Sex and Violence in the Media: Some Thoughts on the Importance of Underinclusion as a Barrier to Medium Specific Regulation

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Professor Clay Calvert has offered a thoughtful and provocative look at the evidentiary quandaries presented by medium specific laws that target sexual and violent content.[1] The questions he examines have taken on some renewed urgency, as the Supreme Court has agreed to review one of the FCC's most recent efforts to clamp down on indecent speech[2]—a case which is a central focus of Professor Calvert's analysis.[3]

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1. Clay Calvert, *The Two-Step Evidentiary and Causation Quandary for Medium-Specific Laws Targeting Sexual & Violent Content: First Proving Harm and Injury to Silence Speech, Then Proving Redress and Rehabilitation Through Censorship*, 60 FED. COMM. L.J. 157 (2008).

2. *See* FCC v. Fox Television Stations, Inc., No. 06-1760ag (Mar. 17, 2008) (granting certiorari); *see generally* Linda Greenhouse, *Court Takes Up On-Air Vulgarity Again*, N.Y. TIMES, Mar. 18, 2008, at A19.

3. *See infra* note 6 and accompanying text.

I find myself in agreement with much of what Professor Calvert has to say about the seemingly never ending attempts by the state and federal governments to impose new censorial regulatory schemes on the media. In particular, I agree with his observation that these politically expedient efforts are misguided and unlikely to accomplish much, being akin, as he so cleverly puts it, to "a never-ending arcade game of Whac-a-Mole."[4] More importantly, I am in complete accord with his suggestion that it is time to end these paternalistic attempts to impose a civility code on a diverse population and to leave it to individuals, assisted by various technological remedies, to do their own content policing.[5]

So it is fair to ask, I suppose, why I am writing this Response if I find so much to my liking in Professor Calvert's article. The reason is that while I agree with his broad views on the subject of media sex and violence, I am less sanguine about his focus on proof issues as creating a potentially insuperable barrier to the government's efforts to act as a decency filter.

Using the Second Circuit's recent decision striking down the FCC's reversal of its "Fleeting Expletives" rule[6] as a starting point,[7] Professor Calvert posits that in order to defend regulation of indecent content in a particular medium of expression, the government must scale two barriers. First, it must prove actual harm caused by the particular kind of speech being regulated. Second, it must demonstrate that the regulation significantly ameliorates the harm.[8]

Central to Professor Calvert's thesis is that medium specific regulations of indecent content are inherently so underinclusive that they will, almost by definition, fail sufficiently to advance the legislative goal of ameliorating the societal harms that media portrayals of sex and violence are perceived by some to cause.[9] In other words, he argues, there is so much sexual and violent content coming from so many different sources, any attempt to address part of the problem—by, for example, limiting access by children to certain kinds of video games—is like the little Dutch boy sticking his finger in one crack of a dike that has a hundred leaks—it's effectively meaningless.[10]

As a basic doctrinal proposition, Professor Calvert's analysis is, of course, quite sound; the cases without doubt support the proposition that in

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4. Calvert, *supra* note 1, at 182.

5. *Id.* at 180. This is a subject that I also recently addressed. *See* David Kohler, *Self Help, the Media and the First Amendment*, 35 HOFSTRA L. REV. 1263 (2007).

6. *See* Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007), c*ert. granted*, No. 06-1760ag (Mar. 17, 2008).

7. Calvert, *supra* note 1, at 158-63.

8. *Id.* at 162-63.

9. *Id.* at 160.

10. *Id.* at 182.

order to be constitutional, government regulation of expression must, among other things, be shown to be effective in promoting a valid legislative purpose. What I am less sure about is that the particular proof issue which is the main focus of his article—the inherent underinclusiveness of medium specific regulation of sexual and violent media content—presents such an unscable barrier that "it will be nearly impossible for any medium-specific effort to restrict minors' access to sexual and/or violent speech ever to pass constitutional muster."[11] I have two basic concerns with this thesis. First, I think Professor Calvert may be reading a bit too much into the cases addressing the relevance of underinclusivness. Second, if he is correct that underinclusion is truly presenting such a formidable roadblock for the government, I fear that it could serve as a catalyst for certain forces within the Supreme Court that have sought to water down the First Amendment doctrine that has, thus far, served as a barrier to these kinds of censorial legislative adventures.

