FROM RESEARCH CONCLUSIONS TO REAL CHANGE: 
THE LAW’S (NON)RESPONSE TO THE NEGATIVE EFFECTS OF 
MASS MEDIA AND MARKETING ON CHILDREN

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Introduction

This paper addresses the law’s response, or non-response, to social science documenting the negative effects of mass media and marketing on children in an effort to consider ways that existing and future research conclusions might result in real change. The dominant influence of mass media and marketing on children is recognized by scholars across many disciplines including child development, communication theory, psychology, and sociology. Numerous studies demonstrate potential harm to children from exposure to mass media and marketing sources. The prevalence of childhood obesity and increased violent behavior in adolescents are among the suggested negative effects.

Legislators at the federal, state, and local levels have made frequent attempts to address the influence of media on children, ranging from taxation of certain media to complete bans on access. Over the past decade, at the federal level alone, the U.S. Congress has introduced hundreds of bills related to the impact of media on children. Administrative agencies like the Federal Communications Commission (FCC), Federal Trade Commission (FTC), and Food and Drug Administration (FDA) also have been active in regulatory endeavors and policy change.

In contrast to legislators and agencies, the courts historically have been reluctant to recognize media effects on children. For example, courts have invalidated every regulatory limit on children’s access to violent media, primarily on the basis of First Amendment and free speech concerns. Only rarely have courts upheld laws targeted at the marketing of harmful products to children. This legal reluctance presents a major barrier to the real world application of and benefit from research conclusions regarding the impact of consumer culture on children. While the research has supported attempts at industry self-regulation (e.g. ratings systems, advisory labels) or voluntary compliance with ethical guidelines, such efforts have achieved little success.

The debate about regulation of media and marketing impacts on youth has been covered exhaustively in social science journals and law reviews, with well-argued positions supporting both sides. On one hand, research studies numbering in the hundreds (if not thousands, as some suggest) document harmful effects of media on children, ranging from poor nutrition to increased violence and aggression. Indeed, a group of leading professional health organizations, including the American Academy of Pediatrics, American Medical Association, and the American Psychological Association, concluded nearly ten years ago that, “based on over 30 years of research, … viewing entertainment violence can lead to increases in aggressive attitudes, values and behavior, particularly in children,” and that research “point[s] overwhelmingly to a causal connection between media violence and aggressive behavior” (American Academy of Pediatrics et al. 2000). More recently, a comprehensive review of experimental, cross-sectional, and longitudinal studies on media violence concluded that exposure to media violence causes aggressive and violent behavior (Gentile, Saleem, and Anderson, 2007, pp. 25-36).

On the other side of the issue, courts and free speech advocates are concerned with any attempt to limit children’s access to material based upon content, especially if that limit might impair adult free speech rights. Such regulations cut to the very core of democratic principles as well as parental authority and autonomy. Moreover, some scholars argue that children are not necessarily harmed by exposure to media violence, even suggesting that media provides a healthy outlet for violent tendencies that otherwise might be acted upon. In critiquing the social science, Professor Heins (2004, pp. 239-44) explains that the findings of media harms have been challenged as based upon flawed research or inconclusive results and, in some cases, it has been suggested that results are mischaracterized, exaggerated, or the opposite of what is reported. The leading study supporting this position was conducted by Professor Jonathan L. Freedman (2002), who reviewed approximately 200 published scientific studies on media violence to conclude that no correlation exists between media violence and aggressive or violent children (pp. 200-01).

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How, then, should future research and regulation respond to the debate? Certainly social science researchers can continue to pursue studies that might provide sufficiently strong evidence to withstand challenges under the existing legal framework. Some suggest that it is only a matter of time before science can meet the exacting standard of proof for causation that courts currently demand (Saunders 2008, p. 55). Legislators, for their part, can continue to draft language in the hope of achieving a sufficiently precise statute that can withstand review under existing First Amendment jurisprudence. Perhaps the problem, however, lies not with a lack of advancement in the research or a need to further refine statutory language, but instead with the entire approach.

This is not the first occasion in American history where the law has failed to recognize a harm warranting action and redress. Indeed, as child and family law scholar Barbara Bennett Woodhouse (2004, p. 94) argues, “[e]xperts who study the ecology of childhood have been sounding a warning call much like that of early environmentalists.” In order to address the environmental crisis, Woodhouse notes that the law had to “find a new way to conceptualize the public/private dichotomy, rather than characterizing regulation as an intrusion on discrete parcels of private property” (p. 93). Likewise, perhaps the time has come for the law to find a new way to conceptualize media and marketing impacts on children. Woodhouse (p. 85) proposes that these issues be considered through a new branch of environmental ethics, in her words “ecogenerism,” or “a child-centered approach to environmental ethics.” She contends that those who advocate for protection of children from the harms of mass media and marketing have much to learn from the environmental law and ethics movement.

