

THE DARK SIDE OF TECHNOLOGICAL ADVANCES: HOW  
TECHNOLOGY HAS ENABLED DOMESTIC VIOLENCE AND  
THE CONTRIBUTING ROLE OF THE FIRST AMENDMENT

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Abstract

*The United States (U.S.) is not effectively combatting domestic violence. Current laws in most states fail to prevent or even address domestic violence, leaving countless Americans to suffer the effects daily. While every state has laws that expressly purport to serve the dual goals of domestic violence response and prevention, modern technologies have not only outpaced the reach of such laws but have found and exploited statutory loopholes. This occurs largely because the drafters of most domestic violence legislation fail to truly understand the history of technology-enabled violence and what legislation must include to effectively combat the realities of domestic violence. It is no surprise that some of the most relied upon modern technologies—smart phones, social media and networking sites, and others—can and continue to be used as means to abuse. The current legal landscape is rife with scholarship about the intersection of modern technology and domestic violence. While such scholarship offers suggestions about how to address this very serious and growing problem, it fails to examine the history of what has happened whenever a new technology form has come into popular use.*

*The failure to recognize past unsuccessful attempts means that any effort to address today's technology-enabled domestic violence will likewise be ineffective. Americans must understand and acknowledge unsuccessful past attempts to achieve a different outcome. Specifically, Americans must acknowledge that U.S. courts robustly uphold the First Amendment's guarantee of free speech. This means that legislation cannot simply prevent speech. Society must acknowledge that individuals other than legislators have important contributions to finding practical, sustaining, and effective solutions. Domestic*

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*violence victims and victim advocates can teach a great deal to policymakers about what abuse looks like and how it impacts individuals and families living with it. Technology developers can have some of the greatest contributions to creative solutions by supporting policymakers' understanding of how the products can be used, especially by users with potentially nefarious intentions. Along with the understanding of past attempts, a multidisciplinary approach to policymaking is vitally important to sustainable and effective solutions necessary to combat domestic violence.*

## TABLE OF CONTENTS

INTRODUCTION.....	94
I. TELEVISION AS AN ENABLER OF DOMESTIC VIOLENCE .....	99
A. <i>Studies Show How Television Has Enabled Domestic Violence</i> .....	100
B. <i>Attempts to Address Domestic Violence Through Legislation, Regulation, and Movements</i> .....	105
II. VIDEO GAMES AS AN ENABLER OF DOMESTIC VIOLENCE .....	111
A. <i>Studies Linking Video Games to Violence</i> .....	112
1. Do Violent Video Games Cause Violent or Aggressive Behavior?.....	113
2. Do Violent Video Games Lead to Increased Violent Actions Towards Women?.....	115
3. Prosocial Effects of Video Games .....	116
B. <i>Attempts to Address Violence Through Legislation</i> .....	118
III. MODERN TECHNOLOGY AS AN ENABLER OF DOMESTIC VIOLENCE.....	124
A. <i>Studies Demonstrate How Modern Technology Enables Domestic Violence</i> .....	124
1. Traditional Forms of Abuse Amplified by Technology.....	125
2. Creating New Ways to Abuse.....	127
a. Social Media and Networking Platforms .....	128
b. Smart Home Technology .....	130
B. <i>How Technology Can Help Victims of Domestic Violence</i> .....	131
IV. SOLUTIONS .....	133
A. <i>Law Enforcement and The Response to the Wheel of Domestic Violence</i> .....	134
B. <i>Domestic Violence Victims and Advocates</i> .....	138
C. <i>The Technology Industry, Social Media Companies, and the First Amendment</i> .....	139
CONCLUSION .....	143

## INTRODUCTION

Let's play a game. We'll call it *Legal Versus Illegal*. The rules are easy—simply say whether the described activity, under the laws as you understand them, would be legal or illegal. Ready? Turning on and off lights. Listening to music. Changing the volume of that music. Adjusting the temperature in your home. Opening and closing your garage door. Changing the lock code for your front door. Hopefully you answered that each of these things is legal. Each of them is—regardless of which state you live in. Now, consider a modification of each of these situations: the controller of each of the previously listed activities no longer lives in the home in which such events are occurring. In fact, they no longer have the right to access that home. Would the activity still be legal? In many states in the United States, as long as the person remaining in the home is a current or former partner, the answer is yes.<sup>1</sup> At least it would not be illegal in the sense that no law exists that addresses such specific behavior. Arguably, a person performing the above-mentioned activities in a home where they no longer reside, at any time of day or night and to any degree they desire, would at minimum constitute harassment.<sup>2</sup> For some, depending on the degree and timing, it could even be considered torture.<sup>3</sup> These are situations where technology has outpaced the laws that would otherwise address such alarming and violating behavior.

Domestic violence affects one in four women and one in nine men each year in the United States.<sup>4</sup> These rates are affected by a multitude of individual, social,

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1. See Nellie Bowles, *Thermostats, Locks and Lights: Digital Tools and Domestic Abuse*, N.Y. TIMES (June 23, 2018), <https://www.nytimes.com/2018/06/23/technology/smart-home-devices-domestic-abuse.html> (“Abusers have learned to use smart home technology to further their power and control in ways that often fall outside existing criminal laws . . .”).

2. See, e.g., *Restraining Orders: What is the Legal Definition of Harassment?*, WOMENSLAW.ORG, <https://www.womenslaw.org/laws/az/restraining-orders/injunctions-against-harassment/basic-information/what-legal-definition> (Dec. 27, 2022) (defining “harassment as two or more acts over any period of time that: is directed at a specific person; serves no legitimate purpose; and reasonably causes the victim to be seriously alarmed, annoyed or harassed”).

3. See generally G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984) [hereinafter U.N. Convention against Torture] (defining torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, punishing . . . for an act [of the victim] . . . [,] or intimidating or coercing” the victim).

4. See *Nat'l Statistics Domestic Violence Fact Sheet*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/STATISTICS#factsheets> (last visited Nov. 5, 2023).

relationship, and environmental factors.<sup>5</sup> The emotional, physical, and economic impacts of this violence are staggering.<sup>6</sup> For decades, those interested in understanding and combatting domestic violence have studied relationships between various forms of technology and violence. This Article incorporates data and conclusions from relevant studies to provide a complete picture of the culture of violence that may or may not surround established forms of technology.

Television was widely introduced into American homes in the late 1940s.<sup>7</sup> At the time, it was a new technology that, for all its wonderful capabilities, introduced a new level of violence.<sup>8</sup> When attempting to address the increase in violence, legislators repeatedly failed to draft statutes that would pass constitutional muster.<sup>9</sup> Claims brought by those alleging injury related to television programming were repeatedly denied, primarily on First Amendment<sup>10</sup> bases.

This pattern was repeated with the emergence of video game technology. Video games introduced a level of increased violence that is still heavily

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[hereinafter *Domestic Violence Fact Sheet*]. This Article uses gender signifiers of he/him to identify domestic violence abusers and she/her to identify domestic violence victims and survivors. This is an intentional use of the gender identifiers. While men and non-binary individuals can be the victims of abuse and women and non-binary individuals can be the perpetrators of abuse, the U.S. Department of Justice, through the Bureau of Justice Statistics, states that in approximately 75% of cases, males are the perpetrators of domestic violence and females are the victim survivors of domestic violence. See Matthew R. Durose, Caroline Wolf Harlow, Patrick A. Langan, Mark Motivans, Ramona R. Rantala & Erica L. Smith, *Family Violence Statistics: Including Statistics on Strangers and Acquaintances*, U.S. DEP'T OF JUST. 1, 14 (2005), <https://bjs.ojp.gov/content/pub/pdf/fvs02.pdf>.

5. See Marcela Tittlová & Peter Papáček, *Factors Contributing to Domestic Violence*, 6 INT'L J. OF ENTREPRENEURIAL KNOWLEDGE 117, 118 (2018).

6. See, e.g., *Domestic Violence Fact Sheet*, *supra* note 4 (stating that “[s]tudies suggest that there is a relationship between intimate partner violence and depression and suicidal behavior,” “72% of all murder-suicides involve an intimate partner,” and domestic violence victims “lose a total of 8.0 million days of paid work each year”).

7. See *Farming in the 1940s: TV Turns On*, WESSELS LIVING HIST. FARM, <https://livinghistoryfarm.org/farming-in-the-1940s/tv-turns-on/> (last visited Nov. 5, 2023) (“According to one survey in 1950, before they got a TV, . . . [Americans] listened to radio an average of nearly five hours a day. Within nine months after they bought a TV they listened to radio, but only for two hours a day. They watched TV for five hours a day.”).

8. See *infra* Section I.A.

9. See *infra* Section I.B.

10. U.S. CONST. amend. I.

debated.<sup>11</sup> Legislative attempts to curb the dissemination of violence and individuals' access to such violence have been met with strong judicial resistance, again hinging on First Amendment free speech protections.<sup>12</sup>

For the last two to three decades, technological advances have been moving faster than most people can comprehend, and faster than the law can reliably address. The speed of technological development often means that rules defining the proper use of technology are not able to keep up to remain effective. Throughout American history, this has been seen in the use of technology typically intended for entertainment, such as television and video games.<sup>13</sup> Arguably, each of these technological mediums developed with benign and entertainment-based, or perhaps educational, goals in mind.<sup>14</sup> However, over time, sometimes very quickly after initial development, certain technologies were used in ways that many individuals viewed as harmful to society.<sup>15</sup> The technology arguably encouraged dangerous behavior, glorified violence or abuse to others, and became a realm of reality that allowed individuals to see violence as a normal and expected part of life.<sup>16</sup>

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11. Francisco A. Carrillo, *Violence in the Media – Psychologists Study TV and Video Game Violence for Potential Harmful Effects*, UCONN KIDS IN DEV. SCI. (Apr. 30, 2020), <https://kids.uconn.edu/2020/04/30/violence-in-the-media-psychologists-study-tv-and-video-game-violence-for-potential-harmful-effects/> (“[I]t’s important to consider how the video game realm contributes to violence as it doesn’t just limit itself to present violence, but to engage the user in virtual violent behaviors.”); see, e.g., Melinda Wenner Moyer, *DO Violent Video Games Trigger Aggression?*, SCI. AM. (Oct. 2, 2018), <https://www.scientificamerican.com/article/do-violent-video-games-trigger-aggression/> (discussing researchers’ ongoing debate as to whether there is a link between playing violent video games and violent behavior).

12. See *infra* Section II.B.

13. See *infra* Sections I.B, II.B.

14. See e.g., William Ryerson, *How can Television-Viewing Help to Advance the SDGs?*, INT’L TELECOMM. UNION (Apr. 22, 2020), <https://www.itu.int/hub/2020/04/how-can-television-viewing-help-to-advance-the-sdgs/> (discussing how television can be used to advance sustainable development goals by transmitting information in a concise, diverse, and cost-effective way).

15. See e.g., *Abuse Using Technology*, WOMENSLAW.ORG, <https://www.womenslaw.org/about-abuse/abuse-using-technology/all> (last visited Nov. 5, 2023) (discussing the ways in which domestic violence abusers can use technology to abuse).

16. See, e.g., Jay G. Hull, Timothy J. Brunelle, Anna T. Prescott, James D. Sargent, *A Longitudinal Study of Risk-Glorifying Video Games and Behavioral Deviance*, J. OF PERSONALITY AND SOC. PSYCH., 300, 325 (Aug. 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4151190/> (presenting research that supports the assertion that “mature-rated, risk-glorifying” video gameplay can negatively affect “the personality, attitudes, and values of the player” to the point of “deviant behavior”).

Part I discusses the connection between television and domestic violence and how television, as a new technology, enabled domestic violence. Part I also discusses studies that point to a causal link between an increase in viewed violence and a disposition of violence on behalf of the television viewer, as well as attempts to curb such violence. Finally, Part I discusses legislators' difficulties in overcoming legal challenges—specifically First Amendment challenges—in their failed attempts to limit the amount of violence in television broadcasting.

Part II discusses the connection between video games and domestic violence and demonstrates how the new technological medium of video games enabled domestic violence. Similar to stunted television-focused efforts, Part II discusses how any legislation or regulation introduced to limit violence in video games was confronted with insurmountable First Amendment-based challenges.

Today, global levels of domestic violence are increasing with the inception and constantly growing prevalence of “smart” technology; Internet of Things (IoT) devices that are equipped with sensors, processing ability, software, and other technology mediums that connect and exchange data via the internet and other communications networks.<sup>17</sup> This is a unique form of violence because the newly introduced technology is itself the weapon, not solely an enabler of it. While former technological advances have served as inspiration for domestic abuse,<sup>18</sup> social media and smart devices are the instruments by which abuse is materializing or transpiring.<sup>19</sup> The law needs to address such developments, but it must do so in a way that preempts and navigates around First Amendment challenges<sup>20</sup>—and addresses the actual problem rather than merely a proxy for it.<sup>21</sup>

One of the reasons that the law must address technology-enabled domestic violence, from a terribly cynical perspective, is that “violence sells.”<sup>22</sup> Not only

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17. See Madison Lo, *A Domestic Violence Dystopia: Abuse via the Internet of Things and Remedies Under Current Law*, 109 CAL. L. REV. 277, 286–89 (2021); Hibaq Farah, *UK MPs Warn Against Growing Use of Smart Tech in Domestic Abuse*, THE GUARDIAN (Aug. 6, 2023), <https://www.theguardian.com/society/2023/aug/07/uk-mps-warn-use-smart-tech-domestic-abuse>.

18. See *infra* Sections I.A, II.A.

19. See *infra* Section II.A.ii.

20. See *infra* Sections I.B, II.B.

21. See *infra* Part IV.

22. Frank Summers, *The United States of America and the Glorification of Violence*, 36 PSYCHOANALYTIC INQUIRY 488, 488–90, <http://edithgonzalez.pbworks.com/w/file/fetch/136740231/DMC%20Journal.pdf>; see L. Rowell Huesmann, Jessica Moise-Titus, Charyl-Lynn Podolski & Leonard Eron, *Longitudinal Relations Between Children's Exposure to TV Violence and Their Aggressive and Violent Behavior in Young Adulthood: 1977-1992*, 39 DEV. PSYCH. 201, 218 (2003).

does violence sell in a market of viewers, but it also sells in a market of purchasers—those who are buying the technology and the devices to commit acts of domestic violence are paying into an industry built on playing off of one’s need to control. Stalking devices, geolocation devices, and devices that allow for external control of the home have developed to enable the user to control another person.<sup>23</sup> Without proper legal regulation, the technology industry will continue to profit off violence.<sup>24</sup>

Part III discusses how domestic violence perpetrators are using modern technologies—including smart phones, social media sites, and smart home technologies—to abuse in new and insidious ways. In some instances, such technology has been wielded to amplify traditional forms of domestic violence, e.g., stalking and harassing. Part III explores how modern technology has changed the way that abuse occurs by allowing abusers to connect with victims, victims’ families, and victims’ homes through means not previously possible. Conversely, Part III discusses how new technology might aid domestic violence victims in breaking free from abuse.

