Free Speech, Fleeting Expletives, and the Causation Quagmire: Was Justice Scalia Wrong in *Fox Television Stations*?

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I. INTRODUCTION

In *FCC v. Fox Television Stations, Inc.*,[1] a badly fractured United States Supreme Court[2] in 2009 narrowly upheld the Federal Communications Commission's (FCC or Commission) recent change and decision in its

1. 129 S. Ct. 1800 (2009).

2. Justice Antonin Scalia authored the opinion of the Court, with the exception of Part III-E, which is a response to the arguments set forth in the dissenting opinions. *Id.* at 1805–19. Justice Clarence Thomas offered a concurring opinion that agreed with the result but questioned the viability of two prior U.S. Supreme Court opinions—*Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969), and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)—that, respectively, provide the precedent, in the face of First Amendment concerns, for giving the FCC the power to closely regulate broadcasting and to punish broadcast indecency. *Fox Television Stations*, 129 S. Ct. at 1819–22 (Thomas, J., concurring). Justice Anthony Kennedy issued an opinion, concurring in part and concurring in the judgment, in which he emphasized that when a government agency, like the FCC, makes a sudden shift in policy, the "decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so," and that "[a]n agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate." *Id.* at 1824 (Kennedy, J., concurring). Justice John Paul Stevens wrote a dissenting opinion that both emphasized the High Court's narrow treatment and ruling on indecency in *Pacifica Foundation* and criticized the FCC for adopting "an interpretation of 'indecency' that bears no resemblance to what *Pacifica* contemplated." *Id.* at 1827–28 (Stevens, J., dissenting). Justice Ruth Bader Ginsburg issued a dissenting opinion in which she not only found that the FCC's decision to change its indecency policy was arbitrary and capricious, but that also emphasized "that there is no way to hide the long shadow the First Amendment casts over what the Commission has done. Today's decision does nothing to diminish that shadow." *Id.* at 1828 (Ginsburg, J., dissenting). Finally, Justice Stephen Breyer issued a dissenting opinion that was joined by Justices Stevens and Ginsburg, as well as Justice David Souter, in which Breyer found that the FCC

> failed adequately to explain *why* it *changed* its indecency policy from a policy permitting a single "fleeting use" of an expletive, to a policy that made no such exception. Its explanation fails to discuss two critical factors, at least one of which directly underlay its original policy decision. Its explanation instead discussed several factors well known to it the first time around, which by themselves provide no significant justification for a *change* of policy.

Id. at 1829 (Breyer, J., dissenting).

indecency[3] enforcement policy[4] to punish broadcasters for the isolated airing of fleeting expletives in time periods that fall outside of the Commission's designated safe-harbor time period.[5] In doing so, the High Court deftly dodged the First Amendment[6] question about the constitutionality of targeting such expression[7] and instead based its decision on the administrative law question of whether the FCC's change in policy was arbitrary and capricious in violation of the Administrative Procedure Act (APA).[8]

This Article concentrates on one particular issue raised in the *Fox Television Stations* ruling—the critical question of causation of harm caused by mass media messages and, in particular, the quantum of evidentiary proof needed by a federal agency to demonstrate causation sufficient to justify restricting the speech in question. The issue is ripe for review, given the following statement by Justice Antonin Scalia in the opinion of the Court in *Fox Television Stations*:

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3. Federal law provides the FCC with the statutory authority to regulate "obscene, indecent, or profane language." 18 U.S.C. § 1464 (2006). The FCC today defines indecent speech as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities." Fed. Commc'n Comm'n, *FCC Consumer Facts: Obscene, Indecent, and Profane Broadcasts*, http://www.fcc.gov/cgb/consumerfacts/obscene.html (last visited July 25, 2010).

4. *See generally* JEREMY HARRIS LIPSCHULTZ, BROADCAST AND INTERNET INDECENCY: DEFINING FREE SPEECH (2008) (providing a comprehensive review of the FCC's enforcement policies targeting broadcast indecency).

5. The notion of a safe-harbor zone

> refers to the time period between 10 p.m. and 6 a.m., local time. During this time period, a station may air indecent and/or profane material. In contrast, there is no "safe harbor" for the broadcast of obscene material. Obscene material is entitled to no First Amendment protection, and may not be broadcast at any time.

Fed. Commc'n Comm'n, *Frequently Asked Questions: Obscenity, Indecency & Profanity*, http://www.fcc.gov/eb/oip/FAQ.html#TheLaw (last visited July 25, 2010).

6. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated eighty-five years ago through the Fourteenth Amendment's Due Process Clause to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

7. Justice Scalia wrote that "[w]e decline to address the constitutional questions at this time." *Fox Television Stations*, 129 S. Ct. at 1819.

8. *See* 5 U.S.C. § 706(2)(A) (2006) (allowing courts to "hold unlawful and set aside agency action, findings, and conclusions" that are determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

> There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency. . . . Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives. Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity.[9]

This line of logic, this Article argues, embraces certain assumptions about media effects and, ultimately, provides the FCC with a nearly evidentiary-free pass on a question of causation of harm that affects the ability of both minors and adults to hear First Amendment-protected speech.[10] This is particularly troubling because Justice Scalia went on to point out that, in the High Court's seminal indecency decision in *FCC v. Pacifica Foundation*,[11] the FCC similarly "had adduced *no quantifiable measure of the harm* caused by the language."[12]

Despite this evidentiary absence, the *Pacifica Foundation* Court nonetheless upheld the Commission's ability to regulate indecency, against a First Amendment challenge, in the name of protecting children.[13] The High Court in *Pacifica Foundation* did not consider any social science evidence of harm to children allegedly caused by expletives; it simply made the passing observation that "Pacifica's broadcast could have enlarged a child's vocabulary in an instant."[14] Justice Scalia thus reasoned in *Fox Television Stations* that "[i]f *the Constitution itself demands of agencies no more scientifically certain criteria to comply with the First Amendment*, neither does the

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9. *Fox Television Stations*, 129 S. Ct. at 1813.

10. *See* Robert Corn-Revere, *New Age Comstockery*, 4 COMMLAW CONSPECTUS 173, 178 (1996) (observing that "[u]nlike obscenity, the Supreme Court and Courts of Appeals have held that indecent speech is protected by the First Amendment. But, because indecency deals with sexual matters, courts also have held that the government may regulate it in certain circumstances."); Milagros Rivera-Sanchez, *How Far Is Too Far? The Line Between "Offensive" and "Indecent" Speech*, 49 FED. COMM. L.J. 327, 332 (1997) (writing that although "indecent speech is protected by the First Amendment," the FCC nonetheless may channel it "to times when children are less likely to be in the audience").

11. 438 U.S. 726 (1978).

12. *Fox Television Stations*, 129 S. Ct. at 1813 (emphasis added).

13. *See Pacifica Foundation*, 438 U.S. at 757 (Powell, J., concurring) (asserting that the FCC's "primary concern was to prevent the broadcast from reaching the ears of unsupervised children who were likely to be in the audience at that hour").

14. *Id.* at 749 (majority opinion).

Administrative Procedure Act to comply with the requirement of reasoned decisionmaking."[15]

The italicized portion of this statement and its interpretation of *Pacifica Foundation* should be highly disturbing for free speech advocates. It suggests that once a federal agency is vested with statutory authority from Congress to regulate a particular category of speech, the agency then is free to make decisions and adopt policies that censor that particular type of speech without having to offer any evidence that the speech actually causes harm. As Justice Breyer pointed out in his dissent in *Fox Television Stations*, the FCC offered "no empirical (or other) evidence"[16] regarding harm caused by hearing a fleeting expletive, and in fact, it failed to address "relevant empirical studies that suggest the contrary."[17] This directly conflicts with an earlier High Court ruling that, in order to avoid a determination that a policy decision is arbitrary and capricious, an "agency must examine the relevant data and articulate a satisfactory explanation for its action."[18]

The FCC's new fleeting-expletive indecency policy, of course, could still be struck down on First Amendment grounds that, as noted earlier, the Court did not address in 2009 in *Fox Television Stations*.[19] Those constitutional reasons, however, certainly will *not* relate to the lack of proof of causation of harm. After Justice Scalia's twin assertions—that the Constitution does *not* demand that an agency offer "more scientifically certain criteria to comply with the First Amendment"[20] and that "there are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them"[21]—the question of proof of harm caused by broadcast profanity was effectively removed from the judicial table. Oral argument on remand from the Supreme Court took place before the United States Court of Appeals for the Second Circuit in January 2010.[22]

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15. *Fox Television Stations*, 129 S. Ct. at 1814 (emphasis added).
16. *Id.* at 1839 (Breyer, J., dissenting).
17. *Id.*
18. Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).
19. *Supra* note 7 and accompanying text.
20. *Fox Television Stations*, 129 S. Ct. at 1814.
21. *Id.* at 1813.
22. *See* Larry Neumeister, *Appeals Judges Mock "Fleeting Expletives" Policy*, ASSOCIATED PRESS, Jan. 14, 2010, *available at* LexisNexis Academic news database.

