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Violence as Indecency: *Pacifica's* Open Door Policy

Craig R. Smith¹

After a somewhat tumultuous time at the hands of reviewers, the film “Bonnie and Clyde” was nominated for ten academy awards including Best Picture. Burnett Guffey won the Oscar for his cinematography, which captured the look of the lower Midwest during the depression. Estelle Parsons, in a breakthrough role, won Best Supporting Actress as the daughter of a preacher who arcs into a gang member. Gene Hackman, as Clyde’s older brother Buck, was nominated for his portrayal and soon was seen as a major star. Warren Beatty, as Clyde, and Faye Dunaway, as Bonnie, became mega-stars after their nominations for the Oscar.

However, “Bonnie and Clyde” had no easy road to fame and fortune. By the time the film opened in the troubled summer of 1967 to compete with such stellar movies as “Who’s Afraid of Virginia Woolf,” “Cool Hand Luke,” “Guess Who’s Coming to Dinner,” “The Graduate,” and “In the Heat of the Night,” François Truffaut and Jean-Luc Godard had passed on it. Jack Warner finally agreed to fund the film if Beatty would star in it. However, when Warner saw the previews, he was offended by the graphic death scenes. He was not alone. After the opening, Bosley Crowther, of the *New York Times*, called the film “a cheap piece of bald-faced slapstick that treats the hideous depredations of that sleazy, moronic pair as though they were as full of fun and frolic as the jazz-age cut ups in ‘Thoroughly Modern Millie.’”² *Time* called the film “tasteless aimlessness.”³ *Newsweek* saw it as “a squalid shoot-em-up for the moron trade.”⁴

A number of things turned the situation around. First, the film caught fire on college campuses because of the spirit of rebellion brewing there due to the failing war in Vietnam. Second, Joe Morgenstern, who had written the first review for *Newsweek*, saw the film again, and decided to write a second review that praised the film and retracted his earlier comments. His friend Pauline Kael followed suit in the October of issue of *The New*

¹ Director, Center for First Amendment Studies, California State University, Long Beach.

² Louis Menand, *Paris, Texas: How Hollywood Brought the Cinema Back from France*, THE NEW YORKER, Feb. 17 & 24, 2003, at 175.

³ *Bonnie and Clyde 1967*, TIME, http://www.time.com/time/2005/100movies/0,23220,bonnie_and_clyde,00.html (last visited Sept. 16, 2006) (referencing the August 25, 1967 issue).

⁴ See RAYMOND J. HEBERSKI, IT’S ONLY A MOVIE! 178 (2001) (discussing the *Newsweek* quote).

Yorker. By December the film was on the cover of *Time* and ready for a second run. Faye Dunaway's costumes, including the infamous beret, led to a fashion revolution. However, the new found success of the film did not quiet its critics. Many argued that such films should be censored for their use of gratuitous violence. None of these critics could know that eleven years later the Supreme Court, as we shall see, would hand down a ruling that might open the door to this kind of censorship. If legislators in 1967 had devised a way to equate violence with indecency, as some have recently, "Bonnie and Clyde" might not have survived.

As it was, Roger Ebert, a young critic of only six months, had proven the exception to the rule among the film's early critics. He believed the film was a masterpiece, a "milestone" of film making. Ebert continues to be vindicated by such writers as Jake Horsley who, in his *Blood Poets*, calls "Bonnie and Clyde" an "all but perfect piece of violent entertainment—the first Hollywood movie to give the audience what it had been unconsciously waiting for: a head-on encounter with sex and death."⁵ Nicole Rafter comments that "the key factor in the movie's success was the way viewers empathized with Bonnie and Clyde. That audiences were able to identify with what were, after all, two long-dead punks, arose from the scriptwriters' skillful downplaying of the characters' negative traits and emphasis on their virtues."⁶ The key question for some critics was whether this kind of identification was healthy. After all, Bonnie and Clyde in real life and on the screen were murderers; one of the main complaints about the film was that it engaged in gratuitous violence. Clyde and his gang kill a number of people, and the killings are shown in more graphic detail than film audiences were accustomed to in 1967. At the film's conclusion, Bonnie and Clyde are machine-gunned to death in slow motion, their bodies riddled with 50 bullet holes. Did such depictions encourage violence in audience members? And if so, would such an outcome justify censoring the film?

Today, there are those in society who would censor films, Internet sites, and video games that depict violence. They would do so to advance the compelling government interest in reducing violence in society. Many of those advocating censorship have attempted to equate violence with indecency and have crafted laws based on indecency statutes. This article explores this legislative maneuver in several stages. First, it reviews the derivation of indecency rulings by the Supreme Court that establish a framework for the new laws. Second, it examines the relationship between depicted and real violence to assess whether a compelling government interest would be advanced by censoring various media. Finally, the article

⁵ 1 JAKE HORSLEY, *THE BLOOD POETS: A CINEMA OF SAVAGERY* 41 (1999).

⁶ NICOLE RAFTER, *SHOTS IN THE MIRROR: CRIME FILMS AND SOCIETY* 156 (2000).

reviews several rulings on the new laws to reveal why they have been declared unconstitutional.

