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REGULATING THE ACCESS OF CHILDREN TO TELEVISED VIOLENCE

*Kevin W. Saunders**

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I would like to begin by thanking the organizers of this symposium for stretching the concept of access to include limitations on audience access, both of children to material that may be inappropriate and of broadcasters to audiences that include children. It is an important issue and one on which former FCC Commissioner Quello was one of the early voices of concern. In the early 1990s, Chairman Quello suggested that the FCC's approach to the regulation of indecent material on the broadcast media be extended to include depictions of violence.¹ A more recent champion of that approach has been Commissioner Gloria Tristani.²

On the legislative side, perhaps the strongest proponent of restrictions has been Senator Ernest Hollings. Over the years, he has introduced a series of bills intended to bring broadcast violence under FCC control. It is the latest of those bills that I will use as the focus of this talk. Senate Bill 341 (bill), introduced on February 15, 2001, but stalled along with much of the rest of the Nation's legislative business by the attacks on September 11th, may well never see action by this Congress.³ It is, however, so likely to be followed by similar efforts that an examination of its provisions and constitutionality is worthwhile.

The bill, titled the Children's Protection from Violent Programming Act,⁴ grows out of dissatisfaction with the V-chip based approach to parental control. Studies indicate that the V-chip is having limited success,⁵ and while it might be tempting to attribute that limited success to lack of parental interest, it may be that the industry's choices were intended to, or at least had the effect of, limiting efficacy. Dale Kunkel pointed out early in the process

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1. See, e.g., James H. Quello, Big Brother Is Watching You, But Are the Kids, Remarks Before the 23rd Annual INTV Convention (Jan. 21, 1996), at <http://www.fcc.gov/Speeches/Quello/spjhg601.txt>.

2. See Gloria Tristani, On Children and Television, Keynote Address at the Annenberg Public Policy Center's 5th Annual Conference on Children & Media (June 26, 2000), at <http://www.fcc.gov/Speeches/Tristani/2000/spgt009.txt>.

3. See S. 341, 107th Cong. (2001).

4. See *id.* A parallel bill was introduced in the House of Representatives. See H.R. 1005, 107th Cong. (2001).

5. See, e.g., Kaiser Family Foundation, *Parents and the V-Chip, 2001*, at <http://www.kff.org/content/2001/3158/chartpack.pdf> (last visited Oct. 9, 2002).

of developing the V-chip system that an age-based, rather than a content-based, system was unlikely to work.⁶ Not allowing parents to make choices based on the violent nature of the material, but instead requiring that all material that might be seen as inappropriate for particular age groups, functionally undercuts the goals of the V-chip requirements.⁷ Parents who would have blocked all violence would not block all material not suitable for a twelve year old.⁸

The new bill requires the FCC to assess the effectiveness of the ratings and encodings that make parents' use of the V-chip possible.⁹ If the Commission finds the V-chip measures insufficiently effective, the Commission is required to engage in rulemaking to prohibit violent video programming during hours when children are likely to be a substantial proportion of the audience.¹⁰ Since the bill requires effectiveness to be judged on the ability to block based solely on violent content and the accompanying findings indicate that aged-based ratings lack that ability, it is clearly envisioned that such rulemaking will prove necessary. In that process the FCC is also directed to determine the hours in which violent programming would be limited and to develop a definition of "violent video programming."¹¹ Significantly, the prohibition would apply not only to broadcast television but to cable as well, although premium and pay-per-view programming would be exempt.¹²

The bill, should it or a future similar effort become law, would operate against a background of FCC efforts to limit the broadcast of indecent material. The seminal case in the area is *FCC v. Pacifica Foundation*,¹³ which grew out of the afternoon radio broadcast of satirist/humorist George Carlin's "Filthy Words" monologue by a New York radio station. After receiving a complaint from a listener claiming he and his young son had heard the broadcast, the Commission associated the complaint with the station's file to be considered should further complaints be received.¹⁴ The Commission also determined that the material in question, despite Carlin's assertions that the

6. See Dale Kunkel, *Why Content, Not the Age of Viewers, Should Control What Children Watch on TV*, CHRON. OF HIGHER EDUC., Jan. 31, 1997, at B4.

7. See *id.*

8. See *id.*

9. See S. 341, 107th Cong. § 3(a)(1) (2001).

10. See *id.* at § 3(b).

11. *Id.* at § 4.

12. See *id.*

13. 438 U.S. 726 (1978).

