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Sex, Violence, and the First Amendment

Geoffrey R. Stone†

Censorship is not an enterprise that attracts particularly subtle or intelligent minds. It is not surprising, then, that Judge Richard Posner has written the definitive judicial opinion rejecting the censorship of violent video games. I take special pleasure in celebrating this opinion because it shows off Judge Posner's ACLU side. Who would have guessed?

I

In *American Amusement Machine Association v Kendrick*,¹ Judge Posner invalidated an Indianapolis ordinance prohibiting operators of video game parlors from allowing minors unaccompanied by a parent, guardian, or other custodian to play video games that are “harmful to minors.” In enacting this ordinance, the Indianapolis City Council attempted to build on the Supreme Court's 1968 decision in *Ginsberg v New York*,² holding that government can constitutionally regulate material that is obscene for minors.³ Under *Ginsberg*, Indianapolis could constitutionally forbid operators of video game parlors from allowing minors unaccompanied by a parent, guardian, or other custodian to play video games that are obscene for minors.⁴ The Indianapolis ordinance attempted to extend the logic of *Ginsberg* to material that is violent, rather than sexual.

Closely tracking the definition of what is obscene for minors, the ordinance restricted video games that contain graphic images of violence that visually depict “realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, or disfiguration” and also appeal primarily to “minors' morbid interest in violence,” are “patently offensive to prevailing standards in the adult community . . .

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¹ 244 F3d 572 (7th Cir 2001).

² 390 US 629 (1968).

³ See *id* at 638.

⁴ See *id* at 637. Indeed, under *Ginsberg*, Indianapolis could flat-out prohibit minors from playing video games that are obscene for minors, with or without parental permission. *Id*.

with respect to what is suitable” for minors, and lack “serious literary, artistic, political or scientific value” for minors.⁵

The central question in *Kendrick* was whether Indianapolis could constitutionally analogize violence to sex. Judge Posner rejected the analogy. As he put the point, “the fact that obscenity is excluded from the protection of the principle that government may not regulate the content of expressive activity” does not require “a like exclusion of violent imagery.”⁶ But what’s wrong with the analogy? Why is sexual imagery different from violent imagery for purposes of the First Amendment?

Posner conceded that there are some “intersections between the concerns that animate obscenity laws and the concerns that animate the Indianapolis ordinance,” but concluded that “in general the concerns are different.”⁷ Specifically, Posner reasoned that the “main reason” for the proscription of obscenity “is not that it is harmful,” but “that it is offensive.” Obscenity is regulated because people find it “disgusting, embarrassing, degrading, disturbing, outrageous, and insulting,” not because it is “believed to inflict temporal (as distinct from spiritual) harm.” The Indianapolis ordinance, on the other hand, sought to regulate violent video games not because the images are offensive, but because of a belief that they “cause temporal harm by engendering aggressive attitudes and behavior, which might lead to violence.”⁸

Posner’s distinction is puzzling on several levels. First, one might think that government should have more rather than less authority to restrict expression that causes violence than expression that causes offense. Not only is violence a more serious harm, but restricting speech because its message offends seems inconsistent with core First Amendment principles.⁹

Second, it is not at all clear that obscenity is regulated because people find it “offensive,” rather than because it is believed to inflict harm. Offensiveness is part of the *definition* of obscenity. To be obscene, material must depict sexual conduct in a manner that “appeals to the prurient interest,” is “patently offensive,” and “lacks serious literary, artistic, political, or scientific value.”¹⁰ Material is “obscene” because it has these three characteristics, but it nonetheless may be

⁵ *Kendrick*, 244 F3d at 573.

⁶ *Id.* at 574.

⁷ *Id.*

⁸ *Id.* at 574–75.

⁹ See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L. Rev. 189, 214–16 (1983) (summarizing Supreme Court case law establishing that the First Amendment “does not permit government to prohibit the public expression of views merely because they are offensive or unpopular”).

¹⁰ *Miller v California*, 413 US 15, 24 (1973).

that obscenity can be regulated only because it is also believed to cause harm.