DEDUCING INDECENCY FROM OBSCENITY

The latest efforts to censor depicted violence rely on the Supreme Court's restriction on broadcasters' First Amendment rights. These restrictions were concretized when the FCC dealt with complaints against a chain of noncommercial stations owned by Pacifica Foundation.⁷ After several complaints about programs dealing with homosexual themes and issues, including broadcast of the play *The Zoo Story*, by Edward Albee, and readings by several homosexual poets and authors, the Commission held that most of the material broadcast was a serious treatment of a social problem that was responsive to the needs and interests of persons making up the listening audiences of the stations.⁸ Moreover, the Commission noted that the two instances where the material was particularly offensive occurred in broadcasts after the hour of 10:00 p.m., when children were less likely to be in the audience. The Commission concluded that no action other than an admonition to Pacifica was appropriate given these facts.⁹

These pre-*Miller*¹⁰ cases suggested that the FCC had backed away from its earlier position in *Palmetto Broadcasting*¹¹ that required protection of the most sensitive of listeners. Instead, the Commission stated that while some of Pacifica's programming was offensive to some listeners, this did not mean that such broadcasts could or should be censored. Despite the FCC's warning in *Palmetto*, even serious literary works such as James Joyce's *Ulysses* or D. H. Lawrence's *Lady Chatterly's Lover*, which would not be found obscene under the *Roth*¹² standard, could nevertheless be banned from the airwaves, particularly if the more lurid details were included in any reading or dramatization.¹³ The different treatment could also be explained by the fact that the Pacifica Foundation stations were non-commercial and supported by listener donations. Although quite liberal in orientation, both politically and culturally, the controversial programs were "serious" literary works rather than smirking innuendo of a broadcast announcer attempting to be clever. Although not precisely similar, the *Palmetto* case presaged the Supreme Court's holding in *Ginzburg v. United*

⁷ *In re* Renewal of Pacifica, 36 F.C.C. 147 (1964).

⁸ *See id.* at 147-151.

⁹ *See id.* at 149-150.

¹⁰ *Miller v. California*, 413 U.S. 15 (1973).

¹¹ *In re* Palmetto Broadcasting Co., 33 F.C.C. 250 (1962).

¹² *Roth v. United States*, 354 U.S. 476 (1957).

¹³ *Palmetto*, 33 F.C.C. at 298-99.

States,¹⁴ two years later, that *pandering* may constitute separate (and perhaps conclusive) evidence that a work is obscene.

Two other decisions by the FCC prior to *Miller* fleshed out the legal theory that indecent, though non-obscene, material broadcast over the airwaves could be prosecuted under 18 U.S.C. § 1464.¹⁵ In *In re WUHY-FM, Eastern Education Radio*, the Commission admonished a station for broadcasting an interview with Grateful Dead lead singer, Jerry Garcia, whose responses were sprinkled with four-letter expletives.¹⁶ The interview was part of a regular program called “Cycle II,” which was broadcast after 10:00 p.m..¹⁷ Cycle II dealt with avant-garde artistic expression, and had frequently included interviews in which four-letter words were used.¹⁸

In maintaining that the protections in *Roth* did not apply to broadcasting, the Commission again distinguished broadcasting from other forms of media such as books, magazines, and motion pictures.¹⁹ Unlike print media or motion pictures, said the FCC, broadcasting is *episodic in nature*. Listeners are constantly tuning in and out of a program, so that their exposure to a program may not ever be of an entire work. This was especially true for radio,²⁰ so that the *Roth* requirement that the work be “taken as whole” was not necessary when examining broadcast matter.²¹ If a part of the broadcast was obscene, it could be heard in isolation. That would create a context for the listener that was harmful, particularly for station-surfing minors. Second, the Commission contended that language need not appeal to the prurient interest in order to be proscribed under the statute.²² It was enough, the Commission said, that the matter being broadcast was “patently offensive.”²³ This shift opened the door to the later fines imposed on such broadcasters as Howard Stern and his parent company Trinity Broadcasting.

¹⁴ *Ginzburg v. United States*, 383 U.S. 463 (1966).

¹⁵ 18 U.S.C. § 1464 (2004). “Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both.” *Id.*

¹⁶ *See In re WUHY-FM, Eastern Education Radio*, 24 F.C.C.2d 408, 409 (1970).

¹⁷ *Id.* at 408.

¹⁸ *Id.* at 408, n.1. The Commission had been monitoring the Cycle II program following receipt of several complaints; however, it had received no complaints about the Garcia interview. *Id.* at 409, n.2.

¹⁹ *Id.* at 411.

²⁰ The 1938 Orson Wells broadcast of H.G. Wells’ “War of the Worlds” is a case in point. Prior to the broadcast it was announced that the program, broadcast on Halloween night, was only a dramatization of the science fiction story written by British novelist H.G. Wells at the turn of the century. Many people in the northeast listening to the CBS broadcast, however, tuned in too late to hear the introduction, and believed that the U.S. was under attack by Martians. Panic set in as word spread by telephone and more people tuned in to listen to the broadcast which was written in the form of a series of newscasts. *See Radio Listeners Panic, Taking War Drama as Fact*, NEW YORK TIMES, Oct. 31, 1938, at 1.

²¹ *In re WUHY-FM*, 24 F.C.C.2d at 412.

²² *Id.*

²³ *Id.* at 411.

Further, despite the fact that the FCC received no complaints about the program, it held that the expletives were “patently offensive by contemporary community standards.”²⁴ The Commission concluded that WUHY-FM’s broadcast of the interview constituted “indecent” and was a violation of 18 U.S.C. § 1464.²⁵ Thus, the stage was set: indecency for broadcasters would cover much more material than obscenity, and this new indecency standard would not apply to the print media.

In October, 1973, WBAI-FM, a Pacifica Foundation-owned radio station in New York, broadcast a 12-minute monologue from a recording of a live performance by satiric humorist George Carlin entitled “Filthy Words.”²⁶ A few weeks later, a man—who stated that he had heard the broadcast while driving with his young son—wrote a letter complaining to the FCC.²⁷ In response to the complaint, Pacifica explained that the monologue had been played during a program about contemporary society’s attitude toward language.²⁸ They also explained that, immediately before its broadcast, listeners had been advised that it included “sensitive language which might be regarded as offensive to some.”²⁹ “Carlin [was] not mouthing obscenities,” said Pacifica, “he [was] merely using words to satirize as harmless and essentially silly our attitudes towards those words.”³⁰ Carlin was teaching a semantics lesson, as he often did and still does in his comedy routines.