Part one of this paper reviews the courts’ repeated rejection of laws that attempt to regulate mass media and marketing effects on children. Part two considers Professor Woodhouse’s proposal that a paradigm shift is in order, and evaluates the efficacy of her ecogenerist principles through a case study of the recent decision by the U.S. Court of Appeals for the Ninth Circuit to invalidate a California statutory ban on the sale and rental of violent video games to children. Part three concludes with suggestions to guide social science scholars as they develop and refine their research on the effects of mass media and marketing on children, as well as legal advocates as they defend challenges to legislative reform in this area.

Part I: The Law’s Response, or Non-Response, to Mass Media’s Effects on Children

Understanding the First Amendment, or Why Legislative Action Means Judicial Rejection

Concern exists for a wide range of media content viewed by children, including but not limited to material that promotes commercialism, poor self image, unhealthy diet, and violent or aggressive behavior. While all of these issues are significant to children’s well being, violent video game content has been the subject of most regulatory attempts to date and thus is a primary (though not the entire) focus of this paper. In many ways, the law governing the constitutionality of regulating mass media harm to children is an undecipherable mess. For example, different standards apply depending on the nature of the regulation (e.g. content based, content-neutral, or something in between), the form of media subject to regulation (e.g. broadcast and cable television, film, radio, video games, the Internet), and the degree of constraint imposed. The complexity only multiplies when considering how to regulate effectively as these media converge. Should a different standard apply to a show aired during the day on broadcast television and the same show made available on the Internet, on a DVD, or cellular telephone? Finally, in the few cases where the U.S. Supreme Court has addressed questions critical to the analysis of constitutional law in this area, the opinions are highly fact driven and have proven difficult to apply in similar but not directly related contexts.

One point of clarity is that any regulation of children’s access to media must satisfy the First Amendment, which provides that “Congress shall make no law . . . abridging the freedom of speech” (U.S. Constitution Amendment I, made applicable to the states by U.S. Constitution Amendment XIV). This protection has been extended by the courts to cover media like television, radio, motion pictures, video games, and the Internet. Acknowledging the complexity of First Amendment law in this context Professor Alan Garfield (2005, pp. 569-70), in his comprehensive review of relevant law and policy, has gleaned “three overarching principles” to guide understanding: first, in some circumstances the government may deny children access to speech that cannot be denied to adults; second, children have certain free speech rights that can trump government’s interest in regulation; and third, if a regulation designed to protect children incidentally also denies adults access to speech, serious constitutional concerns are raised.
Levels of First Amendment Review

Understanding the tests used by courts in First Amendment analysis is critical for designing effective media research because a court’s assessment of causation depends in large part on the applicable level of review. Courts generally apply one of three levels of review to test a statute’s constitutionality—rational basis, intermediate scrutiny, or strict scrutiny—though special tests exist for commercial speech and a few other forms. Rational basis review, the lowest level, is the default test for government action that does not target speech. The test, requiring only that a regulation be rationally related to a legitimate government interest, is fairly easy to satisfy but rarely applied in this context because most media-related regulations target speech.

Intermediate scrutiny, for First Amendment purposes, applies to a regulation that does not directly target speech but has a substantial impact on it. For example, a time, place, and manner restriction receives intermediate scrutiny so long as adequate alternative channels of communication exist. The test is whether the statute involves an important government interest furthered by substantially related means. Thus, a Chicago ordinance prohibiting children’s use of video games during school was upheld under intermediate scrutiny because it applied to all video games in a limited place and time frame (Rothner v. City of Chicago 1991).

Commercial speech gets its own test, also a lower review than strict scrutiny: (1) the speech must concern lawful activity and not be misleading; (2) the asserted governmental interest must be substantial; (3) the regulation must directly advance the asserted governmental interest; and (4) the regulation cannot be more extensive than necessary to serve the articulated interest (Central Hudson Gas v. Public Service Commission of New York 1980). For example, in Lorillard Tobacco Co. v. Reilly (2001), the Supreme Court invalidated a statute banning outdoor advertising of tobacco products near playgrounds because it failed the fourth part of the test.

Strict Scrutiny.

