy relies, of course, on an assumption about "harm to minors" that, as we have seen, is based not on science, but on generalized notions of offensiveness and possible corruption. Whether censorship is *needed* to protect minors of any age remains an open question, though Etzioni is obviously right that intellectual freedom and First Amendment rights are meaningless concepts for very young children.

The Supreme Court has not given us much help here. On the one hand, the Court has established that even elementary school children have free-expression rights: the right not to salute the flag, for example, or to wear black armbands in symbolic and non-disruptive expression of opposition to war.[64] As Justice Robert Jackson wrote for the Court in the flag-salute case, the fact that schools are "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms . . . if we are not to strangle the free mind at its

2000), including a record 68 percent drop in homicides (from 12.1 per 100,000 in 1990 to 3.9 in 2000)); *Violent Crime Fell 9% in '01, Victim Survey Shows*, NEW YORK TIMES, Sept. 9, 2002, at A18 ("The number of people who were victims of all violent crimes except homicide fell by 9 percent in 2001, sending the crime rate to its lowest level since it was first tracked in 1973.").

63. FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 133–34, 239–43 (1997).

64. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969).

source and teach youth to discount important principles of our government as mere platitudes."[65] Quoting this language, Justice Abe Fortas, in the black armband case, went on to note that children "may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[66]

On the other hand, when it comes to sexual content, the Court has given not only school administrators but the government-at-large broad scope in restricting minors' access to ideas—and without requiring a showing of harm. Contrary to Etzioni's assertion, though, the leading case in this area, *Ginsberg v. New York*, did not find a "compelling public interest"[67] in shielding minors from sexual material. Instead, Justice William Brennan, writing for the Court in *Ginsberg*, posited that minors (making no distinction between six- and sixteen-year-olds) have lesser First Amendment rights than adults; hence, the "girlie" magazines at issue in the case, although constitutionally protected for adults—because not obscene—were unprotected for youth. With this jurisprudential sleight-of-hand, Brennan concluded the government need *not* show a compelling need to restrict minors' access to the material (since it was not First Amendment-protected for them). Instead, any "rational basis" would suffice, and in *Ginsberg*, the rational-basis standard was satisfied by the legislature's asserted interest in the "ethical and moral development of youth."[68]

Admittedly, the Supreme Court itself seems to have forgotten that *Ginsberg*'s justification for censoring youth turned only on rational-basis scrutiny, and it has since stated that government has a compelling interest in shielding minors from "indecent messages that are not obscene by adult standards."[69] The Court has not required any showing of harm, however; the compelling interest has simply been assumed.

65. *Barnette*, 319 U.S. at 637.

66. *Tinker*, 393 U.S. at 511.

67. Etzioni, *supra* note 2, at 6.

68. Ginsberg v. New York, 390 U.S. 629, 639–41 (1968). For more on *Ginsberg*'s rational-basis analysis and in particular its reliance on psychiatric theory to justify taboos on adolescents' access to seductive sexual material just at the age when it most interests them, see NOT IN FRONT OF THE CHILDREN, *supra* note 1, at 71–76.

69. Reno v. ACLU, 521 U.S. 844, 869, 863 n.30 (1997) ("[g]overnment generally has a compelling interest in protecting minors from 'indecent' and 'patently offensive' speech."); *see also* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("[T]here is a compelling interest in protecting the physical and psychological well-being of minors . . . [that] extends to shielding minors from the influence of literature that is not obscene by adult standards.").

Nor has the Court been clear in delineating what "indecent" messages minors should not hear. In *Reno v. ACLU*, the Court's 1997 decision striking down the Communications Decency Act, it cited examples of potentially indecent expression that would not necessarily be harmful to minors—including the famous George Carlin "Seven Dirty Words" monolog that was at issue in the 1978 case of *FCC v. Pacifica*.[70] In *Pacifica*, the Court approved the broad, vague indecency standard for broadcasting, assumed that the Carlin monolog met the standard, and gave a wide berth to federal censorship of the airwaves in the presumed interest of protecting youth.[71] If the decision in *Reno* was not an outright rejection of *Pacifica* (both decisions were written by Justice Stevens), it certainly reflected a calmer approach to the notion of presumed harm to minors from sexual messages or vulgar words. And it resoundingly rejected the government's argument for extending the *Pacifica* indecency standard to the Internet.