Sixteen months later, the Commission issued a declaratory order granting the complaint and holding that Pacifica “could have been the subject of administrative sanctions.”³¹ The Commission took the occasion to “clarify the standards which will be utilized in considering” the growing number of

²⁴ *Id.* at 410. The Commission reasoned that the widespread use of such language on the radio would undermine the usefulness of the broadcast medium for millions of people because listeners would never know whether or not their children would be exposed to such “vile expressions” whenever they tuned in to a station’s broadcast. This, in turn, would severely curtail their use of radio, which was not in the public interest. *Id.* at 411.

²⁵ *Id.* at 413-16. The licensee was given a nominal fine of \$100, making it uneconomical for Eastern to appeal the ruling to the courts. *Id.* at 416.

²⁶ *In re* Matter of a Citizen’s Complaint Against Pacifica Foundation Station WBAI (FM), 56 F.C.C.2d 94, 95 (1975) [hereinafter *In re* WBAI].

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 95-96.

³⁰ *Id.* at 96 (quoting Pacifica’s response to the complaint). Pacifica said it was unaware of any complaints and had received none until the FCC made its inquiry. *Id.*

³¹ *Id.* at 99. The Commission did not impose any formal sanctions on Pacifica, but stated that the order would be “associated with the station’s license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress.” *Id.* at 99. The sanctions that the FCC may impose are (1) revocation of license; (2) issuance of cease and desist orders; (3) imposition of monetary penalties; (4) denial of renewal of license; or (5) granting renewal for less than a standard term. *Id.* at 96, n.3.

complaints about indecent speech on the airwaves.³² It advanced several reasons for treating broadcast speech differently from other forms of expression.³³ The Commission stated that its power to regulate indecent broadcasting was found in two federal statutes: 18 U.S.C. § 1464 (which prohibits the broadcast of obscene, indecent or profane language),³⁴ and 47 U.S.C. § 303(g) (which requires the Commission to “encourage the larger and more effective use of radio in the public interest[.]”).³⁵

The Commission characterized the language used in the Carlin monologue as “patently offensive,” though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to those found in the law of nuisance, where the “law generally speaks to *channeling* behavior more than actually prohibiting it.”³⁶ The commission concluded:

[T]he concept of “indecent” is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.³⁷

The Commission argued that certain words used by Carlin depicted sexual and excretory activities in a patently offensive manner and noted that they were broadcast at a time when children were undoubtedly in the audience (early afternoon).³⁸ Further, the pre-recorded language, with these offensive words “repeated over and over,” was willful and deliberate, in violation of 18 U.S.C. § 1464.³⁹

³² *Id.* at 94.

³³ *Id.* at 97. The Commission recited that:

[b]roadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference; (3) unconsenting [sic] adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.

(citations omitted). *Id.*

³⁴ 18 U.S.C. § 1464 (2004).

³⁵ See 47 U.S.C. § 303(g) (2005) (mandating that the F.C.C. “[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest.”).

³⁶ *In re WBAI*, 56 F.C.C.2d at 98.

³⁷ *Id.* Given the importance of the first criteria, the Commission observed that if an offensive broadcast had literary, artistic, political, or scientific value, and were preceded by warnings, it might not be indecent in the late evening, but would be so during the day, when children are in the audience. *Id.* at 98, 100.

³⁸ *Id.* at 99.

³⁹ *Id.*

The National Association of Broadcasters, as well as other groups, filed petitions seeking reconsideration of the *Pacifica* ruling.⁴⁰ The petitioners asked the FCC to clarify its opinion by ruling that the broadcast of indecent words, as part of a live newscast, would not be prohibited.⁴¹ The Commission issued another opinion stating that it, “never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.”⁴² The Commission also noted that its declaratory order was issued in a “specific factual context,” and declined to comment further on various hypothetical situations presented by the petition.⁴³

The rulings were appealed to the U.S. Court of Appeals, D.C. Circuit, which reversed by a vote of 2-1, with each judge writing a separate opinion and advancing several theories.⁴⁴ The FCC obtained a *writ of certiorari* from the Supreme Court. Justice Stevens delivered the opinion of the Court, which reversed the Court of Appeals and upheld the original decision by the FCC.⁴⁵ He limited the scope of the decision to four issues: “(1) whether the scope of judicial review encompasses more than the Commission's determination that the monologue was indecent ‘as broadcast’; (2) whether the Commission's order was a form of censorship forbidden by § 326 [of the Communications Act]; (3) whether the broadcast was indecent within the meaning of § 1464; and (4) whether the order violates the First Amendment of the United States Constitution.”⁴⁶ On the issue of facial validity,⁴⁷ the Court disagreed saying that while, “[i]t is true that the Commission's order may lead some broadcasters to censor themselves[; a]t most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities.”⁴⁸ This statement was important because it provided the model for those who would later attempt to define violence in specific non-

⁴⁰ *In re* “Petition for Clarification or Reconsideration” of a Citizen’s Complaint against Pacifica Foundation, Station WBAI (FM), 59 F.C.C.2d 892, 892 (1976).

⁴¹ *Id.* at 893, n. 1.

⁴² *Id.* at 892.

⁴³ *Id.* at 893. The Commission did acknowledge that under circumstances where “public events likely to produce offensive speech are covered live, and there [was] no opportunity for journalistic editing . . . it would be inequitable for us to hold a licensee responsible for indecent language. We trust that under such circumstances a licensee will exercise judgment, responsibility, and sensitivity to the community’s needs, interests and tastes.” *Id.* at 893, n.1 (citation omitted).

⁴⁴ *Pacifica Found. v. FCC*, 556 F.2d 9, 10-11 (D.C. Cir. 1977), *rev’d*, 438 U.S. 726 (1978).