14. See *FCC v. Pacifica Found.*, 438 U.S. 726, 730 (1978).

words could never be said over the air, could be said but only during hours at which children were not likely to be in the audience.¹⁵

The Supreme Court had to consider both statutory and constitutional issues. On the statutory side, the Court concluded that federal law prohibiting the use of “any obscene, indecent, or profane language” in any radio transmission provided such authority.¹⁶ On the constitutional side, the Court noted that the broadcast media enjoy less first amendment protection than other media, because of a number of factors.¹⁷ Among them are the pervasive presence of the broadcast media in our lives. The broadcast of indecent material confronts us not only in public but also in our homes, including accessibility of broadcasts to children, even those too young to read.¹⁸ Warnings were also seen as inadequate for those tuning in after the program had begun, and turning off the broadcast after hearing the indecent language was seen as an inadequate remedy.¹⁹ Only channeling in hours when children were unlikely to be listening seemed effective in protecting children from the broadcast of indecency.²⁰

Given this background, the current efforts to treat violence similarly raises at least two significant issues. First, can the approach taken with sexual indecency be extended to include limitations on violent programming in broadcast television? Second, even if the subject matter subjected to channeling can include violence, can the channeling requirements be imposed on cable programming in addition to broadcast television?

Turning to the first issue, the language of the statute under which the regulation in *Pacifica* took place may be broad enough to include violence. The *Pacifica* Court’s interpretation of the term “indecent” in the statutory prohibition was that it did not mean “obscene” but addressed material not in conformance with “accepted standards of morality.”²¹ Given that broad reading, it would seem that violent material not conforming with accepted standards of morality could be barred under the statute. If not, any interpretive difficulty would be cured by a statute such as that proposed.

There is, however, a more difficult issue as to whether the *Pacifica* Court’s holding, that the regulation of indecency is constitutional, carries over

15. See *Pacifica*, 438 U.S. at 731-32.

16. *Id.* at 731 (citing 18 U.S.C. § 1464 (1976)).

17. See *id.*

18. See *id.*

19. See *id.* at 748-49.

20. See *id.* at 748-50.

21. *Pacifica*, 438 U.S. at 740 (citing WEBSTER’S THIRD NEW INT’L DICTIONARY (1966), which defines “indecent” as “altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: UNSEEMLY . . . not conforming to generally accepted standards of morality.”).

to violent material. In an article published shortly after *Pacifica*, Professors Krattenmaker and Powe concluded that any attempt to regulate broadcast violence would still raise first amendment problems.²² They examined the holding against a background of other Supreme Court cases concerning the first amendment rights of children and concluded that, unless the Court was implicitly overruling several of those decisions, the indecency that the FCC had the right to regulate had to be conceptually related to obscenity.²³ That is, the material subject to channeling must have the character of obscene material without necessarily reaching such a level of explicitness and offensiveness as to be legally obscene.²⁴ *Pacifica* is then, in their view, limited to sexually indecent material.

The focus of much of my work and the relevance of that work to the issue here has been to propose a theory that responds to Krattenmaker and Powe's argument.²⁵ Accepting their rather well argued position that indecency must be related to obscenity, my response has been to argue that sufficiently explicit and offensive depictions of violence can be included in a statute addressing obscenity. If that is the case, then less extreme depictions can be considered indecent for purposes of channeling in broadcast television.

It is important to note that the Supreme Court has never directly ruled that violent material cannot be obscene or at least regulatable. While there is language in cases involving sexual material that indicates that such material must be erotic to be obscene, in those cases the Court was considering distinctions among materials with a focus on sex or words often associated with sex and concluded that such sexual themes must be erotic to be obscene.²⁶ The relevance of these cases to violence may be minimal. The only Supreme Court case directly concerning the regulation of violence was *Winters v. New York*.²⁷ While the Court struck down the statute at issue, it did so on vagueness grounds and warned against the inference that violent material could not be regulated under a properly drawn statute.²⁸

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

23. See *id.* at 1279-88.

24. See *id.*

25. See generally KEVIN W. SAUNDERS, VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION (1996). See also Kevin W. Saunders, *Media Self-Regulation of Depictions of Violence: A Last Opportunity*, 47 OKLA. L. REV. 445 (1994); Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL RTS. J. 107 (1994).

26. See, e.g., *Cohen v. California*, 403 U.S. 15, 20 (1971); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 n.10 (1975).

27. 333 U.S. 507 (1948).