Sometimes the law is wholly inadequate. This is true of the law that attempts to control harmful behavior attributable to new forms of technology. Policymakers and legislators have tried to address the harms they have observed, but such efforts are always reactionary and never predictive.<sup>25</sup> Maybe this is the way the law should be. But in the realm of violence, and specifically domestic violence, what legislators have done is ineffective.<sup>26</sup> This Article argues that if the United States wants to address the harms of the most recent forms of technology-enabled domestic violence, then we as a nation must look at what has already failed. In Parts I, II, and III, this Article discusses the relationship

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23. See Lo, *supra* note 17, at 283–84 (2021); Kate Lyons, *Stalkers Using Bugging Devices and Spyware to Monitor Victims*, THE GUARDIAN (Feb. 13, 2018), <https://www.theguardian.com/uk-news/2018/feb/13/stalkers-using-bugging-devices-and-spy-ware-to-monitor-victims>; see also Jennifer Valentino-DeVries, *Hundreds of Apps Can Empower Stalkers to Track Their Victims*, N.Y. TIMES (May 19, 2018), <https://www.nytimes.com/2018/05/19/technology/phone-apps-stalking.html> (“As digital tools that gather cellphone data for tracking children, friends or lost phones have multiplied in recent years, so have the options for people who abuse the technology to track others without consent.”).

24. See, e.g., Daniel Malan, *The Law Can’t Keep up With New Tech. Here’s How to Close the Gap*, WORLD ECON. F. (June 21, 2018), <https://www.weforum.org/agenda/2018/06/law-too-slow-for-new-tech-how-keep-up/> (“Law-abiding individuals and corporations spend inordinate amounts of time and money in search of legal loopholes in order to achieve technical compliance only, while others abuse the legal framework so that their criminal activities can remain undetected.”).

25. See *infra* Sections I.B, II.B.

26. See *infra* Sections I.B, II.B.



between the three forms of technology: television, video games, and smart devices. Specifically, how such technology mediums relate to the perpetration of domestic violence. Parts I, II, and III examine how technology has enabled violence and how policy and laws have emerged to address it.

Lastly, Part IV discusses viable solutions to the problem of technology-enabled domestic violence, particularly by changing the makeup of who needs to be part of the problem-solving. For too long, the problem solvers have been legislators or members of law enforcement.<sup>27</sup> Fundamentally, this has resulted in attempted solutions that have not addressed the harm and that have generally been blocked by courts.<sup>28</sup> Relying solely on legislators and courts has resulted in situations that do not adequately address technology-created harms. It is time to acknowledge the need for a wider and more diverse range of individuals and entities to be at the table.<sup>29</sup> To develop a comprehensive solution that will both address the root of technology-enabled domestic violence and survive constitutional challenge, an array of parties must play a role including law enforcement, domestic violence victims and advocates, as well as technology industry leaders and developers.<sup>30</sup>

#### I. TELEVISION AS AN ENABLER OF DOMESTIC VIOLENCE

This Part begins by discussing the relationship between the proliferation of television in American homes and domestic violence. Section A specifically discusses research studies that have explored the effect of television viewing on viewers' violent tendencies and violence in the home.

While the causes for the increase in violence are varied, state and national attempts through legislation and regulation have failed to significantly decrease the violence. Section B discusses the various attempts to address the rise in violence. Whether through proposed legislation, proposed regulations, or litigation, a multitude of people tried to curb the violence that grew with the rise of television. As Section B demonstrates, such attempts have largely failed.

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27. See generally Linda G. Mills, Peggy Grauwiler & Nicole Pezold, *Enhancing Safety and Rehabilitation in Intimate Violence Treatment: New Perspectives*, 121 PUB. HEALTH REP. 363 (July–Aug. 2006) (arguing that “more inclusive treatments may be applied to the complex range of intimate violence cases” and that domestic violence victims must be engaged in “designing their own safety plans”).

28. See *infra* Sections I.B, II.B.

29. See *infra* Part IV.

30. See *infra* Part IV.

A. *Studies Show How Television Has Enabled Domestic Violence*

To understand the relationship between television and domestic violence, it is necessary to determine whether television causes an increase in domestic violence incidents or whether the two are simply correlated. The introduction of television as a staple in American homes allowed for new ways of seeing and being in the world. Suddenly, the world became smaller and the people in it became much closer. Americans welcomed strange people and concepts into their lives on a daily basis. While some of this new culture and humanity changed life for the better, it also allowed for a relationship with violence that many had never seen or experienced. Television is among the top technologies to change the world in the twentieth century.<sup>31</sup> Numerous studies explored whether a link exists between television and increased violence.<sup>32</sup> This Section continues by discussing three such studies.

In the first study, researchers from the University of Michigan conducted a longitudinal observational study.<sup>33</sup> Researchers observed 329 children over a fifteen-year period to see how viewing violent television potentially affected them as adults.<sup>34</sup> The study accounted for the child's and their parents' IQs and socioeconomic statuses as well as the parents' education history, viewing habits, and a number of other factors that could have a disruptive effect on the data collected.<sup>35</sup>

The researchers also accounted for whether the children may have a predisposition to aggression causing them simply to be drawn to more violent television.<sup>36</sup> This is a significant question because drawing any kind of conclusion regarding causation as opposed to a simple correlation relies heavily upon an individual child's predisposition.<sup>37</sup> Children prone to aggression were

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31. See Donovan Alexander, *8 Inventions of 20th Century that Changed the World*, INTERESTING ENGINEERING (Apr. 29, 2019, 12:24 PM), <https://interestingengineering.com/innovation/8-inventions-of-20th-century-that-changed-the-world>.

32. See e.g., Jeffrey G. Johnson, Patricia Cohen, Elizabeth M. Smailes, Stephanie Kasen & Judith S. Brook, *Television Viewing and Aggressive Behavior During Adolescence and Adulthood*, 295 SCI. NO. 5564, 2468–71 (Mar. 2002).

33. Huesmann et al., *supra* note 22, at 201.

34. *Id.* at 201.

35. *Id.* at 214.

36. *Id.* at 201-02 (examining the possible predictable relationship between children that viewed violent television and their aggressive behavior about fifteen years later and discussing the theoretical background to such a longitudinal study).

37. See *id.* (“[A]ggressive children feel happier and more justified if they believe they are not alone in their aggression, and viewing media violence makes them feel happier because it convinces them that they are not alone.”).

drawn to violent television more than children not prone to aggression, likely because the violent television normalized the children's own violent behavior.<sup>38</sup> Researchers found while children prone to aggression watched more violent television, the television viewing also appeared to justify aggressive behavior and seemingly granted permission to behave in a way that society may otherwise quell.<sup>39</sup> Such justification for violent behavior then leads to an actual increase in aggressive behavior in adulthood,<sup>40</sup> thus creating or allowing for a cycle of violence.

The researchers further inquired whether a difference in violent or aggressive behavior and outcomes existed between the male and female participants. The researchers identified "three notable gender differences."<sup>41</sup> First, while increased violent television viewing positively correlated with increased violent behavior in all participants, female participants showed greater levels of indirect aggression as adults, such as taking a person's things or trying to get others to dislike a person.<sup>42</sup> Researchers postulated that this might be because indirect aggression is more socially acceptable for females than direct aggression.<sup>43</sup>

Second, males "who viewed TV violence *and* identified with [either] male aggressive TV characters or perceived TV violence [as what real life looks like] were most at risk for adult aggression," as compared to female participants.<sup>44</sup> In other words, while viewing violent television and identifying with violent television characters increased the risk for adult aggression for males, the same effect was not seen in female participants.<sup>45</sup>

The third notable difference was that "aggressive females may be more prone than aggressive males to use violent media to make themselves feel better and more justified about their own behavior."<sup>46</sup> So, while rates of violence in adulthood increased for both males and females after early violent television

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38. *Id.* at 217.

39. *Id.*

40. *See id.*

41. *Id.*

42. *Id.* at 207, 218.

43. *Id.* at 217 ("The social-cognitive observational learning model suggests that normative beliefs about aggression, hostile biases about the world, and aggressive social scripts are all learned from observing violence. Female participants did not need to have observed indirect aggression to acquire it from observing violence. They only needed to have acquired beliefs more accepting of aggression.").

44. *Id.*

45. *See id.* at 217–18.

46. *Id.* at 218.

viewing, females—more so than males—use the violent television as a means to justify their own aggression.

Ultimately, the study found a positive relationship between the level and amount of violence that the participants watched as young children and participants' aggression as adults.<sup>47</sup> Specifically, the researchers determined that for both females and males, “more childhood exposure to TV violence, greater childhood identification with same-sex aggressive TV characters, and a stronger childhood belief that violent shows tell about life ‘just like it is’ predicted more adult aggression.”<sup>48</sup> When children identified with particular television characters and those characters behaved aggressively, the children believed that that type of behavior was normal and thus the children became more aggressive in adulthood regardless of how aggressive they were prior to such television violence exposure.<sup>49</sup> Childhood exposure to media violence was “not just correlated with aggression but predicted increases or decreases in aggressive behavior.”<sup>50</sup>

It follows then that early childhood viewing of violent television is correlated with increased rates of violence in adulthood. The related next question is whether adults' viewing of television programming not considered to be violent<sup>51</sup> increases rates of violence in society. A 2011 study funded by the National Institute of Child Health and Human Development (NICHD) focused on the relationship between American football watching and domestic violence.<sup>52</sup>

In the NICHD study, researchers examined the relationship between a local professional football team's game outcomes and domestic violence, including the impact of a game's ongoing progress on domestic violence rates.<sup>53</sup> Based on previous research<sup>54</sup> that found violence increased on days when football games

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47. *Id.*

48. *Id.* at 216, 218.

49. *Id.* at 216.

50. *Id.*

51. In this context, “violent” conduct is defined as physical force used with the intent to hurt, damage, or kill someone or something, as opposed to behavior that may be aggressive, but is accepted within the context it is being used. *See Violent*, COLLINS DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/violent> (last visited Nov. 5, 2023).

52. See David Card & Gordon B. Dahl, *Family Violence and Football: The Effect of Unexpected Emotional Cues on Violent Behavior*, 126 Q. J. OF ECON. 103, 103 (2011).

53. *Id.* at 104–05.

54. *See id.* (discussing Walter Gantz, Zheng Wang & Samuel D. Bradley, *Televised NFL Games, the Family, and Domestic Violence*, in HANDBOOK OF SPORTS AND MEDIA 396 (Arthur A. Raney & Jennings Bryant eds., 2006) and Daniel I. Rees & Kevin T. Schnepel, *College Football Games and Crime*, 10 J. OF SPORTS ECON. 68 (2009)).

were on television, and especially when home team games were televised,<sup>55</sup> the NICHHD researchers specifically examined how an unpredicted win or loss affected rates of family violence.<sup>56</sup> To answer this question, researchers analyzed twelve years of data from the National Incident Based Reporting System (NIBRS) along with historical information from Sunday games of six National Football League (NFL) teams.<sup>57</sup>

Researchers collected data about violence between household members collected by the NIBRS and merged it with information from the six selected NFL teams that played during the time period.<sup>58</sup> Ultimately, the study found that a local or home team's upset loss led to a "10% increase in . . . [reported] at-home male-on-female intimate partner violence [IPV]."<sup>59</sup> Although disturbing, one may not be surprised to learn that an unexpected loss of a favored NFL home team is shown to increase the likelihood of domestic violence.<sup>60</sup> More surprising and more disturbing, however, is that the increased rate of violence for the fraction of the population viewing football on any given Sunday is akin to the spike on a hot day<sup>61</sup> and comparable to "one-third of the effect of a holiday like Memorial Day" or Independence Day when IPV increases by 30% and 29%, respectively.<sup>62</sup>

Further research on the relationship between televised sporting events and domestic violence reveals similar outcomes in other countries. For example, soccer matches in England and Scotland, including particularly high-profile matches like the Fédération Internationale de Football Association (FIFA) World Cup and popular rugby matches in Australia have all been linked to an increase

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55. See Card & Dahl, *supra* note 52, at 104–05.

56. *Id.* at 103–104 (defining family violence as "[v]iolence by men against members of their own family").

57. *Id.* at 105.

58. *Id.*

59. *Id.* Intimate partner violence (IPV) is differentiated from domestic violence in that it occurs between current or former romantic partners who may or may not live in the same home, whereas domestic violence is violence that occurs between individuals who reside in the same home, but who may or may not have a romantic relationship (e.g., a sibling, parent-child, or roommate relationship). See Olivia Moorer, *Intimate Partner Violence vs. Domestic Violence*, YWCA SPOKANE (Jan. 5, 2021), <https://ywcaspokane.org/what-is-intimate-partner-domestic-violence/>.

60. See Card & Dahl, *supra* note 52, at 140.

61. *Id.* (explaining IPV is 8% higher when the maximum temperature is over eighty degrees).

62. *Id.*

in IPV reports to police.<sup>63</sup> Thus, television—as a commonplace and readily available technology a significant number of people around the world have incorporated into their regular and daily life—is a significant factor enabling domestic violence.<sup>64</sup>

In contrast, a study examining television’s effect on domestic violence in India suggested that increased access to television and other forms of media may arguably curb rates of domestic violence.<sup>65</sup> In that study, researchers observed “the relation between domestic violence norms and exposure to television and radio.”<sup>66</sup> Researchers assessed access to radio and not just television because radio was a vital source of local public information for women involved in the study. In fact, the greatest difference in the acceptance of domestic violence appeared when women accessed both media together.<sup>67</sup> The study specifically analyzed household data from two cycles of India’s National Family Health Survey (NFHS) dating from 1998 to 1999 and from 2005 to 2006.<sup>68</sup> The results showed that “regularly accessing television and radio leads to a small but statistically significant reduction in the probability of women accepting domestic violence.”<sup>69</sup>

India is distinct from the United States in a variety of ways, but most pointedly here is how television permeated Indian culture. Introduced in 1959, nearly all of Indian television broadcasting was state-controlled.<sup>70</sup> It was not until the 1990s that private and foreign broadcasters entered the market and not until the early 2000s that soap operas were introduced in India.<sup>71</sup> Many of the new soap operas centered “around themes of family and gender and showed women protagonists who were independent and assertive, and who often had a career or

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63. See Simon Demers, *Research Review: Sporting Events and Domestic Violence*, CANADIAN ASS’N OF CHIEFS OF POLICE RSCH. FOUND. (2020), [https://cacp.ca/index.html?asst\\_id=2181](https://cacp.ca/index.html?asst_id=2181).

64. See Stephanie Kohlman, Amber Baig, Guy Balice, Christine DiRubbo, Linda Placencia, Kenneth Skale, Jessica Thomas, Jessica Flitter, Fereshte Mirzad, Hilary Moeckler & Shayne Aquino, *Contribution of Media to the Normalization and Perpetuation of Domestic Violence*, AUSTIN J PSYCH. BEHAV. SCI. (2014), <https://austinpublishinggroup.com/psychiatry-behavioral-sciences/fulltext/ajpbs-v1-id1018.php>.

65. See Kuhuk Bhushan & Prakarsh Singh, *The Effect of Media on Domestic Violence Norms: Evidence from India*, 9 THE ECON. OF PEACE AND SEC. J. 58, 59 (2014).

66. *Id.* at 58.

67. *Id.* at 61.

68. *Id.* at 59.

69. *Id.* at 58.

70. *Id.* at 59.

