

Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Federal Communications Law
Journal

Volume 47 | Issue 2

Article 29

12-1994

Information Superhighway Or Technological Sewer: What Will It Be?

Robert W. Peters
Morality in Media, Inc.

Follow this and additional works at: <http://www.repository.law.indiana.edu/fclj>

 Part of the [Communications Law Commons](#), [First Amendment Commons](#), [Internet Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Peters, Robert W. (1994) "Information Superhighway Or Technological Sewer: What Will It Be?," *Federal Communications Law Journal*: Vol. 47: Iss. 2, Article 29.
Available at: <http://www.repository.law.indiana.edu/fclj/vol47/iss2/29>

This Essay is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Federal Communications Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Information Superhighway Or Technological Sewer: What Will It Be?

Robert W. Peters*

Several years ago the host of a radio talk show asked me whether I was an expert “on the media” or just on the subject of indecency in the media. I responded without hesitation that my expertise was the latter. In recent years, I have become interested in a broader range of media issues, but my focus—and that of *Morality in Media*—is still very much the subject of indecency in the media. It is also, in good measure, the focus of this Essay.

I was brought up in the 1950s and 1960s, during what some refer to as television’s golden years, and our family certainly watched a lot of television. Thinking back, however, I can’t remember much, if anything, other than perhaps too much violence, that I saw on TV that I would now consider morally objectionable.

Glorification and promotion of sexual immorality, vulgarity, nudity, and sexually explicit scenes just weren’t part of the programming, as I remember it. The television industry, for whatever reasons, had high regard for standards of decency and, generally speaking, for the Judeo-Christian moral and family ethic.

I agree with those who say that real life for many if not most Americans in the 1950s and 1960s had little to do with “life” on primetime TV.¹ The real-life problems were often bigger and not so easily solved, and most real-life American families weren’t so well-off financially. Nor did all live in “lily-white” suburbs.

* The Author is President of *Morality in Media, Inc.*, a national interfaith organization working to curb traffic in illegal hardcore pornography and to uphold standards of decency in the media. He graduated from Dartmouth College in 1971 and New York University School of Law in 1975 and was admitted to practice law in New York State in 1976.

1. See Marianne Means, *Political Nostalgia for 1950s Ignores an Ugly Reality*, ORLANDO SENTINEL, Sept. 22, 1994, at A11.

But the "domestic environment" presented on television in the 1950s and 1960s was, on the whole, constructive, well-mannered, and likeable, and television was a source of entertainment that the vast majority of Americans could enjoy, with or without their children, and that did not offend their most cherished values.

Today, opinion polls show that Americans are no longer comfortable with much TV programming. For example, according to a Family Channel/Gallup Survey released in July 1993, an almost two-to-one majority of viewers said that TV depicts negative values over positive ones, and an even larger percentage felt that TV programming does not represent their own values.² According to a survey from the Corporation for Public Broadcasting, released in January 1994, 82 percent of adults think TV is too violent and 70 percent think there is too much sex and offensive language.³

More recently, a June 1994 *Newsweek* poll reported that, in response to the question "Who is to blame for the problem of low morals and personal character in this country?" 67 percent "blame" TV and other popular entertainment "a lot."⁴ Both the President and First Lady have expressed their concern about the level of violence and explicit sex on TV,⁵ which should help dispel any notion that the concern is limited to constituents of the "religious right."

These and other evidence of widespread concern about exploitive, gratuitous sex, vulgarity, and violence on TV and in other media should also put to rest the notion that the entertainment media are giving the American people what they want. As a dear friend once put it: "It is preposterous to suggest that TV viewers are bombarding the TV producers with demands for more sexual dysfunctionals on talk shows, or more graphic depictions of sex and violence in TV movies, or more four-letter words in sitcoms and dramas."⁶ A 1992 Gallup Poll showed that 71 percent of Americans say that objectionable content influences them to watch less TV.⁷

I would add that it is a mistake to assume that because viewers regularly watch a program, they must enjoy or approve of all of it. For

2. *Alternative TV Ratings: TV Programming Is Too Negative, Detrimental to Family, Viewers Say*, RES. ALERT, Sept. 3, 1993.

3. Shauna Snow, *Morning Report*, L.A. TIMES, Feb. 2, 1994, at F2.

4. Howard Fineman, *The Virtuecrats*, NEWSWEEK, June 13, 1994, at 31, 36.

5. See Paul Bedard, *Clinton Slams Film Violence*, WASH. TIMES, Dec. 5, 1993, at A1.

6. TV: THE WORLD'S GREATEST MIND-BENDER 15 (Betty Wein ed., *Morality in Media* 1993).

7. *Discontent Growing; Gallup Poll Finds "Public Outcry" Against TV and Cable Programming*, COMM. DAILY, Aug. 25, 1992, at A5.

example, I still very much enjoy a good football game. I don't, however, enjoy watching players get knocked unconscious or seriously injured, and if the sport continues to get more and more violent, I will stop watching it.