28. See *Winters v. New York*, 333 U.S. 507, 520 (1948).

I argue that including violence within the obscenity exception to the First Amendment²⁹ is justified by an examination of the ordinary language concept of obscenity, by the legal history of obscenity law, and by the policy arguments that underlie the existence of the exception. Turning first to the ordinary language concept, the extension of the term is clearly broader than sex, reaching even such uses as a corporation making “obscene profits.” A reasonable limiting construction that still includes violence is found in a suggested derivation of the word as from “ab scaena” or “off the stage,”³⁰ referring to material that could not be presented onstage. Viewed from that perspective and over a long-term history, obscenity has included violence at least as regularly as it has included sex. The classical Greek theater prohibited the depiction of homicide on the stage.³¹ Although a killing that occurred offstage could be described onstage in great detail, it could not be shown.³² While a character might die onstage of natural causes or be struck dead by the gods or commit suicide, visual depiction of homicide was barred.³³ At the same time, there was a toleration in Greek theater of sexual dialogue and the onstage portrayal of sexual excitement and nudity.³⁴ The theater of early Rome maintained these Greek values, and while later Roman theater allowed, and in fact reveled in, violence to the degree of actual killings, it also allowed the actual performance of sexual acts on stage.³⁵

The relative treatments of sex and violence as obscenity varied over the centuries. In some eras prior to our own, theater was quite violent, with the Middle Age mystery plays serving as an example.³⁶ Similarly, in some eras, entertainment was very sexual to the degree of animal, and even human, copulation being seen as fit for display.³⁷ The important point is that, in the history of the theater, sex does not have any exclusive claim to the label “obscene.”

29. The obscenity exception was recognized in *Roth v. United States*, 354 U.S. 476 (1957), and the test for obscenity is presented in *Miller v. California*, 413 U.S. 15 (1973).

30. Havelock Ellis is credited with this derivation. See, e.g., 2 JOEL FEINBERG, *OFFENSE TO OTHERS: THE MORAL LIMITS OF CRIMINAL LAW* 117 (1985) (citing HAVELock ELLIS, *ON LIFE AND SEX* 175 (1947)).

31. See, e.g., ROY C. FLICKINGER, *THE GREEK THEATER AND ITS DRAMA* 130 (4th ed. 1936); PETER D. ARNOTT, *AN INTRODUCTION TO THE GREEK THEATRE* 22 (1959).

32. See FLICKINGER, *supra* note 31, at 131.

33. See *id.*

34. See, e.g., ARISTOPHANES, *LYSISTRATA* (Robert Henning Webb trans., 1963).

35. See RICHARD C. BEACHAM, *THE ROMAN THEATRE AND ITS AUDIENCE* 136-37 (1991).

36. See, e.g., John S. GATTON, *There Must Be Blood: Mutilation and Martyrdom on the Medieval Stage*, in *VIOLENCE IN DRAMA* 79 (James Redmond ed., 1991).

37. See EBERHARD & PHYLLIS KRONHAUSEN, *PORNOGRAPHY AND THE LAW: THE PSYCHOLOGY OF EROTIC REALISM AND PORNOGRAPHY* 66-67 (1964).

Ordinary language can only take us so far, and what is of real historical importance to the law is the legal view of obscenity in the constitutionally relevant past. When the Supreme Court recognized the obscenity exception, it cited to a long history of statutes and cases dating back to the constitutional era.³⁸ What is important to note in that history is the lack of focus on sexuality in those statutes and cases. In Professor Frederick Schauer's analysis of the history of obscenity law,³⁹ he concludes that an English definition of obscenity limited to sex did not develop until the 1868 case of *Regina v. Hicklin*.⁴⁰ In American law the focus on sex emerged only in the 1896 Supreme Court decision in *Swearingen v. United States*.⁴¹ The limitation of obscenity to sex is the creation of the Victorian era's obsessive concerns over sex. This late 1800s, post-fourteenth amendment focus is then the product of a constitutionally irrelevant period. If the law in the constitutional era and in the time of the Fourteenth Amendment left obscene material unprotected, as the Court concluded, it should be what was obscene in that era, not the post-Victorian era, that is without first amendment protection.

It is also interesting to note that the late 1800s limitation on the use of the word "obscene" was not accompanied by a change in the desire to regulate other depictions that would formerly have been labeled "obscene." The New York organization established by the anti-obscenity crusader Anthony Comstock also led the effort to prohibit the distribution of "any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, or principally made up of criminal news, police reports or accounts of criminal deeds or pictures and stories of deeds of bloodshed, lust or crime."⁴² While this was the statute *Winters* found unconstitutionally vague, it reflected a concern shared by a majority of the states at the time, as shown by nineteen nearly identical and four substantially similar statutes.⁴³ The history of nonprotection for violent material is then, up until the most recent era, as long as that for sexual material, and if legal history justifies the obscenity exception, it justifies an exception that reaches violence as well as sex.