Thus, the First Amendment rights of minors vary depending on subject matter, with sex the most disapproved category. Etzioni would expand that category to include violence, but as previously noted, without even attempting to define what kind of violent content he thinks is sufficiently offensive, corrupting, or immoral to be restricted. A number of courts have had to address this question as state or local governments have expanded their obscenity-based "harmful to minors" prohibitions to cover violence as well.

In one such case, Judge Richard Posner of the Seventh Circuit Court of Appeals gave an eloquent response. Violent themes have always been part of children's literature, Posner observed; to shield youngsters from the subject until they are adults "would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it." Children and adolescents, Posner said, are "unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble."[72]

70. *Reno*, 521 U.S. at 866–67, 878.

71. FCC v. Pacifica Found., 438 U.S. 726, 742, 744, 747 (1978). The indecency standard consists of just one of the three parts of the *Miller v. California* obscenity test; that is, whether the language describes sexual or excretory activities or organs in a manner that is "patently offensive as measured by contemporary community standards for the broadcast medium." *Id*. at 732; Miller v. California, 413 U.S. 15, 24 (1973).

72. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577–79 (7th Cir. 2001) (striking down ordinance restricting minors' access to violent video games in arcades). St. Louis passed a similar ordinance, banning sale or distribution to minors of video games with "graphic violence"; in 2002, a federal district court upheld it, but in June 2003, the U.S. Court of Appeals

As a matter of public policy, what free-expression analysis makes sense for minors? Rules of constitutional law flow from public policy concerns: what is a "compelling state interest"; what is the concept of a "public forum"? And what are the underlying values of the First Amendment? As Justice Stewart said, concurring in *Ginsberg*, children are "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[73] On the other hand, as Justice Brennan wrote in the Supreme Court's 1982 school library censorship case, "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."[74]

How to resolve this paradox? First, Etzioni and I agree that below the age of seven or eight, it makes little sense to talk of First Amendment rights for minors. Of course, this does not mean that the government can put a young child in jail for wearing a political button, or that any sort of censorship scheme would be constitutional as long as it doesn't impact anyone older than seven. But for purposes of preserving and enhancing intellectual freedom, the usual "age of reason" (about age seven) seems a good place to start.

At the other end of the spectrum, teenagers above age fifteen or so are as mentally capable as adults (in many cases, more so), and they are at the height of their sexual powers and sexual interest. It is important for them to get good, explicit sexual information and to understand what pornography is and in what ways it distorts human sexuality. It is also important that they have free access to political and artistic ideas because they are on the verge of becoming full-fledged citizens in a democratic society, and they cannot be expected to fulfill that role if they are shielded from disturbing ideas and images until they are eighteen. Society's moral or pedagogical interest in imposing taboos is not sufficient justification for affording them lesser First Amendment rights than adults.

What about the kids in the middle (ages eight to fifteen, approximately)? I agree with Etzioni that their free-expression rights

for the Eighth Circuit reversed. Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003). Other cases striking down restrictions on minors' access to violent images or ideas include *Winters v. New York*, 333 U.S. 507 (1948); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 691 (8th Cir. 1992); *Eclipse Enters. v. Gulotta*, 134 F.3d 63, 68 (2d Cir. 1997); and *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 532–33 (Tenn. 1993).

73. *Ginsburg*, 390 U.S. at 649–50 (1968) (Stewart, J., concurring).

74. Bd. of Educ. v. Pico, 457 U.S. 853, 868 (1982) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

are lesser in magnitude than those of older minors and adults. I would therefore suggest a First Amendment balancing test less stringent than "compelling state interest/strict scrutiny" but nonetheless demanding enough so that government censorship aimed at the eight to fifteen age group is based on something more substantial than generalized notions of what is "appropriate" for children. Minors, like adults, are distinct individuals with different interests and levels of understanding. Age-staggered blocking and rating schemes are blunt instruments for determining appropriateness for kids this age, and they inevitably censor material that would be educational for some of them.

Most importantly, it's only a matter of guesswork whether even clearly age-inappropriate materials are actually *harmful.* This reinforces the point that the understandable concerns of many parents and policy wonks over mass media content, and their legitimate interests in the moral education and socialization of youth, are better accomplished by education than by censorship.