Third, the Supreme Court has made clear that obscenity may be regulated in part because it is harmful. In *Paris Adult Theatre I v Slaton*,¹¹ for example, the Court explained that the “legitimate state interests” that justify the regulation of obscenity include “the public safety,” implicated by “an arguable correlation between obscene material and crime.”¹²

Fourth, the Indianapolis ordinance regulates violent video games only if they depict violence in a manner that is “patently offensive to prevailing standards in the adult community . . . with respect to what is suitable material”¹³ for minors. Thus, like the obscenity doctrine, the Indianapolis ordinance invokes *both* offensiveness and a possible correlation between the offensive material and crime.¹⁴ Posner’s distinction between offensiveness and harm therefore does not adequately explain why the government can constitutionally regulate sexual but not violent imagery.

II

We need to back up a bit. Why can the government constitutionally regulate obscene expression? Clearly, the reason is that such speech is thought to be of only “low” First Amendment value. As the Supreme Court explained in *Chaplinsky v New Hampshire*,¹⁵ “[t]here are certain well-defined and narrowly limited classes of speech,” such as the “obscene” and the “libelous,” that “are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”¹⁶ The “prevention and punishment” of such classes of speech “have never been thought to raise any Constitutional problem,” not because they are especially harmful, but because they are “no essential part of any exposition of ideas” and do not further the values the First Amendment was designed to promote.¹⁷

This doctrine plays a central role in First Amendment jurisprudence. It explains why the government can regulate false statements of fact, threats, incitement, commercial advertising, fighting words, and obscenity. It is the concept of First Amendment “value,” rather than

¹¹ 413 US 49 (1973).

¹² *Id.* at 57–58.

¹³ *Kendrick*, 244 F3d at 573.

¹⁴ *Id.* at 574–75.

¹⁵ 315 US 568 (1942).

¹⁶ *Id.* at 571–72.

¹⁷ *Id.*

either offensiveness or harm, which explains why Indianapolis can constitutionally regulate video games that are obscene for minors.

But that still does not tell us why some sexual imagery is of “low” First Amendment value, but violent imagery is not. Judge Posner examined at some length in *Kendrick* the value of violent expression. “Violence,” he observed, “has always been . . . a central interest of humankind,” and “classic literature and art,” such as the *Odyssey*, *The Divine Comedy*, and *War and Peace*, “are saturated with graphic scenes of violence.”¹⁸ For the government to attempt to shield individuals, including minors, “from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.”¹⁹

This is all true. But Indianapolis was not trying to shield minors from *all* depictions of violence, but only from those that graphically portray such inhuman acts as decapitation, dismemberment, and mutilation and also are “patently offensive,” appeal predominantly “to minors’ morbid interest in violence,” and lack “serious literary, artistic, political or scientific value.”²⁰ Surely, for Indianapolis to protect minors from such images would not leave them “unequipped to cope with the world as we know it.”²¹ Indeed, none of the works cited by Judge Posner would be affected by the Indianapolis ordinance, even if it applied to violent scenes in literature.

Moreover, everything Judge Posner said about violence applies equally to sex. As the Supreme Court observed fifty years ago in *Roth v United States*,²² “[s]ex, a great and mysterious motive force in human life,” has long been portrayed “in art, literature and scientific works” and has “been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.”²³ Throughout history, “classic” works of literature, such as Ovid’s *Art of Love*, FitzGerald’s *Rubaiyat of Omar Khayyam*, Chaucer’s *Canterbury Tales*, and D.H. Lawrence’s *Lady Chatterley’s Lover*, have been “saturated with graphic scenes of [sex].”²⁴ To shield minors “from exposure to [sexual] descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.”²⁵ If the First Amendment allows Indianapo-

¹⁸ *Kendrick*, 244 F3d at 575, 577.

¹⁹ *Id.* at 577.

²⁰ *Id.* at 573.

²¹ *Id.* at 577.

²² 354 US 476 (1957).

²³ *Id.* at 487.

²⁴ *Kendrick*, 244 F3d at 575.