Part II of this Article begins by unpacking Justice Scalia's statements in *Fox Television Stations* regarding causation of harm and exploring them, in interdisciplinary fashion,[23] with research from multiple fields.[24] It also suggests how Justice Scalia's analysis begs the legal system for a greater infusion of research from social science fields, including, but not limited to, communication and media effects.[25] Next, Part III contextualizes the causation issue within a much broader framework, illustrating how Justice Scalia's remarks demonstrate the doctrinal inconsistency and judicial incoherence on speech-related questions of both causation and redress of harm in areas of law other than indecency, namely, with laws targeting violent video games, commercial speech, and trademark.[26]

Finally, Part IV concludes by contending that Justice Scalia's assertion in *Fox Television Stations* that "[t]here are some propositions for which scant empirical evidence can be marshaled"[27] creates what the authors call a *harm causation gap* that provides courts with substantial legal leeway to speculate about which speech-harm "propositions"[28] those are and, in turn, to determine which laws affecting free speech are given merely cursory review on the question of causation of harm.[29] In addition, Part IV speculates about the extent to which the target of the alleged harm caused by fleeting expletives—namely, children, rather than adults—might influence legal standards on the proof of causation of harm.

II. JUSTICE SCALIA'S RULING ON CAUSATION OF HARM AND THE OPPORTUNITIES FOR COMMUNICATION RESEARCH THAT IT OPENS

This part of the Article has two sections. Section A analyzes the topic of causation of harm allegedly caused by fleeting expletives like those that were at issue in *Fox Television Stations*. Section B then suggests the relevance and possible importance of communication research in contributing to legal discussions and analyses on harm causation, given the statements of Justice Scalia in the case.

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23. Such an interdisciplinary approach may prove useful because, as Stanford Law School Professor Deborah Rhode writes in a damning indictment of legal scholarship, "Much interdisciplinary work that was initially of little interest to lawyers and judges has in fact reshaped the legal landscape." Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1338 (2002).

24. *See infra* Part II.

25. *See infra* Part II.B.

26. *See infra* Part III.

27. *Fox Television Stations*, 129 S. Ct. at 1813.

28. *Id.*

29. *See infra* Part IV.

A. The Analysis of Causation of Harm in Fox Television Stations

Prior to the U.S. Supreme Court's 2009 ruling in *Fox Television Stations*, the evidentiary battle in the case over causation of harm caused by fleeting expletives erupted before the United States Court of Appeals for the Second Circuit.[30] In the process of concluding in 2007 "that the FCC's new policy regarding 'fleeting expletives' is arbitrary and capricious under the Administrative Procedure Act,"[31] the appellate court observed that the FCC's decision to start targeting fleeting expletives was:

> *devoid of any evidence that suggests a fleeting expletive is harmful*, let alone establishes that this harm is serious enough to warrant government regulation. Such evidence would seem to be particularly relevant today when children likely hear this language far more often from other sources than they did in the 1970s when the Commission first began sanctioning indecent speech.[32]

Put more bluntly, the Second Circuit found that the FCC failed to demonstrate there even was an actual problem—an actual harm—that its new enforcement policy would remedy.[33] The FCC offered no proof of either causation of harm from hearing fleeting expletives or even a positive correlation[34] showing that an increase in fleeting expletives on the airwaves is associated with an increase in the use of those expletives by minors. Even the existence of one study purporting to show causation here would not, of course, advance the debate too far because "a causal relationship cannot be proven by one study. If the evidence from

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30. Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1800 (2009).

31. *Id.* at 447.

32. *Id.* at 461 (emphasis added).

33. *See id.* ("The Commission has similarly failed to explain how its current policy would remedy the purported 'problem' or to point to supporting evidence.").

34. A correlation is

> [a]n empirical relationship between two variables such that (1) changes in one are associated with changes in the other or (2) particular attributes of one variable are associated with particular attributes of the other. Correlation in and of itself does not constitute a causal relationship between the two variables, but it is one criterion of causality.

EARL BABBIE, THE PRACTICE OF SOCIAL RESEARCH 90 (11th ed. 2007). A positive correlation, in turn, "means that two variables move, or change, in the *same* direction . . . . If one variable goes up, the other tends to also; if it goes down, the other does too." LAWRENCE R. FREY ET AL., INVESTIGATING COMMUNICATION: AN INTRODUCTION TO RESEARCH METHODS 357 (2d ed. 2000).

numerous studies all supports a causal relationship, we can have more faith that such a relationship exists."[35]

The seemingly high level of scrutiny paid by the Second Circuit to the causation of harm question, however, virtually evaporated into the rarified judicial atmosphere when the case reached the U.S. Supreme Court. In particular, Justice Scalia's remarks regarding causation of harm quoted in Part I[36] need to be examined more carefully in order to understand both the assumptions they embrace and the questions they raise. Those statements are addressed separately below, in step-by-step fashion. Importantly, the purpose of this section is *not* to definitively resolve the causation questions raised regarding fleeting expletives—a task far beyond the scope of this Article—but is to illustrate potential flaws and problems with Justice Scalia's logic and reasoning regarding the aspect of causation.

1. Assertion No. 1: "There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them."[37]

This sentence provided the entrée for Justice Scalia's discussion about proof of harm. The initial quartet of related questions raised by it is as follows.

Is it really true that empirical evidence of the supposedly harmful effect of broadcast profanity on children cannot be marshaled? Justice Scalia seems to simply assume that empirical evidence is not possible or that only scant evidence can be found. Is this the case? Does Justice Scalia mean causational evidence when he employs the term empirical evidence, or does he mean something else, perhaps more broadly in the sense of quantitative evidence, as opposed to qualitative or cultural? What he possibly means by empirical evidence is addressed later in more detail in Section A.[38]

What exactly is the supposedly harmful effect on children about which the FCC and the Court are concerned? Is it psychological damage to minors? Is it an erosion of their morals or values? Or is it the mere fact that they might learn and repeat the isolated and fleeting words they hear uttered on television, assuming, of course, they have not previously heard the words before? Without specification and explication of the

35. David H. Weaver, *Basic Statistical Tools*, *in* MASS COMMUNICATION RESEARCH AND THEORY 147, 161 (Guido H. Stempel III et al. eds., 2003).
36. *Supra* notes 9–15 and accompanying text.
37. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1813 (2009).
38. *See infra* notes 94–97 and accompanying text.

precise harm that minors allegedly suffer, it is impossible to know whether social science, communication research, or both might exist—or could be generated—to help lawmakers and judges better understand if there really is either a correlational or a causal relationship.

Why does Justice Scalia frame the issue of harm so broadly? In particular, he frames the issue as the harmful effect of broadcast profanity on children when, in fact, the FCC policy change before the Court dealt far more narrowly and precisely with the supposedly harmful effect of hearing isolated and fleeting expletives on children. In other words, the real question would seem to be whether children are harmed, whatever "harm" that might be, by hearing one or two passing expletives during the course of a live broadcast of a two-hour awards show.[39] Or, perhaps, the real question might be whether exposure over time—for instance, to five or six shows per year that include such ephemeral and fleeting expletives—causes harm.