⁴⁵ *See FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

⁴⁶ *Id.* at 734.

⁴⁷ In this context, *Pacifica* had argued that even if the Carlin piece could be deemed unprotected speech under the First Amendment, the FCC’s indecency policy was constitutionally overbroad, and would cause broadcasters to engage in self-censorship. *Id.* This is also known as the so-called “chilling” effect. *Id.* at 761-62, n.4 (Powell, J., concurring).

⁴⁸ *Id.* at 743. Justice Stevens observed that, “There are few, if any, thoughts that cannot be expressed by the use of less offensive language.” *Id.* at 743, n.18.

vague terms in order to meet with the standard. The Court dismissed the importance of protecting the broadcast of some of these references, contending that such references, “surely lie at the periphery of First Amendment concern.”⁴⁹ That is to say that indecent material was not the focus of the Founders’ concern, Benjamin Franklin’s scatological writings notwithstanding.

However, Justice Stevens admitted that offensive language by itself is not sufficient to justify the curtailment of a person’s First Amendment rights. “If there were any reason to believe that the Commission’s characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words—First Amendment protection might be required.”⁵⁰ Here, however, the Commission was punishing speech *not* because it disagreed with Carlin’s *opinion* that such language is harmless, but rather because of Carlin’s use of the offensive words to support his opinion. The Court stated that lesser First Amendment protection afforded broadcast speech were quite complex. However, two reasons were pertinent to the Carlin case: (1) the “uniquely pervasive presence” of broadcasting in the lives of all Americans, *intruding* even, into the privacy of the home, where the individual’s right to be let alone “plainly outweighs the First Amendment rights of an intruder;”⁵¹ and (2) the unique accessibility of the broadcast medium to children even to those who are too young to read.⁵² As noted by Justice Stevens, “[a]lthough Cohen’s written message [in *Cohen v. California*] might have been incomprehensible to a first grader, *Pacifica*’s broadcast could have enlarged a child’s vocabulary in an instant.”⁵³ As one might expect, the Court’s ruling in *Pacifica* was far from unanimous. Justices Powell and Blackmun, although concurring in the general holding, did not agree that the Supreme Court was free to decide for itself, on the basis of content, which speech is more “valuable” and therefore deserving of First Amendment protection, and which is less “valuable” and therefore less deserving of such protection.⁵⁴ Justice Brennan, joined by Justice Marshall,

⁴⁹ *Id.* at 743. The Court cited its prior decisions in *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380-81 (1977) and *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976) as support for the conclusion that there was a hierarchy of the subject matter of speech, and that commercial speech and indecent speech occupied the bottom rungs on the ladder, deserving of less protection than other kinds of speech. *Id.*

⁵⁰ *Id.* at 746. Justice Stevens argued in a footnote that Carlin’s opinion that society’s attitude towards the use of “four-letter words” did not mean that they could be used in all contexts. “The belief that these words are harmless does not necessarily confer a First Amendment privilege to use them while proselytizing, just as the conviction that obscenity is harmless does not license one to communicate that conviction by the indiscriminate distribution of an obscene leaflet.” *Id.* at 746, n. 22.

⁵¹ *Id.* at 748 (citing *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970)).

⁵² *Id.* at 749.

⁵³ *Id.*

⁵⁴ *Id.* at 761 (Powell, J., concurring in part).

dissented on the grounds that to restrict the airwaves to what was fit only for children, unconstitutionally deprived adult listeners of the kind of material represented by the Carlin monologue.⁵⁵ Moreover, despite the majority's assurance that the holding was limited to the specific facts of the case, Justice Brennan expressed his concern that no standards were articulated for judging which works could be banned from broadcast.⁵⁶ Justice Stewart also dissented, primarily on the point that there was no evidence whatsoever that Congress had specifically intended a different meaning to be ascribed to the term "indecent" in 18 U.S.C. § 1464 (broadcast obscenity) than it did in 18 U.S.C. § 1461 (obscenity by mail).⁵⁷ He held that the term "indecent" in 18 U.S.C. § 1464 prohibits nothing more than obscene speech,⁵⁸ as the Court had only recently reiterated in *Hamling v. United States*.⁵⁹ Thus, he would have affirmed the Circuit Court's holding reversing the FCC's decision.⁶⁰ Justice Stewart's position is key because it undercuts the majority's attempt to get around the burdens of proof required in obscenity cases. *Pacifica's* looser protections not only discriminate against broadcasters, they allow the FCC to violate the First Amendment rights of speakers who happen to use the airwaves to convey a message in a way that is not obscene. The *Pacifica* ruling thereby facilitates those who would equate depicted violence with indecency by opening the door to restrictions on indecent (partial, context determined) speech, as opposed to speech that fell under the much narrower obscenity rules. As we shall see, it is very difficult to prove a direct harm caused by the depiction of violence, but in obscenity and indecency cases, no such requirement has been part of the burden of proof. Preventing the violation of the social moral code is the only government interest.

VIOLENCE AND INDECENCY

The difference between "indecency" and "violence" was made clear earlier in *Winters v. New York*,⁶¹ one of the few Supreme Court cases that deals with the question of the effect of violence in the media. The state of New York had arrested Winters under a statute that prohibited the sale of stories of bloodshed.⁶² After three arguments before the Supreme Court, the law was deemed unconstitutional on the ground that it was too vague.⁶³ The

⁵⁵ See *id.* at 767-68 (Brennan, J., dissenting).

⁵⁶ *Id.* at 770.

⁵⁷ *Id.* at 780 (Stewart, J., dissenting).

⁵⁸ *Id.*

⁵⁹ See *id.* at 779.

⁶⁰ *Id.* at 780 (Stewart, J., dissenting).

⁶¹ *Winters v. New York*, 333 U.S. 507, 510 (1948). See also *Cohen v. California*, 403 U.S. 15, 25 (1971).