I. STRETCHING THE UNDERINCLUSIVENESS RUBBER BAND TOO FAR

In *City of Ladue v. Gilleo*,[12] the Supreme Court explained that underinclusiveness can factor into First Amendment doctrine in two distinct ways. First, it may serve as a marker for content discrimination. That is, by exempting some speech from its scope, regulation may "represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing views to the people.'"[13] This is not the kind of underinclusiveness addressed by Professor Calvert, as the regulations he discusses are overtly content based.

Alternatively, and more relevant to the present discussion, a seriously underinclusive regulation "may diminish the credibility of the government's rationale for restricting speech in the first place."[14] It is this form of underinclusiveness that is the focus of Professor Calvert's article. However, the cases that have addressed the problem in this context cannot, I think, bear the weight he assigns to them. By and large, underinclusion as a basis for striking down regulatory schemes has been used sparingly, and then only where it is so glaring as to make any government claims in support of it simply incredible.

For example, Professor Calvert cites the Supreme Court's commercial speech jurisprudence as an area where notions of "effectiveness and

11. *Id.* at 168.
12. 512 U.S. 43 (1994).
13. *Id.* at 51.
14. *Id.* at 52.

efficacy of censorship-based remedies" are pervasive.[15] While this may be true as an abstract principle, the overwhelming majority of the Supreme Court's attention to this area has involved complete bans on particular kinds of expression which were condemned because they prohibited too much speech, not too little.[16] Indeed, *Central Hudson Gas & Electric Co. v. Public Service Commission*, the principal Supreme Court commercial speech precedent on which Professor Calvert relies for the broad doctrinal proposition, is precisely such a case:

> The Commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use.[17]

The commercial speech case that Professor Calvert discusses which did, in fact, rely on an underinclusiveness rationale—*Pitt News v. Pappert*[18]—was in my view one of those very easy cases involving a regulation so obviously ineffective that it was almost laughable. *Pitt News* arose out of a Pennsylvania statute that prohibited advertising the price of alcoholic beverages in college newspapers only; it did nothing to limit such advertising anywhere else—in regular newspapers, on television, in flyers distributed on campuses, etc. Indeed, the statute only prohibited paid advertising, not any other form of communication concerning liquor prices.[19] It was thus not particularly difficult for Judge—now Justice—Alito to dismiss the State's attempts to justify the law as involving mere "speculation and conjecture" and suggest that any effect it might have on the problem of college drinking would be immaterial.[20]

The difficulty in trying to extend this kind of reasoning too far is illustrated by a failed attempt to do so—one involving a Supreme Court commercial speech case that did, to a great degree, rely on underinclusion. That decision, *City of Cincinnati v. Discovery Network, Inc.*,[21] involved an ordinance that prohibited the placement on public property of newsracks used to distribute commercial handbills. The ordinance did nothing to restrict newsracks distributing other kinds of publications—for example newspapers. The evidence showed that the ordinance affected only 62

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15. Calvert, *supra* note 1, at 169.

16. See generally David Kohler, At The Intersection Of Comic Books And Third World Working Conditions: Is It Time To Re-Examine The Role Of Commercial Interests In The Regulation Of Expression?, 28 HASTINGS COMM. & ENT. L. J. 145, 152 (2006).

17. Central Hudson Gas & Elec. Co. v. Public Service Comm., 447 U.S. 570 (1980).

18. 379 F.3d 96 (3d Cir. 2004).

19. *Id.* at 105.

20. *Id.* at 107-08.