When Justice Scalia uses the term *children*, to what age is he referring? Who, in other words, is the mythical, hypothetical child against whom the FCC and courts will evaluate both the harm and suitability of television programming? Is Justice Scalia suggesting that the same alleged harm would occur for an infant, as it would for a six-year-old boy or a sixteen-year-old girl? Is he lumping all minors of all ages and both genders in together as children? This is very important because, as an article in *Developmental Psychology* observed, "several researchers have reported that young children seem to recall more of the *visual* than the *auditory* (mainly verbal) components of television programs."[40] On the other hand, it is true that "[p]reschool-aged children learn vocabulary and concepts from educational television."[41]

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39. The *Fox Television Stations* case pivoted on the use of unscripted expletives by celebrities Cher and Nicole Richie during, respectively, the 2002 and 2003 Billboard Music Awards shows. *Fox Television Stations*, 129 S. Ct. at 1808.

40. Cynthia Hoffner & Joanne Cantor, *Developmental Differences in Responses to a Television Character's Appearance and Behavior*, 21 DEVELOPMENTAL PSYCHOL. 1065, 1065 (1985) (emphasis added). *See* Diane E. Field & Daniel R. Anderson, *Instruction and Modality Effects on Children's Television Attention and Comprehension*, 77 J. EDUC. PSYCHOL. 91, 97–98 (1985) ("[O]lder children are more likely to process the audio at a semantic level without looking.").

41. Georgene L. Troseth, *TV Guide: Two-Year-Old Children Learn To Use Video as a Source of Information*, 39 DEVELOPMENTAL PSYCHOL. 140, 140 (2003).

2. Assertion No. 2: "One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency."[42]

Justice Scalia's initial assumption here certainly is well taken. It is highly unlikely that the human subjects committee or institutional review board (IRB)[43] of any department, college, or university would approve a study that exposes children—however old or young they may be—to words like *shit*, *cunt*, and *fuck*,[44] largely because "[a] central responsibility of IRBs is to ensure that the potential benefits to the individual research participants (and to society) will be greater than any risks that may be encountered by participation in the research."[45] On top of this, of course, parents would need to consent to have their children participate in such a study or experiment.

But Justice Scalia's hypothetical of a controlled study, of course, is merely an extreme example he uses to illustrate what is *not* possible. It does not mean that surveys, field studies, or other forms of communication or psychology research cannot be, or have not already been, conducted regarding the possible impact of profanity, be it broadcast or interpersonal, on minors.

There already exists, in fact, much scholarly literature from different fields on profanity and swearing that might, in the future, help both courts and the FCC to gain a much better understanding of this speech phenomenon.[46] As Brigham Young University Professor Dale Cressman

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42. *Fox Television Stations*, 129 S. Ct. at 1813.

43. *See generally* Stephen J. Ceci et al., *Human Subjects Review, Personal Values, and the Regulation of Social Science Research*, 40 AM. PSYCHOLOGIST 994, 994 (1985) (describing "the role played by human subjects committees (or institutional review boards—IRBs for short) in the regulation of research," noting that "[o]ften, the first step (a required one in most cases) in undertaking research is to obtain the approval of one's IRB for the proposed treatment of human subjects," and pointing out that, among other factors, IRBs consider the physical and mental risks of proposed studies).

44. The seven words used by comedian George Carlin during the radio broadcast that gave rise to the Supreme Court's ruling in *Pacifica Foundation* were "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits." *See* Christine A. Corcos, *George Carlin, Constitutional Law Scholar*, 37 STETSON L. REV. 899, 911 (2008) (citing these words and providing "part of Carlin's *Seven Filthy Words* monologue in which he critiqued the FCC's policy by using some of the words he thought the agency would ban").

45. Ralph L. Rosnow et al., *The Institutional Review Board as a Mirror of Scientific and Ethical Standards*, 48 AM. PSYCHOLOGIST 821, 822 (1993).

46. A number of relatively recent books address profanity, swearing, or cursing, or all three. *See, e.g.*, KEITH ALLAN & KATE BURRIDGE, FORBIDDEN WORDS: TABOO AND THE CENSORING OF LANGUAGE (2006); GEOFFREY HUGHES, SWEARING: A SOCIAL HISTORY OF FOUL LANGUAGE, OATHS AND PROFANITY IN ENGLISH (1991); TIMOTHY JAY,

and his colleagues write in a 2009 article, "Research on profanity is not confined to the field of communication. Sociologists, psychologists, and pediatricians are among those contributing to the academic literature on the nature, social uses, and effects of profanity—both in the media and in everyday life."[47]

For instance, more than 100 years ago, *The Psychological Review* published an article titled *The Psychology of Profanity*[48] that suggested the beneficial use of swearing as "a safety-valve"[49] because "if the man did not swear, he would do something worse. It may be likened to the engine blowing off steam."[50] First Amendment scholars will recognize how this comports with the safety-valve function in free speech for which it is theorized "that tolerance of radical speech diminished the likelihood of radical action."[51] The radical speech that is swearing within many circles of society allows a person to blow off verbal steam.

What is most striking about this, of course, is that it completely contradicts the underlying, fundamental assumption embraced by the FCC in its indecency policy that profanity and swearing are necessarily bad things. Communication researchers like Daniel Linz of the University of California, Santa Barbara have built up healthy publication records testing and challenging similar assumptions by the legal system about media effects or effects associated with businesses that distribute First Amendment-protected materials.[52]

CURSING IN AMERICA: A PSYCHOLINGUISTIC STUDY OF DIRTY LANGUAGE IN THE COURTS, IN THE MOVIES, IN THE SCHOOLYARDS AND ON THE STREETS (1992); RUTH WAJNRYB, EXPLETIVE DELETED: A GOOD LOOK AT BAD LANGUAGE (2005). In addition to the other scholarly articles discussed later in this part of the Article, there are others on the topic, including some very old ones. *See, e.g.*, Edward C. Echols, *The Art of Classical Swearing*, 46 CLASSICAL J. 291 (1951); Edwin P. Whipple, *The Swearing Habit*, 140 N. AM. REV. 536 (1885).

47. Dale L. Cressman et al., *Swearing in the Cinema: An Analysis of Profanity in U.S. Teen-Oriented Movies, 1980–2006*, 3 J. CHILD. & MEDIA 117, 119 (2009).

48. G.T.W. Patrick, *The Psychology of Profanity*, 8 PSYCHOL. REV. 113 (1901).

49. *Id.* at 119.

50. *Id.*

51. Bradley C. Bobertz, *The Brandeis Gambit: The Making of America's "First Freedom," 1909-1931*, 40 WM. & MARY L. REV. 557, 609 (1999).

52. *See, e.g.*, Daniel Linz et al., *An Examination of the Assumption that Adult Businesses Are Associated with Crime in Surrounding Areas: A Secondary Effects Study in Charlotte, North Carolina*, 38 LAW & SOC'Y REV. 69 (2004); Daniel Linz et al., *Testing Legal Assumptions Regarding the Effects of Dancer Nudity and Proximity to Patron on Erotic Expression*, 24 LAW & HUM. BEHAV. 507 (2000); Bryant Paul & Daniel

In 2009, Professor Timothy Jay published an article in *Psychology, Public Policy, and Law* called *Do Offensive Words Harm People?*[53] in which he boldly contended that "[a]sserting that offensive words universally cause harm cannot be justified."[54] Professor Jay's work, in bridging psychology and law, takes the FCC to task in somewhat blistering fashion, arguing that:

> Judicial reasoning in *Pacifica* is based on the Justices' folk knowledge of offensiveness but not on any scientific evidence of harm from indecent speech. . . . *There is no psychological evidence of harm from fleeting expletives.* In the end, it appears that the FCC remains out of touch with millions of speakers, and with meaningful linguistic analyses of swearing in public, to impose its own notion on propriety on all of us. Unsupported beliefs about indecency are not unlike those underlying our approach to sexuality education in public schools.[55]

Professor Jay notes that, during his research, he and his colleagues have "recorded hundreds of incidences of children saying offensive words in public and private places,"[56] thus "making suspect assumptions that children are corrupted by fleeting expletives that they already know and use."[57] He concludes that "courts need to abandon inaccurate commonsense views of offensive speech and be more open to expert testimony and scientific evidence regarding the nature of offensive words."[58]

In a different article, Professor Jay argues that "[t]he negative framing of swearing reinforces the notion of taboo words as substandard speech and is used by authority figures to relegate swearing to bad behavior that cannot be condoned."[59] In the case of indecency, the authors of this Article contend that the FCC is such an authority figure and that it has engaged in such a negative framing of certain language in order to promote and enhance its authority over broadcast indecency. Children are arguably being used, in other words, by the FCC to perpetuate and instantiate its authority over society's use of language in the broadcast medium.