⁶² *Winters*, 333 U.S. at 508.

⁶³ *Id.* at 520.

Court has repeatedly held to this position. In *Connally v. General Construction Company*, for example, the Court ruled that terminology is unacceptable if it is “so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.”⁶⁴ It is a long-standing matter of constitutional law and administrative review that the arbitrary and capricious application of laws or regulations is prohibited. For example, in *Cox v. New Hampshire*, the Supreme Court made clear that a law giving a licensing board arbitrary power and unfettered discretion over parades would not stand.⁶⁵ Similarly, “gratuitous violence” is clearly an arbitrary phrase that can be used in a capricious manner. Thus, defining what is or is not gratuitous violence may be better left to critics than to government censors.

Nonetheless, many critics of the media argue that imitation of violence, particularly from video games and television, is a cause of concern. However, no court has granted monetary compensation for harm allegedly caused by a video program because the courts doubt the existence of a provable, causal link between video depiction and real harm.⁶⁶ In several cases including *Zamora v. Columbia Broadcasting System*, *Olivia N. v. NBC*, *Walt Disney Prod. v. Shannon*, and *DeFilippo v. NBC*, the plaintiffs were denied damages when they alleged that they were victims of violence incited by television programming.⁶⁷ Instead, the courts sided with the defendants’ claims to a First Amendment right to freedom of expression. Only advocacy of “imminent lawless action” may be restricted,⁶⁸ and the Supreme Court has specifically ruled that televised violence does not fall into that category, especially if it is entertainment.⁶⁹ Viewers are expected to know the difference between fact and fiction and, in either case, have the good sense not to imitate harmful activity.

Specifically with regard to indecent material, First Amendment protection was unanimously extended to the Internet in June of 1997 in *Reno v. ACLU*.⁷⁰ The Court struck down the provision of the law that prohibited the

⁶⁴ *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

⁶⁵ See generally, *Cox v. New Hampshire*, 312 U.S. 569 (1941). See also *Cantwell v. Connecticut*, 310 U.S. 296, 297 (1940) (“arbitrary and capricious action by licensing officer is subject to judicial review”); *Lovell v. City of Griffin*, 303 U.S. 444, 450-52 (1938) (striking an ordinance which absolutely prohibited distribution of leaflets as overly broad).

⁶⁶ Raymond G. Lande, M.D., *The Video Violence Debate*, 44 HOSP. & COMMUNITY PSYCHIATRY 347, 349 (1993) (citing, Vitauts M. Gulbis, *Broadcasters Personal Injury Liability*, 20 A.L.R. 4TH 327 (1983)).

⁶⁷ *Zamora v. Columbia Broad. Sys.*, 480 F.Supp. 199 (S.D. Fla. 1979); *Olivia N. v. Nat’l Broad. Co.*, 178 Cal. Rptr. 888 (Cal. Ct. App. 1982); *Walt Disney Prod. v. Shannon*, 276 S.E.2d 580 (Ga. 1981); *DeFilippo v. Nat’l Broad. Co., Inc.*, 446 A.2d 1036 (R.I. 1982).

⁶⁸ See *Brandenburg v. Ohio*, 395 U.S. 444, 449 n.4 (1969).

⁶⁹ See Julian W. Schlegel, Note, *The Television Violence Act of 1990: A New program for Government Censorship?*, 46 FED. COMM. L.J. 187, 206-07 (1993).

⁷⁰ *Reno v. American Civil Lib. Union*, 521 U.S. 844 (1996).

“display” of indecent materials on-line, and voted seven to two to void the provision that banned the transmission of indecent information to a minor.⁷¹ Justice Stevens argued that the government may not, in an effort to protect children, “justify an unnecessarily broad suppression of speech addressed to adults.”⁷² On this point, his opinion directly contradicts the *Pacifica* holding.

The vagueness of the term “violence” is one of the most persistent problems for those who seek to regulate it because it encourages arbitrary regulation that violates free, let alone creative, speech. As I have shown, the Supreme Court has consistently ruled that inhibiting speech is unconstitutional, especially when the inhibition is caused by the application of an “arbitrary and capricious” standard. Television programs from reruns of *The Little Rascals* to *Friends* achieve comic effects using what some have called violent activity. Since conflict makes drama, it is hard to find a serious program, whether it is *Hamlet* or *Saving Private Ryan*, that is not violent in some way. Furthermore, violence can be used to reinforce in the mind of audience members what is moral and what is immoral. Other studies show that violence in programming is cathartic and might actually prevent real-world violence.⁷³

The problem with defining violence also exists in the social scientific world. Sometimes violence is described as aggressive behavior; sometimes it is described as verbal abuse and teasing. Constitutional scholars Thomas Krattenmaker and L.A. Powe put the problem this way in their landmark two-hundred page review of social scientific research:

Finally, and most damaging to proponents of the violence hypothesis, no one yet has been able to suggest an acceptable operational definition of the very kind of behavior sought to be measured: “violence.” To be useful as a basis for policymaking, studies of the causes of violence must rest upon a definition incorporating normative, social connotations. To illustrate, if violence is defined simply as a willingness to stand one’s ground when physically attacked, it is extremely unlikely that violence caused by television would produce an outcry for increased public regulation. What then can the researcher take as an objectively observable conception of violence capable of measuring behavior that produces social concern?⁷⁴

In the wrong hands, and perhaps in any hands, using a phrase like “gratuitous violence” to write policy creates a “broad sweep” that would

⁷¹ *Id.* at 859, 885.

⁷² *Id.* at 875.

⁷³ For discussion on this, see JIB FOWLES, *THE CASE FOR TELEVISION VIOLENCE* (1999).