21. 507 U.S. 410 (1993).

newsracks, leaving between 1,500 and 2,000 unaffected.[22] Thus the Court had little difficulty concluding that the city's regulatory scheme bore "no relationship *whatsoever* to the particular interests that . . . [it] asserted."[23]

In *Mainstream Marketing Services v. FTC*[24] various parties attempted to extend the reasoning of *Discovery Network* to a more difficult problem: the Federal Trade Commission's "Do Not Call" registry which severely limited whom direct marketers could make unsolicited promotional call to. In challenging the FTC's restrictions, the plaintiffs relied heavily on *Discovery Network*, arguing that the registry was seriously underinclusive because it did not limit charitable or other noncommercial solicitations.[25] The Tenth Circuit rejected this attempt to extend the reasoning of *Discovery Network*, characterizing that decision as involving a law that affected only a "minute" and "paltry"[26] part of the regulatory problem, noting that underinclusiveness is relevant "only if it renders the regulatory framework so irrational that it fails materially to advance the aims that it was purportedly designed to further."[27]

Professor Calvert candidly acknowledges that "[t]he concept of underinclusiveness needs to be approached with some caution,"[28] but I am not sure he really takes this admonition sufficiently to heart when he advances the doctrine as a potentially far reaching cure to legislative overkill in regard to media sex and violence. He is, of course, perfectly free to make the case that various courts' views of the limited utility of underinclusion are inappropriately crabbed, but I don't think he does that. Indeed, the other decision he principally relies on—*American Amusement Machine Association v. Kendrick*—is, in my view, simply another one of those easy cases involving a thoroughly ineffective regulatory effort.[29] *Kendrick* involved a city ordinance that attempted to restrict minors from entering video game arcades and playing certain games. Because of its

22. *Id.* at 417-18.

23. *Id*. at 424.

24. 358 F.3d 1228 (10th Cir. 2004).

25. *See id*. at 1245-46.

26. *Id.* at 1245.

27. *Id.* at 1238-39. *Compare* Rubin v. Coors Brewing Co., 514 U.S. 476, 489 (1995) (striking down law prohibiting disclosure of alcohol content on beer labels but not in advertising or elsewhere) *with* United States v. Edge Broad. Co., 509 U.S. 418, 434 (1993) (upholding regulation prohibiting broadcasters in one state from advertising lottery of a border state where residents would nonetheless be exposed to significant cross-border advertising).

28. Calvert, *supra* note 1, at 175, *quoting* Nat'l Fed'n of Blind v. FTC, 420 F.3d 331, 345 (4th Cir. 2005).

29. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001).

severely limited scope, Judge Posner recognized that it would catch only a "tiny fraction" of the media violence to which children are exposed.[30]

In sum, it is not at all clear to me that Professor Calvert has made the case that courts are applying underinclusion in ways that present quite such a formidable barrier to the regulation of media portrayals of sex and violence. Most of the cases that have thus far been litigated have involved poorly constructed legislative schemes based on relatively paltry data such as *Kendrick*. Moreover, if underinclusion loomed so large as a principal line of defense, I cannot help but wonder, and worry, what might happen if, say, Congress took on the issue and attempted to address it in a more comprehensive and considered way. Although, there is no current move afoot in Congress that I am aware of, the FCC recently addressed the prospect of extending indecency regulation to violence as well.[31] It is worth noting, moreover, that *FCC v. Pacifica Foundation*,[32] the Supreme Court's decision that arguably started us down this road, involved a medium specific law that at least in today's environment is wildly underinclusive. Do we really think that the Supreme Court is likely to overrule *Pacifia* on that basis? If Professor Calvert's analysis of the evolving doctrine is correct, it leads ineluctably to this conclusion. And, although I entirely agree that *Pacifica* needs to go, I fear that this is the wrong way to go about getting rid of it and that, indeed, excessive reliance on notions of underinclusiveness might, in fact, be counterproductive.

II. THE SNAP BACK COULD HURT

Professor Calvert forthrightly acknowledges where an aggressive application of the underinclusiveness principle must lead:

> If courts like those that have struck down laws targeting violent images in video games continue to vigorously consider the underinclusive nature of the remedy provided by such statutes, then legislators are arguably boxed in by and between the inclusiveness and overbreadth doctrines. In a nutshell, they are damned if they do too little to address, through censorship-based legislation, the harms allegedly caused by viewing sexual and violent content, and they are damned if they do too much and draft vastly sweeping laws that cut across media . . . or that too expansively define the allegedly harmful material they attempt to regulate.[33]

This strikes me as a potentially dangerous proposition. There is something of a debate going on within the Supreme Court over how much deference regulators should be given when addressing perceived problems

30. *Id.* at 579.