G. Linz, *The Effects of Exposure to Virtual Child Pornography on Viewer Cognitions and Attitudes Toward Deviant Sexual Behavior*, 35 COMM. RES. 3 (2008).

53. Timothy Jay, *Do Offensive Words Harm People?*, 15 PSYCHOL. PUB. POL'Y & L. 81 (2009).

54. *Id.* at 89.

55. *Id.* at 92 (emphasis added).

56. *Id.*

57. *Id.*

58. *Id.* at 94.

59. Timothy Jay, *The Utility and Ubiquity of Taboo Words*, 4 PERSP. PSYCHOL. SCI. 153, 157 (2009).

> *3. Assertion No. 3: "Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives."*[60]

The primary questions raised by Justice Scalia's assertions here are as follows.

Do children necessarily mimic behavior they observe that appears to be normal and appropriate? Put differently, will hearing expletives on television programs tend to cause children to use them?

Is Justice Scalia, and, in turn, the FCC, concerned merely with short-term mimicry—he uses the word *mimic*[61]—or is he concerned with long-term observational learning from television? There are critical differences between the two, although this may simply have been a careless use of language by the Justice.[62]

Is the alleged harm from the broadcast of fleeting expletives the mere later use of those words by minors, rather than some deeper psychological scarring or emotional injury?

With his first sentence in the quotation immediately above, Justice Scalia begins to tap into social learning theory that, as communication scholars Jennings Bryant and Susan Thompson write, places "much emphasis on the concept of *observational learning*. A person observes other people's actions and the consequences of those actions, and learns from what has been observed. The learned behavior can then be reenacted

60. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1813 (2009).
61. *Id.*
62. Jodi L. Whitaker and Brad J. Bushman explain the difference this way in a recent law journal article:

> Mimicry is the short-term copying of the actions of others. In contrast, *observational learning* refers to "the process through which behavioral scripts, world schemas, and normative beliefs become encoded in a [person]'s mind simply as a consequence of the [person] observing others." Whereas short-term mimicry needs only one exposure to the observed behavior for children to imitate the action, long-term observational learning usually requires repeated exposure or repeated rehearsal.

Jodi L. Whitaker & Brad J. Bushman, *A Review of the Effects of Violent Video Games on Children and Adolescents*, 66 WASH. & LEE L. REV. 1033, 1044 (2009) (alterations in original).

by the observer."[63] Justice Scalia also is correct that television can influence what children learn, as Professors Barry Sapolsky and Barbara Kaye note:

> Television is one of many socialization agents. Although television violence studies are mixed on the effects of viewing violence, it is well documented that television is very influential and shapes our views of the world and our behaviors, including gender roles. Social learning theory explains that behaviors we view most often and those that are easy to imitate tend to be the most influential.[64]

Justice Scalia's second sentence—that if children hear expletives on television programming, they will tend to use them—is relatively remarkable because it is reminiscent of the outdated hypodermic needle model of mass communication effects in which audience members, as communication researchers Werner J. Severin and James W. Tankard, Jr., note, were perceived as "vulnerable targets easily influenced by mass communication messages."[65] Although this theory, sometimes known as the bullet theory, "is clearly a view held by members of the public at various times,"[66] it has been rejected by communication researchers who see a much more complex communication process under which "there are a number of different dependent variables that can be examined in the quest for possible effects of mass communication."[67] Indeed, children are not inert viewers of television; Gordon Berry of the University of California, Los Angeles, for instance, contends that "for the child[,] television viewing is not the passive and stuporlike activity many have characterized it to be."[68] The impact of television viewing on minors is much more complex than a bullet-like effect.[69]

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63. JENNINGS BRYANT & SUSAN THOMPSON, FUNDAMENTALS OF MEDIA EFFECTS 70 (2002).

64. Barry S. Sapolsky & Barbara K. Kaye, *The Use of Offensive Language by Men and Women in Prime Time Television Entertainment*, 13 ATLANTIC J. COMM. 292, 295 (2005).

65. WERNER J. SEVERIN & JAMES W. TANKARD, JR., COMMUNICATION THEORIES: ORIGINS, METHODS, AND USES IN THE MASS MEDIA 18 (5th ed. 2001).

66. *Id.* at 13.

67. *Id.*

68. Gordon L. Berry, *Developing Children and Multicultural Attitudes: The Systemic Psychosocial Influences of Television Portrayals in a Multimedia Society*, 9 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 360, 362 (2003).

69. Brian R. Clifford and his co-authors assert:

> [T]hat a knowledge of the interactions among media components and content, viewer variables such as perception, evaluation and motivation, together with cognitive capabilities, and characteristics of different viewing and viewer backgrounds are essential components in the effort to understand the child's television experience and the impact of that experience upon them.

BRIAN R. CLIFFORD ET AL., TELEVISION AND CHILDREN: PROGRAM EVALUATION, COMPREHENSION, AND IMPACT 227 (1995).

Thus, although children conceivably might *learn* a new expletive from watching and listening to a television program, especially given "the well-documented ability of preschoolers to learn vocabulary incidentally,"[70] this does not necessarily mean that they will start *using* that word or saying it as a regular part of their vocabulary. In particular, social cognitive theory suggests that "outcome expectancies"[71] will influence whether a behavior is enacted. If a child knows that his parents[72] will punish him for using certain offensive words, this may dissuade him from using them.[73] This is particularly important because "[t]elevision viewing occurs in an ecological context of the family"[74] and, in particular, "[f]or children under age 7, most viewing of general audience programs occurs with an adult, usually a parent."[75] These general-audience programs would seem to be the types of programs, as compared to educational ones like *Sesame Street* in which a fleeting expletive might occur, and a parent thus has the opportunity to instruct the child as the parent sees fit about the use of such language.

Stanford University's Albert Bandura contends that "[t]he ability to envision the likely outcomes of prospective actions is another way in which anticipatory mechanisms regulate human motivation and action. People strive to gain anticipated beneficial outcomes and to forestall aversive ones."[76] Bandura thus stresses that "[s]ocial cognitive theory

70. JUDITH VAN EVRA, TELEVISION AND CHILD DEVELOPMENT 45 (1990).

71. *See* Gerald M. Devins, *Social Cognitive Analysis of Recovery from a Lapse After Smoking Cessation: Comment on Haaga and Stewart (1992)*, 60 J. CONSULTING & CLINICAL PSYCHOL. 29, 29 (1992) ("An *outcome* expectation has been defined as one's estimate that a given behavior can produce a particular outcome.").

72. *See* Brian L. Thorn & Lucia A. Gilbert, *Antecedents of Work and Family Role Expectations of College Men*, 12 J. FAM. PSYCHOL. 259, 260 (1998) ("It is clear that parents are in a position to impart a great deal of influence on the learning and socialization process . . . .").

73. This holds true for other types of behavior engaged in by minors. For instance, "[a] growing body of literature supports the strength of alcohol-related expectancies as important determinants of adolescent drinking behavior." Lawrence M. Scheier & Gilbert J. Botvin, *Expectancies as Mediators of the Effects of Social Influences and Alcohol Knowledge on Adolescent Alcohol Use: A Prospective Analysis*, 11 PSYCHOL. ADDICTIVE BEHAVS. 48, 48 (1997).

74. Aletha C. Huston et al., *From Attention to Comprehension: How Children Watch and Learn from Television*, *in* CHILDREN AND TELEVISION: FIFTY YEARS OF RESEARCH 41, 46 (Norma Pecora et al. eds., 2007).