I point out the above because the moguls of the communications industry must make policymaking decisions, not just in regard to technology, but also in regard to program content. The financially profitable, as well as socially responsible, decision would be to provide more and more uplifting, wholesome entertainment—not more and more indecent, violent fare.

Undoubtedly, prurience, sleaze, vulgarity, reality-turned-sensationalism, and gut-wrenching violence do sell, at least in the short run. They sell because a segment of the population, many of whom are youths, find them "entertaining." They sell because a segment of the population is vulnerable to crass appeals to the baser instincts, particularly where explicit sex and violence are concerned. But what the large majority of the American people want and will demand is high quality entertainment.

I would also point out that these content decisions involve both programming produced by the mainstream entertainment media and programming produced by "others"—e.g., the hardcore pornographers who seek to distribute their wares on channels of communication owned by the mainstream media.

I recently wrote an article for *Religious Broadcasting* magazine, the thrust of which was that prior to the 1970s, there was a distinct line between "adults only" businesses and mainstream businesses, and that back then mainstream businesses didn't distribute hardcore pornographic materials.⁸ Today, the line has blurred to the point where for many "mainstream businesses" (which include cable TV companies, on-line computer services, computer magazines, and newspapers), the only difference between them and "adults only" businesses is that the mainstreamers separate the porn from other goods or services by the word "adult" or the letter "X."

These companies attempt to justify their decision to carry hardcore pornographic materials by saying that they are not in the business of "censorship" or that market demand must be the final arbiter. As a CEO of one mainstream hotel chain recently put it: "We believe it is more practical to have a system available through a wider variety and to allow our guests to make their own selections."⁹

8. Robert Peters, *The Blurring Line Between Pornography and Mainstream Business*, RELIGIOUS BROADCASTING, July-Aug. 1994, at 52, 52.

9. Letter from J.W. Marriott, Jr., Chairman of the Board and President, Marriott International, Inc., to Robert W. Peters, President, Morality in Media, Inc. (July 29, 1994)

All mainstream companies, however, engage in self-censorship, act as final arbiters, and limit consumer choice. For example, to their credit, there isn't a mainstream company in America that is doing business with the Ku Klux Klan or neo-Nazi groups.

A TV critic once said to me that it is ludicrous to compare hate propaganda with pornography. My purpose in doing so is to make the point that mainstream companies do not choose to provide pornographic material because *on principle* they are opposed to "censorship," but rather because it is profitable to do so and, in many cases, because pornography is not offensive to the individuals who control these companies.

I also do not accept the argument that pornography is "harmless entertainment."¹⁰ It is not!¹¹ Individuals injured by pornography include children sexually abused by pedophiles who use so-called "adult" pornography to allure or instruct the children; children who are sexually abused by other children who copy what they have viewed in hardcore pornography; adults and youth who become addicted to pornography; wives who are sexually abused or abandoned by porn-addicted husbands; men and women who are raped, tortured, and murdered by porn-addicted perpetrators; men who contract sexually transmitted diseases, including AIDS, in the backrooms of "adult bookstores;" and "performers" who are abused, or who contract AIDS, in the production of hardcore pornography.

There is also a "social aspect" to the distribution of pornography that was aptly described by the Supreme Court in *Paris Adult Theatre I v. Slaton*:

We categorically disapprove the theory . . . that obscene, pornographic films acquire constitutional immunity . . . simply because they are exhibited for consenting adults only. . . . In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby. . . . These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself. . . . Quite apart from sex crimes, however, there remains one problem of large proportions aptly described by Professor Bickel: "It concerns the tone of society, the mode . . . the style and quality of life, now and in the future." . . . As

(copy on file with the *Federal Communications Law Journal*).

10. See, e.g., THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 32 (Bantam 1970).

11. See, e.g., THE FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY (July 1986).

Mr. Chief Justice Warren stated, there is a “right of the Nation and of the States to maintain a decent society.”¹²

I would add that the First Amendment places restrictions on government, not private companies, and the private companies, with few exceptions, are not required to provide a forum for hate propaganda or appeals to the prurient interests—and should not be.

It is our earnest desire that the leaders of the mainstream communications industry will once again make decisions about program content, not on the basis of what is profitable in the short run, but on the basis of what is profitable *and* socially beneficial—or, at the very least, not socially destructive.