It is also important to examine briefly the policies said to justify the First Amendment and its obscenity exception. If the amendment protected only political speech or speech advocating social change, the exception both with regard to sex and to violence would be justified, since material with serious

38. See *Roth*, 354 U.S. at 482-83.

39. See FREDERICK F. SCHAUER, *THE LAW OF OBSCENITY* 7 (1976).

40. 3 L.R.-Q.B. 360 (1868).

41. 161 U.S. 446 (1896).

42. N.Y. PENAL LAW § 380 (1884). See also N.Y. PENAL LAW § 692 (1887).

43. See *Winters*, 333 U.S. at 522-23 (Frankfurter, J., dissenting).

value cannot be considered obscene.⁴⁴ Professor Schauer's "Free Speech Principle" is broader but still requires communication, and he justifies placing the hardest core pornography in the obscenity exception because he sees it as noncommunicative, as nonspeech, and as no more worthy of first amendment protection than would be a mechanical sex aid.⁴⁵ His objection to protecting sexually obscene materials appears to be that the brain is not their real audience.⁴⁶ They have a visceral, rather than a cognitive or emotional, response.⁴⁷ Music and romantic literature may stimulate, but they do so through the higher order functions of the brain; the brain is at least a co-equal audience.⁴⁸ His view that the brain is a superior audience to the genitals seems reasonable. However, the brain would also seem to be a superior audience to the adrenals, and there seems to be no reason to prefer one portion of the endocrine system over the other. If depictions are violent enough to have a hormonal effect, Schauer's arguments would seem also to exclude them from the protection of the First Amendment.

While there are first amendment theories that speak against the existence of any obscenity exception, as long as the obscenity exception is a part of the law, the interesting theories are those that justify it. Each of those theories also justifies an exception for violent obscenity.⁴⁹ Given the legal history, the ordinary language concept, and the inability to distinguish the two under first amendment theory, the law should allow a refocusing of the obscenity exception to include violence. That recognition of violent obscenity should be accompanied by a further recognition that violent material may also be indecent. As such, it may already come within the authority of the FCC to channel it in hours when children are less likely to be in the audience. Congress can answer any statutory concerns through a bill such as that introduced by Senator Hollings,⁵⁰ and the courts should uphold the practice through the same analysis as was employed in *Pacifica*.⁵¹

The second issue, the extension of the FCC channeling approach to cable programming, is more difficult. It raises all the issues already discussed but also raises separate issues with regard to the standards to be applied to cable as distinct from the broadcast media. While the broadcast media have

44. See *Miller*, 413 U.S. at 24.

45. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* ch. 12 (1982).

46. See *id.*

47. See *id.*

48. See *id.*

49. For an examination of other policy bases for the obscenity exception and their application to violence see SAUNDERS, *VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION*, *supra* note 25, at 135-60.

50. See S. 341, 107th Cong. (2001).

51. See *Pacifica*, 438 U.S. at 734-51.

regularly been held subject to a variety of governmental regulations, cable has enjoyed stronger first amendment protection. The most recent example of that stronger protection, and one particularly relevant to the subject here, is found in *United States v. Playboy Entertainment Group, Inc.*⁵² The issue there was an attempt to prevent signal bleed on cable channels primarily devoted to sexually oriented programming.⁵³ Programmers were required either to scramble fully their offerings, to shield children from exposure to the distorted but discernable images and the audio that accompanies those images on less fully scrambled channels, or to limit their sexually oriented programming to the hours of 10 p.m. to 6 a.m.⁵⁴ The costs of full scrambling led Playboy to choose the second alternative, but that resulted in a loss of income compared to what would be obtained from twenty-four hour programming.⁵⁵

When Playboy's challenge to the statutory requirements reached the Supreme Court, the provisions were not well received. Even though the channeling requirement clearly would have been constitutional in the context of broadcasting, extension to cable was held to be a violation of the First Amendment.⁵⁶ The Court recognized the restriction as content based and held that the limitations had to meet strict scrutiny; they had to be necessary to, or narrowly tailored to, a compelling governmental interest.⁵⁷ The Court did not dispute the position that the shielding of children from sexually indecent material was such a compelling interest but said that, if there was a less restrictive means of reaching the government's goal, the full scrambling or channeling choice could not be imposed.⁵⁸ That less restrictive means was available in another provision of the federal statutes and speaks to one of the reasons for distinguishing cable from broadcast. Just as cable is invited into the home, often on a channel by channel or tier by tier of service basis, broadcast is available to anyone with a television or radio. However, cable can be blocked on a channel by channel basis. In fact, federal law requires cable providers to block or scramble fully any channel the subscriber does not wish to receive.⁵⁹ This alternative provides protection for children whose parents wish that protection, without imposing scrambling costs on the programmer or restricting the hours of its programming. The lesson here, and one that can be found throughout first amendment law, is that attempts to

52. 529 U.S. 803 (2000).