75. *Id.*

76. Albert Bandura, *Human Agency in Social Cognitive Theory*, 44 AM. PSYCHOLOGIST 1175, 1180 (1989).

distinguishes between *acquisition* and *performance* because people do not perform everything they learn."[77] The bottom line is that "whether observers actually engage in that learned behavior is a function of the reinforcement contingencies (positive or negative) they associate with it."[78]

It is important to notice here that Justice Scalia still has not identified the specific harm that justifies regulating fleeting expletives, other than the assertion that children will "use"[79] them. Is he suggesting that mere use of an expletive is, in and of itself, a harm to the child? If it is the harm, it can easily be cured.[80] One study published in 1978, for instance, focused on an eleven-year-old boy named Mark who "would swear profusely at the dinner table."[81] The study found that:

> Mark's swearing behavior could be rapidly and considerably decreased if that behavior resulted in his having to wash windows. It appears that washing windows, combined with the threat of loss of privileges if the window washing was not completed, was indeed a sufficiently potent aversive stimulus for Mark to learn quickly to avoid it by decreasing his swearing behavior.[82]

Moreover, if the only alleged harm is the mere use of expletives by minors, is it not the prerogative of parents—not the government—to either praise or punish their children's use of language? Indeed, some parents may not object to their children using expletives, just as they also might not object to allowing their minors to hear an occasional expletive on a television program rather than shielding them in an expletive-free, televised bubble that does not reflect the growing use of profanity in the real world.[83] It is useful to recall here the words of the

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77. Albert Bandura, *Social Cognitive Theory of Mass Communication*, *in* MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 61, 68–69 (Jennings Bryant & Dolf Zillmann eds., 1994) (emphasis added).

78. STANLEY J. BARAN & DENNIS K. DAVIS, MASS COMMUNICATION THEORY: FOUNDATIONS, FERMENT, AND FUTURE 185 (5th ed. 2009) (italics and bold emphasis omitted).

79. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1813 (2009).

80. *See* Ashton D. Trice & Frank C. Parker, *Decreasing Adolescent Swearing in an Instructional Setting*, 6 EDUC. & TREATMENT CHILD. 29, 29 (1983) (reporting the results of a study in which "the use of obscene words by two adolescents was reduced using feedback with social reinforcement and response cost procedures in an instructional setting").

81. Joel Fischer & Robert Nehs, *Use of a Commonly Available Chore To Reduce a Boy's Rate of Swearing*, 9 J. BEHAV. THERAPY & EXPERIMENTAL PSYCHIATRY 81, 81 (1978).

82. *Id.* at 82.

83. *See generally* Melanie B. Glover, *Youth Swearing a Curse on the Rise*, CHI. TRIB., Mar. 2, 2008, at C12 (describing an increase in adolescent swearing, and quoting one expert for the proposition that the "average adolescent uses roughly 80 to 90 swear words a day"); Laura McFarland, *What the %&$@—For Some Kids, Potty Training Includes Word Choice*, ROCKY MOUNT TELEGRAM (N.C.), Apr. 27, 2008, at Sunday Life (quoting a clinical psychologist for the proposition that "there is an increase in the pervasiveness of inappropriate language").

late Justice William Brennan, dissenting in the seminal indecency case of *Pacifica Foundation*, who opined:

> [*P*]*arents, not the government*, have the right to make certain decisions regarding the upbringing of their children. As surprising as it may be to individual Members of this Court, some parents may actually find Mr. [George] Carlin's unabashed attitude towards the seven "dirty words" healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature or its existence. Only the Court's regrettable decision does that.[84]

Finally, if the use of bad words is the harm on which Justice Scalia was focused, then both he and the FCC ignore literature suggesting the value of swearing, even including among minors. Professor Vivian de Klerk, a linguist, writes that "swearing is one of the many ways in which members of groups can reflect their informality and modernity, ensuring that they are seen as 'cool,' fashionable, up-to-date and part of the speech community of young people, while at the same time distinguishing themselves as members of a distinctive peer group."[85] She asserts that expletives "are prime symbolic assets"[86] in the speech marketplace of minors, "carrying markedly higher value during the adolescent years than in later years."[87]

The use of offensive words by minors thus has its benefits within their peer-group worlds and as they attempt to carve out their own identities. First Amendment scholars will note how this comports with the self-realization theory of freedom of expression.[88] As the late Justice Thurgood Marshall once wrote:

> The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress

84. FCC v. Pacifica Found., 438 U.S. 726, 770 (1978) (Brennan, J., dissenting) (emphasis added).

85. Vivian de Klerk, *Slang and Swearing as Markers of Inclusion and Exclusion in Adolescence*, *in* TALKING ADOLESCENCE: PERSPECTIVES ON COMMUNICATION IN THE TEENAGE YEARS 111, 112 (Angie Williams & Crispin Thurlow eds., 2005).

86. *Id.* at 116.

87. *Id.*

88. *See* R. George Wright, *Freedom and Culture: Why We Should Not Buy Commercial Speech*, 72 DENV. U. L. REV. 137, 153 (1994) (identifying "the development and flourishing of the personality" as the goal of the "self-realization" theory of free expression).

> expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.[89]

If minors actually do learn expletives from the fleeting ones they hear on television programs rather than from other sources, such as their peers, parents, or music, there is no evidence to show that their usage is, standing alone, harmful. The use of swearwords on occasion, studies show, can even enhance one's perceived credibility.[90] In addition, a recent study demonstrated that swearing can relieve physical pain.[91] The law overlooks such benefits and only assumes harms.

4. Assertion No. 4: "Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity."[92]

These two sentences raise three key questions.

Is Justice Scalia suggesting that once Congress decides that a particular form of media content is harmful to audience members, and in turn, once it delegates the creation and enforcement of regulations designed to stop such harms to a federal agency, then no "empirical" data evidencing harm is needed to justify its regulation? Alternatively, does this no-data-required determination only apply to those areas where the type of longitudinal, controlled studies to which he also referred[93] are not possible?

What does Justice Scalia mean by empirical data? By definition, "[e]mpirical research often is associated with systematic scientific methodology based on observation and fact-based interpretation and frequently is contrasted with normative, or philosophical and value judgmental, research that empirical researchers often regard as anecdotal and unsystematic, which is more common in the humanities."[94] As a 1987

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89. Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring), *overruled by* Thornburgh v. Abbott, 490 U.S. 401, 411 (1989).

90. Eric Rassin & Simone van der Heijden, *Appearing Credible? Swearing Helps!*, 11 PSYCHOL. CRIME & L. 177, 181 (2005).

91. *See* William Hageman, *Pain Relief You Can Swear by*, STAR-LEDGER (Newark, N.J.), Sept. 1, 2009, at 37 (describing the study in which university students were each "asked to put his or her hand in 32-degree water for as long as possible. When repeating their favorite profanity—at an even volume and pace—the students were able to keep their hand in the water for an average of 155 seconds, 40 seconds longer than when they did it without swearing").

92. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1813 (2009).

93. *Supra* note 9 and accompanying text.

94. Mack C. Shelley, *Empiricism*, *in* ENCYCLOPEDIA OF EDUCATIONAL LEADERSHIP AND ADMINISTRATION 337, 337 (Fenwick W. English ed., 2006).

article in *Law and Contemporary Problems* suggested, "any product of observation or experiment might be called empirical."[95]

Rather than *empirical*, does Scalia really mean the term *scientific method*? The scientific method "involves steps beyond observation and description. Specifically, these steps include development and testing of explanations for patterns derived from observations."[96] In other words, if *empirical research* merely means observational research for Justice Scalia, then this is different from scientific data because "discovery and documentation, rooted in observations and descriptions, do not comprise the process commonly termed the *scientific method*. The 'scientific method' depends on the generation and testing of scientific hypotheses, which are defined as *candidate explanations*."[97]

Is empirical data—whatever Justice Scalia meant by that—the only type of evidence that courts should consider when evaluating issues of harm caused by media messages, or are other types of research and theory also relevant?

In summary, this section has not attempted to resolve the causation issue related to fleeting expletives, but it has instead demonstrated that the issue is far more complex than Justice Scalia makes it out to be with his assumptions and assertions on the topic. It has also established that a vast amount of research and theory related to expletives already exists that both the FCC and the Court ignored while so quickly concluding—if not assuming—that fleeting expletives must surely cause some undefined and unidentified harm. By failing to identify the very harm in question, both Justice Scalia and the FCC evade the possibility of outside research contributing to the causation question.