71. *Id.*

worked outside the home.”<sup>72</sup> Researchers reviewed answers from women in response to being asked about when, given four possible scenarios, a husband would be justified in beating his wife.<sup>73</sup>

Researchers ultimately found that “regularly accessing both television and radio ha[d], over time, a small but statistically significant effect on reducing the probability of women accepting violence.”<sup>74</sup> In fact, the effect was equivalent to women having “three additional years of education” in respect to their willingness to accept domestic violence.<sup>75</sup> This suggests that access to radio and television may have the effect of reducing women’s acceptance of violence based on a woman’s changed individual understanding of her social status and related autonomous power.<sup>76</sup>

*B. Attempts to Address Domestic Violence Through Legislation, Regulation, and Movements*

What does this mean for policymakers and those attempting to address domestic violence? Is television the enabler or the answer? In the United States, most policy discussions focus on the theory that television is the enabler and thus, must be regulated. The federal government first conducted investigations into the efficacy of television regulation in the 1950s.<sup>77</sup> Specifically, the studies began looking at the “extent of television violence.”<sup>78</sup> Congress conducted investigations from the mid-1950s to mid-1960s.<sup>79</sup> In 1968, fourteen years after the studies began, U.S. President Lyndon B. Johnson established the Eisenhower Commission on the Causes and Prevention of Violence.<sup>80</sup>

In 1974, in response to pressure from the Federal Communications Commission (FCC), which was in turn receiving pressure from congressional committees, the three main television networks<sup>81</sup> and the Television Code

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72. *Id.*

73. *Id.* at 59–60 (explaining the four scenarios as (1) if the wife left the home without telling her husband, (2) if the wife neglected the household or children, (3) if the wife did not cook food properly, and (4) if the husband suspected the wife of being unfaithful).

74. *Id.* at 62.

75. *Id.* at 61.

76. *See id.* at 58–59, 62–63.

77. *See* Julia W. Schlegel, *The Television Violence Act of 1990: A New Program for Government Censorship?*, 46 FED. COMM’N L.J. 187, 188 (1993).

78. *Id.* at 190.

79. *Id.* at 188.

80. *See* Exec. Order No. 11,412, 33 Fed. Reg. 8583 (June 12, 1968).

81. American Broadcasting Company (ABC), National Broadcasting Company (NBC), and Columbia Broadcasting System (CBS).

Review Board of the National Association of Broadcasters adopted the Family Viewing Policy.<sup>82</sup> This policy outlined the type of programming that could be shown at particular times of the day, primarily “during the early evening hours when the whole family might be watching.”<sup>83</sup> The policy was voluntary and ultimately did not change the amount of violence broadcasted.<sup>84</sup> In fact, by 1976, the U.S. District Court for the Central District of California found the “family hour” or “family viewing policy” unenforceable and in violation of the First Amendment.<sup>85</sup> The court held that “[b]y engaging in a [monopolistic and] concerted plan to cause industry-wide delegation of programming authority,” the FCC subverted “the decentralized character” of American television broadcasting and thereby “imperiled” viewers’ First Amendment rights.<sup>86</sup>

It was not until 1990 that Congress finally acted, and passed the Television Violence Act.<sup>87</sup> The purpose of the Act was to allow the television networks to jointly agree on standards without violating anti-trust laws.<sup>88</sup> The legislation gave the networks the ability to meet and discuss violence on television, but it did not require them to comply nor did it give Congress any ability to enforce the Act.<sup>89</sup> The legislation did very little to change the type of programming and, in fact, had no authority to force television networks to do anything other than to convene and discuss possible guidelines to reduce violent television.<sup>90</sup> According to former U.S. Senator Paul Simon, who introduced the original bill, the Television Violence Act “simply permit[ed] the industry to establish standards on violence on a voluntary basis for limited purposes and a limited time.”<sup>91</sup>

Shortly after the passage of the Television Violence Act, Congress passed the next act in a series of acts intended to curb violence on television.<sup>92</sup> The Children’s Television Violence Act of 1990 was intended to reduce the amount of advertising during children’s programming and increase the number of

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82. Schlegel, *supra* note 79, at 190–91.

83. See David Black, *Inside TV’s ‘Family Hour’ Feud*, N.Y. TIMES (Dec. 7, 1975), <https://www.nytimes.com/1975/12/07/archives/inside-tvs-family-hour-feud-inside-the-family-viewing-hour-feud.html>.

84. *Id.*

85. *Writers Guild of America W., Inc. v. FCC*, 423 F. Supp. 1064, 1161 (C.D. Cal. 1976).

86. *Id.* at 1143–44.

87. Schlegel, *supra* note 77, at 194.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 188–89.

92. See *id.* at 195.



educational programs for children.<sup>93</sup> Similar to its predecessor, the Children's Television Violence Act was poorly enforced and poorly followed.<sup>94</sup> In 1993, the FCC finally started to take the intention of the Act seriously by refusing to designate certain programming as educational and refusing to renew licenses of networks that failed to comply with the requirements.<sup>95</sup>

The Television Violence Act and Children's Television Violence Act were followed by a series of actions by U.S. senators and representatives attempting to address violence in society.<sup>96</sup> Such attempts included telling "television networks to figure out a way to label violence in programming," introducing legislation "that required the installation of a so-called V-chip in all new television sets," introducing a bill to "ban 'gratuitous violence' from television," and introducing legislation to "ban violent television programs when children are 'reasonably likely' to compose a 'substantial part of the audience.'"<sup>97</sup> The problem with many of these attempts to regulate violence on television was that the regulations' definitions of violence were overly broad, thereby allowing for restriction of protected speech.<sup>98</sup>

Despite the investigations conducted by Congress and the passage of both the Television Violence Act and the Children's Television Violence Act to

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93. See *id.* at 195–96; Jeremy Gerard, *House Passes Bill to Restrict Ads on Children's Television Programs*, N.Y. TIMES (July 24, 1990), <https://www.nytimes.com/1990/07/24/us/house-passes-bill-to-restrict-ads-on-children-s-television-programs.html> (stating that the Act "would limit advertising to 10 1/2 minutes per hour on weekends and 12 minutes per hour on weekdays, placing a cap on advertising that has grown in the six years since deregulation" and the Act "would mean that children's programs would be permitted to carry about the same amount of advertising as programming aimed at adults in prime time").

94. See Schlegel, *supra* note 77, at 196 (explaining that the Federal Communications Commission (FCC) was required to enforce the Act, but only acted if a formal complaint was filed challenging a television station's compliance, meaning that the FCC was not monitoring compliance on its own).

95. *Id.*

96. See, e.g., Daniella Perry, *Television on Television Violence: Perspectives from the 70s and 90s*, OPEN VAULT, [https://openvault.wgbh.org/exhibits/television\\_violence/article](https://openvault.wgbh.org/exhibits/television_violence/article) (last visited Nov. 5, 2023) (discussing the Television Communications Act of 1996); Lauren-Brooke Eisen, *The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System*, BRENNAN CTR. FOR JUST. (Sept. 9, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice> (discussing the history and legacy of the Violent Crime Control and Law Enforcement Act of 1994).

97. *Id.*

98. See e.g., *Action for Child's Television v. FCC*, 58 F.3d 654, 669 (D.C. Cir. 1995) (holding that the FCC's attempted regulation of radio and television broadcasters in regard to when certain material could be broadcast unnecessarily interfered with First Amendment protections).

address increasing rates of violence, no lawsuit has ever been successful in proving a link between an individual's television consumption and violent action.<sup>99</sup> U.S. courts have routinely sided with broadcasters in challenges regarding television violence.<sup>100</sup> The basis for this, as one might expect, is freedom of speech as guaranteed by the First Amendment.<sup>101</sup>

The U.S. Supreme Court, very notably, has cautioned against the suppression of speech, even if that speech may be violent in nature. In *Brandenburg v. Ohio*,<sup>102</sup> the court struck down an Ohio statute under which a Ku Klux Klan leader was arrested for his speech at a Klan rally.<sup>103</sup> The court determined that the statute was overly broad because it prohibited speech without specifying that the speech did in fact incite "imminent lawless action," the second prong of the constitutional test<sup>104</sup> necessary to legally prohibit speech acts.<sup>105</sup> Further, lower courts have ruled primarily on legal grounds, citing to the First Amendment right to free speech, without ever considering the social science data.<sup>106</sup> Therefore, "courts have usually found that violence in programming

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99. Research for this Article did not yield a single lawsuit in which the deciding court found a link between television consumption and violent action. See *Freedom of Expression in the Arts and Entertainment*, ACLU (Feb. 27, 2002), <https://www.aclu.org/documents/freedom-expression-arts-and-entertainment> ("If there really were a clear cause-and-effect relationship between what normal children see on TV and harmful actions, then limits on such expression might arguably be warranted.").

100. See e.g., *Olivia N. v. Nat'l Broad. Co.*, 126 Cal. App. 3d 488, 494–95 (1981) (holding that plaintiff's attempt to hold television broadcasters liable for damages on simple negligence would violate First Amendment free speech guarantees).

101. See U.S. CONST. amend. I.

102. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

103. *Id.* at 444–45; see also *id.* at 446 (showing that the Klan leader's speech included anti-Semitic and anti-black comments, as well as alleging that "there might have to be some revengeance taken" if the government continued to "suppress the white, Caucasian race").

104. *Id.* at 447 (explaining that the government may prohibit speech that (1) is "directed to inciting or producing imminent lawless action" and (2) is "likely to incite or produce such action").

105. See *id.* at 445–46 (explaining the law prohibited advocating "crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform," as well as assembling "with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism").

106. See e.g., *Writers Guild of America W., Inc. v. FCC*, 423 F. Supp. 1064, 1143–44 (C.D. Cal. 1976) (holding that FCC's attempt to regulate television programming was a violation of television viewers' First Amendment rights); *Olivia N. v. Nat'l Broad. Co.*, 126 Cal. App. 3d 488, 494–95 (1981) (holding that plaintiff's attempt to hold television broadcasters liable for damages on simple negligence would violate First Amendment free speech guarantees); *Zamora v. Columbia Broad. Sys.*, 480 F. Supp. 199, 205 (S.D. Fla. 1979)

cannot be regulated without creating a chilling effect on its content.”<sup>107</sup>

With routine regularity, U.S. courts refuse to hold broadcasting networks or television producers responsible for alleged harms caused by programming. In 1979, the Southern District Court of Florida barred a cause of action against three broadcasting networks on First Amendment grounds where a minor plaintiff claimed he had become involuntarily addicted to “extensive viewing of television violence.”<sup>108</sup> The plaintiff alleged that the networks were responsible for the development of his sociopathic personality, and that viewing their violent programming desensitized him to violent behavior, resulting in the plaintiff murdering his elderly neighbor.<sup>109</sup> The court dismissed the case with prejudice, stating that restricting network programming violated the First Amendment rights of the networks.<sup>110</sup>

In 1981, the Supreme Court of Georgia reviewed a case in which an eleven-year-old attempted to recreate a sound effect using a BB pellet and a balloon as demonstrated on a children’s television program.<sup>111</sup> The plaintiff, using alternative materials, was partially blinded by a piece of lead that he used in place of a BB pellet.<sup>112</sup> The court granted summary judgment in favor of the defendant because the words uttered during the program did not rise to the level of a “clear

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(dismissing with prejudice parents’ claim that broadcasts by three television networks caused their son to become sociopathic and murder their neighbor because restricting television programming violated the First Amendment rights of the networks); *Walt Disney Prod. Inc. v. Shannon*, 276 S.E. 2d 580, 583 (Ga. 1981) (deciding in favor of defendants in a suit brought by person injured while trying to recreate a demonstration on a children television program and ruling on First Amendment grounds that the words uttered in the program did not constitute a clear and present danger); *DeFilippo v. Nat’l Broad. Co.*, 446 A.2d 1036, 1039 (R.I. 1982) (denying parents’ claim on behalf of a child who died after imitating the action of a person on television on First Amendment grounds because recovery by plaintiffs would “inevitably lead to self-censorship on the part of broadcasters” and content-based regulation); *Wilson v. Midway Games, Inc.* 198 F. Supp. 2d 167, 181, 183 (D. Conn. 2002) (dismissing private lawsuit by mother claiming her child died because of a depiction of violent acts in a video game because her claim of negligent and intentional infliction of emotion distress was precluded by the First Amendment); *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1184–85 (W.D. Wash. 2004) (holding Washington State law banning the sale of certain video games as unconstitutional because it violated free speech protections of the First Amendment); *Brown v. Ent. Merchs Ass’n.*, 564 U.S. 786, 805 (2011) (ruling that California’s attempt to regulate the sale and distribution of video games violated free speech protections).

107. See Craig R. Smith & Rebecca DeVerter, *Violence & Media*, FREEDOM F. INS. (Feb. 2018) (available upon request); see also cases cited *supra* note 106.

108. *Zamora*, 480 F. Supp. at 200.

109. *Id.*

110. *Id.* at 207.

111. *Shannon*, 276 S.E.2d at 580.

112. *Id.* at 581.

and present danger” and therefore constituted protected speech under the First Amendment.<sup>113</sup>

In 1982, the Supreme Court of Rhode Island ruled on a case involving a “hanging” stunt performed by a professional stuntman on NBC.<sup>114</sup> The lower court granted a summary judgment motion in favor of the defendant, declining to hold the network liable for the death of the plaintiff’s son after the son imitated the stuntman and accidentally hanged himself.<sup>115</sup> The state supreme court upheld the ruling, determining that the broadcast did not constitute incitement and that recovery was otherwise barred by the First Amendment as it would “inevitably lead to self-censorship on the part of broadcasters” and content-based regulation.<sup>116</sup>

The above cases constitute a small sample of cases dealing with speech regulation. Overall, courts are very hesitant to limit speech of any kind,<sup>117</sup> even if there is a risk of danger.<sup>118</sup> In 1927, in a concurring opinion joined by former Justice Oliver Wendell Holmes, former U.S. Supreme Court Justice Louis Brandeis wrote:

Fear of serious injury cannot alone justify suppression of free speech . . . Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.<sup>119</sup>

As shown, whether television leads to increased levels of violence in society is not necessarily a settled matter. Yet, there is evidence that television enables violence such as increased rates of violence in adults exposed to violent television as young children. Similarly, rates of domestic violence increase on

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113. *Id.* at 580.

114. *DeFilippo v. Nat’l Broad. Co.*, 446 A.2d 1036, 1037 (R.I. 1982).

115. *Id.* at 1038.

116. *Id.* at 1042.

117. *See RAV v. City of St. Paul*, 505 U.S. 377, 377–78 (invalidating a city ordinance that prohibited the burning of a cross on the lawn of an African American family; the Court found the ordinance to be overly broad in its application because it prohibited constitutionally protected speech).

118. *See* Geoffrey R. Stone & Eugene Volokh, *Freedom of Speech and the Press*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-i/interpretations/266> (“[M]ost other content-based restrictions on speech are presumptively unconstitutional. Even entertainment, vulgarity, ‘hate speech’ (bigoted speech about particular races, religions, sexual orientations, and the like), blasphemy (speech that offends people’s religious sensibilities), and violent video games are protected by the First Amendment.”).

119. *Whitney v. California*, 274 U.S. 357, 376 (1927).

days when perpetrators watch football, and the predicted winner of the game loses. Notably, some evidence suggests that in cultures where education for women is at a premium and where societal norms allow for increased levels of domestic violence, increased consumption of television and radio may alternatively lower domestic violence levels. Whatever the results of these important studies, U.S. courts regularly refuse to limit speech in response to any regulatory or statutory attempt to limit violence on television. Upholding the First Amendment shield as a categorical bar, courts will allow violent speech rather than place an unconstitutional restriction on it.