Unfortunately, however, not everyone has a social conscience. That is why we have laws, and at *Morality in Media*, we don’t agree that the information superhighway should be exempt from laws prohibiting obscenity or indecency. There are already laws prohibiting or restricting obscene or indecent matter in the broadcast media, on cable/satellite TV, and by means of telephone.¹³ To the extent that new technologies have created “loopholes,” laws should be enacted to plug them. For example, the current federal obscenity laws may be inadequate to address the growing problem of noncommercial computer “bulletin boards” that provide hardcore pornographic material. We have prepared a proposed law to address this problem.

At *Morality in Media*, we also don’t agree that the obscenity laws should only be enforced against sleazy “adults only” businesses, but not against “mainstream” businesses that choose to profit from hardcore pornography—which includes so-called “cable versions” of hardcore material. According to a June 1994 WSJ/NBC News Poll, 78 percent of the American people agree that there should be “stricter laws to control pornography,”¹⁴ and a major part of the concern can be directly tied to the decision of mainstream companies to promote and/or serve as distribution channels for hardcore pornography.

We also read *FCC v. Pacifica Foundation*¹⁵ as allowing the government to prohibit non-obscene but “indecent” material on the information superhighway in circumstances where unwilling adults would be assaulted in the privacy of their home and/or children would have easy access to it.

12. *Paris I*, 413 U.S. 49, 57-60 (1973) (quoting Alexander Bickel, *On Pornography: Dissenting and Concurring Opinions*, PUB. INTEREST, Winter 1971, at 25, 25-26 (emphasis omitted) and *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, J., dissenting)).

13. *See, e.g.*, 47 U.S.C. § 223 (1988); 18 U.S.C. § 1464 (1988).

14. Rich Jaroslovsky, *Washington Wire*, WALL ST. J., June 17, 1994, at A1.

15. *Pacifica*, 438 U.S. 726 (1978).

The rationale for our position was aptly described by our current General Counsel, Paul J. McGeady:

Does not the Supreme Court opinion [in *Miller v. California*] mean that you can present explicit hard-core sex . . . on TV if the “play” or “film” or “live performance” [when taken as a whole] has literary or artistic value? It would appear that most Americans . . . would not tolerate the concept that they must switch the dial to avoid such performances on TV or radio or that they must be concerned that their minor children may be exposed. . . . Television and radio communications . . . partake of the nature of a public access thoroughfare (albeit an electromagnetic one), and what may be prohibited on the public street should be equally prohibited on TV and radio. This includes undoubtedly all soft-core or hard-core sexually explicit conduct as well as nudity. . . . What is the quality in public nudity that permits the law to inhibit it without proof of obscenity? . . . We suggest that the quality involved is “intrusiveness” Just as a citizen is entitled to walk down the public street without the necessity of having to avert his eyes to avoid a public nude performance, so too he [or she] is entitled to “flip the dial” without viewing intrusive nudity or explicit hard-core sex.¹⁶

Enforcing laws against obscene or indecent material over the information superhighway will not prevent the discussion of human sexuality or the presentation of any viewpoint pertaining thereto. As the Supreme Court pointed out in *FCC v. Pacifica Foundation*, “[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication.”¹⁷

The time of day and other factors are also important in determining whether a particular depiction or description is “indecent.” Under the holding of *Sable Communications v. FCC*, indecent but non-obscene communications by means of telephone are protected in circumstances where they are restricted to adults who seek them.¹⁸

As for the “communicative content” of obscene expression, the Supreme Court in its *Miller v. California* decision stated aptly:

The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or the majority of the people approve of the ideas these works represent. “The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people.” . . . But

16. PAUL J. MCGEADY, WHERE DO YOU DRAW THE LINE? 102-03 (Victor B. Cline ed., 1974).

17. *Pacifica*, 438 U.S. at 743 n.18.

18. *Sable*, 492 U.S. 115 (1989).

the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.¹⁹

Enforcing laws against obscenity or indecency, however, will help ensure that the information superhighway will enhance our lives, rather than transforming our cultural environment into a toxic, technological sewer—or, perhaps more accurately, a public nuisance. Law enforcement will help discourage the “permissiveness” which can only “tend further to erode public confidence in the law—that subtle but indispensable ingredient of ordered liberty.”²⁰

19. *Miller*, 413 U.S. 15, 34-35 (1973) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

20. *Rosenfeld v. New Jersey*, 408 U.S. 901, 902 (1972) (Burger, C.J., dissenting).