Laws designed to limit children’s access to harmful media usually are content-based and, therefore, subject to strict scrutiny. This often is the death knell for a statute, since laws subject to strict scrutiny are presumed invalid (R.A.V. v. City of St. Paul 1992, p. 382). Strict scrutiny requires that the government (1) show a compelling interest in regulating the subject matter and (2) use the least restrictive means in achieving that interest (United States v. Playboy Entertainment Group 2000). The purpose of strict scrutiny is to protect speech, even (and especially) if it is controversial, unpopular, unhealthy, or violent. It is an incredibly difficult test to satisfy. Nowhere is this more true than in the context of government efforts to regulate children’s access to various forms of mass media and marketing. Professor Catherine Ross (2002) has written exhaustively on the serious difficulties governments face in satisfying the test, particularly with respect to demonstrating a compelling interest. Yet she acknowledges that it is “not necessarily impossible” to create regulations governing controversial speech and children, so long as the targeted speech is carefully defined and tied to a specific harm (p. 523). To overcome the difficulties, she counsels, “legislatures and administrative agencies would need to demonstrate that the speech actually harms children, that the private market or other means are unable to provide remedies for parents who seek them, and that the regulation would actually facilitate the choices made by parents, including all of the diverse views of nonconformist parents” (p. 523). To date, no legislature or agency has successfully accomplished this.

Exceptions to Strict Scrutiny

Some limited exceptions to strict scrutiny exist for certain categories of speech like obscenity, defamation, incitement, and pornography produced with real children (Ashcroft v. Free Speech Coalition 2002, p. 245-46), or certain forms of media such as broadcast radio (FCC v. Pacifica Foundation 1978). For purposes here the notable exceptions are incitement and obscenity, along with the Pacifica case which offers a possible argument for lesser review, at least for broadcast media. The incitement and obscenity exceptions are addressed in turn below, both in the context of violent video game regulations, and Pacifica is taken up briefly later in the paper.

Incitement

The incitement exception is based upon the Supreme Court case Brandenburg v. Ohio (1969), which held that government may regulate otherwise protected speech if it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action” (p. 448). Some have argued that violent video games may be regulated under this exception. The argument has failed, however, because the social science evidence has not demonstrated that video games direct or incite violent acts. For example, Second Circuit Court of Appeals Judge Richard Posner in American Amusement Machine Association v. Kendrick (2001, pp. 578-79) rejected the studies submitted by the city because they failed to prove
that video games caused someone to commit an act of violence rather than simply feeling aggressive or (2) that video games have caused an increase in the average level of violence. Another problem with the incitement exception is timing, for "[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed at some indefinite future time" (Ashcroft, p. 253). Thus, to satisfy Brandenburg, the government would have to show that a violent act occurred immediately after the playing of a violent video game.

**Obscenity**

Obscenity has been defined by the Supreme Court as “works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value” (Miller v. California 1973, p. 24). Obscene speech receives no First Amendment protection, which means that speech falling under this definition can be regulated. In seeking similar treatment of violent material, academics and legislators have argued that courts ought to extend the obscenity exception to violence. The leading proponent is Professor Kevin Saunders (1996), who argues that extreme violence, by definition, is obscene and should be treated as such under the First Amendment. As one court considering this argument explained, “[t]he Latin root ‘obscaenus’ literally means ‘of filth’ and has been defined to include that which is ‘disgusting to the senses’ and ‘grossly repugnant to the generally accepted notions of what is appropriate’” (Video Software Dealers Association v. Maleng 2004, p. 1185). Yet the court declined to adopt the broad, common definition of obscenity. Like all other courts considering this argument, it limited the legal definition to sex-related material. The argument that violence be treated as a separate exception similarly has been unsuccessful. Invariably, courts apply strict scrutiny to invalidate regulations prohibiting children’s access to violent video games or other materials.

**Variable Obscenity**

Another argument advanced in some cases is that extreme violence can be regulated under Ginsberg v. New York (1968), in which the Supreme Court held that a state may prohibit the sale of sexually-explicit materials to children even when those materials would not be considered obscene for adults. Here the Court applied the concept of a “variable obscenity” (Saunders 1996, pp. 49-50) to find that the materials were obscene as to minors (Ginsberg, p. 641). Classifying the materials in this way allowed for application of the rational basis test to uphold the challenged statute. Two justifications were offered: (1) “constitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society” and (2) the government has an “independent interest in the well-being of its youth” (pp. 639-40). Though courts often reference these justifications, no court has relied upon them to apply rational basis review to violent media laws, and all courts have rejected the argument to extend Ginsberg.