31. *See* Stephen Labaton, *F.C.C. Moves to Restrict TV Violence*, N.Y. TIMES, Apr. 26, 2007, at C1.

32. 438 U.S. 726 (1978).

33. Calvert, *supra* note 1, at 176.

caused by speech in a changing media environment, particularly speech which might be deemed inappropriate for minors. Were it to become clear that the law has developed in a way that almost by definition dooms virtually any attempt to address hard problems, I fear the Court might feel compelled to move in a direction that would not benefit an expansive view of First Amendment protection.

Denver Area Educational Telecommunications Consortium v. Federal Communications Commission[34] illustrates that these concerns do not simply spring from some particularly paranoid quadrant of my brain. That case addressed several provisions of the Cable Television Consumer Protection and Competition Act of 1992. A plurality of the Court, led by Justice Breyer, appeared willing to move away from the traditional strict scrutiny model of First Amendment decision-making in an effort to address more flexibly what it perceived as difficult questions posed by a complex and dynamic medium.[35] Justice Kennedy, by contrast, argued against an abandonment of traditional norms in terms that have considerable relevance to the instant issue:

> [I]f strict scrutiny is an instance of 'judicial formulas so rigid that they become a straightjacket that disables government from responding to serious problems' . . . this is a grave indictment of our First Amendment jurisprudence which relies on strict scrutiny in a number of settings where context is important.[36]

It seems to me that Professor Calvert's thesis leads precisely to the kind of straightjacket that even Justice Kennedy would find discomfiting.[37] This becomes even more apparent in Part III of Professor Calvert's article where he explains why "[t]he difficulty of demonstrating the effectiveness of a medium-specific law is immense."[38]

Let me be clear. My concern here is not in the suggestion that sustaining content-based laws presents a very formidable task—I believe it does and should. Rather, my skepticism lies in the kinds of proof Professor Calvert posits would be necessary to do so. In his estimation, such proof would be virtually impossible to develop because: "How can one test the

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34. 518 U.S. 727 (1996).

35. *See id.* at 741-43.

36. *Id.* at 784 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part); *see* Simon & Schuster v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment) ("the use of . . . traditional legal categories is preferable to . . . ad hoc balancing . . . .").

37. *See also* Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 611 (2005) ("[C]ourts cannot fairly put legislators in the 'Catch-22' of having to provide data that is unobtainable.").

38. Calvert *supra* note 1, at 176.

effectiveness of a law if the law is never given the chance to go into effect in the first place?"[39]

Again, I am not sure that his insistence on such irrefutable "real world" evidence is quite supported by the cases.[40] To the contrary, the cases better support a view that in appropriate instances courts should and do give some at least some deference to carefully constructed predictive judgments of the legislative branch. One sees this, for example, in *Turner Broadcasting System, Inc. v. Federal Communications Commission*,[41] which upheld the constitutionality of cable must carry regulation:

> In reviewing the constitutionality of a statute, 'courts must accord substantial deference to the predictive judgments of Congress.' . . . . This principle has special significance in cases . . . involving congressional complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change.[42]

To be sure, attempts to regulate on the basis of content require a very high quantum of proof, as to harm, the effectiveness of the regulatory approach chosen, and whether the legislative approach is sufficiently tailored and necessary to solve the problem.[43] Those attempts should and do usually fail, because:

> strict scrutiny . . . confines the balancing process in a manner protective of speech; it does not disable government from addressing serious problems, but it does ensure that the solutions do not sacrifice speech to a greater extent than necessary.[44]

Justice Kennedy's efforts to preserve strict scrutiny and resist the introduction of more flexible approaches into First Amendment doctrine have thus far prevailed.[45] But a high burden doesn't mean an impossible one. In other words while the current standard holds regulators feet to the fire, it does not mean that they will always be consumed by the flames. Were First Amendment law to develop in a way suggesting that the legislative house always burns down, it is not hard to believe that Justice Breyer's calls for more flexibility in First Amendment doctrine might gain

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39. *Id.* at 178.

40. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60-61 (1973) (quoting Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911) ("We do not demand of legislatures 'scientifically certain criteria of legislation.'")).

41. 520 U.S. 180 (1997).