## II. VIDEO GAMES AS AN ENABLER OF DOMESTIC VIOLENCE

This Part discusses the relationship between video games and domestic violence. Despite some assumptions and attempts to show that violent video games cause or are correlated with increased actual violence, research does not definitively show this relationship.<sup>120</sup> A review of studies examining the link between violent video games and violent behavior shows a spectrum of results.<sup>121</sup> While some research suggests a positive correlation between violent video games and violent behavior,<sup>122</sup> other evidence shows that, under the right conditions, video games and virtual reality technology can potentially be used to curb violent and aggressive tendencies.<sup>123</sup> Despite this mixed research, many law and policy initiatives have attempted to limit the level and amount of violence by restricting the ability to purchase and play video games and requiring video games to be labelled with restrictive ratings.<sup>124</sup> As was true with restrictions and ratings for television, any attempts to limit access to and the content of video games has almost uniformly been denied by state and federal courts.<sup>125</sup>

Video games are not a spinoff from television, nor are they a natural development from other traditional games like board games. Video games are their own inventive creation, first coming out as early as 1958.<sup>126</sup> Still, video

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120. See, e.g., *History of Video Games*, PROCON.ORG, <https://videogames.procon.org/history-of-violent-video-games/> (June 8, 2021) [hereinafter PROCON.] (“Defenders of violent video games argue that the research has failed to show a causal link between video games and real-world violence. They argue that correlations between video games and violent behavior can be explained by youth predisposed to violence being attracted to violent entertainment.”).

121. *Id.*

122. See *infra* Section II.A.

123. See *infra* Section II.A.

124. See *infra* Section II.B.

125. See *infra* Section II.B.

126. *October 1958: Physicist Invents First Video Game, in This Month in Physics History*, in 17 AM. PHYSICAL SOCIETY NEWS (Oct. 2008).

games are an interesting combination of television and traditional games. While requiring participant interaction and investment, video games are also viewed on a screen—or most recently in a virtual reality—which makes the game playing much more realistic and even personal.<sup>127</sup> The game play is active, not passive. As such, it is important to explore how video games can affect violence in viewers and participants.

#### A. *Studies Linking Video Games to Violence*

Violence in video games, and thus controversy over viewership of video games, started in the mid-1970s with the release of a game called *Death Race*.<sup>128</sup> As soon as video games like *Death Race* made their popular debut, alarms sounded with concern that participation in playing and viewing violence in a video game would lead to violent behavior in real life.<sup>129</sup> Studies yielded a confusing mix of results showing both that violent video games increased adolescent aggression<sup>130</sup> and that exposure to some games might instead “protect against interpersonal violence.”<sup>131</sup>

Two scientific theories emerged that address the possible effects of video game violence. One theory asserts that video games increase violence by teaching individual players how to be violent and reinforcing a player’s already violent tendencies.<sup>132</sup> The second theory claims that players of violent video games use the games as an outlet for aggression, thereby neutralizing or even decreasing aggression and having a beneficial effect on players’ mental health.<sup>133</sup>

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127. See generally Isabela Granic, Adam Lobel & Rutger C. M. E. Engels, *The Benefits of Playing Video Games*, 69 AM. PSYCH., 66–78 (Jan. 2014) (discussing how video game play can benefit children based on being more realistic for, and personal to, the player).

128. See *A Timeline of Video Game Controversies*, NAT’L COAL. AGAINST CENSORSHIP, <https://ncac.org/resource/a-timeline-of-video-game-controversies> (last visited Nov. 5, 2023) [hereinafter NAT’L COAL. AGAINST CENSORSHIP] (describing *Death Race* as the first controversial video game).

129. See Nicholas David Bowman, Sun Joo Ahn & Laura M. Mercer Kollar, *The Paradox of Interactive Media: The Potential for Video Games and Virtual Reality as Tools for Violence Prevention*, 5 FRONTIERS IN COMM’N 1, 4–5 (2020).

130. See Rong Shao & Yunqiang Wang, *The Relation of Violent Video Games to Adolescent Aggression: An Examination of Moderated Mediation Effect*, 10 FRONTIERS IN PSYCH. 1, 7 (2019).

131. Bowman, *supra* note 129, at 1.

132. See, e.g., Ryan C. W. Hall, Terri Day & Richard C. W. Hall, *A Plea for Caution: Violent Video Games, the Supreme Court, and the Role of Science*, 86 MAYO CLINIC PROCS. 315, 315 (2011), [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3068891/pdf/mayoclinproc\\_86\\_4\\_008.pdf](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3068891/pdf/mayoclinproc_86_4_008.pdf).

133. *Id.*

These theories are heavily debated. For example, a side-by-side comparison by ProCon.Org of different arguments for and against the theory that violent video games increase violence in players that resulted in nine arguments in support of the theory and nine against.<sup>134</sup> It seems that for every study showing violent video game play increases violent and aggressive tendencies in players, another study shows the opposite. Notably, some studies indicate that video games actually help players build empathy and prosocial behaviors.<sup>135</sup>

The following Section discusses the relevant arguments of (1) whether violent video games cause an increase in aggression and (2) whether video games that portray violence against women increase harmful attitudes and sexual violence toward women.

### 1. Do Violent Video Games Cause Violent or Aggressive Behavior?

Several studies show a correlation between violent video games and violent behavior. Most of the studies seem to focus on child and adolescent behavior. For example, a study published in 2014 in the *Journal of the American Medical Association* found a causal link between a player regularly playing violent video games and the person's increased aggressive behavior in the long-term.<sup>136</sup> In this study, researchers observed a total of 3,034 children and adolescents over a three-year period from twelve schools in Singapore.<sup>137</sup> The study participants completed yearly surveys that measured "aggressive behavior, with aggressive cognitions . . . and empathy as potential mediators" with the goal of understanding the effects of violent video game play.<sup>138</sup> The results of the study showed that "habitual violent video game play increases long-term aggressive behavior by producing general changes in aggressive cognition."<sup>139</sup> Several other studies also show that there is a greater likelihood of "children who play M-

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134. PROCON, *supra* note 120.

135. See, e.g., Matthew Grizzar, Ron Tamborini, Robert J. Lewis, Lu Wang & Sujay Prabhu, *Being Bad in a Video Game Can Make Us More Morally Sensitive*, CYBERPSYCH., BEHAV., AND SOC. NETWORKING, (July 2014) (discussing study findings "indicat[ing] that committing 'immoral' virtual behaviors in a video game can lead to increased moral sensitivity of the player").

136. Douglas A. Gentile, Dongdong Li, Angeline Khoo, Sara Prot, Craig A. Anderson, *Mediators and Moderators of Long-Term Effects of Violent Video Games on Aggressive Behavior*, 168 JAMA PEDIATRICS 450, 456 (2014).

137. *Id.* at 451.

138. *Id.* at 450.87ryyhuhng

139. *Id.* at 456.

rated<sup>140</sup> games” exhibiting aggressive behavior including bullying, physical aggression with peers, and arguing with teachers.<sup>141</sup>

At the same time, a handful of other studies indicate that video games are not necessarily the cause of violent behavior but of *more* aggressive behavior.<sup>142</sup> The authors of these studies point out a difference between violence and aggression.<sup>143</sup> In a YouTube Learning Series, Producer Lauren Farrar stated that “everything that is violent is aggressive, but not everything that is aggressive is violent. . . .”<sup>144</sup> The research on the effects of violent video games and behavior often looks at these milder forms of aggressive behavior.<sup>145</sup> In other words, researchers often fail to distinguish between merely aggressive conduct like “getting frustrated, yelling, talking back, [and] arguing” and conduct that is both aggressive and violent.<sup>146</sup> Further, these studies indicate that any video game depicting competition will increase aggression in players, not just video games identified as violent.<sup>147</sup>

A 2011 study examining the effects of video games on violence and competitiveness found that competitiveness, not violent content, in video games was responsible for elevating short-term aggressive behavior.<sup>148</sup> A 2013 follow-up study by the same researchers looked further at the possible causal relationship between aggressive personalities and competitive game choice, asking<sup>149</sup> whether competitive video game play “predicts aggression over time” or whether “aggression predicts competitive video game play.”<sup>150</sup> This study suggested that, while an association exists between competitive video game

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140. M-Rated is defined by the Entertainment Software Rating Board (ESRB) as content that is appropriate for people who are seventeen years old and older, and which may have “intense violence, blood and gore, sexual content and/or strong language.” *Ratings Guide*, ENT. SOFTWARE RATING BD., <https://www.esrb.org/ratings-guide/>.

141. PROCON, *supra* note 120.

142. *Id.*

143. See Paul J. C. Adachi & Teena Willoughby, *The Effect of Video Game Competition and Violence on Aggressive Behavior: Which Characteristic Has the Greatest Influence?*, 1 PSYCH. OF VIOLENCE 259, 273 (2011).

144. Lauren Farrar, *Are Video Games Really Making Us More Violent?*, KQED (Jan 8, 2020), <https://www.kqed.org/education/533045/are-video-games-really-making-us-more-violent>.

145. *Id.*

146. *Id.*

147. PROCON, *supra* note 120.

148. See Adachi & Willoughby, *supra* note 143, at 273.

149. *Id.*

150. *Id.*



playing and aggression, the increase in aggression seen among adolescents playing video games also results from competitive activities in general.<sup>151</sup>

Based on the extreme conclusions of these studies, it is difficult to know whether video games cause violent behavior, have a neutral effect on players, or do in fact create positive outcomes for players. Regardless, it seems likely video games that depict and often encourage violence have some kind of effect on the those who play them.<sup>152</sup> As discussed in the following Section, it is especially likely that games depicting violence against a specific group of people, such as women, will have a particular effect on attitudes and behaviors toward that group.

## 2. Do Violent Video Games Lead to Increased Violent Actions Towards Women?

Several studies offer similar contradictory results regarding correlations between violent video games and harmful attitudes and behaviors towards women. In a 2012 study published in the *Journal of Interpersonal Violence*, researchers found increased rape myth acceptance, i.e., rape-supportive attitudes, in male study participants who played video games “[that involved the] sexual objectification of women and violence against women.”<sup>153</sup> Such results did not appear for female study participants.<sup>154</sup> Researchers in the study used actual video games to help understand how portrayals of women influence both male and female undergraduate players.<sup>155</sup> The video games included violent, negative, and sexist portrayals of women.<sup>156</sup>

The researchers found that it was not “the degree of exposure (hours played) to violent video games” that increased negative attitudes towards women, but the “sexual objectification of women and violence against women in video games [that] increase[d] rape myths in male participants.”<sup>157</sup> The researchers noted that the results supported prior research suggesting that portrayals of sexual violence in media reduced men’s sympathy toward rape victims.<sup>158</sup> Based on these similar

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151. *Id.*

152. *See* Gentile et al., *supra* note 136, at 456.

153. Victoria Simpson Beck, Stephanie Boys, Christopher Rose & Eric Beck, *Violence Against Women in Video Games: A Prequel or Sequel to Rape Myth Acceptance?*, 27 J. OF INTERPERS. VIOLENCE 3016, 3024 (2012).

154. *See id.*

155. *Id.* at 3020.

156. *Id.*

157. *Id.* at 3025.

158. *Id.* at 3025–26.

findings,<sup>159</sup> the American Psychological Association issued a resolution in 2005, updated most recently in 2020, confirming “a direct association between violent video game use and aggressive outcomes” and “increases in aggressive behavior, aggressive affect, aggressive cognitions and decreases in prosocial behavior, empathy, and moral engagement.”<sup>160</sup>

On the other hand, although less starkly contradictory as some of the prior pro and con studies, evidence suggests that “by age seven children can distinguish fantasy from reality and can tell the difference between video game violence and real-world violence.”<sup>161</sup> This distinction means that what players see and do through video games does not translate into their respective beliefs or actions in the real world. Players may not actually see games as a reflection of reality but rather see games as just that—games.<sup>162</sup>

### 3. Prosocial Effects of Video Games

Surprisingly, some studies dealing with video games and violence focusing on whether video game play—even violent video game play—could reduce violent tendencies in individuals yield intriguing results. Several studies looked at the possibility of using violent video games to reduce violence among certain populations and helping perpetrators of violence gain a better understanding of themselves as well as victims of violence.<sup>163</sup>

In an article looking at the “paradox” of video games and virtual reality as a way to prevent violence, authors looked at studies that used survey data of

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159. See e.g., Patricia Arriaga, Maria Benedicta, Monteiro & Francisco Esteves, *Effects of Playing Violent Computer Games on Emotional Desensitization and Aggressive Behavior*, J. OF APPLIED SOC. PSYCH., 1900, 1919 (2011) (finding that even short-term play of violent video games, as opposed to long-term repeated exposure to violent video games, can lead to emotional desensitization in players); Happ, C., Melzer, A., & Steffgen, G, *Superman v. BAD Man? The Effects of Empathy and Game Character in Violent Video Games*, CYBERPSYCH., BEHAV., AND SOC. NETWORKING, 1, 1–7 (2013) (showing that video game players who played violent games had an increased likelihood of engaging in aggressing behavior than those without a habit of playing violent games).

160. *Resolution on Violence in Video Games and Interactive Media*, AM. PSYCH. ASS’N, 1–2 (Aug. 17, 2005), <https://www.apa.org/about/policy/resolution-violent-video-games.pdf>.

161. Sasha Emmons, *Is Media Violence Damaging to Kids?*, CNN (Feb. 21, 2013, 1:18 PM), <https://www.cnn.com/2013/02/21/living/parenting-kids-violence-media/index.html>.

162. See Steven Malliet, *An Exploration of Adolescents’ Perceptions of Videogame Realism*, 31 LEARNING MEDIA AND TECHN. 377, 392 (2006) (“In general, it may be concluded that gamers are rather sceptical [sic] towards looking at games as a reflection of, or a source of, information about reality.”).

163. Bowman et al., *supra* note 129, at 1.

players to gauge their emotional reactions to the games they played.<sup>164</sup> The data showed that “adults who play video games on a regular basis understand more nuanced portrayals of violence on more contemplative, serious, and humanistic terms.”<sup>165</sup> Further, “[e]xperimental data focused on feelings of guilt have shown that when players are forced to commit acts of unjustified violence, post-gameplay guilt reactions are increased.”<sup>166</sup> Ultimately, the authors suggest that “violent video game content might ‘encourage critical engagement with real world issues and problems, including forms of violence.’”<sup>167</sup> Arguably, this is an important recognition that must be further studied and developed because it contradicts prevailing thoughts on what happens to those who play violent video games and are thereby rewarded for their increased violent action.<sup>168</sup>

The idea of learning and understanding the perspective of another may have been the impetus behind the creation of a “non-digital card based simulation game” created by the Washington State Coalition Against Domestic Violence called *In Her Shoes*.<sup>169</sup> The card game is designed to expose players to the complex experiences of domestic violence survivors to “incite[] social empathy.”<sup>170</sup> Participants must specifically identify challenges faced by domestic violence victims who are in the midst of trying to survive abusive relationships and in turn, confront many of the “victim-blaming myths” surrounding domestic violence.<sup>171</sup> The idea of shifting perspective is a key element in video games that can be used to build empathy in players.<sup>172</sup> Moreover, the ability to experience a different perspective from that of a participant’s daily lens “allows for a deeper exploration of . . . ethical issues” and presents a greater opportunity to synthesize and contemplate such differing perspectives.<sup>173</sup>

This perspective-shifting effect is demonstrated by the results of previously mentioned studies regarding virtual reality gaming.<sup>174</sup> In virtual reality, as

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164. *See id.* at 2.

165. *Id.* at 6.

166. *Id.*

167. *Id.* at 7.

168. *See id.* at 11.

169. Siouxsie, *How Video Games Can Change the World for Domestic Violence Survivors*, THE ARTIFICE (Nov. 22, 2021), <https://the-artifice.com/games-domestic-violence/>.