²⁵ *Id.* at 577.

lis to regulate a small subset of sexual imagery because it is “patently offensive,” appeals primarily to the “prurient interest in sex,” and lacks “serious . . . value,” why shouldn’t it also allow Indianapolis to regulate a small subset of violent imagery that is “patently offensive,” appeals primarily to the “morbid interest in violence,” and lacks “serious . . . value?”²⁶

III

We return, then, to the question: why is obscenity of only low First Amendment value? In *Roth*, the Court maintained that “implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.”²⁷ To prove this assertion, the Court noted that thirteen of the fourteen states “which by 1792 had ratified the Constitution” provided “for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes.”²⁸ Apparently, the Court’s reasoning was that because the states prohibited certain categories of expression despite their own state constitutional guarantees of free speech, the Framers of the First Amendment must have assumed that those classes of speech were also unprotected by the First Amendment. This makes sense. But, unfortunately, it tells us nothing about obscenity, for unlike libel, blasphemy, and profanity, obscenity was not unlawful under either English or American law in 1792.

In England, the government first punished an obscene publication in 1727. In *Dominus Rex v Curl*²⁹ the court sustained the conviction of Edward Curll for publishing *Venus in the Cloister, Or the Nun in Her Smock*, an English translation of a French anti-Catholic tract written around 1682. *Venus in the Cloister* was an explicit depiction of rampant sex among monks and nuns in a convent. It dealt quite graphically with voyeurism, masturbation, fornication, dildos, and flagellation. The King’s Bench held that Curll’s publication was “punishable at common law, as an offense against the peace, in tending to weaken the bonds of civil society, virtue, and morality.”³⁰ In fact, the prosecution had less to do with the sexual nature of the material than with Curll’s “long-running battle with the authorities” and his recent

²⁶ Id at 573.

²⁷ 354 US at 484.

²⁸ Id at 482.

²⁹ 2 Strange 788 (1727).

³⁰ Id at 791.

publication of several politically libelous works that had infuriated public officials.³¹

Thereafter, obscenity prosecutions pretty much disappeared in England for the remainder of the eighteenth century, despite a profusion of sexually explicit writings. *The Toast*, for example, a satirical work published in 1736, has been described “as one of the most obscene works ever printed” in England,³² and Gervaise de Latouche’s *History of Don B*, published in England in 1743, portrayed in graphic detail the hero’s nocturnal orgies with monks and nuns.³³ Neither was prosecuted as obscene. Moreover, English readers in the eighteenth century had ready access to a constant stream of sexually explicit and lewd ballads, poems, novels, whore catalogues, sex guides, erotic prints, licentious newspapers and magazines, and pornographic anti-Catholic and antigovernment tracts.³⁴ But for almost a century after *Curl*, English law yielded nothing of consequence on the concept of obscenity. There was no definition of the concept, no rationale for its regulation, and only sporadic skirmishes over the matter. As one commentator described the situation, until the early nineteenth century the authorities “seem to have been doing little else than casual bloodletting, and

³¹ See Pat Rogers and Paul Baines, *The Prosecutions of Edmund Curll, 1725–28*, 5 Library: The Transactions of the Bibliographical Society 189 (2004) (discussing the context of Curll’s prosecution). See also Julie Peakman, *Mighty Lewd Books: The Development of Pornography in Eighteenth-Century England* 39–44 (Palgrave 2003) (describing censorship and prosecutions for obscenity in eighteenth century England, including Curll’s); Frederick F. Schauer, *The Law of Obscenity* 5–6 (Bureau of National Affairs 1976) (noting that Curll “was a constant source of political irritation, and his prosecution . . . had obvious political motives”); Albert P. Gerber, *Sex, Pornography, and Justice* 66–67 (Lyle Stuart 1965) (noting that if Curll’s “book had not had religious overtones it probably would have passed unnoticed”); Alec Craig, *The Banned Books of England and Other Countries: A Study of the Conception of Literary Obscenity* 29–32 (Allen & Unwin 1962) (providing a narrative account of Curll’s prosecution and its aftermath).

³² George Ryley Scott, “*Into Whose Hands?: An Examination of Obscene Libel in Its Legal, Sociological and Literary Aspects* 142 (Waron 1945) (analyzing scandalous or graphic works banned without prosecution).