B. Communication Research

Twenty years ago, Professors Jeremy Cohen and Timothy Gleason called for "an interdisciplinary approach to communication and law"[98] that would raise "basic questions about communication assumptions

95. Teresa A. Sullivan et al., *The Use of Empirical Data in Formulating Bankruptcy Policy*, 50 LAW & CONTEMP. PROBS. 195, 196 n.3 (1987).

96. Guy R. McPherson, *Scientific Method*, *in* 2 ENCYCLOPEDIA OF EDUCATIONAL PSYCHOLOGY 888, 888 (Neil J. Salkind & Kristin Rasmussen eds., 2008).

97. *Id.*

98. JEREMY COHEN & TIMOTHY GLEASON, SOCIAL RESEARCH IN COMMUNICATION AND LAW 13 (1990).

inherent in law" and attempt "to find suitable means for identifying those assumptions and for testing both their scientific and their legal validity."[99] Now both deans at major research universities,[100] Cohen and Gleason lamented back in 1990, as assistant professors, what they described as "a dearth of communication studies material that integrates communication theory and law."[101] They contended, however, that "[a] specific research agenda cannot be dictated"[102] when it comes to "the kinds of questions open to research under the heading of communication and law."[103]

Justice Scalia, the authors of this Article assert, actually handed communication researchers a potential media-effects agenda when he asserted that "[*t*]*here are some propositions for which scant empirical evidence can be marshaled*."[104] When it comes to propositions relating to the supposedly deleterious effects of speech and media messages on minors, as well as adults, communication researchers can help the law by doing the following.

Identifying and explaining the types of empirical evidence—correlational? causational? survey? experimental? meta-analysis?[105]—that actually can be marshaled on any given issue of harm that lawmakers or agencies attribute to a type of media message. In other words, is it really true, as Justice Scalia asserted, that the effect of profanity on minors is one of those speech-harm propositions on which scant empirical evidence either exists or could be generated? Communication researchers might be

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99. *Id.* at 12.

100. Cohen is associate vice president and senior associate dean for undergraduate education at the Pennsylvania State University. *See* Jeremy Cohen—College of Communications, http://comm.psu.edu/people/jxc45 (last visited July 25, 2010). Gleason is dean of the School of Journalism and Communication at the University of Oregon. *See* Tim Gleason—School of Journalism and Communication, http://jcomm.uoregon.edu/faculty-staff/tgleason (last visited July 25, 2010).

101. COHEN & GLEASON, *supra* note 98, at 113.

102. *Id.* at 134.

103. *Id.*

104. FCC v. Fox Television Stations, 129 S. Ct. 1800, 1813 (2009) (emphasis added).

105. University of Connecticut Psychology Professor Blair T. Johnson writes that:

> Meta-analysis uses statistical techniques to summarize results from different empirical studies on a given topic to learn more about that topic. In other words, meta-analyses bring together the results of many different studies, although the number of studies may be as small as two in some specialized contexts. Because these quantitative reviews are analyses of analyses, they are literally meta-analyses. The practice is also known as *research synthesis*, a term that more completely encompasses the steps involved in conducting such a review.

Blair T. Johnson, *Meta-Analysis*, *in* 2 ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY 560, 560 (Roy F. Baumeister & Kathleen D. Vohs eds., 2007).

able to help answer this question so that lawmakers and judges know what type of evidence exists.

Filing amici curiae briefs that help to explain the meaning of the relevant evidence that exists regarding the supposed impact of a particular type of media message on those who are exposed to it. Significantly, this already occurred on the question of whether violent video games cause harm—a friend-of-the-court brief was filed by thirty-three scholars from the fields of media, psychology, and culture[106] in *Interactive Digital Software Ass'n v. St. Louis County*.[107]

Testifying before congressional hearings and state legislative bodies when bills affecting First Amendment speech rights are put up for debate before critical committees.

Creating research agendas around those topics of causation of harm with which lawmakers are grappling, from violent video games to indecency to restrictions targeting tobacco advertising.

In a 2009 law journal article, Professor Kimberlianne Podlas observed that "much of the empirical research on television effects remains within the fields of cognitive psychology and media studies. As a result, legal scholars and practitioners have been slow to apply these insights to the law."[108] But help from communication research can be important, as communication scholars Michael Gurevitch, Stephen Coleman, and Jay G. Blumler made clear in a 2009 article when they wrote that "communication scholars can help policy makers to avoid some of the more crass assumptions that misguided the earlier debates. Media effects are not direct and undifferentiated."[109]

None of this will be easy, however. As one of the authors of this Article wrote in 2004, "The intersection of social science and the law has long been controversial. The extent to which social scientific methods and theoretical structures can or should contribute to the law has been

106. *See* Marjorie Heins, *Introduction to Brief* Amici Curiae *of Thirty-Three Media Scholars in St. Louis Video Games Case*, 31 HOFSTRA L. REV. 419 (2002) (including the complete text of the brief, as well as a description of it by one of its authors).

107. Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003).

108. Kimberlianne Podlas, *Respect My Authority!* South Park*'s Expression of Legal Ideology and Contribution to Legal Culture*, 11 VAND. J. ENT. & TECH. L. 491, 493–94 (2009).

109. Michael Gurevitch et al., *Political Communication—Old and New Media Relationships*, 625 ANNALS AM. ACAD. POL. & SOC. SCI. 164, 177 (2009).

contested in American legal thought since the early twentieth century."[110] When it comes to free speech questions, "translating social scientific findings into the domain of existing First Amendment doctrine is a daunting problem. It is one that scholars and judges must grapple with, while doing their best to ensure that valuable First Amendment freedoms are respected."[111]

But the power of communication research could ultimately undo the entire line of indecency regulation that flows from *FCC v. Pacifica Foundation*.[112] As Professor Mehmet Konar-Steenberg wrote five years ago in a law journal article, if judicial assumptions about media harms are wrong, then:

> [I]t becomes easier to argue that *Pacifica* was wrongly decided. *Pacifica* represents an exception to the general First Amendment rule, and if it can be shown to be based on unsubstantiated assumptions about mass communications effects, then there is no demonstrated basis for departing from the default First Amendment protections afforded to non-broadcast media. Second, it becomes possible to affirmatively argue in favor of extending the highest level of First Amendment protection to all media based on the empirically-demonstrable conclusion that audiences actively use media.[113]

With this background in mind on both Justice Scalia's statements regarding causation of harm and fleeting expletives, as well as an examination of the research and potential research related to the topic, this Article next illustrates the judicial inconsistency that exists when it comes to questions of speech and harm, depending upon either the topic or subject matter.

III. JUDICIAL INCONSISTENCY AND INCOHERENCE ON CAUSATION OF HARM FROM MEDIA MESSAGES

This part of the Article illustrates how the level of attention paid by courts to the issue of harm allegedly caused by speech varies substantially, depending on the type of speech at issue. As an examination, the causation-of-harm question in each of the three different categories of speech described below suggests, there is judicial inconsistency when it comes to scrutinizing causation and demanding proof of harm. Section

110. Matthew D. Bunker & David K. Perry, *Standing at the Crossroads: Social Science, Human Agency and Free Speech Law*, 9 COMM. L. & POL'Y 1, 1 (2004).

111. *Id.* at 23.

112. FCC v. Pacifica Found., 438 U.S. 726 (1978).

113. Mehmet Konar-Steenberg, *The Needle and the Damage Done: The Pervasive Presence of Obsolete Mass Media Audience Models in First Amendment Doctrine*, 8 VAND. J. ENT. & TECH. L. 45, 68 (2005).

