

Chapter 2: Conflating Violence and Indecency Is Insidious Censorship

By Craig Smith, Director

In the previous chapter of this report, I examined the problems resulting from attempts to censor and/or regulate indecency. The *Pacifica* ruling, because of its vague and arbitrary nature, has opened the door to censorship of harmless broadcast discourse. A further manifestation of this problem is that some policy makers have used the ruling to attempt to censor violence by equating it with indecency. Thus, this chapter examines the law regarding censorship beyond *Pacifica* and then looks at the problems related to regulating violence in this manner.

The Current State of the Law

The difference between “indecency” and “violence” was made clear in *Winters v. New York*,¹ one of the few Supreme Court cases that deals with the question of the effect of media portrayals of violence. The state of New York had arrested Winters under a statute that prohibited the sale of stories of bloodshed.² After three arguments before the Supreme Court, the law was deemed unconstitutional on the ground that it was too vague.³ The 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.”⁴ 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.⁵ Similarly, “gratuitous violence” is clearly an arbitrary phrase that can be used in a capricious manner.

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.⁶ 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.⁷ Instead, the courts sided with

¹ *Winters v. New York*, 333 U.S. 507, 510 (1948). See also *Cohen v. California*, 403 U.S. 15, 25 (1971).

² *Winters*, 333 U.S. at 508.

³ *Id.* at 520.

⁴ *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

⁵ 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).

⁶ 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)).

⁷ *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).

the defendants' claims to a First Amendment right to freedom of expression. Only advocacy of "imminent lawless action" may be restricted,⁸ and the Supreme Court has specifically ruled that televised violence does not fall into that category, especially if it is entertainment.⁹ 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*.¹⁰ The Court struck down the provision of the law that prohibited the "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.¹¹ Justice Stevens argued that the government may not, in an effort to protect children, "justify an unnecessarily broad suppression of speech addressed to adults."¹² 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. 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 violent activity. Since conflict makes drama, it is hard to find a serious work, 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. Violence in programming is often cathartic and might actually prevent real-world violence.¹³

The Problem of Defining Unhealthy Violence

Defining violence is a problem 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 Lucas 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

⁸ See *Brandenburg v. Ohio*, 395 U.S. 444, 449 n.4 (1969).

⁹ 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).

¹⁰ *Reno v. American Civil Lib. Union*, 521 U.S. 844 (1996).

¹¹ *Id.* at 859, 885.

¹² *Id.* at 875.

¹³ For discussion on this, see JIB FOWLES, *THE CASE FOR TELEVISION VIOLENCE* (1999).

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?¹⁴

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

If the term “violence” was not already open to arbitrary use, the attempt to equate it with indecency certainly makes matters worse. 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.¹⁵

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.¹⁶ 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.”¹⁷ Secondly, the ordinance defined “graphic violence” as “amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration.”¹⁸ 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.¹⁹ The case was appealed to the Seventh Circuit in 2001.²⁰

¹⁴ Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1155 (1978).

¹⁵ *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).

¹⁶ *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).

¹⁷ *Am. Amusement Mach.*, 115 F. Supp. 2d at 946.

¹⁸ *Id.*

¹⁹ *Id.* at 963-64.

²⁰ *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

Judge Posner wrote the opinion for the court in *American Amusement Machine Association v. Kendrick*.²¹ Referencing *State v. Johnson*, which makes clear that, “depictions of torture and deformation are not inherently sexual,”²² he refused to equate violence with obscenity.²³ Likewise, Posner took exception to the use of court-sanctioned obscenity prohibitions as applied to violent depictions.²⁴ He argued that, “no showing has been made that games of the sort found in the record of this case” induce violence.²⁵ “The grounds [for such an ordinance] must be compelling and not merely plausible [because c]hildren have First Amendment rights.”²⁶ 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.²⁷

Assessing Evidence of 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.²⁸ As Marjorie Heins of the ACLU has made clear, much of the so-called research is merely a summary of other studies.²⁹ The original studies are erroneous, poorly measured, and/or based on responses from high school or college freshmen and sophomores.³⁰ 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.”³¹ That is why it is very difficult to get such evidence admitted into 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

²¹ *Id.* at 573.

²² *Id.* at 574 (quoting *State v. Johnson*, 343 So.2d 705, 709-10 (La. 1977)).

²³ *Am. Amusement Mach.*, 244 F.3d at 574.

²⁴ *Id.* at 575-76.

²⁵ *Id.* at 575.

²⁶ *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)).

²⁷ *Am. Amusement Mach.*, 244 F.3d at 577.

²⁸ 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).

²⁹ 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).

³⁰ See Strassburger, *supra* note 88 at 161-94.

³¹ MARCIA PALLY, SEX AND SENSIBILITY: REFLECTIONS ON FORBIDDEN MIRRORS AND THE WILL TO CENSOR 93 (1994).

intentions.”³² Jonathan Freedman, a professor at the University of Toronto, also determined that “preference for violent programming on television is correlated with aggressive behavior.”³³ 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.³⁴ Those prone to violence watch violent programming; the programming does not make them violent.³⁵ Karen Hennigan and her associates examined the impact of the introduction of television on levels of crime in the United States.³⁶ The researchers took advantage of the FCC freeze on new broadcasting licenses, which lasted from late 1949 to mid-1952.³⁷ Those communities that gained access to television prior to the freeze were compared to the communities that were temporarily isolated from television's influence.³⁸ The researchers employed an interrupted time series design with switching replications to ensure internal and external validity.³⁹ 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.”⁴⁰

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.⁴¹ The study examined Holland, Australia, Finland, Israel, Poland, and the United States over a period of three years.⁴² 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.”⁴³ The statistical relationship between aggression and television, that some social scientists have found, disappears when the data is corrected to reflect such other factors as a child's intelligence and preexisting level of aggression.⁴⁴

³² 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).