170. *Id.*

171. *Id.*

172. *See id.*

173. *Id.*

174. *See, e.g.*, Bowman et al., *supra* note 129, at 4, 7–10 (depicting results from a plethora of studies regarding virtual reality gaming).

opposed to traditional video games, users are immersed in an experience that can “feel as authentic as experiences in the real world.”<sup>175</sup> Players using virtual reality can, therefore, “experience firsthand the gruesome reality of surviving in a warzone or living life as a refugee.”<sup>176</sup> One study examined the effects of violent virtual reality settings on the reactions of males with a history of domestic violence.<sup>177</sup> Researchers found that recognition of fear in female faces was more difficult for males who had committed acts of domestic violence than for males who had not.<sup>178</sup> Once experiencing domestic violence as a female victim, the male participants’ abilities to “recognize fear in a female face improved and their tendency” to misidentify fear as happiness decreased.<sup>179</sup> These findings have the potential to drastically change how society deals with and addresses violent behavior broadly and domestic violence specifically. If a video game can truly impact long-term behavior changes for the better, the possibilities for other prosocial gaming are vast.

### *B. Attempts to Address Violence Through Legislation*

As with attempts to limit violence in television, national and state leaders have tried various legislation<sup>180</sup> and regulations to limit the type of violence and the audience for video games in the United States.<sup>181</sup> However, it has not just been through official state action that video game distribution has been limited. The general public has also significantly influenced early distribution of video games. As early as 1976—only five years after the release of the first video

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175. *Id.* at 7.

176. *Id.*

177. *See id.* at 9.

178. *See id.*

179. *See id.*

180. *See, e.g.*, Gerald Barrett, OLR RSCH. REP., 2008-R-0233, LEGIS. AND VIDEO GAME VIOLENCE (2008) (showing that in July 2005, Illinois passed the Safe Games Illinois Act that criminalized the sale, renting, or permitting of a violent or sexually explicit video game to a minor as a Class A misdemeanor); *see also id.* (explaining that in July 2007, a bill was introduced in the U.S. House of Representatives as the Children Protection from Video Game Violence & Sexual Content Act); *id.* (explaining that the bill sought to both direct the Federal Trade Commission to review video game ratings and the Government Accounting Office to study impacts of video games on children and young adults).

181. *See, e.g., id.* (showing that in October 2005, California passed the “Ultra violent Video Games” bills that banned the sale of violent video games and required signs explaining the regulations anywhere such games were sold); *see also id.* (explaining that in June 2006, Louisiana passed a regulation allowing judges to decide the appropriateness of video games for minors based on pre-established criteria and gave the authority for judges to order that games be pulled from store shelves).

game—public outcry regarding *Death Race*, a video game where the player earned points for running over “gremlins,” caused manufacturers to remove the game from the market.<sup>182</sup> According to video game historian Steve L. Kent, the uproar about *Death Race* “was that you heard this little [audible cry of] ‘ahhkh’ when . . . [a character] got hit, and a little gravestone came up.”<sup>183</sup> Again in 1983, the public protested at the release of a game called *Custer’s Revenge* which included a depiction of a man and woman having sex, with critics saying it was a rape.<sup>184</sup> The game never had much success.<sup>185</sup>

It was not until 1993, with the release of the three video games *Night Trap*, *Mortal Combat*, and *Doom*, that Congress participated in conversations about video game violence and held hearings regarding the violence in the three games.<sup>186</sup> As a result of the hearings, toy stores voluntarily removed the game *Night Trap* and, one year later, the Entertainment Software Industry voluntarily established the Entertainment Software Ratings Board (ESRB), which is responsible for assigning age and content ratings to video games.<sup>187</sup> The establishment of the ESRB also avoided potential government regulation.<sup>188</sup> Even though the ESRB rating system was voluntary, most games were submitted for rating “because many retail stores prohibit[ed] the sale of unrated video games and the major console manufacturers [would] not license games for their systems unless they [carried] ESRB ratings.”<sup>189</sup>

Soon after, as video game play became more common, and especially after violent public attacks piqued national attention, legislation and litigation began. In 1999, after a school shooting in Kentucky killed three students and injured five others, parents of the three murdered students sued several computer game companies claiming that the companies “manufactured and/or supplied to [the shooter] violent video games which made the violence pleasurable and attractive, and disconnected the violence from the natural consequences thereof, thereby causing [the shooter] to act out the violence.”<sup>190</sup> The federal District Court for the Western District of Kentucky dismissed the case, also for a failure to state a claim upon which the court could act.<sup>191</sup> While the issue of First Amendment

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182. NAT’L COAL. AGAINST CENSORSHIP, *supra* note 128.

183. *See id.*

184. *See id.*

185. *See id.*

186. *See id.*

187. *See id.*

188. *Id.*

189. *Id.*

190. James v. Meow Media, Inc., 90 F. Supp. 2d 798, 801 (W.D. Ky. 2000).

191. *Id.* at 800.

speech protection was not raised and thus not the basis for the court's ultimate judgment, language in the opinion suggests that the First Amendment shield would dictate a finding in favor of the computer game company defendants as the court did not want to stifle creativity.<sup>192</sup>

In 2000, *Wilson v. Midway Games*<sup>193</sup> was an early lawsuit filed by a private citizen against a video game company.<sup>194</sup> In *Wilson*, a mother sued the creators of *Mortal Kombat* after her son was killed by a friend who, as the mother claimed, was "addicted and obsessed with the fighting game" and believed that he was a character in the game.<sup>195</sup> The federal District Court for the District of Connecticut dismissed the complaint for failing to state a claim upon which relief could be granted, specifically stating that the claim for "negligent and intentional infliction of emotional distress was precluded by the First Amendment."<sup>196</sup>

In an attempt to provide the courts with legislation upon which it could act, cities and states began passing laws "restricting minors' access to violent video games."<sup>197</sup> In 2000, Indianapolis passed a city ordinance that "would have forbidden any operator of five or more video-game machines in one place from allowing a minor unaccompanied by a parent . . . to use 'an amusement machine that is harmful to minors.'"<sup>198</sup> The ordinance was struck down by the Seventh Circuit Court of Appeals in 2001 because it "likely violate[d] the First Amendment."<sup>199</sup> In 2003, Washington was among the first states to pass legislation that banned the "sale of video games to minors that portray realistic violence towards law enforcement officers."<sup>200</sup> In 2004, the Western District of

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192. *See id.* at 818–19.

193. *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167 (D. Conn. 2002).

194. *Id.* at 174; *see also* Rudy Obias, *11 Times Video Games Led to Lawsuits*, MENTAL FLOSS (Feb. 19, 2014), <https://www.mentalfloss.com/article/55078/11-times-video-games-led-lawsuits> (providing chronological review of lawsuits that "affected the video game industry as a whole").

195. *Id.*

196. *Wilson*, 198 F. Supp. 2d at 169.

197. *See What's in a Game? Regulation of Violent Video Games and the First Amendment: Hearing Before the S. Subcomm. on the Const., Civ. Rts. and Prop. Rts.*, 109th Cong. 479 (2006) (statement of Sam Brownback, S. from Kan.) ("Since 2001, four States and two cities have passed laws restricting minors' access to violent video games.").

198. *See* NAT'L COAL. AGAINST CENSORSHIP, *supra* note 128.

199. Andrews Publications, *7th Circuit Refuses to Enforce Restrictions on Children's Video Game Access*, 18 No. 14 ANDREWS COMPUT. & ONLINE INDUS. LITIG. REP. 8 (2001).

200. Barrett, *supra* note 180.

Washington initially issued an injunction against the law but later ruled the law unconstitutional because it violated free speech protections.<sup>201</sup>

Other city and state governments followed suit, namely St. Louis, Missouri as well as California, Illinois, Maryland, Louisiana, Michigan, Minnesota, Oklahoma, and Georgia.<sup>202</sup> Each piece of legislation that attempted to restrict or ban outright the sale of video games to minors was eventually ruled unconstitutional by either the state court in which the case was filed or by a circuit court hearing the case.<sup>203</sup> Alternatively, the ordinances or legislation that have endured legal or constitutional challenges are sufficiently narrowly tailored to include language about sexually explicit content. This is the case in both Maryland and Louisiana where the legislatures have passed bills that ban distribution of games to minors when those games contain “sexually explicit content.”<sup>204</sup> The bills narrowly define sexually explicit content to be that which “would be found in pornographic movies or magazines.”<sup>205</sup>

The U.S. Supreme Court specifically addressed this issue in its 2011 decision in *Brown v. Entertainment Merchants Association*.<sup>206</sup> The Court considered a California law “restricting the sale and distribution of violent video games to minors.”<sup>207</sup> The original bill, signed into law in 2005 by then Governor Arnold Schwarzenegger “contained a detailed definition of [violent video] games, applying to those ‘in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being’ if the games also met other criteria reflecting a lack of positive value to minors.”<sup>208</sup> Additionally, the law also included a requirement that any game that met the prescribed definition of a violent video game include an “18” on the label to indicate the recommended age of players.<sup>209</sup>

Following decisions of a U.S. district court judge in California and the Ninth Circuit, the Supreme Court determined that the law was unconstitutional based on First Amendment grounds. The Court determined that the regulated speech

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201. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1183, 1191 (W.D. Wash. 2004).

202. Barrett, *supra* note 180.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786 (2011).

207. See NAT’L COAL. AGAINST CENSORSHIP, *supra* note 128.

208. *Regulation of Violent Video Games Sales to Minors Violates First Amendment*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (Feb. 28, 2023), <https://www.rcfp.org/journals/regulation-violent-video-games/>.

209. *Id.*

was protected and framed the case as one involving content-based regulation of speech.<sup>210</sup> As a free speech case, the Court then addressed whether the type of regulation was permissible or, in other words, whether it focused on a compelling state interest.<sup>211</sup> While the Court found California's interest in helping parents control and protect their children from violence to be legitimate, it held that the legislation was "seriously underinclusive" because it addressed only video games and not any other portrayals of violence.<sup>212</sup> Moreover, the Court found that the regulation was "seriously overinclusive" by including the rights of those whose parents believed violent video games to be a "harmless pastime."<sup>213</sup>

While the Court's holding was a 7-2 decision to strike the California law, only four justices joined Justice Scalia in his opinion: Kennedy, Ginsburg, Sotomayor, and Kagan.<sup>214</sup> Justice Alito wrote a concurrence in which Justice Roberts joined.<sup>215</sup> Justices Thomas and Breyer each wrote their own dissent.<sup>216</sup>

Interestingly, the court dismissed any evidence linking violence in video games to potential violent behavior. Justice Scalia addressed the argument in Justice Alito's concurrence that participating in violence begets violent behavior, stating, "[A]s for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind."<sup>217</sup> Justice Scalia followed with an explanation suggesting that any time one participates in an activity that includes something violent then they are interacting with it—whether it be literature, a movie, or a video game.<sup>218</sup> Justice Scalia seemed to note that while individuals constantly interact with media of all sorts including media that depicts violent action, most individuals who participate with such media do not then commit violent acts or become violent individuals. Further, the Court struck the regulation of video games based on the premise that interactions with violence causes violent behavior; consistent with its past rulings on literature and movie content.<sup>219</sup>

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210. *Brown v. Ent. Merchants Ass'n.*, 564 U.S. 786, 794 (2011).

211. *Id.*

212. *Brown v. Ent. Merch. Ass'n.*, 564 U.S. 786, 805 (2011).

213. *Id.* at 805.

214. *Id.* at 787.

215. *Id.* at 805 (Alito, J., concurring).

216. *Id.* at 821 (Thomas, J., dissenting); *see also id.* at 839–40 (Breyer, J., dissenting).

217. *Id.* at 798.

218. *Id.* ("As Judge Posner has observed, all literature is interactive. '[T]he 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.'") (citing *Am. Amusement Machine Assn. v. Kendrick*, 244 F.3d 572, 577 (C.A.7 2001)).

219. *Id.* at 797–98.



Although Justice Alito concurred in the ultimate result, finding that the California law was not written specifically enough to pass constitutional muster, he did not agree that the Court should ignore studies that suggest playing violent video games leads to violent behavior.<sup>220</sup> Notably, neither dissent discussed any of the social science linking violence in video games to violent behavior.<sup>221</sup>

After the shooting at Sandy Hook Elementary School in December 2012, a violent attack that resulted in the murders of twenty children and six adult school staff members of which the country took significant notice, the U.S. Senate acted again to address violence in society. Specifically seeking to study the impact of violent video games on those who play them, former U.S. Senator John Rockefeller IV introduced the Violent Content Research Act in January 2013.<sup>222</sup> The Act would have directed various federal agencies to “conduct a comprehensive study and investigation of whether exposure to violent video games and programming has a harmful effect on children that is distinguishable from any other factors.”<sup>223</sup> The research was to consider three things: (1) whether video game exposure caused more aggressive behavior and how video games compared to other factors that affect children’s behavior; (2) the impact of video games on a child’s well-being; and (3) any characteristics of the video games that “have a uniquely harmful effect on the behavior of children.”<sup>224</sup>

While the Act had bipartisan support, it died in committee.<sup>225</sup> The last action taken was in December 2013 when the Act was placed on the Senate Legislative Calendar under General Orders.<sup>226</sup> The results of this research could have yielded significant outcomes, both for legislators to address media and technology-enabled violence, as well as to increase public knowledge and understanding as to the effect of virtual violence on a player’s behavior and interactions with the world. Thus, it is disappointing that no further action was taken on the Act. This failure to act on the part of the government is sadly indicative of what has happened so far with government regulation of modern technology as it relates

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220. *Id.* at 806 (Alito J., concurring).

221. *See id.* at 822 (Thomas J., dissenting) (demonstrating a broader understanding of the First Amendment whereby communication to minors can be restricted); *id.* at 842 (Breyer J., dissenting) (stating the California statute passed constitutional muster because the state can legitimately regulate sales to minors due to it falling under the state’s authority to protect children). *Id.* at 850 (Breyer J., dissenting) (demonstrating, like Justice Thomas, skepticism about a First Amendment violation due to California’s compelling interest in regulating the speech).

222. Violent Content Research Act, S. 134, 113th Cong. (2013).

223. *Id.* at § 2(a).

224. *Id.* at § 2(b)(A).

225. *See id.*

226. *See id.*

to domestic violence. State and national governments' failure to hold entities accountable for enabling acts of domestic violence has allowed perpetrators of such violence to continue, increase, and intensify their abusive behavior.

### III. MODERN TECHNOLOGY AS AN ENABLER OF DOMESTIC VIOLENCE

This Part discusses the connection between the newest forms of domestic violence and modern technologies, including smart phones, social media sites, and smart home technologies. Section A specifically discusses how new technology modes have changed the look and consequences of domestic violence and done so in a way that the violence often, and intentionally, remains under the radar of law enforcement.

Despite the negative and dangerous ways that domestic abusers can use modern technology against their victims, modern technology also provides new opportunities for domestic violence victims to leave and survive their abusers. Section B discusses specific ways that domestic violence victims and survivors have used technology to their advantage.