A initially addresses laws targeting violent video games,[114] while Section B then analyzes evidentiary issues affecting causation and remedy of harm in the commercial speech doctrine,[115] and Section C finally focuses on trademark law.[116]

A. Violent Video Games

Like the constitutionality of laws targeting indecency, statutes focusing on violent video games are content-based laws[117] and thus are subject to the strict scrutiny standard of judicial review.[118] Moreover, both broadcast indecency regulations and violent video game laws are aimed at protecting minors from supposedly pernicious content.[119]

When it comes, however, to evaluating the constitutionality of regulations designed to limit minors' access to video games featuring violent images and storylines, courts are uniformly rigorous on demanding evidentiary proof of causation of harm. For instance, in its 2009 decision in *Video*

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114. *See infra* Part III.A.
115. *See infra* Part III.B.
116. *See infra* Part III.C.
117. *See generally* Wilson R. Huhn, *Assessing the Constitutionality of Laws that Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 803–06 (2004) (providing an excellent overview and analysis of the sometimes slippery distinctions between content-neutral laws and content-based laws).
118. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000) (writing that a "content-based speech restriction" is permissible "only if it satisfies strict scrutiny," which requires that the law in question "be narrowly tailored to promote a compelling Government interest"); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."). *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 903 (2d ed. 2002) ("[C]ontent-based discrimination must meet strict scrutiny . . . .").
119. *See* Clay Calvert & Robert D. Richards, *Precedent Be Damned—It's All About Good Politics & Sensational Soundbites: The Video Game Censorship Saga of 2005*, 6 TEX. REV. ENT. & SPORTS L. 79, 128 (2005) (analyzing several ill-fated legislative attempts to restrict minors' access to violent video games, and asserting that "[t]he rhetoric behind all of the legislation is decidedly child-centric, focusing on the need to protect innocent children from alleged harms while simultaneously providing parents with the tools and ability to do so"); Kevin W. Saunders, *The Cost of Errors in the Debate over Media Harm to Children*, 2005 MICH. ST. L. REV. 771, 772 ("From concerns over comic books and crime magazines in the 1950s, through concerns involving violent films, to *recent concerns over violent video games*, the issue has been the same: whether these influences cause children to become violent or otherwise injure them psychologically." (emphasis added)).

Software Dealers Ass'n v. Schwarzenegger,[120] the United States Court of Appeals for the Ninth Circuit required California to offer "substantial evidence"[121] of the state's "purported interest in preventing psychological or neurological harm"[122] to minors who play violent video games. The Ninth Circuit not only engaged in its own examination and analysis of several studies offered by California,[123] but it suggested that proof of harm *causation*—not merely *correlation*—was required when it wrote:

> Nearly all of the research is based on correlation, not evidence of *causation*, and most of the studies suffer from significant, admitted flaws in methodology as they relate to the State's claimed interest. None of the research establishes or suggests a *causal link* between minors playing violent video games and actual psychological or neurological harm, and inferences to that effect would not be reasonable. In fact, some of the studies caution against inferring *causation*. Although we do not require the State to demonstrate a "scientific certainty," the State must come forward with more than it has.[124]

Just one year before, the United States Court of Appeals for the Eighth Circuit in *Entertainment Software Ass'n v. Swanson*[125] went even further on the evidentiary burden in striking down a Minnesota law targeting violent video games when it held "that the evidence falls short of establishing the *statistical certainty of causation demanded*."[126] The appellate court in *Swanson* somewhat chafed at the application of this evidentiary standard, remarking that "[t]he requirement of such a high level of proof may reflect a refined estrangement from reality."[127] The court determined, however, that it had to apply it in light of precedent from an earlier Eighth Circuit ruling in *Interactive Digital Software Ass'n v. St. Louis County*[128] that struck down a local ordinance targeting violent video games. In *Interactive Digital Software Ass'n*, the Eighth Circuit opined that St. Louis County, Missouri:

> [M]ust come forward with empirical support for its belief that "violent" video games cause psychological harm to minors. In this case, as we have already explained, the

120. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950 (9th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3627 (U.S. Apr. 26, 2010) (No. 08-1448).
121. *Id.* at 962 (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997)).
122. *Id.* at 964.
123. *See id.* at 963–64 (critiquing research conducted by Dr. Craig Anderson and Dr. Douglas Gentile).
124. *Id.* at 964 (emphasis added).
125. 519 F.3d 768 (8th Cir. 2008).
126. *Id.* at 772 (emphasis added).
127. *Id.*
128. 329 F.3d 954 (8th Cir. 2003).

> County has failed to present the "substantial supporting evidence" of harm that is required before an ordinance that threatens protected speech can be upheld.[129]

The other federal appellate court to address the constitutionality of laws affecting minors' access to violent video games, the United States Court of Appeals for the Seventh Circuit, also suggested the need for "social scientific evidence"[130] to support such measures. In rejecting the studies offered by the city of Indianapolis, the Seventh Circuit reasoned:

> There is no indication that the games used in the studies are similar to those in the record of this case or to other games likely to be marketed in game arcades in Indianapolis. The studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere.[131]

At this point, the inconsistency on the question of causation should be clear—laws targeting broadcast indecency and statutes centering on violent video games both are content-based measures aimed at protecting minors from the alleged harms of exposure to certain content, yet only laws targeting violent video games are routinely subjected to a rigorous evidentiary analysis on the issue of causation of harm.

B. Commercial Speech

Although somewhat inconsistently,[132] courts working within commercial speech jurisprudence[133] in recent years, including the Supreme Court, are taking greater care with the nature of the harm the government alleges,

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129. *Id.* at 959.
130. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 579 (7th Cir. 2001).
131. *Id.* at 578–79.
132. University of North Carolina Professor Michael Hoefges, for instance, observed in a 2003 article that "[t]he Supreme Court remains divided on how to apply the *Central Hudson* analysis in commercial speech cases, especially when it comes to the *sufficiency of evidence needed to establish 'direct advancement' under the third factor* and 'narrow tailoring' under the fourth factor." Michael Hoefges, *Protecting Tobacco Advertising Under the Commercial Speech Doctrine: The Constitutional Impact of* Lorillard Tobacco Co., 8 COMM. L. & POL'Y 267, 311 (2003) (second emphasis added).
133. The U.S. Supreme Court first gave constitutional protection to advertising in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). It concluded then that "commercial speech, like other varieties, is protected." *Id.* at 770. In reaching this decision, the High Court recognized the "consumer's interest in the free flow of commercial information." *Id.* at 763. The Court also agreed that "society also may have a strong interest in the free flow of commercial information." *Id.* at 764.

as well as the efficacy of the remedy proposed by the governmental regulator.[134] In this area of communications law, at least, courts increasingly are demanding empirical evidence of some sort related to causation and remedy of harm, rather than impressionistic guesswork or mere speculation and conjecture, thus illustrating far less deference paid to government action than is given to the FCC in the realm of indecency in cases like *Fox Television Stations*.[135]

In commercial speech, the vehicle for this data-driven inquiry is the so-called *Central Hudson* test, a modified form of intermediate scrutiny[136] that was initially created in the seminal 1980 case of *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[137] Although the second part of the test, which requires that "the asserted governmental interest is substantial,"[138] is sometimes evaluated at a fairly high level of generality, as is often the case in heightened scrutiny formulations, the third part of the test, "whether the regulation directly advances the governmental interest asserted,"[139] has increasingly been interpreted by the Court to require rather precise evidentiary standards.

In the early years after the creation of the *Central Hudson* test, the Court was sometimes less than rigorous in applying the test. The 1986 decision in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*,[140] for example, the Court upheld a restriction on ads for casino

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134. Emily Erickson, *Disfavored Advertising: Telemarketing, Junk Faxes and the Commercial Speech Doctrine*, 11 COMM. L. & POL'Y 589, 602 (2006) ("[T]he broader trend has been one of higher scrutiny for commercial speech cases.").

135. As one federal appellate court opined in a 2009 commercial speech case, "[W]e do not simply defer to defendant's contention because it is a legislative judgment" but instead "independently evaluate" the government's assertions. W. Va. Ass'n Club Owners & Fraternal Serv., Inc. v. Musgrave, 553 F.3d 292, 303 (4th Cir. 2009).

136. Under the U.S. Supreme Court's articulation of the intermediate scrutiny standard of judicial review, "[a] content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997). *See* Capobianco v. Summers, 377 F.3d 559, 562 (6th Cir. 2004) (referring to the *Central Hudson* test as "the intermediate scrutiny test"); Anheuser-Busch, Inc. v. Schmoke, 63 F.3d 1305, 1313 (4th Cir. 1995) ("The Supreme Court has characterized the review of commercial speech regulation as one of intermediate scrutiny.").