⁷⁴ Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1155 (1978).

include many instances of creativity or even innocuous speech and/or programming. Therefore, it is unconstitutional and dangerous to allow the government to censor “gratuitous violence” and/or other such indefinable phrases. As we shall see, that argument has forced advocates of censorship of violence to attempt the kind of specific definitions that have succeeded in indecency and obscenity cases. Specific kinds of dismemberment, blood flow, and the like have been incorporated into the latest ordinances.

VIOLENCE AS INDECENCY

If the term “violence” was not already open to arbitrary use, the attempt to equate it with indecency certainly reinforced that move. Municipalities and state governments are considering or have written ordinances that equate violence with indecency by conflating the terms used by the Supreme Court in the *Roth*, *Miller*, and *Jenkins* cases.⁷⁵

One of the most recent ordinances was written by the City of Indianapolis; it attempted to limit access to violent video games by minors in arcades.⁷⁶ The ordinance defined “graphic violence” in two ways. First, it bracketed “graphic violence” with obscenity, arguing that it caters to a “morbid interest” and is “patently offensive to prevailing standards in the adult community as a whole . . . [and] lacks serious literary, artistic, political or scientific value.”⁷⁷ Secondly, the ordinance defined “graphic violence” as “amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration.”⁷⁸ The trial court approved the implementation of the ordinance on the grounds that psychological studies of other games provided enough data to convince the court that such games induced minors to aggressive acts of violence.⁷⁹ The case was appealed to the Seventh Circuit in 2001.⁸⁰

Judge Posner wrote the opinion for the court in *American Amusement Machine Association v. Kendrick*.⁸¹ Referencing *State v. Johnson*, which makes clear that, “depictions of torture and deformation are not inherently sexual,”⁸² he refused to equate violence with obscenity.⁸³ Likewise, Posner took exception to the use of court-sanctioned obscenity prohibitions as ap-

⁷⁵ *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1973); *Jenkins v. Georgia*, 418 U.S. 153 (1974).

⁷⁶ *Am. Amusement Mach. Ass’n v. Kendrick*, 115 F. Supp. 2d 943, 946 (S.D. In. 2000), *rev’d* *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

⁷⁷ *Am. Amusement Mach.*, 115 F. Supp. 2d at 946.

⁷⁸ *Id.*

⁷⁹ *Id.* at 963-64.

⁸⁰ *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

⁸¹ *Id.* at 573.

⁸² *Id.* at 574 (quoting *State v. Johnson*, 343 So.2d 705, 709-10 (La. 1977)).

⁸³ *Am. Amusement Mach.*, 244 F.3d at 574.

plied to violent depictions.⁸⁴ He argued that, “no showing has been made that games of the sort found in the record of this case” induce violence.⁸⁵ “The grounds [for such an ordinance] must be compelling and not merely plausible [because c]hildren have First Amendment rights.”⁸⁶ In the end, he compared the video games to literature containing graphic violence and concluded that video games, despite their interactive nature, were still stories that taught various lessons.⁸⁷

THE EVIDENCE FOR A COMPELLING GOVERNMENT INTEREST

Thus, those attempting to censor violence face the burden of proving that there is at least a correlation between viewing violence on some form of media and then enacting it. The fact is that most of the studies used to support such a correlation are methodologically flawed.⁸⁸ As Marjorie Heins of the ACLU has made clear, much of the so-called research is merely a summary of other studies.⁸⁹ The original studies are erroneous, poorly measured, and/or based on responses from high school freshmen and sophomores.⁹⁰ The laboratory tests are not scientific, not representative of the population, and do not use an operational definition of violence. As Marcia Pally has reported, the Department of Education concluded that “a disturbing amount of scholarship has been slipshod.”⁹¹ That is why it is very difficult to get such evidence admitted in courts of law.

One of the most distressing facts about these studies is that they ignore variables that are clearly relevant to them. For example, preference for violence is a factor that is a stronger predictor of aggression than viewing choices. In 1991, Kim Walker and Donald Morley “demonstrated that the strongest predictor of aggression among adolescents was their attitude toward television violence. [T]he more adolescents reported liking television violence, the more aggressive were their behavioral intentions.”⁹² Jonathan Freedman, a professor at the University of Toronto, also determined that

⁸⁴ *Id.* at 575-76.

⁸⁵ *Id.* at 575.

⁸⁶ *Id.* at 576 (citing *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 212-14 (1975); *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 511-14 (1969)).

⁸⁷ *Am. Amusement Mach.*, 244 F.3d at 577.

⁸⁸ Jonathan Freedman, *Television Violence and Aggression: A Rejoinder*, 100 PSYCHOL. BULL. 372-78 (1986); Victor Strassburger, *Television and Adolescents: Sex, Drugs, Rock 'n' Roll*, 1 ADOLESCENT MED. 161-94 (1990).

⁸⁹ Marjorie Heins, *Media Violence and Free Speech*, (Oct. 4, 1994) (paper presented to International Conference on Violence in the Media). See also Freedman, *supra* note 88, at 372-78 (summarizing several studies).

⁹⁰ See Strassburger, *supra* note 88, at 161-94.

⁹¹ MARCIA PALLY, SEX AND SENSIBILITY: REFLECTIONS ON FORBIDDEN MIRRORS AND THE WILL TO CENSOR 93 (1994).

⁹² Kim B. Walker & Donald D. Morley, *Attitudes and Parental Factors as Intervening Variables in the Television Violence-Aggression Relation*, 8 COMM. RES. REP. 44 (1991).