³³ Here is an excerpt from *History of Don B*:

Sometimes I was put on a bench, completely naked; one Sister placed herself astride my throat in such a way that my chin was hidden in her pubic hair, another one put herself on my belly, a third one, who was on my thighs, tried to introduce my prick into her cunt; two others again were placed at my sides so that I could hold a cunt in each hand; and finally another one, who possessed the nicest breast, was at my head, and bending forward, she pushed my face between her bobbies; all of them were naked, all rubbed themselves, all discharged; my thighs, my belly, my chest, my prick, everything was wet, I floated while fucking.

Quoted in Peter Wagner, *Eros Revived: Erotica of the Enlightenment in England and America* 236 (Secker and Warburg 1988).

³⁴ See *id.* at 6, 87–112, 248–55; Roy Porter, *Mixed Feelings: The Enlightenment and Sexuality in Eighteenth-Century Britain*, in Paul-Gabriel Bouc , ed., *Sexuality in Eighteenth-Century Britain* 8 (Manchester 1982).

the few shots fired [were] mostly blanks.”³⁵ In the 1790s, when the United States was contemplating the First Amendment, London was awash with sexually explicit material.³⁶

The first prosecution for obscenity in the United States did not occur until 1815, almost a quarter century *after* the adoption of the First Amendment, when a Pennsylvania court declared it an offense to exhibit for profit a drawing of a nude couple.³⁷ The Supreme Court’s claim in *Roth* that “implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance” was misleading, at best. Indeed, the most striking fact about that era was the *absence* of any laws regulating such material. What the Court did in *Roth* was to extrapolate from regulations of libel, blasphemy, and profanity to regulations of obscenity. It was that extrapolation that required the Court’s subtle use of the word “implicit.” But the real lesson “implicit” in the origins of the First Amendment is that at the time the First Amendment was enacted obscenity was treated completely differently from libel, blasphemy, and profanity.³⁸

IV

Still, we are left with the question: why is obscenity of only low First Amendment value? It is difficult to answer this question definitively because the Supreme Court has never offered a clearly defined theory of low-value speech. The case law, however, suggests that several factors are relevant to the analysis. First, categories of low-value speech (for example, false statements of fact, threats, commercial advertising, fighting words, express incitement of unlawful conduct, and obscenity) do not primarily advance political discourse. Second, categories of low-value speech are not defined in terms of disfavored ideas or political viewpoints.³⁹ Third, low-value speech usually has a strong

³⁵ Leo M. Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv L Rev 40, 47 (1938) (tracing obscenity law from the prosecution of Sir Charles Sedley to the attempted banning of *Ulysses*).

³⁶ See Peakman, *Mighty Lewd Books* at 12, 44 (cited in note 31).

³⁷ *Commonwealth v Sharpless*, 2 Serg & Rawle 91 (Pa 1815) (referring to common law principles to uphold a conviction for showing an obscene drawing for profit).

³⁸ Moreover, because modern First Amendment doctrine treats neither blasphemy nor profanity as low-value speech, and narrowly defines libel as covering only false statements of fact, it is clear that the Court has not treated the judgments of the Framers as controlling. The Court’s invocation in *Roth* of the purported understanding of the Framers was therefore not only inaccurate, but also misleading insofar as it implied that the Framers’ understanding controls First Amendment doctrine. (All of this, by the way, underscores the dangers of “originalism” as a mode of constitutional interpretation.)

³⁹ See *American Booksellers Association v Hudnut*, 771 F2d 323, 327 (7th Cir 1985), *affd* 475 US 1001 (1986) (observing that “[u]nder the First Amendment the government must leave to the people the evaluation of ideas”).

noncognitive impact on its audience.⁴⁰ Fourth, categories of low-value speech have long been regulated without undue harm to the overall system of free expression.

Obscenity satisfies all four of these criteria. First, obscenity does not predominantly advance political discourse. Of course, sexually explicit expression can communicate implicit or even explicit political messages. But, by definition, obscenity is primarily sexual rather than political expression. A video of two or more people engaged in sexual intercourse, fellatio, cunnilingus, and anal intercourse for ninety minutes is not predominantly political in nature.