V. NON-CENSORIAL SOLUTIONS

Neither mistaken notions about proven harm from media sex or violence, nor the doctrinal pigeonholes that have come to dominate First Amendment analysis, are really useful in addressing the public policy issue of mass media content and minors. The courts can set some First Amendment ground rules, but it is up to the political branches and the nonprofit sector to set constructive policy. Likewise, political grandstanding and attacks on particularly abhorrent media creations may garner headlines and indignation, but they do nothing to resolve the underlying problem.

How should we deal, then, with troubling media messages and ideas? As one pundit suggested, there are three answers: education, education, and more education. This approach should include:

– Media literacy education that teaches kids how to analyze media messages, including (especially) commercials, and how to test them against social, family, and community values. Media literacy education does not flatly condemn all sexual or violent content or try to persuade students that their favorite songs and TV shows are terrible, but it gets them to think about the issues, and about how they watch, listen, and respond. Media literacy education also includes youth arts and journalism projects that give minors a hands-on under-

standing of media production, and real-world experience in thinking and communicating about social issues.[75]

– Independent, diverse, nonprofit alternative media that give youngsters attractive alternatives to corporate mass-media creations. This requires not only censorship-free funding of public broadcasting and the arts, but regulatory action—controlling media consolidation (and breaking up large conglomerates) to make room for noncommercial alternatives; providing broadcast frequencies for nonprofit ventures; and enforcing and expanding cable TV public-access requirements.

– Serious, comprehensive sexuality education—not the ideologically driven, medically irresponsible "abstinence" education that currently dominates federal sex-ed policy and that, scandalously, prohibits teaching students about the importance of contraception and safer sex.[76]

– More nuanced, truly useful information about movies, music, and other aspects of popular culture, rather than simplistic, decontextualized ratings and labeling schemes.

CONCLUSION

Etzioni speaks to commonly and deeply held concerns about the mass media's effect on youth, but his article has serious flaws. He assumes harm, and he inaccurately discusses social-science research. He does not address the definitional quagmire of censorship, and he minimizes the evil of Internet filters.

Nevertheless, Etzioni raises important questions. He rightly notes the importance of differentiating among minors of different ages when seeking answers to concerns about media content. And he struggles for a balance between individual rights and communitarian interests. In this critique, I have suggested that the Internet filtering, TV rating, and other measures Etzioni promotes undermine free-

75. *See* MARJORIE HEINS & CHRISTINA CHO, FREE EXPRESSION POLICY PROJECT, MEDIA LITERACY: AN ALTERNATIVE TO CENSORSHIP, www.fepproject.org/policyreports/medialiteracy2d.html (2003).

76. *See* National Coalition Against Censorship, *Abstinence-Only Education: A Joint Statement*, www.ncac.org/issues/abonlypresskit.html#jointstmt (June 12, 2001); NOT IN FRONT OF THE CHILDREN, *supra* note 1, at 137–56; *see generally*, JANICE M. IRVINE, TALK ABOUT SEX: THE BATTLES OVER SEX EDUCATION IN THE UNITED STATES (2002). The federal abstinence-only education law was a late addition to the 1996 welfare reform statute, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified at 42 U.S.C. § 710 (2000)).

expression values, do nothing to educate youth, and are probably counterproductive. The next step is for all those interested in a progressive public policy that truly serves minors to get together and work on non-censorial solutions.[77]

77. Etzioni's *Response*, 79 CHI.-KENT L. REV. 299 (2004), badly misrepresents the substance of this Article. Nowhere do I agree with his asserted "need to defend children from violent material." Instead, I show that "harm" is unproven, in part because we cannot even define what we think might be harmful. Nor do I ignore his assertion that Internet filters are "improving"; on the contrary, I show that because of their mechanistic nature, they cannot be meaningfully improved. Worst, Etzioni twists my distinction between evidence of physical harm (for example, from tobacco), and failed attempts to prove psychological harm from expression. Nowhere do I say that science cannot prove harm from tobacco or other toxins; what I do say is that social science has not and probably cannot prove harm from something as broad and vague as "media violence." These misrepresentations do not advance the cause of reasoned debate.