³³ Jonathan L. Freedman, *Effect of Television Violence on Aggressiveness*, 96 PSYCHOL. BULL. 227, 243 (1984).

³⁴ 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.

³⁵ *Id.*

³⁶ 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).

³⁷ *Id.* at 454.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 469-73.

⁴¹ 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).

⁴² *Id.* at 147.

⁴³ *Id.*

⁴⁴ *Id.*

Donnerstein argues that “viewing violence per se does not cause people to become violent.”⁴⁵ He points out those countries with much more violence on broadcast media than America do not have high levels of violence in society.⁴⁶ 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.⁴⁷ 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.⁴⁸ James Q. Wilson, the Collins Professor of Management and Public Policy at UCLA, reached a similar conclusion in his book *The Moral Sense*.⁴⁹ 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 it is 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.⁵⁰ In the *New York Times*, she responded to Dr. Brandon Centerwall's study⁵¹ 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.”⁵² According 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.”⁵³ 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

⁴⁵ See Meier, *supra* note 94, at G1.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ JAMES Q. WILSON, *THE MORAL SENSE* (1995).

⁵⁰ See generally MARIE WINN, *THE PLUG IN DRUG: TELEVISION, CHILDREN, AND THE FAMILY* (1985).

⁵¹ Brandon S. Centerwall, *Television and Violence: The Scale of the Problem and Where to go From Here*, 267 *JAMA* 3059-63 (1992).

⁵² Marie Winn, *Does Television Itself Nurture Violence?*, *N.Y. TIMES*, Aug. 9, 1992, at A16.

⁵³ James R. Petersen, *The Curse of The Boob Tube*, *PLAYBOY*, Dec., 1992, at 49. See also Schlegel, *supra* note 69, at 200.

to read, or riding a bicycle.⁵⁴ 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;⁵⁵ 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.⁵⁶ 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.⁵⁷ 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.⁵⁸

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.⁵⁹ 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.⁶⁰ Raine went on to take PET (position-emission tomography) scans of forty-one convicted murderers and compared them to forty-one normal counterparts.⁶¹ The murderers had lower levels of prefrontal activity.⁶² In fact, Raine demonstrated that impulsive murderers, as compared with premeditated murderers, had the lowest levels of prefrontal activity.⁶³ He also found that brain cells in the prefrontal area were smaller among people demonstrating anti-social behavior than among those who did not.⁶⁴ Jonathan Pincus,

⁵⁴ *Id.*

⁵⁵ 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).

⁵⁶ Herbert L. Needleman et al., *Bone Lead Levels and Delinquent Behavior*, 275 JAMA 363, 369 (1996).

⁵⁷ *Id.* at 363-64.

⁵⁸ *Id.* at 366-67.

⁵⁹ 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.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

head of neurology at the Veterans Center in Washington, D.C., also linked damage to prefrontal lobe areas with increased violent tendencies.⁶⁵ And, Dr. Allan Siegel of the New Jersey Medical School has found that different parts of the hypothalamus cause different types of violence.⁶⁶

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.”⁶⁷ 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.⁶⁸

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.

The Agenda of the FCC

Despite the preponderance of research on this issue, the staff at the Federal Communications Commission in February of 2007 invited Congress to censor violence on television. The FCC report argues that it would not violate the Constitution to equate violence with indecency, which the FCC already has the power to regulate. All it would take is an act of Congress giving the FCC the power to move forward with its censorship agenda.

Some may argue that since the Democrats control the Congress, the First Amendment is safe from such intrusions. The fact is, however, that the leading legislator supporting this move is Senator Jay Rockefeller, Democrat of West Virginia. In July 2007, the senator announced his intention to craft legislation that would attempt to categorize violence within the same parameters used to regulate “indecency” in the media, thus allowing the FCC to govern and penalize its misuse in broadcasting.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ BROADCASTING AND CABLE, Oct. 30, 2000, at 82.

⁶⁸ 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).

Senator Rockefeller went so far as to include cable and satellite programming in the purview of the intended bill, which would doubtless make it the most powerfully broad piece of censorship legislation ever drafted. Ostensibly it would regulate nearly everything save content created specifically for print or the Internet. First Amendment lawyer Corn-Revere cautions that such legislation would target speech based on viewpoint as well as subject and would therefore be subject to very close scrutiny by the courts.⁶⁸

Conclusion

Because of the research reviewed in this study, the courts have found that violent programming cannot be regulated without creating a chilling effect on its content. Furthermore, since violence is very difficult to define, it presents regulators with the opportunity to censor in an arbitrary and capricious manner, which is also unconstitutional. Since the FCC and some members of Congress choose to ignore their pledge to uphold and defend the Constitution, it may be up to the courts to save us from unconstitutional censorship in the near future.