Second, obscenity is not defined in terms of disfavored ideas or political viewpoints. Rather, it is defined by its graphic depiction of sex and the offensiveness of that depiction. Whatever ideas or viewpoints obscenity might convey can readily be communicated without resort to obscenity. In this sense, obscenity is “no essential part of any exposition of ideas”⁴¹ and may be seen more as a means of communication than as an idea or point of view in itself. Material can be obscene regardless of its underlying “point of view.” It can be obscene without regard to whether it celebrates or condemns oral sex or adultery.

Third, obscenity has a strong noncognitive impact on its audience. A goal of the First Amendment is to promote expression that engages the thought process and attempts to reinforce or alter opinions and attitudes by rational persuasion. Most forms of low-value speech have a different impact. Threats, for example, affect people’s behavior not by persuasion but by coercion. The First Amendment is not designed to foster speech that influences people by intimidation. A threat may literally be “speech,” but its primary effect is analogous to twisting someone’s arm.⁴² Similarly, fighting words have only low value in part because they are equivalent to a physical assault. Hurling a personal epithet at another person in a face-to-face encounter is more like spitting in his eye than engaging him in debate. Express incitement of unlawful conduct that creates a likely and imminent danger of harm

⁴⁰ I say “usually” because this characteristic is not present for all categories of low-value speech. False statements of fact, for example, do not share this characteristic. Nonetheless, this seems an important if not a necessary factor in low-value analysis. See Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L J 589, 603 (stating that speech “that has purely noncognitive appeal will be entitled to less constitutional protection”).

⁴¹ *Chaplinsky*, 315 US at 572.

⁴² See *Virginia v Black*, 538 US 343, 359 (2003) (“[F]ighting words . . . are generally proscribable under the First Amendment. . . . [T]he First Amendment also permits a state to ban a ‘true threat.’”); Edward Baker, *Human Liberty and Freedom of Speech* 59–60 (Oxford 1989) (explaining why coercive speech receives less constitutional protection); Kent Greenawalt, *Speech, Crime and the Uses of Language* 94 (Oxford 1989) (distinguishing protected “warning threats” from unprotected “manipulative threats”).

has a similar quality. Like Justice Holmes's false cry of fire in a crowded theater,⁴³ such speech triggers an immediate response that is not based on reflective thought.⁴⁴ Obscenity is similar. When we say that obscenity predominantly appeals to the "prurient interest in sex,"⁴⁵ we mean, in part, that obscenity creates an immediate physiological response of sexual arousal. In this sense, obscenity is like a sexy stroke on the thigh or a vibrator. It is, in effect, a sex aid—a device to stimulate sexual excitement. That it achieves this effect by imagery rather than by physical contact does not alter its essential nature. Like threats and fighting words, obscenity is low-value speech in part because its primary impact is noncognitive.⁴⁶

Fourth, there is a long history of obscenity regulation in the United States. Although there was no clear consensus in 1792 that obscenity was not protected by the First Amendment, obscenity has in fact been regulated by every state in the nation since Anthony Comstock launched his anti-obscenity campaign in the 1860s. By the time of *Chaplin*, the Court could accurately state that obscenity was one of those "limited classes of speech" that had long been recognized as subject to government regulation without raising "any Constitutional problem."⁴⁷

In light of these four criteria, a reasonable case can be made for the proposition that obscenity is properly characterized as low-value speech, within the meaning of First Amendment doctrine.

V

If speech has only low First Amendment value when it appeals primarily to the prurient interest in sex, is patently offensive to contemporary community standards concerning the depiction of sex, and lacks serious literary, artistic, political, or scientific value, shouldn't the same be true for speech that appeals primarily to the morbid interest in violence, is patently offensive to contemporary community standards concerning the depiction of violence, and lacks serious literary, artistic, political or scientific value? Why should we give more constitutional protection to images of violence than to images of sex?

⁴³ See *Schenck v United States*, 249 US 47, 52 (1919) ("[T]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic").