**Vagueness**

Also important to note in discussing constitutional issues for media regulation is the problem of vagueness. Courts will strike a law as “unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted” (Chemerinsky 2002, 910). For example, in Entertainment Software Association v. Foti (2006, pp. 835-36), the court found Louisiana’s violent video game statute unconstitutionally vague because it “fails to provide specific definitions of prohibited conduct: many of its terms, such as ‘morbid interest,’ have no clear meaning; and there is no explanation of crucial terms such as ‘violence.’”

**Other Examples of Attempts to Regulate Media Influence on Children**

Before moving on to consider how the seeming stalemate between the scientific research and the courts might be resolved, it is helpful background to summarize efforts at regulating children’s access to media in areas beyond video games. This discussion is not meant to be comprehensive, but touches on key issues for several categories of media.

**Television and Radio**

The Supreme Court has afforded less protection for broadcast radio and television, at least in the case of indecent speech. In upholding a federal law banning indecent language from radio broadcast, the Court cited the unique concerns of broadcast media, namely its presence in the privacy of the home and its accessibility to children, to justify less First Amendment protection (FCC v. Pacifica Foundation 1978, p. 748-49). Pacifica was extended to broadcast television in
Action for Children’s Television v. FCC (1995), which upheld the FCC’s rules establishing time limits for indecent broadcasting. In the case of cable television, however, courts have rejected legislative efforts to regulate indecency, and likely would do the same for other subscription media such as satellite radio (Corn-Revere 2006).

As for regulating violence on television, the only successful legislation is the Telecommunications Act’s Parental Choice in Television Programming Section (1996) in which Congress implemented what is commonly known as the V-chip along with the requirement of a voluntary ratings system on both broadcast and cable television. While proponents were hopeful that the V-chip would effectively provide parents the ability to control children’s exposure to harmful television, the FCC and others have documented the failings of this system (FCC 2007, p. 931.). Subsequent legislative attempts to regulate broadcast violence have been unsuccessful (see, for example, the Broadcast Decency Enforcement Act of 2004, 2005 and the Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005). While the FCC recently issued a report finding that Congress could constitutionally regulate excessively violent programming harmful to children under Pacifica (FCC 2007, p. 940), the courts are likely to disagree (Sparr 2008).

Marketing and Advertising

For the most part, attempts to place limits on marketing and advertising to children have met a fate similar to violent video game regulations. Even efforts to regulate advertising of products that are illegal for children to possess have been viewed with great suspicion by the courts, though some regulations have been permitted, such as a ban on television tobacco advertisements. Because of First Amendment concerns, the FTC has encouraged industry self-regulation and, accordingly, the motion picture, music, and electronic game industries have developed extensive ratings systems, though in practice they have proven ineffective (FTC 2007, p. 2). For further discussion of efforts to control harmful marketing to children, see the FTC’s Report on Marketing Food to Children (2008) and Klein et al. (2006).

Internet/Online Social Networks

Congress has attempted several efforts at protecting children from harmful Internet content, notably the Communications Decency Act (1996) and the Children Online Protection Act (1998). Yet these efforts also have failed when challenged on First Amendment grounds (Reno v. American Civil Liberties Union 1997; Ashcroft v. American Civil Liberties Union, 2004). One exception has been American Library Association v. United States (2003), where the Supreme Court upheld the Children’s Internet Protection Act, requiring schools and libraries that receive federal aid to install filters on all computers. Another area of emerging media is the online social network such as Facebook or MySpace. Here concerns may extend far beyond violent content exposure to include protection from sexual predators, identity theft, and reputational harms. Regulation has yet to occur, but it is important to recognize that advances in technology will only continue to present new media forums where potential harm to children ought to be examined and, if appropriate, regulated.

Remaining Questions

The myriad unsuccessful attempts to address mass media and marketing harm to children, only a handful of which are highlighted here, raise two key questions. First, at what point, if ever, will courts recognize a category of speech that causes harm to minors, such as extremely violent material, as undeserving of First Amendment protection? Second, given that courts consider current social science insufficient to justify regulation of harmful media under the strict scrutiny First Amendment test, how should future research be structured? Parts II and III of this paper offer an initial response.