53. See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 806 (2000).

54. See *Playboy Entm't*, 529 U.S. at 808.

55. See *id.* at 809.

56. See *id.* at 811-12.

57. See *id.* at 812-13.

58. See *id.* at 813-23.

59. See *id.* at 809-10 (quoting 47 U.S.C. § 560 (1994 & Supp. III 1997)).

protect children will be struck down if there is an alternative that is less burdensome on adult communication.

Senator Hollings' bill takes an interesting approach to the least restrictive means problem. The bill instructs the FCC to assess the effectiveness of rating and encoding programs for the purpose of allowing the V-chip to provide a screening device for violent programming, in cable as well as broadcast, and only calls for channeling if the Commission concludes that the rating system is inadequate.⁶⁰ By calling for an assessment of what would seem to be the only available alternative, the bill at least attempts to require that channeling be imposed only if it is the least restrictive alternative.⁶¹

The courts will not be reticent to consider other alternatives that might be less restrictive than channeling, and it is possible that the cable industry will avoid the imposition of channeling, even if the rating and encoding is found inadequate. But, lacking a less restrictive alternative, the industry may be forced to choose between an adequate rating and encoding system and time channeling.

Without a third alternative, the forced choice should be constitutional. The Court in *Playboy Entertainment* seemingly was willing to allow the time restrictions on Playboy's cable channel if there had been no less restrictive alternative.⁶² The Court certainly recognized the importance of the government interest involved.⁶³ Here, of course, the interest is the shielding of children from violent material, rather than sexual indecency. If the interest recognized in shielding from sexual indecency must be tied to the concept of obscenity, then as argued above, the inclusion of violence in the obscenity exception should carry over to cable and provide as compelling a government interest in this context as well.

If the interest that would, absent a less restrictive alternative, justify the restrictions on cable indecency is instead based on demonstrated actual harm to minors, the evidence is far stronger for the analogous interest in shielding children from violent depictions. There is little evidence of physical and psychological harm growing out of the exposure of children to indecency, perhaps due primarily to ethical concerns over exposing test samples of children to such material. There is, however, strong evidence of negative physical and psychological effects growing out of exposure to media violence.

There is now a vast body of research, and the aggregate of that social science and psychological research clearly demonstrates a connection between media violence generally and real world violence. Six major professional

60. See S. 341, 107th Cong. §§ 3(a)(1), 5 (2001).

61. See *id.* at § 2(15).

62. See *Playboy Entm't*, 529 U.S. at 813-23.

63. See *id.*

organizations in the health field have found the science conclusive.⁶⁴ In a joint statement, issued in July 2000, the American Psychological Association, the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Medical Association, the American Academy of Family Physicians, and the American Psychiatric Association concluded that “well over 1,000 studies . . . point overwhelmingly to a causal connection between media violence and aggressive behavior in some children.”⁶⁵ While some in the entertainment industry may still dispute the connection, as tobacco executives continued to dispute the detrimental health effects of cigarettes, the scientific community has come to its conclusion.

The government interest, then, is at least as strong in shielding children from violent material as it is in shielding them from sexual indecency. That interest, as shown by the *Playboy Entertainment* case,⁶⁶ is strong enough to require channeling, even on cable, if there is no less restrictive alternative. The V-chip would seem to be that alternative, but only if the industry implements it in a manner that allows it to do the job originally envisioned for the chip. If the FCC finds that the age-based approach is inadequate, a content-based approach is not forthcoming, and a third less restrictive approach is not recognized, time channeling should also be imposed on cable programming.

64. See American Academy of Pediatrics et al., Joint Statement on the Impact of Entertainment Violence on Children, Statement to the Congressional Public Health Summit (July 26, 2000), at <http://www.aap.org/advocacy/releases/jstmtevc.htm>.

65. *Id.*

66. See *Playboy Entm't*, 529 U.S. at 813-23.