#### *A. Studies Demonstrate How Modern Technology Enables Domestic Violence*

Modern technology such as smart phones, computers, the internet, social media and networking platforms, smart home technology, and all associated components has the potential to enable violence in more amplified and distinct ways than television<sup>227</sup> and video games.<sup>228</sup> The dangerous reality of modern technology is that it is not simply a mode through which users observe or even participate in created violence, it is a mode through which perpetrators can carry out significant and insidious violence.<sup>229</sup> Modern technology does this in a way that can go largely unnoticed because the same technology that perpetrators use to abuse can be used in ways that are entirely appropriate and expected.<sup>230</sup> Through modern technology, domestic violence perpetrators have not only found easier and more prolific ways to abuse, but also completely new ways to abuse their victims. Technologies like “cellular and wireless telephones, GPS and location services, spyware software and keystroke login hardware, and hidden

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227. *See supra* Section I.A (discussing ways that television can enable violence).

228. *See supra* Section II.A (discussing ways that video games can enable violence).

229. *See* Aikaterini Grimani, Anna Gavine & Wendy Moncur, *An Evidence Synthesis of Covert Online Strategies Regarding Intimate Partner Violence*, 23 *TRAUMA, VIOLENCE, & ABUSE* 581, 590 (2020).

230. *See id.* at 582.

cameras<sup>231</sup> are all tools used by perpetrators to “exert power and control by frightening, stalking, monitoring, and controlling . . . victims.”<sup>232</sup> With such technology, perpetrators can abuse their victim more easily, quickly, and continuously.

Moreover, social media has provided perpetrators with new and stealthier ways to abuse. “Social networking sites afford unique opportunities to perpetrators to humiliate, manipulate, or harass their victim, within an online community that is typically occupied by the victim’s friends and family.”<sup>233</sup> Smart home technology is another means by which perpetrators have used new and emerging technology to abuse, harass, and arguably torture their victims.<sup>234</sup> By abusing through smart home technology, perpetrators can further isolate and threaten a victim, and can create a world in which the victim has no safe space left.<sup>235</sup>

### 1. Traditional Forms of Abuse Amplified by Technology

Domestic violence can be defined as:

[T]he willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior as part of a systematic pattern of power and control perpetrated by one intimate partner against another. It includes physical violence, sexual violence, psychological violence, and emotional abuse. The frequency and severity of domestic violence can vary dramatically; however, the one constant component of domestic violence is one partner’s consistent efforts to maintain power and control over the other.<sup>236</sup>

Except for physical violence, modern technologies allow each of the above types of domestic violence abuse to occur more frequently, more severely, and with greater consequence.

Specifically, regarding stalking, which “encompasses a pattern of repeated, intrusive behaviors” like “following, harassing, and threatening . . . that cause[s]

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231. *Id.*

232. *Id.*

233. *Id.*

234. See Dana Holmstrand, *A Haunted (Smart) House: Smart Home Devices as Tools of Harassment and Abuse*, 6 GEO. L. TECH. REV. 223, 227–28 (2022).

235. *Id.*

236. *What is Domestic Violence*, NAT’L COALITION AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/learn-more> (last visited Nov. 5, 2023).

fear in victims,<sup>237</sup> modern technology allows domestic violence perpetrators to continue and escalate their abuse. For example, stalking through “computer-mediated communication” is sometimes referred to as “cyberstalking.”<sup>238</sup> Stalking in this higher-tech way allows for continuous and regular emails, texts, and calls to a victim multiple times throughout a day, following a victim through the use of global position system (GPS) monitoring, and an abuser’s surreptitious watching of a victim through hidden cameras.<sup>239</sup> In April 2021, Apple released AirTags, a device meant to help individuals keep track of keys, backpacks, and possibly even pets.<sup>240</sup> But such devices, along with an Amazon competitor, Tile, quickly became the latest technology that enable abusers to stalk their victims—usually without the tracked individual even knowing the Tag or Tile is on them.<sup>241</sup> While lawsuits have been filed against Apple for failing to have adequate safeguards to prevent this kind of stalking,<sup>242</sup> this and other technology remains readily available and affordable, allowing abusers to continue to stalk, often without police intervention.<sup>243</sup>

Higher-tech stalking methods thus show that while traditional stalking behavior, such as messaging, following, and watching, requires a perpetrator to be physically near a victim, modern technology-enabled stalking allows the behavior to occur at any time and from any place.<sup>244</sup> This allows abusers to create a sense of omnipresence that puts victims in a constant state of fear and vigilance.<sup>245</sup> When an abuser takes steps to make a victim feel like he knows every piece of the victim’s life, the victim will “feel that she has no privacy,

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237. Delanie Woodlock, *The Abuse of Technology in Domestic Violence and Stalking*, 23 VIOLENCE AGAINST WOMEN 584, 585 (2017).

238. Grimani et al., *supra* note 234, at 582.

239. *See generally* Woodlock, *supra* note 242, at 586–98 (discussing past studies examining technology-enabled stalking and the researchers’ “SmartSafe study . . . examin[ing] how mobile technologies provide additional opportunities for the perpetration of stalking and domestic violence against women”).

240. *See* Adrienne Matei, ‘I was Just Really Scared’: Apple AirTags Lead to Stalking Complaints, THE GUARDIAN (Jan. 20, 2022), <https://www.theguardian.com/technology/2022/jan/20/apple-airtags-stalking-complaints-technology>.

241. *See* Ryan Mac & Kashmir Hill, *Are Apple Air Tags Being Used to Track People and Steal Cars?*, N.Y. TIMES (Dec. 30, 2021), <https://www.nytimes.com/2021/12/30/technology/apple-airtags-tracking-stalking.html>.

242. Amanda Holpuch, *Two Women Sue Apple Over AirTag Stalking*, N.Y. TIMES (Dec. 6, 2022), <https://www.nytimes.com/2022/12/06/business/apple-airtag-lawsuit.html>.

243. Mac & Hill, *supra* note 246.

244. Woodlock, *supra* note 242, at 592.

245. Katrina Markwick, Andrew Bickerdike, Elisabeth Wilson-Evered & John Zeleznikow, *Technology and Family Violence in the Context of Post-Separated Parenting*, 40 AUSTL. AND N.Z. J. OF FAM. THERAPY, 143, 144 (2019).

security, or safety, and that the stalker knows and sees everything.”<sup>246</sup> Victims, in this way, feel completely trapped by their abuser.<sup>247</sup> Other cyberstalking behavior includes monitoring emails as well as “sending insulting emails, disrupting email communications by flooding a victim’s email inbox with unwanted email, or by sending a virus program.”<sup>248</sup>

Newer forms of technology classified as “spyware” allow abusers to make stalking even easier and more pervasive. Spyware enables an abuser to “access a victim’s computer remotely and download software that allows them to contact the victim as soon as the victim logs on, to view and monitor the victim’s [computer] activities and even to ‘assume control of the victim’s computer.’”<sup>249</sup> This is one of the many ways abusers create a feeling of isolation in victims—by making the victim believe that the abuser knows every action the victim takes, even and especially those that the victim takes to protect herself or leave the relationship.<sup>250</sup> If a victim uses a computer or other connected device to seek help or support from professionals or friends, an abuser with this kind of “spyware” can see each page she visits, what she types in, who she might connect with, and many other online activities.<sup>251</sup> Modern technology not only makes abusive activity more convenient for the abuser but makes new and previously unimagined abusive behaviors possible. For a victim of domestic violence, the impact of modern technologies may mean that they can never get away from their abuser or the abuse they may be desperately trying to escape.

## 2. Creating New Ways to Abuse

Although exciting and convenient in ways that are not nefarious, constantly evolving technology continues to create new methods and manners for abuse. The following sections discuss new forms of abuse available through (a) social media and networking platforms, and (b) smart home technology. To the detriment of victims, due to being unaddressed by the law or private technology companies, such abuse is largely unfettered.

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246. Woodlock, *supra* note 242, at 592.

247. *Id.*

248. Grimani et al., *supra* note 234, at 582.

249. Markwick et al., *supra* note 249, at 146.

250. Grimani et al., *supra* note 234, at 587–88.

251. *Id.*

## a. Social Media and Networking Platforms

Social networking sites present a new and potentially very dangerous form of technology for the domestic violence crisis. Social media platforms have created ways for abusers to connect with both their victims and victims' family and friends in ways never been done before. Using social media, "perpetrators [can] obtain information from . . . Facebook accounts, even if they had been blocked."<sup>252</sup> An abuser can monitor a victim through social media accounts of shared friends.<sup>253</sup> While this may fall under the category of stalking as discussed above,<sup>254</sup> it is also a form of stalking that would not be available without social media sites allowing individuals to post pictures and information that "tag" another person, thereby allowing an abuser to have information that even the original poster did not intend to be shared.<sup>255</sup> Social media platforms have become essential tools for abusers to access a large audience and further control their victims.<sup>256</sup>

Abusers can use social media to post information about a partner or ex-partner that is embarrassing, private, and even false, allowing family and friends of the victim to see the information.<sup>257</sup> Such posts may be used to humiliate, manipulate, and harass a victim in front of their support network.<sup>258</sup> In this way, technology has enhanced the level of abuse perpetrated against a victim by allowing private, and possibly inaccurate, information to be made public and available to an "innumerable number of people" who can view it repeatedly.<sup>259</sup> Not only does this level of abuse harm the victim in terms of the content of the post, it also serves to isolate a victim from the very people needed for support.<sup>260</sup> Often, abusers will extend such social media abuse to a victim's friends, family, and even their coworkers to intentionally sabotage the victim's critical interpersonal supports.<sup>261</sup>

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252. Markwick et al., *supra* note 249, at 152.

253. Woodlock, *supra* note 242, at 594.

254. *See supra* Section III.A.i.

255. Woodlock, *supra* note 242, at 594.

256. *See* Megan L. Bumb, *Domestic Violence Law, Abusers' Intent, and Social Media: How Transaction-Bound Statutes are the True Threats to Prosecuting Perpetrators of Gender-Based Violence*, 82 BROOK. L. REV. 917, 927 (2017).

257. Markwick et al., *supra* note 249, at 145.

258. Grimani et al., *supra* note 234, at 582.

259. Markwick et al., *supra* note 249, at 147.

260. Woodlock, *supra* note 242, at 594.

261. *Id.*

Isolation is its own form of abuse that goes hand in hand with other forms of domestic violence. The use of social media to create a victim's isolation is a harsh paradox because social media can be an important way for abuse victims to maintain the supports necessary to remove themselves from the abuse.<sup>262</sup> It is surprisingly easy for abusers to use social media to isolate victims. Often abusers already know, or can easily figure out, a victim's password, thereby allowing a perpetrator to access the victim's social media account and impersonate or simply take over their account.<sup>263</sup> In one study involving interviews of domestic violence victims and their advocates, one advocate reported a situation in which a victim's ex-partner stole the victim's phone, accessed her Facebook account, changed the password, and then began "contacting all her friends and supports, pretending to be her" and "result[ing] in her becoming very isolated."<sup>264</sup>

One of the more insidious ways an abuser uses social media to abuse is by using it to sexually exploit the victim. This, again, is an aspect of modern technology that is not simply an expansion of previous domestic violence tools, but, in fact, is a new way for a domestic violence perpetrator to abuse.<sup>265</sup> By using social media accounts that are visible to a victim's family and friends, an abuser can "share sexualized content" to isolate, humiliate, and shame the victim.<sup>266</sup> Perpetrators of this type of sexual abuse generally use it in three different ways: by taking "photos or videos during a sexual assault," using sexual images of the victim to "threaten and coerce a victim into having unwanted

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262. *See id.* at 599.

263. Nicki Dell, Karen Levy, Damon McCoy & Thomas Ristenpart, *How Domestic Abusers Use Smartphones to Spy on Their Partners*, Vox (May 21, 2018), <https://www.vox.com/the-big-idea/2018/5/21/17374434/intimate-partner-violence-spyware-domestic-abusers-apple-google>; *see, e.g.*, Woodlock, *supra* note 242, at 595–96 (discussing reported perpetrators' emphasized use of victims' social media and networks to abuse).

264. *Id.* at 596.

265. *See* Markwick et al., *supra* note 249, at 148.

266. Woodlock, *supra* note 242, at 596. Moreover, Artificial Intelligence has enabled people to create "deepfakes" online, which create realistic but fake visual depictions of people. William Brangham, Harry Zahn, & Michael Boulter, *How Artificial Intelligence is Being Used to Create 'Deepfakes' Online*, PBS NEWS (Apr. 23, 2023, 5:40 PM), <https://www.pbs.org/newshour/show/how-artificial-intelligence-is-being-used-to-create-deepfakes-online>. Deepfakes have been used to create false images of real people engaged in pornography. *See* Jared de Guzman, Note, *Saving Face: Lessons from the DMCA for Combatting Deepfake Pornography*, 58 GONZ. L. REV. 109, 111–12 (2023). Currently, there are no adequate remedies for victims of deepfake pornography or punishments for distributors, thus creating another potential mechanism for an abuser to exploit their victim. *See id.* at 112–14.

sexual contact,” or participating in “revenge porn” whereby a perpetrator<sup>267</sup> “posts or threatens to post sexual or intimate images of a victim online.”<sup>268</sup> The information posted or sent does not have to be images; the perpetrator in the above story also “allegedly sent sexual messages to male friends in . . . [the victim’s] account, resulting in the . . . [victim] feeling ashamed and powerless.”<sup>269</sup> It is only through social media platforms that this type of abuse—widespread sharing of intimate images that can be viewed multiple times by multiple known and unknown people—is possible.

#### b. Smart Home Technology

A relatively new form of technology abuse is smart home facilitated technology abuse, which goes beyond new ways to abuse, as discussed above, by bringing people into a reality of modern life unthinkable until very recently.<sup>270</sup> Smart home facilitated technology abuse is the use of technology linked to smart home devices “including thermostats, locks, lights, speakers, and doorbells” as weapons of surveillance, power, and control.<sup>271</sup> Through smart home technology, former partners are able to not only harass<sup>272</sup> but torture a victim who remains in the once shared home.<sup>273</sup> Using smart technology that is connected to a device within the control of the abuser, the abuser can continually ring a doorbell, shift the temperature in the home from extremely cold to extremely hot, change locks, turn off the refrigerator, flicker lights on and off, or blare music in the middle of the night.<sup>274</sup>

Smart home technology is designed to make life easier by allowing consumers to connect with their homes, or parts of their homes, while they are

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267. Markwick et al., *supra* note 249, at 148 (noting that perpetrators are usually current or former partners of victims).

268. *Id.*

269. Woodlock, *supra* note 242, at 596.

270. See Ahmed Alshehri, Malek Ben Salem & Lei Ding, *Are Smart Home Devices Abandoning IPV Victims?*, INST. OF ELEC. AND ELEC. ENG’RS INC., 1368, 1368 (2020) (“Smart home technologies give abusers a great tool to carry out destructive activities with less effort and lower risks compared to traditional methods of abuse . . . . Still, a thorough analysis of tech-abuse in smart homes has not been conducted.”).

271. Holmstrand, *supra* note 239, at 224.

272. *Id.*

273. U.N. Convention on Torture, *supra* note 3, at 1 (defining torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, punishing . . . for an act [of the victim] . . . [,] or intimidating or coercing [the victim]”).

274. Holmstrand, *supra* note 239, at 227.



away or in another area. However, what was designed to make life easier has also been used as a tool for destructive and abusive activity.<sup>275</sup> The difficulty with this type of technology is that although the domestic violence abuser is using the smart device(s) in the way that the technology is designed to be used, the abuser is weaponizing the technology against another person with the intent to cause harm rather than to increase comfortability—thus making the victim’s home their prison.<sup>276</sup>

Because this form of technology is new<sup>277</sup> and constantly evolving,<sup>278</sup> knowing and understanding how to use it will be vital for victims. This knowledge is necessary for domestic violence victims to both recognize domestic violence as it occurs and to know how to stop the immediate violence inflicted by smart home facilitated technology abuse. The following Section discusses how increased knowledge can arguably help a victim to permanently end the violence and empower a domestic violence survivor to help others caught in the web of ongoing domestic abuse.