Part II: Approaching Mass Media Regulation From An Ecogenerist Perspective

Lessons from Environmental Ethics

The law’s continued inability to recognize the harms of media and marketing documented by social science has led a handful of legal scholars to “examine this disconnect between law and reality [by considering] the effect of the media and advertising industries on children’s socialization” (Rosenbury 2007, p. 849). Professor Laura Rosenbury and others recognize that the traditional paradigm, focusing on the role of parents and the State in the lives of children, fails to account for the ways that the media and advertising “industries supplement, and often supplant, parental and state authority over children” (p. 849). Perhaps most radical proposal for reframing these issues has come from Professor Barbara Bennett Woodhouse, who “argues for an EcoGenerist paradigm, based on ecological principles developed in the environmental arena, informed by the principle of generism, or the primacy of supporting and nurturing the next generation. She analogizes the violence in culture, with its known negative effects on children, to a toxic substance in children’s environment, and calls upon us to learn from
environmentalists how to think about and address the toxic qualities of children’s cultural and social environment” (Dowd 2006, xxiii). For Woodhouse (2007 p. 528-29), “[a]n ecogenerist is committed to maintaining and restoring a healthy social and physical environment for the benefit of the next generation and generations to come.” She has employed her theory of ecogenism to advocate for reform to child welfare and protection law in a variety of ways, but for purposes of this paper the most relevant aspect is her suggestion that lessons learned by environmentalists can be drawn upon by those seeking to address media harm to children.

According to Woodhouse (pp. 94-95), “mass-media marketing is not a benign entrepreneurial enterprise--it is a potentially destructive assault on children's environment that we must strive to understand and attempt to regulate.” She uses the term “mass-media marketing” to describe what she characterizes as a “force … having a deleterious effect on the culture of childhood” and identifies several ways in which this force “has changed the ecology of childhood” (pp. 100-01). These contexts include the dominance of advertising, a diminished role of parents and adults in the lives of children, the disparate impact of adverse media effects on minority and poor children, and the harmful effects of violent or sexual media on children (p.101). Just as state and local government could not “manage the competing demands between the needs of local businesses, the need to grow, and resource protection” prior to the advent of environmental law as we now know it (Browner 2001, p. 330), so too have the competing demands associated with regulating media effects on children become unmanageable.

Woodhouse adopts a variety of environmental ethics theories to reexamine traditional conceptions about media harm to children. For example, she observes that environmentalists’ “deep ecology” solves problems by pushing beyond the surface and replacing the “dominant Western paradigm of Newtonian science by approaching nature as something to be divided into parts and classified” with a “relational model that sees all organisms . . . as intrinsically interrelated” (2006, p. 423). She also looks to ecofeminism, particularly its “emphas[is] on the connection between the actions and fates of individuals and the future of the relationships and ecological communities that are necessary . . . for the next generation to survive and thrive” (p. 423). Other relevant theories include “sustainable development” and “restoration ecology” for their focus on prevention and balance (p. 424). Similarly, she notes the parallels between environmentalists’ use of “biological control” (i.e. use of natural organisms to fight invaders) and “media education” advocates who “protect children against harmful media by exposing them to materials and media inputs that educate them to be critical consumers” (2004, p. 142).

Applying Ecogenerism through a Case Study: Video Software Dealers Association v. Schwarzenegger

Perhaps the best way to understand the law’s non-response to media research, and how an ecogenerist approach might alter that response, is to examine a case study. In the most recent case to consider media effects on children, the Ninth Circuit U.S. Court of Appeals found unconstitutional a California statute prohibiting the sale or rental of violent video games to minors (“Video Software Dealers Association v. Schwarzenegger 2009). While the court’s holding is limited to regulation of video game violence, the court’s concerns in applying the First Amendment and evaluating the social science offer insights into the challenges that will be faced in any future efforts to regulate media or marketing content on behalf of children.

Background

In 2005, the California legislature passed and Governor Schwarzenegger signed into law a statute that imposed restrictions and a labeling requirement on the sale or rental of violent video games to minors. The statute defined “a violent video game” as a game that “includes killing, maiming, dismembering, or sexually assaulting an image of a human being” where the game either (1) as toward minors “…appeals to a deviant or morbid interest…., is patently offensive to prevailing standards in the community, and lack[s] serious literary, artistic, political, or scientific values” or (2) “enables … virtual[] inflict[ion] of serious injury … [in an] especially heinous, cruel or depraved [manner]” (“Video Software, p. 953; California Civil Code Sections 1746-1746.5). Soon after its passage two video game industry associations filed a lawsuit against the government challenging the statute. Following precedent from other violent video game cases, the lower court declared the statute unconstitutional.

Legal Arguments

On appeal, in an effort to distinguish its case from the other unsuccessful cases, the government advanced three key arguments. First, the government contended that violent material should be regulated as obscenity, either as falling within the definition of obscene or under the variable obscenity standard in Ginsberg. Second, the government submitted that social science research had advanced considerably since it was evaluated by other courts, and now demonstrated conclusively the requisite causal connection between playing the targeted video games and increased violent behavior or aggression, even
under a strict scrutiny review. Third, the government argued that the statute was more narrowly drawn than versions enacted by other states, as the statute did not prohibit children from playing or possessing the video games; rather, it required that a parent or guardian make the purchase.