⁴⁴ Commercial advertising does not necessarily cause a noncognitive response, but it has persuasively been characterized as merely a form of economic conduct. See Thomas H. Jackson and John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va L Rev 1, 14–25 (1979).

⁴⁵ *Kendrick*, 244 F3d at 573.

⁴⁶ See Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 Georgetown L J 899, 920–28 (1979).

⁴⁷ See 315 US at 571–72.

The first two criteria, which support the judgment that obscenity is of only low First Amendment value, are also satisfied by the types of images regulated by the Indianapolis ordinance. The class of speech covered by the ordinance does not predominantly advance political discourse and is not defined in a way that clearly disfavors any particular idea or point of view. As a class, depictions of hardcore violence, like depictions of hardcore sex, are not inherently political in nature. It is less clear, however, whether the third criterion is satisfied. The noncognitive, physiological response to hardcore depictions of sex is unmistakable and it seems reasonable to analogize obscenity to various types of conduct that create the same sexual response. But there is no consensus that violent images have such an impact. Violent images have a variety of effects on viewers, but they are not primarily noncognitive. Certainly, repeated exposure to such images might have a coarsening effect that gradually inures the viewer to the horrors of violence, but many forms of expression (including political advertising) have such an effect. That is quite different from what we mean by noncognitive impact in the contexts of obscenity, fighting words, threats, and incitement. Obscenity is sex; violent images are not violence.

Fourth, and perhaps most important, the United States has a long history of regulating obscene expression, but it has no tradition of regulating violent speech.⁴⁸ Not only was violent expression not included in the *Chaplinsky* list, but the Court made clear almost sixty years ago that speech focusing on “deeds of bloodshed, lust or crime” is “as much entitled to the protection of free speech as the best of literature.”⁴⁹ Indeed, in the entire history of American law there have been almost no efforts to regulate the depiction of violence.⁵⁰ As Posner rightly observed, “the notion of forbidding not violence itself, but pictures of violence, is a novelty.”⁵¹ As a consequence, we have no shared understanding of what we might mean by low-value violent speech. Indeed, we lack even a word analogous to “obscenity” with which to describe the concept of violent expression.

As Judge Posner reasoned in *Kendrick*, images of violence are a fundamental part of our history, culture, and politics. Can we imagine

⁴⁸ See *Kendrick*, 244 F3d at 578.

⁴⁹ *Winters v New York*, 333 US 507, 508, 510 (1948) (voiding for vagueness a New York state statute banning, among other things, the sale of publications containing stories of such deeds).

⁵⁰ See Ian Matheson Ballard, Jr., *See No Evil, Hear No Evil: Television Violence and the First Amendment*, 81 Va L Rev 175, 194 (1995) (noting that “history . . . does not support” the classification of media violence as unprotected speech); Thomas G. Krattenmaker and L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 Va L Rev 1123, 1199 (1978) (reporting that nothing in the statutes of the American colonies suggested “that depictions of violence in literature should or could be suppressed”).

⁵¹ *Kendrick*, 244 F3d at 575–76.

censors reviewing films like *Saving Private Ryan* and *Schindler's List* to determine whether their depictions of violence are of low First Amendment value? Can we imagine censors making it a crime for *Time* magazine or CNN to show images of terrorist beheadings or of Mai Lai because such depictions are thought to offend contemporary community standards?

Of course, we allow just that in the realm of sex. But that is precisely why history is relevant. At least with obscenity, we have managed over many years to develop reasonably workable standards. To start from scratch in the realm of violence, after eschewing that approach for more than two centuries, would open a Pandora's box that is both unnecessary and unwise.