### B. *How Technology Can Help Victims of Domestic Violence*

As with television<sup>279</sup> and video games,<sup>280</sup> modern technology can help those living and dealing with domestic violence, not just cause harm. In fact, so-called smart technology has capabilities to help domestic violence victims that, if used properly, may even outweigh its negatives. For example, technology can “give victims access to essential resources and service providers, reduce feelings of isolation by allowing victims to maintain contact with their social networks and joining online support groups, . . . and empower victims.”<sup>281</sup> Given the internet’s

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275. Alshehri et al., *supra* note 275, at 1368.

276. *Id.* at 1370.

277. See discussion *infra* Part IV (discussing the possible ways to address this new type of domestic violence abuse). It is important to note that because this technology and method of abuse is so recent, the legislative or policy approaches remain limited.

278. See generally Patrick L. Austin, *What Will Smart Homes Look Like 10 Years From Now?*, TIME (Jul. 25, 2019, 6:18 AM), <https://time.com/5634791/smart-homes-future/> (discussing various ongoing developments in smart home technology such as artificial intelligence and robot-driven features and the reality that “[y]ou’re more likely than not to end up in a connected home one day, whether you mean to or not”).

279. See *supra* Section I.A.

280. See *supra* Section II.A.iii.

281. Hadeel Al-Alosi, *Fighting Fire with Fire: Exploring the Potential of Technology to Help Victims Combat Intimate Partner Violence*, 52 AGGRESSION AND VIOLENT BEHAV. 1, 4 (2020).

ability to search out resources for just about anything, the potential for domestic violence victims to use modern technology to access resources is undeniable.

An interesting facet of modern technology as a resource for domestic violence victims is that, before even utilizing it to find help, some victims have used modern technology to gain insight that they were being abused and to research possible support services.<sup>282</sup> Once recognizing they are in an abusive relationship, victims can use modern technology to find services such as “health-related services, housing, employment, and education, as well as financial and legal advice.”<sup>283</sup> Further, as noted by researchers at the Western Sydney University in Australia, “[modern] technology may be the only feasible way for some victims to overcome barriers from seeking help, such as time, geography, disability, and communication barriers.”<sup>284</sup>

As a tool to address isolation, “[modern] technology has proven to be an effective way to provide victims with social connections in times of isolation.”<sup>285</sup> Victims can use modern technology to connect with family and friends, but, sometimes even more importantly, to connect with other victims. In a study conducted in 2016 that involved more than 200 victims and 350 experts in the United Kingdom, researchers learned that the all-day ability to connect with others for help and advice was a main reason for the use of Facebook support groups.<sup>286</sup> In addition to these connections, victims used modern technology to find “employment and access services for themselves and their children.”<sup>287</sup>

As a tool for empowering victims, modern technology “assists [domestic violence victims] in rebuilding their lives by facilitating their interaction with the outside world.”<sup>288</sup> A report from the United Nations (U.N.) Broadband Commission for Digital Development found that “85% of women around the world say that the internet gives them more freedom.”<sup>289</sup> With online platforms, women can give voice to their experiences in ways that “the formal justice system is often unable to.”<sup>290</sup>

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282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 5.

286. *Id.*

287. *Id.*

288. *Id.* at 6.

289. *Id.*

290. *Id.*

In fact, social media and online platforms have played a crucial role in not just personal empowerment, but also in larger social activism movements.<sup>291</sup> Because of social media, campaigns designed to increase awareness of and push for legislation to end domestic violence are possible on national and even global scales.<sup>292</sup> Notably, “use of social media by individuals and organizations to promote collective action and engagement is not new.”<sup>293</sup> Movements like “Black Lives Matter” and “revolutions that helped shape the Arab Spring” have utilized social media to inform and gather support.<sup>294</sup> Not only do social justice movements raise global awareness, but they provide a space for individuals to share their stories. Narrative and storytelling serve a major role in social justice efforts.<sup>295</sup> Allowing a space for domestic violence victims to share their stories not only empowers those telling their story, but it supports the emergence of a community of survivors to support each other and work towards realistic solutions. Social media and technology are a part of everyday life and “access to these [modern] technologies is important for women’s social and political participation and access to life-enhancing services, health care, education, and economic opportunities.”<sup>296</sup>

It is important to understand all available aspects of modern technology. As with most things in this world, technology is a double-edged sword with great capabilities for both positive and nefarious purposes. It will only be with the input of representatives from multiple disciplines that realistic and sustainable solutions for technology-enabled domestic violence can be developed.

#### IV. SOLUTIONS

Proposed legislation and other attempts to address modern technology-enabled violence are premature if not pursued with a full understanding of the history of how technology has continually enabled domestic violence. A review

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291. See, e.g., Mai ElSherief, Elizabeth Belding & Dana Nguyen, *#NotOkay: Understanding Gender-Based Violence in Social Media*, ELEVENTH INT’L AAAI CONF. ON WEB AND SOC. MEDIA 52, 52–53 (2017) (stating “influential people such as celebrities were better at starting conversations on social media,” “[t]he ultimate form of influence is to promote collective action via social networks,” and providing theories as to how ideas or campaigns can spread across human social networks).

292. *Id.* at 53.

293. *Id.*

294. *Id.*

295. *Id.* at 60.

296. Nicolas Suzor, Molly Dragiewicz, Bridget Harris, Rosalie Gillett, Jean Burgess & Tess Van Geelen, *Human Rights by Design: The Responsibilities of Social Media Platforms to Address Gender-Based Violence Online*, 11 POL’Y AND INTERNET 84, 89 (2019).

of how both television and video games enable domestic violence should inform how society can best address technology-enabled domestic violence moving forward. By today's standards, many of the tactics that U.S. legislators employed in response to violence on television seem almost pointless given that the legislation allowed the power-wielding television networks to act voluntarily in assuming responsibility. Ironic, since such networks and their leaders were the entities and people the legislature needed to regulate to achieve any of its goals.<sup>297</sup>

Similarly, the efforts taken to address violence in video games out of fear that violent video games may contribute to players' increased violent behavior have all failed First Amendment scrutiny.<sup>298</sup> State and federal courts around the country, including the U.S. Supreme Court, have made it obvious that First Amendment protections are robust enough to overcome any challenge that seeks to limit violent speech disseminated through television, video games, or social media.<sup>299</sup>

The question then becomes—if the answer is not in the previous legislative attempts to address television and video game violence and its relationship to domestic violence, what is the answer? Very likely, it is a variety of tactics that involve individuals and stakeholders from several different industries. In addition to policymakers and legislators, stakeholders must include many other voices in the development of criminal and civil legislation to address online and other technology-related offenses. This includes, but is not limited to, law enforcement to determine what and how laws are being broken, domestic violence victims who have intimate knowledge of how technology is and can be used to abuse, domestic violence victim advocates, and the technology industry to determine the actual effect of the products that they collectively and individually put on the market.<sup>300</sup>

#### *A. Law Enforcement and The Response to the Wheel of Domestic Violence*

Policy and legislation tend to go hand in hand with law enforcement because law enforcement personnel are enforcing the policies and legislation that are written. We must first address the law, however. One of the first steps any effective legislation must do is to properly categorize all forms of domestic violence as serious crimes. Often, stalking; including surveillance and monitoring a victim's online activity; harassment, and other actions associated

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297. *See supra* Section I.B.

298. *See supra* Section II.B.

299. *See* cases cited *supra* note 106.

300. *See* Grimani et al., *supra* note 234, at 590.

with domestic violence are not seen as serious or as dangerous as they truly are.<sup>301</sup> Stalking and other abusive behavior must be treated as serious offenses if we want to stop technology-enabled domestic violence.<sup>302</sup> One study found that in “homicides of women by intimate partners . . . 76% of . . . women were stalked prior to their murder.”<sup>303</sup> This risk factor alone justifies an expansion of “legislative definitions of IPV facilitated by technology such as ‘cyberstalking’ . . . to include the wide range of technologies and the different ways they are used to perpetrate IPV.”<sup>304</sup> Although some states may already treat these types of behaviors as serious crimes,<sup>305</sup> we need to have across-the-board agreement that technology-enabled abuse is first defined as a serious crime, and then actually treated as such.

One of the very real obstacles to effectively addressing domestic violence through legislation is the fact that most laws are written to address particular incidents that cause specific and identifiable outcomes. Current domestic violence statutes have been referred to as being “transaction-bound,” meaning that they “center around a singular incident of harm-producing behavior.”<sup>306</sup> However, in order for a statute to properly address the kind of harm a victim of domestic violence is experiencing, it must allow for “contextual elements” that provide a fuller picture of the abusive relationship beyond the incident at hand.<sup>307</sup> To fully understand the need for more comprehensive legislation and other solutions, it is necessary to not only understand domestic violence and the cycle it follows but also the reality of the often tragic outcomes that can occur when a

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301. See, e.g., 18 PA. CONS. STAT. § 2709.1(c) (2023) (showing that stalking is a first-degree misdemeanor for a first offense and increases to a third-degree felony for a subsequent offense or if the person has previously been convicted of a violent crime against the same person); 18 PA. CONS. STAT. § 2709(c)(1), (2) (explaining that harassment charges rank as a summary offense for a first offense and increase to a third-degree misdemeanor only if the communication to or about the other person is offensive, anonymous, or communicated at extremely inconvenient hours); 18 PA. CONS. STAT. § 2709(a.1) (adding a section for cyber harassment of a child in 2015, the violation of which is a third-degree misdemeanor).

302. See Woodlock, *supra* note 242, at 599.

303. Markwick et al., *supra* note 249, at 152.

304. *Id.*

305. See, e.g., CAL PENAL CODE § 646.9(a), (b) (West 2023) (explaining that stalking is punishable by imprisonment and/or by a maximum fine of \$1,000, with a potential increase in prison time if the person stalks in violation of a restraining order or similar protective order); ALA. CODE § 13A-6-90(b) (2023) (classifying stalking as a Class C felony); FLA STAT. § 784.048(2)–(5) (2023) (classifying different defined acts of cyberstalking as ranging from a first-degree misdemeanor to third-degree felony).

306. Bumb, *supra* note 261, at 934.

307. *Id.*

victim of domestic violence tries to get help or tries to continue to live in the relationship—sometimes concurrently.

In 1984, a group of domestic violence educators developed a tool called the Power and Control Wheel to help abusers, victims, and advocates better understand domestic violence.<sup>308</sup> The Wheel shows a continuum of domestic violence that includes coercion and threats to exert control and power over the victim as well as intimidation, emotional abuse, isolation, economic abuse, using male privilege,<sup>309</sup> using children,<sup>310</sup> and minimizing, denying, or blaming to control a partner.<sup>311</sup> Different depictions of the Wheel usually include examples of abusive behaviors under each category.<sup>312</sup> It is important to understand that while domestic violence is the pattern of behavior, numerous actions fall into multiple categories. Any singular action may not necessarily constitute abuse and is unlikely to be pursued by law enforcement and prosecutors—or by legislators to draft responsive legislation.<sup>313</sup>

The cyclical nature of violence helps explain why many abuse victims may not understand that they are in an abusive relationship or may not be able to leave

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308. See *Understanding the Power and Control Wheel*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <https://www.theduluthmodel.org/wheels/faqs-about-the-wheels/> (last visited Nov. 5, 2023).

309. See *Power and Control*, NAT'L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/identify-abuse/power-and-control/> (last visited Nov. 5, 2023) [hereinafter NAT'L DOMESTIC VIOLENCE HOTLINE] (including, for example, making all the major decisions on behalf of the relationship or acting like the “master of the castle” by treating the victim like a servant).

310. See *id.* (using the victim’s children to relay messages or making threats to remove the children from the victim).

311. See *Power and Control*, DOMESTIC ABUSE INTERVENTION PROGRAMS, <https://www.theduluthmodel.org/wp-content/uploads/2017/03/PowerandControl.pdf> (last visited Nov. 5, 2023).

312. See, e.g., *Domestic Violence Power & Control Wheel*, WEAVE, [https://www.weaveinc.org/sites/main/files/file-attachments/power\\_\\_control\\_wheel.pdf?1655327862](https://www.weaveinc.org/sites/main/files/file-attachments/power__control_wheel.pdf?1655327862) (last visited Nov. 5, 2023) (showing, for example, the category of “[u]sing [c]hildren” as including “[u]sing the children to relay messages” and “[t]hreatening to take the children away”); *Power & Control*, YWCA SPOKANE, <https://ywcaspokane.org/wp-content/uploads/2017/10/2018-YWCA-Spokane-Power-and-Control-Wheel.pdf> (last visited Nov. 5, 2023) (showing, for example, the category of “isolation” as including the abuser controlling what the victim does or “who they see and talk to” and “us[ing] jealousy to justify actions”).

313. See, e.g., NAT'L DOMESTIC VIOLENCE HOTLINE, *supra* note 314 (examples include the abuser causing the victim to lose her job or using court-ordered visitation to harass the victim).

an abusive relationship until it is too late.<sup>314</sup> The stages of violence within an abusive relationship are unique to that relationship and may constantly—and unpredictably—evolve throughout the relationship.<sup>315</sup> Such potential stages broadly include (1) the “Tension Building” stage where an abuser becomes irritable, impatient, or has a short temper; (2) the “Incident” stage where actual abusive behavior like social isolation as well as physical, sexual, and verbal violence occurs; (3) the “Reconciliation” stage where an abuser may apologize, declare love, or promise to get help; and (4) the “Calm” stage where the abuser begins to justify and minimize their actions and blame other circumstances or people, including the victim, for their abusive behavior.<sup>316</sup> This pattern and cycle of abuse is varied and unique and is therefore often difficult to identify or pinpoint using traditional policing methods. If a victim is able to leave the relationship, she may have a hard time describing the singular event that caused her to contact law enforcement or that led to the decision to seek outside help. Paradoxically, most of the current laws that address domestic violence rely upon singular events as evidence of a crime.<sup>317</sup>

Specifically, regarding modern technology-enabled abuse, one can imagine a victim receiving an “anonymous” message on Facebook that references a person, location, or event that only the victim and a former abusive partner know about and that indicates the former abusive partner is continuing to watch or know about the acquaintances, locations, or events that the victim is attending. A simple communication like this will not mean anything to law enforcement and will likely be ignored because no crime has been committed and no real actor is identifiable. But this is the kind of action that can lead to a domestic violence victim’s isolation and feeling like they can never escape the abuse.<sup>318</sup>

In addition to current state and federal statutes failing to fully address social media and internet issues, such lawmaking efforts fall short of identifying and

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314. Hope Gillette, *The 4 Stages of the Cycle of Abuse: From Tension to Calm and Back*, PSYCH CENTRAL (Jul. 15, 2022), <https://psychcentral.com/health/cycle-of-abuse>; see also TED, *Why Domestic Violence Victims Don't Leave*, YOUTUBE (Jan. 25, 2013), <https://www.youtube.com/watch?v=V1yW5IsnSjo> (detailing one domestic violence survivor’s story of enduring abuse, recognizing her husband as an abuser, grappling with the dangerous reality posed by trying to leave the relationship, and eventually leaving the relationship out of fear for her life).