The court was not persuaded. First, addressing the level of First Amendment protection, the court recognized the repeated resistance of other courts to include violence under the umbrella of obscenity (Video Software, p. 960). The court took care to note both the Supreme Court’s historical position “consistently address[ing] obscenity with reference to sex-based materials,” not violent materials, and the history of other courts rejecting requests to apply lesser protection to violent speech under the definition of obscenity or Ginsberg. (pp. 959, 960).

Second, the court evaluated the government’s interest in preventing psychological or neurological harm to the brains of children playing violent video games (Video Software, p. 961). The court “recognized that there is a compelling interest in protecting the physical and psychological well-being of minors,” but also observed that “when the government seeks to restrict speech it must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way” (p. 962). The government’s evidence to document the harm consisted primarily of the research by Professor Craig Anderson, whose work includes numerous studies and articles addressing media violence, especially in video games, and has been relied upon repeatedly by legislators and federal agencies to establish a causal link between violence in video games and psychological harm, though uniformly rejected by courts (Video Software p. 963). In an effort to address the previous courts’ rulings, the government focused on his 2004 meta-analysis study (i.e. a quantitative method for integrating existing studies) demonstrating a link between exposure to violent video games with increased aggressive behavior, cognition, and affect as well as cardiovascular arousal and decreased helping behavior (Video Software, p. 963). The court found the research unconvincing, however, based upon Anderson’s disclaimers regarding the small sample size, lack of longitudinal studies and limited focus on children under the age of 18 (Video Software, p. 963). The court disregarded other social science evidence on similar grounds.

Third, as to the government’s argument that the statute was more narrowly tailored than other states’ previous efforts, the court again disagreed and found that the burden to show that no less restrictive alternatives were available was not met (p. 964-65). Specifically, the court suggested other alternatives such as a voluntary rating system, parental controls on modern gaming systems, and enhanced education campaigns (p. 965). Thus, the lower court’s decision was affirmed. It is important to note, however, that this may not be the final word. In May 2009, the government filed a petition for review with the U.S. Supreme Court.

**Applying Ecogenerism to Violent Video Game Regulations**

How might a focus on ecogenerist principles have changed the outcome in the Video Software case? The concept of ecogenerism is appealing to those frustrated by the current legal framework, yet reconciling it with the First Amendment presents obstacles. Indeed, Woodhouse herself, in recognizing “serious dangers to breaching the First Amendment distinctions that protect expression from content-based regulation … set aside these issues for another day” when she first proposed an ecogenerist approach (2004, p. 96). But her proposal cannot be taken seriously without addressing the First Amendment. While Woodhouse (2004, p. 128) may be correct that “this issue is not about values of parental authority or values of free expression, but rather values of generational justice and human flourishing,” courts are unlikely to ignore free speech concerns.

Woodhouse has offered some initial observations about how an ecogenerist would respond to First Amendment concerns by exploring this tension in the context of Internet violence. First, ecogenerist theory “would place children at the center of the analysis rather than at the periphery” (Woodhouse 2006, p. 429). Where the First Amendment focuses on protection of adult free speech rights, environmental law is most concerned about the level of toxins to which the most vulnerable are exposed (p. 429). Likewise, media effects law should prioritize concern about the level of “toxic” media to which children are exposed. Second, ecogenerist theory regulates at the source rather than at the end result (p. 429). For example, in addressing the issue of air pollution, environmental law would not be satisfied with a response that placed the responsibility of children’s exposure to toxic air pollution on a parent’s decision to keep the child indoors (p. 429). Similarly, ameliorating the harms of media cannot be left to parents alone. Third, ecogenerism “would shift the analysis to measuring environmental harms to children and addressing them at their source rather than privatizing responsibility for protecting children’s environment” (p. 430). Thus, Woodhouse concludes that research “clearly establish[ing] but fall[ing] short of conclusively proving a causal connection between harm to children and exposure to media violence” could be relied upon by legislators in adopting regulations so long as it is rooted in science, not popular opinion (p. 429, 430). These observations are
highly relevant to the disposition of the Video Software case.

There are a number of other ways an ecogenerist approach might be applied to support regulations limiting children’s access to violent video games. First, environmental law is centered on empirical research. “Imagine a regulatory scheme,” suggests Woodhouse, “designed to preserve the environment for children’s healthy development that relied on established evidence-based benchmarks similar to those in various environmental laws” (2005, p. 442). Such a scheme could replace the current focus on balancing protection of children against adult free speech rights to allow for appropriate regulation based on objective criteria supported by scientific evidence, not ideological positions. The environmentalist concept of the “precautionary principle” also is relevant here. This principle, “made explicit in various environmental treaties and conventions, holds that we should not require scientific certainty about the precise effects of a course of conduct before regulating it, if the possible risks of leaving it unregulated may be serious or irreversible” (Woodhouse 2005, p. 439).