This analysis suggests that the list of low-value categories should be effectively frozen. There are obvious objections to such a conclusion. There may be sound reasons to recognize new categories of low-value speech as society, technology, First Amendment theory, and our understanding of human behavior change over time. But the recognition of new categories of low-value speech that have no historical pedigree poses real dangers. The very concept of low-value speech is inherently problematic. As Thomas Emerson observed, the doctrine inevitably involves the courts in "value judgments concerned with the content of expression," a role that is awkward, at best, in light of "the basic theory of the First Amendment."⁵² Placing great weight on tradition in this context is a reasonable way to capture the benefits of the doctrine without inviting freewheeling judicial judgments about constitutional "value."⁵³

Proponents of the Indianapolis ordinance would no doubt respond that the ordinance did not impose a full-blown prohibition of hardcore violent images, but only a regulation of speech for *minors*. As Judge Posner noted, however, "[c]hildren have First Amendment rights."⁵⁴ Indeed, children "must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn

⁵² Thomas Emerson, *The System of Freedom of Expression* 326 (Random House 1970).

⁵³ Cass Sunstein has astutely observed that the low-value theory is essential to "any well-functioning system of free expression" because without it one of two "unacceptable" results would follow: either (1) "the burden of justification imposed on government" when it regulates high-value speech, such as pure political expression, "would have to be lowered"; or (2) "the properly stringent standards applied to efforts to regulate" high value speech would have to be applied to low-value speech, with the result that government would not be able to regulate speech "that in all probability should be regulated." Cass R. Sunstein, *The Partial Constitution* 233–34 (Harvard 1993).

⁵⁴ *Kendrick*, 244 F3d at 576.

eighteen, so that their minds are not a blank when they first exercise the franchise.”⁵⁵

Moreover, the analogy to *Ginsberg* fails. In *Ginsberg*, the Court held that some sexually explicit material that may not be obscene for adults may nonetheless be obscene for children and that the government may therefore shield children from such material. Thus, the government may constitutionally prohibit video stores from renting X-rated videos to twelve-year-olds and may constitutionally prohibit video game parlors from letting twelve-year-olds play X-rated video games. As long as it is possible to protect children from such material without unduly interfering with the rights of adults, the Court has upheld such regulations.⁵⁶

But that principle has no application to the regulation of violent expression. The *Ginsberg* “obscene for minors” doctrine is premised on the predicate judgment that there exists a category of expression—obscenity—that is of only low First Amendment value. The key question in *Ginsberg* was whether the *definition* of obscenity may differ for children and adults. In the context of violent images, however, there is no predicate category of low-value speech on which to premise a broader definition with respect to children. *Ginsberg* is therefore irrelevant.

Of course, the government has an interest in the well-being of minors, and it may in appropriate circumstances protect minors from harmful expression. But as the Court explained in *Erznoznik v Jacksonville*,⁵⁷

[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them. . . . Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.⁵⁸

Applying this principle, courts have consistently rejected the argument that the government may shield minors from otherwise constitutionally protected images merely because the government thinks

⁵⁵ *Id.* at 577.

⁵⁶ If the government cannot protect minors without interfering with the rights of adults, the regulation is presumptively unconstitutional. See generally, for example, *United States v Playboy Entertainment Group, Inc.*, 529 US 803 (2000) (invalidating the “signal bleed” provision of the Telecommunications Act, which required cable operators to either scramble sexually explicit channels or limit programming on such channels to certain hours); *Reno v ACLU*, 521 US 844 (1997) (affirming an injunction against enforcement of Communications Decency Act, which sought to bar minors from harmful or indecent material on the internet).

⁵⁷ 422 US 205 (1975).

⁵⁸ See *id.* at 212–14.

such exposure “might do them harm.”⁵⁹ As Judge Posner observed, “[t]his is not merely a matter of pressing the First Amendment to a dryly logical extreme,” for “[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.”⁶⁰

VI

I come to praise Posner, not to harry him, but I find one facet of his opinion in *Kendrick* troubling. Indianapolis argued that its ordinance was constitutional because playing violent video games might harm children psychologically and/or cause them to engage in violent behavior. To support this contention, the city presented “a pair of empirical studies by psychologists which found that playing a violent video game tends to make young people more aggressive in their attitudes and behavior.”⁶¹ Posner held that the studies were not sufficient to justify the regulation, because they did “not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive.”⁶²