“preference for violent programming on television is correlated with aggressive behavior.”⁹³ In other words, *if a child prefers violence beforehand, the child will select violent programming*. Professor Edward Donnerstein, a psychologist and Dean of Social Behavioral Science at the University of Arizona, concurs.⁹⁴ Those prone to violence watch violent programming; the programming does not make them violent.⁹⁵ Karen Hennigan and her associates examined the impact of the introduction of television on levels of crime in the United States.⁹⁶ The researchers took advantage of the FCC freeze on new broadcasting licenses, which lasted from late 1949 to mid-1952.⁹⁷ Those communities that gained access to television prior to the freeze were compared to the communities that were temporarily isolated from television's influence.⁹⁸ The researchers employed an interrupted time series design with switching replications to ensure internal and external validity.⁹⁹ Yearly FBI crime reports supplied the data detailing statistics for the following crimes: murder, aggravated assault, larceny, auto theft, and burglary. The researchers analyzed reports from 1936 through 1976 for cities, and from 1933 through 1974 for the states and found “no consistent evidence of an increase in . . . [murder, aggravated assault, burglary, or auto theft] due to the introduction of television in the years tested.”¹⁰⁰

In 1992, Wiegman conducted a cross-cultural, longitudinal study investigating the extent to which the viewing of violent content in dramatic television programs invited aggressive behavior in children.¹⁰¹ The study examined Holland, Australia, Finland, Israel, Poland, and the United States over a period of three years.¹⁰² The researchers reported that, “On the basis of the data of all countries participating in this study, we may conclude that there is almost no evidence for the hypothesis that television violence viewing leads to aggressive behaviour.”¹⁰³ The statistical relationship between aggression and television, that some social scientists have found, disappears

⁹³ Jonathan L. Freedman, *Effect of Television Violence on Aggressiveness*, 96 PSYCHOL. BULL. 227, 243 (1984).

⁹⁴ Marcia Meier, *Violence in Our Society: Who's to Blame and What's to be Done?*, SANTA BARBARA NEWS-PRESS, Mar. 5, 1995, at G5.

⁹⁵ *Id.*

⁹⁶ See generally Karen M. Hennigan et al., *Impact of the Introduction of Television on Crime in the United States: Empirical Findings and Theoretical Implications*, 42 J. PERSONALITY & SOC. PSYCHOL. 461, 473 (1982).

⁹⁷ *Id.* at 454.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 469-73.

¹⁰¹ O. WIEGMAN, ET AL., *A Longitudinal Study of the Effects of Television Viewing on Aggressive and Pro-Social Behaviour*, 31 BRIT. J.SOC. PSYCHOL. 147, 159 (1992).

¹⁰² *Id.* at 147.

¹⁰³ *Id.*

when the data is corrected to reflect such other factors as a child's intelligence and preexisting level of aggression.¹⁰⁴

Donnerstein argues that "viewing violence per se does not cause people to become violent."¹⁰⁵ He points out those countries with much more violence on broadcast media than America do not have high levels of violence in society.¹⁰⁶ He cites Japan and Canada as his examples. What America has that Japan and Canada lack is a high level of poverty, excessive gun ownership, drug abuse, broken homes, illegitimacy, and gangs.¹⁰⁷ Donnerstein makes clear that violence in America has declined for every age group except teenagers, where the increase skews the results for the rest of the population.¹⁰⁸ James Q. Wilson, the Collins Professor of Management and Public Policy at UCLA, reached a similar conclusion in his book *The Moral Sense*.¹⁰⁹ In Japan, incredible violence pervades the media, yet Japan has remarkably low rates of crime, particularly violent crime.

There are other questions that some social scientists avoid. Could it be that television's profound effect stems not from its content but from its availability, the amount of time watched, the introduction of color, and/or location? Since television is in our homes, it is more accessible, and misuse may be more likely to result than from more remote media such as motion pictures. If that were the case, banning certain programming would not solve the problem because those who watch television excessively would simply tune-in to other programs. By some accounts, children who do not receive proper exercise and play time become more aggressive. This phenomenon is not difficult to understand. Outdoor competitive physical games provide an outlet for aggression. If that outlet is blocked because the child is watching too much television, the child will be more violent in interpersonal behavior. Thus, the variable may not be the *content* of television programming, but rather the *amount of time* spent watching television.

Marie Winn, author of *The Plug in Drug: Television, Children and the Family*, supports this hypothesis.¹¹⁰ In the *New York Times*, she responded to Dr. Brandon Centerwall's study¹¹¹ by explaining that violent content is not the problem but that "the time-consuming act of watching replaces some crucial child experiences, notably play and socialization."¹¹² Accord-

¹⁰⁴ *Id*

¹⁰⁵ See Meier, *supra* note 94, at G1.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ JAMES Q. WILSON, *THE MORAL SENSE* (1995).

¹¹⁰ See generally MARIE WINN, *THE PLUG IN DRUG: TELEVISION, CHILDREN, AND THE FAMILY* (1985).

¹¹¹ Brandon S. Centerwall, *Television and Violence: The Scale of the Problem and Where to go From Here*, 267 JAMA 3059-63 (1992).

¹¹² Marie Winn, *Does Television Itself Nurture Violence?*, N.Y. TIMES, Aug. 9, 1992, at A16.

ing to Winn, “[e]ven if the content is monitored—if all your child watches is *Sesame Street*, *National Geographic* specials or *60 Minutes*, the effect [is] the same.”¹¹³ Understandably, the twenty-four hours, on average, that the American child spends in front of the television each week replaces time that might better be spent interacting with family members, playing with the family pet, learning to read, or riding a bicycle.¹¹⁴ The solution is to *restrict access to television*, which in fact some parental groups have advised.

Geographic location is also a factor that many social scientists avoid. Detroit’s reported crimes are many times higher than Windsor, Canada;¹¹⁵ yet, residents of Windsor, just across the bridge from Detroit, watch the same programming as do the citizens of Detroit. This situation is not unique. Compare various neighborhoods in San Francisco, New York City, and Los Angeles, and the results suggest that alternate causes are at work here.