42. *Id.* at 195-96.

43. *See, e.g.*, *Simon & Schuster*, 502 U.S. at 116 (content based restrictions "cannot be tolerated under the First Amendment" and are "presumptively . . . beyond the power of the government.").

44. *Denver Area*, 518 U.S. at 784-85 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

45. *See* Ashcroft v. ACLU, 542 U.S. 656, 664-70 (2004); United States v. Playboy Entm't Group, Inc., 592 U.s. 803, 813-16 (2000).

additional momentum, and that might not be a good thing for the protection of expression.

III. THE NEED FOR FUNDAMENTAL CHANGE

Although I have some doubts about Professor Calvert's approach to proof issues in the regulation of media portrayals of sex and violence, I fully agree that the difficulty of marshalling acceptable justifications for content-based regulation is—and should remain—high. There is, however, another more fundamental doctrinal issue that comes into play here, one that Professor Calvert addresses only indirectly.

With one notable exception, the Supreme Court has erected a formidable doctrinal barrier against government attempts to regulate speech which falls into the broad rubric of offending public sensibilities. Thus, it has held unconstitutional attempts to punish profane statements adorning one's clothing;[46] prohibit drive in movie theaters from exhibiting sexually themed movies where members of the public, including children, might catch a glimpse;[47] and severely restrict access to sex lines via the telephone.[48] In these cases, the court has acknowledged that individuals may simply have to endure some exposure to such material regardless of the proof offered to support a government's attempt to regulate:

> Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists.[49]

In other words, the animating value in these cases is self help: the right and responsibility of individuals to make their own choices about what to view and hear.

Individual self help is a fundamental speech value which has not always received the kind of explicit acknowledgement that it deserves.[50] The glaring exception to self help driven doctrine in cases involving simply offensive speech is *FCC v. Pacifica Foundation.*[51] Unlike all the other cases involving this genre of speech, *Pacifica* completely eschewed placing any responsibility on the individual to endure indecent speech,[52] and it upheld the FCC's power to regulate in this area based on little or no evidence of actual harm. It did so by using a bit of legal legerdemain; it assumed that broadcasting presents something akin to a captive audience problem where unwitting viewers are assaulted in the privacy of their own

46. Cohen v. California, 403 U.S. 15 (1971).
47. Erznoznik v. Jacksonville, 422 U.S. 205 (1975).
48. Sable Commc'ns, Inc. v. FCC, 492 U.S. 115 (1989).
49. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000).
50. *See* Kohler, *supra* note 5, at 1263.
51. 438 U.S. 726 (1978).
52. *See id.* at 748-49.

homes. As I have discussed elsewhere in some detail, that characterization was unsupportable when the case was decided, and it is even more preposterous in today's media environment.[53]

More recently, the Court seems to have moved at least a half step away from *Pacifica*, or at least has constrained its application to the special considerations that may arise with broadcast television.[54] Nonetheless, the Court's current efforts in this area are not entirely reassuring, as many of its cases have been decided by razor thin margins. Thus, for example, while the majority's rhetoric in its most recent relevant decision—*ACLU v. Ashcroft*—contains much in support of the value of self help, the case was decided by a five to four vote with the dissent led by Justice Breyer arguing strongly in favor of giving the government greater leeway to regulate.[55] That leeway included a willingness to countenance a legislative solution that left forty percent of the perceived problem largely untouched, not a ringing endorsement for sensitive decision-making based on notions of underinclusiveness.

This leads me back to where I began. I noted at the beginning my strong agreement with Professor Calvert's observation that "[i]t is time, then, to end the medium-specific regulation of sexual and violent content and, instead, to let technological remedies administered by parents on an individual and voluntary basis take the place of government-mandated censorship."[56] The best way of doing this is to restore the value of self help to the primary position it deserves in First Amendment decision-making. There have been some promising signs that this may be happening, but they are still a bit too dim for my taste.

53. *See* Kohler, *supra* note 5, at 1278-82.
54. *See Ashcroft*, 542 U.S. at 666-70; *Playboy*, 529 U.S. at 813-14.
55. *See Ashcroft*, 542 U.S. at 676-91.
56. Calvert, *supra* note 1, at 181.