The implication of this passage might be that with more persuasive evidence of harm the government could constitutionally prohibit minors from viewing images of violence. This is too low a standard. If violent images are not low-value speech, then only a showing of clear and present danger should be sufficient to regulate such expression. Otherwise, the government would be empowered upon a similar showing to deny minors access to *any* speech that has caused harm to some minors or caused some minors “to commit a violent act.” In this passage of his opinion, which happily is only dictum, Judge Posner seemed to revert to his more poetic rendition of what he has described as the true meaning of the First Amendment: “ $A_x \bullet B_x = -(pH / (1 + d)^n + O)_x$.”⁶³ That is, the First Amendment is all about bal-

⁵⁹ See, for example, *Video Software Dealers Association v Maleng*, 325 F Supp 2d 1180, 1186 (WD Wash 2004) (striking down a Washington statute penalizing the distribution to minors of violent video games). See also *Interactive Digital Software Association v St. Louis County*, 329 F3d 954, 959–60 (8th Cir 2003) (requiring that a government entity seeking to regulate violent material present compelling evidence that it is harmful for children in order to avoid invalidation under the First Amendment); *Video Software Dealers Association v Webster*, 968 F2d 684, 688 (8th Cir 1992) (striking down a Missouri statute barring distribution of violent video games to minors).

⁶⁰ *Kendrick*, 244 F3d at 576–77.

⁶¹ *Id* at 574.

⁶² *Id* at 578–79.

⁶³ Richard A. Posner, *The Speech Market and the Legacy of Schenck*, in Lee C. Bollinger and Geoffrey R. Stone, eds, *Eternally Vigilant: Free Speech in the Modern Era* 121, 126 (Chicago 2002) (setting out the formula for the optimal strictness of speech regulation).

ancing costs and benefits. Posner's suggestion that with a bit more proof of harm Indianapolis might be able to save its ordinance might be taken to impeach the rest of his opinion, were the rest of his opinion not so compelling in its reasoning.⁶⁴

VII

I would be remiss if I did not mention at least in passing some of the other features I most like about Judge Posner's opinion in *Kendrick*. Not only does it reach the right result for (pretty much) the right reasons, but it also displays the ease with which Posner cuts to the heart of an issue, his intense curiosity, and his unique sense of whimsy.

Those who seek to regulate violent video games invariably argue that video games are more harmful than literature or movies because they are interactive. Posner dismissed this argument with a flourish:

[T]his point is superficial, in fact erroneous. All literature (here broadly defined to include movies, television, and other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.⁶⁵

One might suspect Posner was an English major.

With apparent relish, Posner described the videogames in the record:

Take . . . "The House of the Dead." The player is armed with a gun—most fortunately, because he is being assailed by a seemingly unending succession of hideous axe-wielding zombies, the living dead conjured back to life by voodoo. The zombies have already knocked down and wounded several people, who are pleading pitifully for help, and one of the player's duties is to protect those unfortunates from renewed assaults by the zombies. His main task, however, is self-defense. Zombies are supernatural beings, therefore difficult to kill. Repeated shots are necessary to stop them as they rush headlong toward the player.⁶⁶

Reading this, it is hard not to imagine Posner hunched over his computer, striving frantically to decimate the surging zombies. After describing *The House of the Dead*, Posner playfully noted that "[s]elf-

⁶⁴ Note that a holding that the government may not make it unlawful for minors to play violent video games does not mean that their parents may not prohibit them from doing so.

⁶⁵ *Kendrick*, 244 F3d at 577.

⁶⁶ *Id.*

defense, protection of others, dread of the ‘undead,’ fighting against overwhelming odds—these are age-old themes of literature,” and that “[i]t is conceivable that pushing a button or manipulating a toggle stick engenders an even deeper surge of aggressive joy” in the player than in the reader or viewer.⁶⁷ After reading Posner’s description, I was ready to run out to buy *The House of the Dead* for my four-year-old granddaughter.

Richard Posner’s legacy will not turn on his opinion in *Kendrick*. But in this little opinion he demonstrated some of the qualities that have made him one of the great judges of his generation: a fierce intellectual curiosity, a genuine engagement with ideas, an eagerness to cut through the legal babble to get to the core of the issue, and an evident delight in occasionally reaching results that startle admirers and critics alike.

⁶⁷ Id at 577–79.