Whether an evidence-based set of benchmarks would have altered the outcome of Video Software is uncertain, but the court’s opinion reflects the need for that sort of measure. Acknowledging a “lay review” of the evidence and that the government is not required “to demonstrate a scientific certainty” (p. 964), the court nonetheless required the government to do exactly that. Moreover, ethical considerations may very well preclude the proof demanded by cases like Video Software to the extent harm is caused to children in the laboratory research setting (Saunders 2005, p. 724; Varstug 2004, p. 1822).

Second, the emergence of environmental law and its influence in reframing traditional property rights and land use law provides inspiration and precedent for the paradigm shift that would be required in violent video game jurisprudence. As Woodhouse (2005, p. 443) recognizes, traditional family law already has begun this process, moving from treatment of children as property of parents to the “very different overarching ethical principle [of looking to] the best interests of the child.” The pending petition before the Supreme Court to review the Video Software case presents an important opportunity for the Court to reframe the debate on media violence regulation. The Court has never directly addressed the issue of whether a state may restrict the sale of violent video games to minors, and a decision to hear the case would have a significant impact on future research and regulatory efforts to address media harm to children regardless of the ultimate outcome on the merits.

Third, ecogenerism reveals the disingenuous nature of alternatives to legislative action like industry self-regulation or parental control, which profess to be solutions but fail in actual practice. As Woodhouse (p. 126) explains: “Parent-activated internet filters, V-chips, and special web zones to which parents may subscribe their children, all fail to protect the child whose parent is either uninterested or unable to enforce (or afford) these child-safe zones. Moreover, individualized parental control may be a wholly ineffective alternative to government regulation. As with contagious diseases and firearms, when one child in a peer group is exposed to risk, the entire group is potentially exposed.” The Video Software court (p. 965) relied upon these purported solutions in finding that the government failed to show that no less burdensome alternatives exist. The ecogenerist perspective reveals why the court should not have done so.

Finally, one particularly relevant lesson environmentalists offer the movement to protect children from media is how to “avoid[] paralysis in the face of scientific uncertainty and natural flux” (Woodhouse 2004, p. 147). For example, “[o]pponents of environmental regulation have launched sharp critiques at the methods used to calculate costs and benefits, claiming that they overstate the risks and underestimate the costs, and environmentalists have responded with critiques of their own, charging the opposition with manipulating the data and the methods of computations to understate the risks and inflate the costs.” (2004, p. 147). These arguments are strikingly similar to those in the media violence debate. Environmentalists successfully established a regulatory framework for evaluating empirical science in the face of uncertainty and flux. The movement to protect children from media harm can do so as well.

Part III: Guidance for Future Research and Reform

Having reviewed the existing legal framework, and considered the possibilities of reframing the issues, this paper now concludes with suggestions to guide future work on the effects of mass media and marketing on children. Courts, legal commentators, and social science researchers all have offered suggestions under the existing legal framework. These recommendations, filtered through an ecogenerist perspective, are summarized below.

Suggestions for future research and regulation from legal scholars and judges primarily focus on a narrowing approach, whether in the language used or in the underlying research. For example, in the American Amusement case mentioned above, Judge Posner suggested that future research be tied directly to the particular video game or media subject and involve children of the age subject to the regulation with a sufficient demonstration of causation. Judge Robert Lasnik in Video Software Dealers v. Maleng (2004) listed three key considerations for future regulation: (1) the law should apply only
to “depraved or extreme acts of violence that violate community norms and prompted the legislature to act;” (2) the law should ban “depictions of extreme violence against all innocent victims, regardless of their viewpoint or status;” and (3) “social scientific studies [must] support the legislative findings” (p. 1190). Similarly, Professor Saunders (2004, p. 264) has suggested “that a statute limited to violent, or perhaps only to first person shooter, video games” might withstand scrutiny. As Professor Ross (2006, p. 301) also has observed, “[t]o provide legally convincing evidence … studies would need to distinguish more carefully among factors such as the level of exposure to violent entertainment, and violence and poverty in the community.” She also expresses concern about the definitional problem associated with the term “media violence” in that research studies define it inconsistently (if at all), and she suggests that future studies “must be carefully crafted to identify the precise harm caused by the speech, and to show that restrictions on speech would directly and materially alleviate the harm” (p. 302). Others look to advances in neuroscience and the use of MRI as possible future sources for the evidence sought by courts (Chananie 2007; Saunders 2005). Significantly, all of these recommendations focus on shortcomings of the research studies, whereas an ecogenerist perspective also would focus on the standards used by courts evaluating the social science. This is not to say that recommendations from legal academics and judges be ignored, but they ought not to be relied upon alone.