315. Gillette, *supra* note 319.

316. *Id.*

317. See Bumb, *supra* note 261, at 934; see e.g., TEX. PENAL CODE ANN. § 42.072 (West 2023) (describing crime of stalking, which requires any stalking act under the statute to be threatening in nature, and failing to recognize behavior that may seem innocent to others can be understood as threatening by the intended recipient).

318. See Woodlock, *supra* note 242, at 592.

addressing the factors that make domestic violence unique to each victim by each abuser.<sup>319</sup> A proposed solution to this issue is legislation that addresses “the recurrent nature of abuse, its coercive dynamic, and allow[s] consideration of the abuser’s intent.”<sup>320</sup> As illustrated above, often perpetrators post to social media sites, such as Facebook, using veiled or coded language so that the victim knows and understands the threat, but the threat is not obvious to third parties.<sup>321</sup> This makes prosecution or even detection of such crimes very difficult. Better training and education for law enforcement and legal personnel can make these crimes more visible.<sup>322</sup> Further, judges and police officers must understand the power dynamics of abusive relationships to understand that social media posts that do not identify a victim may still be threatening and may in fact constitute a prosecutable no contact order violation.<sup>323</sup> Thus, it is only with properly drafted legislation defining conduct that constitutes a domestic violence crime as well as proper training that law enforcement can effectively address the insidious reality of technology-enabled domestic violence.

#### B. Domestic Violence Victims and Advocates

Victims and victim advocates must also be part of the conversation that aims to address technology-enabled domestic violence. A variety of strategies must be employed to address the specific needs and concerns of those most affected by technology abuse. Examples of strategies include hearing directly from victims and survivors to understand their experiences,<sup>324</sup> training domestic violence advocates and legal professionals,<sup>325</sup> and working on collaborations between law enforcement and support service providers.<sup>326</sup>

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319. Bumb, *supra* note 261, at 951–52.

320. *Id.* at 953.

321. Markwick et al., *supra* note 249, at 153.

322. *See* Woodlock, *supra* note 242, at 599.

323. Bumb, *supra* note 261, at 928.

324. Markwick et al., *supra* note 249, at 154.

325. *See* Woodlock, *supra* note 242, at 584, 587, 599 (discussing that the Australian Domestic Violence Resource Centre Victoria is “one of the first domestic violence organizations in the world to have online resources for victims,” “has used technology to prevent domestic violence for more than 15 years,” and “is continuing advocacy in the area of technology-facilitated abuse through the training of domestic-violence workers and legal professionals”).

326. *See* Grimani et al., *supra* note 234, at 590.



C. *The Technology Industry, Social Media Companies, and the First Amendment*

Finally, we must look at social media platforms specifically, where much of the technology-enabled abuse is occurring. Social media company leaders and personnel must participate in the conversation to address technology-enabled domestic violence. While many would agree that the technology industry must be one of many players to address this issue, one argument is that it is precisely the social media platforms that should be one of the primary industries to lead discussions on dealing with online violence—especially domestic violence and other forms of violence that generally target women.<sup>327</sup> As spelled out in a 2016 editorial by *WIRED Magazine*, the assumption that technological development was value-neutral and that there was no need to create a prosocial platform<sup>328</sup> has led to a situation where internet platforms are not only not prosocial but are indeed actively antisocial.<sup>329</sup> Multiple studies set forth the proposition that very specific features of technology allow perpetrators' abusive and controlling behavior to occur at extraordinary rates.<sup>330</sup> Facebook allows abusers to monitor individuals and their contacts.<sup>331</sup> So-called "revenge porn," "the abusive, non-consensual sharing of intimate images" can be easily perpetrated against a partner or ex-partner by posting "personal information, images or video."<sup>332</sup> Even social media that flags inappropriate content can be used if a perpetrator removes the posted content prior to actually being flagged. This tactic has been termed "tweet and delete."<sup>333</sup> The *WIRED Magazine* editorial asserts that it is the creators and developers of these sites that are obligated to "protect users from abuse" that is inflicted through their platforms.<sup>334</sup>

Using their smart phone as a psychological and potentially physically harmful weapon, abusers can control victims' lights, blare loud music through

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327. See Suzor et al., *supra* note 301, at 86.

328. Prosocial platforms are those that depict attitudes and behaviors thought to be socially acceptable or preferred by society at large. Michal Christine, *A Definition for Prosocial Media*, PRO-SOCIAL MEDIA EFFECTS, June 4, 2012, <https://prosocialmediaeffects.wordpress.com/2012/06/04/a-definition-for-prosocial-media/>

329. See Suzor et al., *supra* note 301, at 85.

330. Woodlock, *supra* note 242, at 597, 599.

331. *Id.* at 593–94.

332. Molly Dragiewicz, Jean Burgess, Ariadna Matamoros-Fernández, Michael Salter, Nicolas P. Suzor, Delanie Woodlock, & Bridget Harris, *Technology Facilitated Coercive Control: Domestic Violence and the Competing Roles of Digital Media Platforms*. 18 FEMINIST MEDIA STUDS. 609, 613 (2018).

333. *Id.*

334. Suzor et al., *supra* note 301, at 85.

speakers, or control their smart home appliances.<sup>335</sup> The technology industry must use their unique abilities and assume their critical responsibility to implement precautionary measures to prevent the use of their products and networks for abuse. A preventative measure can be as simple as an optional password before a device can connect to a home-based instrument.<sup>336</sup> The primary user of a device should be able to easily monitor all people who connect to their technology and schedule the frequency of software checks and responsive updates that can protect the device from being hacked into.<sup>337</sup> This will prevent abusers from taking control of their victim's property and terrorizing them from a distance, and also potentially help a victim proactively monitor—and thus report to law enforcement or their support networks—if and when an abuser is attempting or attempts to harass them. Knowledge is power, and for a domestic violence victim it can be the difference between life and death. The technology industry must acknowledge that they hold the metaphorical key to such knowledge and make a conscious decision to assume such responsibility and provide tools to decrease the utility of their products for abusers.<sup>338</sup> At a certain point, violence should not be permitted to sell.

In the United States, there is no legal responsibility for internet providers, including telecommunications providers, search engines, content hosts, and digital media platforms, “when their networks are used in abusive ways.”<sup>339</sup> However, this type of violence, specifically when it targets women, “is increasingly recognized as a major human rights problem” by Amnesty

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335. See Bowles, *supra* note 1; Coco Khan, ‘Smart’ Tech is Being Weaponised by Domestic Abusers, and Women are Experiencing the Worst of It, THE GUARDIAN (Apr. 4, 2023), <https://www.theguardian.com/commentisfree/2023/apr/04/smart-tech-domestic-abusers-women>; *Abuse Using Technology*, WOMENSLAW.ORG, <https://www.womenslaw.org/about-abuse/abuse-using-technology/ways-abusers-misuse-technology/abuse-involving-cyber> (last visited Nov. 5, 2023).

336. See Amanda Kippert, *Smart Home Technology is Being Used Against Survivors*, DOMESTICSHELTERS.ORG (Jan. 14, 2019), <https://www.domesticshelters.org/articles/technology/smart-home-technology-is-being-used-against-survivors>.

337. See Kaitlyn Wells & Thorin Klosowski, *Domestic Abusers can Control Your Devices. Here’s How to Fight Back*, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/smarter-living/wirecutter/domestic-abusers-can-control-your-devices-heres-how-to-fight-back.html>; Alice Nunwick, *Tech Companies Must Address the Role of Smart Homes in Domestic Abuse*, VERDICT (May 24, 2023), <https://www.verdict.co.uk/tech-companies-must-address-the-role-of-smart-homes-in-domestic-abuse/?cf-view>.

338. See Sandra Laville, *Top Tech Firms Urged to Step Up Online Abuse Fightback*, THE GUARDIAN (Apr. 11, 2016), <https://www.theguardian.com/technology/2016/apr/11/facebook-twitter-google-urged-to-step-up-online-abuse-fightback>.

339. Suzor et al., *supra* note 301, at 86.

International and the U.N. Human Rights Council, among others.<sup>340</sup> Online abuse cannot be something that the creators and funders of the abuser-utilized platform simply ignore. Rather, the technology industry—including any industry creating IoT, social media platforms, SmartHome tools, or geolocation tracking devices—has a responsibility to “mitigate harm perpetrated through . . . [its] networks.”<sup>341</sup> It is precisely this argument that the U.S. Supreme Court was asked to decide in the recent cases of *Gonzalez v. Google LLC*<sup>342</sup> and *Twitter, Inc. v. Taamneh*.<sup>343</sup> Unfortunately, the Court refused to take the opportunity to find any culpability or future obligation of social media companies to mitigate violence promulgated on their platforms.<sup>344</sup>

Restricting language, even abusive language, raises the hairs on the backs of many individuals and organizations that advocate for freedom of speech rights and related First Amendment protection. It was First Amendment protection that prevented the restriction of television programming and struck down legislation limiting video games.<sup>345</sup> In its most recent term, the Supreme Court decided *Counterman v. Colorado*<sup>346</sup> and again reinforced the power of First Amendment protections. In *Counterman*, the Court decided that any state attempting to prosecute threatening language must prove that a defendant—in this case, a person making threats in an online forum—“had some subjective understanding

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340. *Id.* at 96.

341. *Id.*

342. *Gonzalez v. Google LLC*, 598 U.S. 617 (2023).

343. *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023).

344. In *Gonzalez* and *Taamneh*, the U.S. Supreme Court did not specifically address the issue of whether the First Amendment shield could be pierced in response to online-aided or facilitated violence. Rather, the Court focused on whether social media companies; Google, Twitter, and Facebook; aided and abetted terrorist organizations’ criminal or tortious activity. *Gonzalez*, 598 U.S. at 621–22; *Taamneh*, 589 U.S. at 482. The Court ultimately concluded that the platforms were too far removed from the actions of the terrorist organizations for the companies to be criminally culpable. *Gonzalez*, 598 U.S. at 622; *Taamneh*, 589 U.S. at 506. While not directly addressing the issue of whether social media companies could be held responsible for the activity of single users (e.g., domestic violence abusers), the Supreme Court’s recent decisions may indicate a general reluctance of the Court to legally recognize a zone of responsibility wherein social media companies are expected to maintain a duty of care in respect to the content of speech posted in their forums. *See Gonzalez*, 598 U.S. at 622; *Taamneh*, 589 U.S. at 506–07. Such a question is beyond the scope of this Article but the realities of the relationship between technology and violence in *Gonzalez* and *Taamneh* underscores this Article’s argument that more dynamic approaches to the issue are necessary if there is any hope in a shared effort to not only address current technology-enabled violence but to prevent it. *See Gonzalez*, 598 U.S. at 622; *Taamneh*, 589 U.S. at 506–07.

345. *See supra* Sections I.B, II.B.

346. *Counterman v. Colorado*, 143 S. Ct. 2106 (2023).

of his statements' threatening nature."<sup>347</sup> The Court stated a concern that criminalizing speech would create a "chilling effect" or, in other words, an environment where people are afraid to say anything at all.<sup>348</sup>

However, as described in two different reports from the U.N. in 1997 and 1998, and in a 2018 Amnesty International publication, when viewed through the lens of international human rights, "[t]he conflict between protecting freedom of speech online and preventing abuse is a false dichotomy that rests on a refusal to account for power among individual users."<sup>349</sup> Specifically regarding the obligations of countries in the protection of freedom of speech and expression, the U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression emphasized "there is a distinction to be drawn between speech which offends and hurts and that which exceeds the threshold of tolerance, ceases to be speech and becomes crime under international law."<sup>350</sup> When an abuser is allowed to post, say, or use any other form of communication as they want, the intended victim of that communication may well "self-censor and discontinue their participation in online spaces . . . [and] may also suppress their voice in this context."<sup>351</sup> Thus, when certain speech is not monitored and viewed and understood by a victim, that language can have the effect of limiting what the victim says. This is a difficult issue to address because it requires the trier of law to decide whose First Amendment rights are more important—an abuser who has a constitutional right to post violent messaging, whether violent in its intent or its effect, or a victim who is now silenced by that message. This is an important re-framing of the issue that many courts have seemingly not considered. Arguably, if courts sufficiently conducted this delicate balancing act, there would be a collective benefit of a much richer body of case law that discusses such a weighing of important and complex considerations.

In addressing the balance of individual rights when domestic violence is involved, a party's First Amendment rights cannot be viewed as carrying the same weight. The power differential that is involved in domestic violence must be considered by the judiciary when considering the constitutional rights of both the abuser and the victim. Addressing this kind of challenge requires social media

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347. *Id.* at 2111.

348*T.* *Id.* at 2114; *see also The Supreme Court, Counterman v. Colorado—Leading Cases*, 137 HARV. L. REV. 300 (2023).

349. Suzor, *supra* note 301, at 89.

350. Abid Hussain (Special Rapporteur on Commission on Human Rights), *Question of the Human Rights of All Person Subjected to any Form of Detention or Imprisonment Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. E/CN.4/1997/31 (Feb. 4, 1997).

351. Suzor et al., *supra* note 301, at 89.

platforms to closely engage in the conversation to limit technology-enabled domestic violence. Social media companies are vital to bringing realization to the voice of those victimized by their expertly constructed and constantly evolving platforms. If social media company leaders are not willing to restrict the words of abuser-users, then an alternative solution is for social media platforms to lend greater voice and support to the victims. Social media companies can do this by providing, and then strictly enforcing, policies regarding abusive online activity. They can highlight, and then follow through on, a commitment to support domestic violence victims and survivors by not tolerating abusive behavior of any sort.<sup>352</sup> Regardless of what social media companies do or how their platforms continue to operate, their leaders' knowledge and power must be part of the conversation and solutions-focused collaboration moving forward.

Taken together, the above proposals can serve as the basis for a conversation that includes the many stakeholders necessary to confront and resolve the role that technology plays in enabling domestic violence in the United States. Properly categorizing all forms of domestic violence provides a practical foundation to not only acknowledge the seriousness of domestic violence but to develop appropriate consequences for abusers. Building from this foundation, policy makers and legislators must develop legislation that recognizes the complex and cyclical nature of domestic violence. Law enforcement and legal personnel must then be educated and trained to understand the complex and interconnected aspects of domestic violence. The kind of veiled and insidious forms that domestic violence can assume make detection and understanding of the violence difficult—and has given abusers the ability and freedom to abuse for far too long. Finally, social media companies must take responsibility in addressing the undeniable use of their platforms and technology to perpetrate and proliferate domestic violence. Social media company leaders must have some kind of authority to limit the way abusers use their technology or, at minimum, to provide greater access to victims to speak their truth and find safety.

#### CONCLUSION

The law is regularly playing catch-up to the new and innovative structures that humans develop and bring into the world. Each new development and form of technology brings challenges; some challenges that we have seen before or

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352. See, e.g., Sascha Brodsky, *How Social Media Companies Are Trying to Stop Abuse*, LIFEWIRE (Sept. 1, 2021, 10:51 AM), <https://www.lifewire.com/how-social-media-companies-are-trying-to-stop-abuse-5199806> (discussing possible strategies to prevent or halt online abuse).

could predict and some that are brand new. To ensure that we are addressing such challenges in the most effective, legal, and sustainable ways, we need to be able to see how past challenges have and have not been resolved. The United States cannot rely on legislation and law enforcement alone to combat technology-enabled domestic violence. We must engage a multitude of disciplines that represent all the people and industries involved to craft a long-lasting solution to the pervasive and deeply dangerous issue of technology-enabled domestic violence. Undoubtedly, this must include domestic violence victims who are surviving and have survived abuse—and against all odds, made their voices heard.