In January of 1996, the results of an extensive geographic study demonstrated that exposure to lead in the environment may contribute significantly to criminal behavior, particularly in inner cities.¹¹⁶ This field study was conducted by Dr. Herbert L. Needleman of the University of Pittsburgh’s School of Medicine; Dr. Needleman studied 301 males from Pittsburgh’s inner-city.¹¹⁷ He found that boys with above-normal lead values were more aggressive and had higher delinquency rates when evaluated by teachers, parents, and, most important, themselves.¹¹⁸

Perhaps the cause of violence is brain physiology. Richard Davidson, a psychologist at the University of Wisconsin, studied 500 people with strong violent activity and concluded that they had diminished brain activity in the prefrontal region, while activity in the amygdala was higher than normal.¹¹⁹ The prefrontal area helps to control serotonin levels. The link between prefrontal damage and violence has been the subject of important recent research. In 2002, University of Southern California neuro-scientist Adrian Raine found that damage or poor functioning of the prefrontal cortex was highly correlated to violent activity.¹²⁰ Raine went on to take PET

¹¹³ James R. Petersen, *The Curse of The Boob Tube*, PLAYBOY, Dec., 1992, at 49. See also Schlegel, *supra* note 69, at 200.

¹¹⁴ *Id.*

¹¹⁵ Compare FEDERAL BUREAU OF INVESTIGATION, 2002 *Uniform Crime Report, Table 6*, available at <http://www.fbi.gov/ucr/02cius.htm> (click on “Table 6” link) (last accessed Mar. 9 2005), with THE DAILY, *Crime Rates by Metropolitan Area*, available at <http://www.statcan.ca/Daily/English/0-30724/d030724a.htm> (last accessed Jul. 24, 2003).

¹¹⁶ Herbert L. Needleman et al., *Bone Lead Levels and Delinquent Behavior*, 275 JAMA 363, 369 (1996).

¹¹⁷ *Id.* at 363-64.

¹¹⁸ *Id.* at 366-67.

¹¹⁹ Judy Foreman, *Roots of Violence May Lie in Damaged Brain Cells*, LOS ANGELES TIMES, Apr. 29, 2002, at S1, S4. Ms. Foreman is on the faculty of the Harvard Medical School.

¹²⁰ *Id.*

(position-emission tomography) scans of forty-one convicted murderers and compared them to forty-one normal counterparts.¹²¹ The murderers had lower levels of prefrontal activity.¹²² In fact, Raine demonstrated that impulsive murderers, as compared with premeditated murderers, had the lowest levels of prefrontal activity.¹²³ He also found that brain cells in the prefrontal area were smaller among people demonstrating anti-social behavior than among those who did not.¹²⁴ Jonathan Pincus, head of neurology at the Veterans Center in Washington, D.C., also linked damage to prefrontal lobe areas with increased violent tendencies.¹²⁵ And, Dr. Allan Siegel of the New Jersey Medical School has found that different parts of the hypothalamus cause different types of violence.¹²⁶

As new research has come in, the role of depicted violence has been further defined. Richard Rhodes, a Pulitzer Prize winning scientist, told ABC News: "There is no good evidence that watching mock violence in the media either causes or even influences people to become violent."¹²⁷ In 2001, President Bush's Surgeon General concluded that the evidence to suggest that video games cause long-term aggressive behavior was insufficient. In April of 2004, the *Journal of the American Medical Association* summarized available research and agreed with the Surgeon General. It also noted that while video game participation has increased, youth violence is on the decrease. In June of 2005, Professor Dmitri Williams published a study in *Communication Monographs* that examined 213 non-video game playing subjects who were asked to play video games for a month. He found no increase in aggressiveness among the participants.¹²⁸

Thus, the best evidence does not support the contention that depicted violence causes real violence in society. Censoring depicted violence is not going to reduce violence; such a scheme does not advance a compelling government interest based on current research.

CONCLUSION

"This Film Is Not Yet Rated," premiered at the 2006 Sundance Film Festival. It argued that the Motion Picture Association engaged a double standard when applying ratings to sex and violence. The film argues that violence should receive the same ratings as sexually explicit material. The

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ BROADCASTING AND CABLE, Oct. 30, 2000, at 82.

¹²⁸ See generally Dmitri Williams & Martin Skoric, *Internet Fantasy Violence, A Test of Aggression in an Online Game*, COMMUNICATION MONOGRAPHS, Jun., 2005, at 217, available at <https://netfiles.uiuc.edu/dcwill/www/CMWilliamsSkoric.pdf> (last visited Nov. 04, 2006).

film may result in more attempts to legislate morality. To date, however, legal challenges to statutes attempting to censor video games have succeeded.¹²⁹ We have also seen the same protection afforded to the Internet, to cable television, and to the print media. Violence cannot be censored because it cannot be equated with indecency or obscenity. Violence cannot be censored because advocates of censorship have failed to present a compelling interest for restrictions. Thus, on most all fronts, the First Amendment rights of those who depict violence have been protected.

What remains troubling is that the *Pacifica* ruling has not been reversed. The FCC is allowed to continue to treat broadcasters as second class citizens. The ruling invites advocates of censorship to build insidious analogies that undermine creative works. As long as the *Pacifica* ruling remains on the books, it is an invitation to those who seek to censor violence to write statutes that equate violence with indecency and to restrict media in the same way that the ruling restricts broadcasters. The restrictions placed on broadcasters by *Red Lion Broadcasting v. FCC* have been severely eroded by the suspension of the fairness doctrine and the repeal of the political editorial and personal attack rules. However, *Pacifica* stands as regnant law and thus continues to invite unwarranted censorship. It is time this mote in the eye of the First Amendment be removed.

¹²⁹ The most recent case occurred in California where the video game association won a stay of implementing a new law passed by the legislature and signed by the governor that would have required that video games be labeled by degree of violence. Those with the highest ratings would not have been allowed to be sold to minors.