Interestingly, and possibly reflecting the frustration of repeated rejection by courts, social science researchers Gentile, Saleem and Anderson (2007, p. 46) recently proposed a moratorium of five to ten years on any legislation. During that time, they recommend several actions:

- Train lawyers and judges in collaboration with scientists on the meaning of causality in science and how to interpret the empirical data;
- Establish uniform guidelines for expert qualifications;
- Help researchers understand the different standards of causality used by courts, and how standards change depending on the type of court review; and
- Design research focusing on (1) immediate harm rather than cumulative long-term effects; (2) harm to the viewing child; and (3) real-world contexts, distinguishing the effect of media and accounting for other factors (pp. 45-46).

A number of these actions reflect ecogenerist values, though the moratorium does not. As the early environmentalists and others at the forefront of major social movements know, continued legal challenges can serve as a catalyst for change even in the face of defeat. In addition to narrowing research to fit existing legal requirements, ecogenerism would encourage expanded research, focused on developing an entirely new regulatory framework based upon established scientific benchmarks to evaluate media harm. (Perhaps ecogenerist arguments also will convince Congress to finally pass the Children and Media Research Act, a $95 million proposal to fund expanded research on media and children that has been introduced several times, most recently in 2007.)

Ecogenerism also would incorporate media literacy education, “no child left inside” programs, and similar efforts as central to the legislative agenda along with continued work on media access laws, at least to the extent these efforts were maintained with children’s interests as paramount. For example Professor Heins maintains, as an alternative to regulation on children’s access to media, that legislation should encourage and facilitate youth media education programs (Heins & Cho, 2003). In particular, she argues that “the federal government should create guidelines for media literacy education which recognize that critical thinking is the goal, and that media literacy is more than simply an ‘inoculation’ against violent, sexual, or other controversial content in art and entertainment” (p.1). Reviewing what she calls “a patchwork quilt of nonprofit advocacy groups, for-profit providers of curricular materials, and assorted state and local initiatives” that currently attempt to address media literacy efforts, she proposes that much could be gained from a federally-driven national initiative (and cite successful efforts in this regard by other countries such as Canada, England, and Australia) (pp. 20, 20-37). As for “no child left inside” programs, these initiatives also try to address media influence without direct regulation of children’s access. Instead, children are encouraged to participate in outdoor education activities as an alternative (or in addition) to media-related activities like television and video games.

Finally, ecogenerism would support increased regulation of marketing harmful products to children. This is an area where regulators might find more success withstanding First Amendment challenges given the lower level of review applicable to commercial speech, as discussed earlier in Part I.A. For example, the Supreme Court has found constitutional laws restricting the advertisement to minors of products like tobacco and alcohol. A bill currently pending in the U.S. House of Representatives proposes marketing restrictions for violent video games. The bill would require the Consumer Product
Safety Commission to issue regulations requiring warning labels on the packaging of any video game rated T (Teen) or higher by the Electronics Software Ratings Board. While a labeling restriction would not account for all of the concerns from an ecogenerist perspective, it may be the best available tool for addressing violent media harm absent a fundamental shift in existing First Amendment jurisprudence.

Conclusion

The law’s continued refusal to recognize mass media and marketing harm to children has left researchers and regulators in a strange position, waiting until science might sufficiently advance to satisfy a court’s causality requirements and in the meantime engaging in a seemingly fruitless exercise of tweaking statutory language in an effort to survive First Amendment scrutiny. Like the early environmentalists, mass media reform advocates have harnessed the social science but have lacked the regulatory framework necessary to convert the research results into real change. As this paper has shown in a close examination of recent litigation surrounding California’s violent video game statute, the lessons of environmental ethics applied through Woodhouse’s ecogenerism offer inspiration for future research initiatives and legislative action.

References


9. California Civil Code Sections 1746-1746.5.


33. Interactive Digital Software Association v. St. Louis County, 329 F.3d 954 (8th Cir. 2003).


41. Rothner v. City of Chicago, 929 F.2d 297, 298 (7th Cir. 1991).


49. U.S. Constitution Amendments I and VIX.


53. Video Software Dealers Association v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009).