137. 447 U.S. 557 (1980).

138. *Id*. at 566.

139. *Id.*

140. 478 U.S. 328 (1986). Among other conclusions highly criticized by constitutional scholars, the *Posadas* majority suggested that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." *Id.* at 345–46. This "greater includes the lesser" formulation, which seemed incomprehensible to many First Amendment scholars, was eventually repudiated by the Court. S*ee, e.g.*, Phillip B.

gambling aimed at Puerto Rican residents rather than at tourists. The regulation was designed to achieve the rather delicate balance of encouraging tourists to drop a few dollars at the craps table and depart the jurisdiction forthwith, while not persuading locals to engage in gambling, with all its attendant social ills.[141]

In considering the issue of whether the advertising regulation directly advanced the state's interest in preventing excessive gambling among local residents, part three of the *Central Hudson* test, the majority's analysis was surprising:

> The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one, and the fact appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view.[142]

This was a rather stunning brand of legal jujitsu that used the First Amendment speaker's very presence in court against it. As one treatise put it, "[S]ince the person whose speech is banned has brought the case before the Supreme Court, the ban likely passes the third part of the test. 'Catch-22,' precisely."[143] There is a complete absence of any independent assessment by the Court, either as to the actual harm or the regulatory mode chosen to address it. Professors Michael Hoefges and Milagros Rivera-Sanchez wrote that *Posadas* embraced a "highly deferential application of the direct-advancement inquiry under the third *Central Hudson* factor."[144] They added:

> To this day, the *Posadas* opinion stands as perhaps the Court's most lenient application of intermediate scrutiny under the *Central Hudson* analysis. The majority deferred without question to Puerto Rico's asserted regulatory interests and, more importantly, blindly assumed that regulation of gambling advertising

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Kurland, Posadas de Puerto Rico v. Tourism Company*: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful*," 1986 SUP. CT. REV. 1, 13.

141. *Posadas*, 478 U.S. at 341.

142. *Id.* at 341–42.

143. P. CAMERON DEVORE & ROBERT D. SACK, ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE 4-22 (1999).

144. Michael Hoefges & Milagros Rivera-Sanchez, *"Vice" Advertising Under the Supreme Court's Commercial Speech Doctrine: The Shifting* Central Hudson *Analysis*, 22 HASTINGS COMM. & ENT. L.J. 345, 361–62 (2000).

> would be effective in curing potentially harmful secondary effects of gambling related to behavior.[145]

As the Court developed its commercial speech jurisprudence, however, it increasingly applied a more rigorous standard to the direct-advancement part of the *Central Hudson* test. In *Edenfield v. Fane*,[146] the Court in 1993 considered a challenge to a Florida Board of Accountancy rule that forbade direct solicitation of clients by Certified Public Accountants (CPA). The Board based its defense of the rule on its interest in preventing fraud and protecting potential clients' privacy, as well as protecting "the fact and appearance of CPA independence and to guard against conflicts of interest."[147]

Although the Court acknowledged the substantiality of these interests "in the abstract,"[148] it saved the rigorous examination for the third prong of the test, requiring solid proof that the solicitation ban served those interests.[149] On the latter point, the Court specifically noted that "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain such a restriction . . . *must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree*."[150] Close observers of the Supreme Court will recall that this same language was cited favorably in 2002 by Justice David Souter in another First Amendment area in which intermediate scrutiny is employed, namely the zoning of adult bookstores.[151]

This stands in stark contrast, of course, to the High Court's analysis in both *Pacifica Foundation* and *Fox Television Stations*, in which there was no demonstration by any evidence that the harms suffered by children from hearing indecent speech are real.[152] In *Edenfield*, the Court found that the government failed to meet this standard. The Board had failed, the Court noted, to submit any studies indicating that CPA solicitation of clients created dangers of lack of independence, fraud, or the like.[153] Nor did the Board offer anecdotal evidence of such outcomes

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145. *Id.* at 361 (emphasis omitted).
146. 507 U.S. 761 (1993).
147. *Id.* at 769.
148. *Id.* at 770.
149. *Id.*
150. *Id.* at 770–71 (emphasis added).
151. *See* Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 458 n.3 (2002) (Souter, J., dissenting). Justice Souter went on to stress the dangers of "an uncritical common sense" and to write that "we must be careful about substituting common assumptions for evidence." *Id.* at 459.
152. *Supra* notes 9–15 and accompanying text.
153. *Edenfield*, 507 U.S. at 771.

from in-person solicitation of clients. The Court also pointed out that some of the evidence presented by the Board actually contradicted, rather than supported, its contentions.[154] This requirement of empirical evidence put forward by the party seeking to suppress the speech is light-years from *Posadas*' catch-22 methodology.

The Court deviated somewhat from this data-driven trajectory in 1995's *Florida Bar v. Went For It, Inc*.[155] In that case, the Court upheld a Florida Bar rule imposing a thirty-day restriction on attorney direct-mail solicitation of accident or disaster victims or their families.[156] The Florida Bar justified its rule with a study that included examples of citizens outraged by solicitation letters they had received in the wake of tragedies.[157] Justice Sandra Day O'Connor's majority opinion defended the conclusion that "direct-mail solicitation in the immediate aftermath of accidents . . . targets a concrete, non-speculative harm,"[158] even though Justice Anthony Kennedy's dissent suggested that the specifics of the Bar's study were lacking.

Justice Kennedy wrote that the study "includes no actual surveys, few indications of sample size or selection procedure, no explanations of methodology, and no discussion of excluded results. There is no description of the statistical universe or scientific framework that permits any productive use of the information."[159] Justice Kennedy seemed to be taking the position that if the government wished to have its evidence treated with the respect due to empirical inquiry, it needed to observe the niceties associated with such research.

Justice O'Connor's majority opinion rejected these concerns, noting that "we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information."[160] The very fact that the two opinions were arguing about the interpretation of empirical data, in any event, was a major step forward.

In *44 Liquormart, Inc. v. Rhode Island*,[161] decided in 1996, the Court continued to emphasize these themes. Although *44 Liquormart* was

154. *Id.* at 772.
155. 515 U.S. 618 (1995).
156. *Id.* at 620.
157. *Id.* at 626–27.
158. *Id.* at 628–29.
159. *Id.* at 640 (Kennedy, J., dissenting).
160. *Id.* at 628 (majority opinion).
161. 517 U.S. 484 (1996).

notable for Justice Thomas's call to repudiate the *Central Hudson* test in at least some advertising situations,[162] the Court's other members chose instead to focus on an increasingly rigorous analysis. *44 Liquormart* arose when the State of Rhode Island attempted to prohibit price advertising for alcoholic beverages other than at the point of sale. Justice John Paul Stevens's plurality opinion emphasized that Rhode Island had presented no evidence that its regulation would maintain higher alcohol prices in the state and thereby promote temperance, thus meeting the third prong of *Central Hudson*. Justice Stevens wrote that "[a]lthough the record suggests that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers of modest means, . . . the State has presented no evidence to suggest that its speech prohibition will *significantly* reduce marketwide consumption."[163]

In its 2001 opinion in *Lorillard Tobacco Co. v. Reilly*,[164] the Court reiterated the three principles on the direct-advancement prong: (1) the harms the government asserts are real; (2) mere speculation and conjecture will not satisfy the government's evidentiary burden of showing regulations will cure those harms; and (3) empirical data accompanied by a surfeit of background information is not required, however, to meet that burden.[165]

In *Lorillard*, the Massachusetts Attorney General offered into evidence numerous studies to demonstrate that minors actually are harmed by certain tobacco products that were reviewed by the Court, with Justice O'Connor concluding for the majority:

> Our review of the record reveals that the Attorney General has provided *ample documentation of the problem* with underage use of smokeless tobacco and cigars. . . . On this record and in the posture of summary judgment, we are unable to conclude that the Attorney General's decision to regulate advertising

162. "In my view, the *Central Hudson* test asks the courts to weigh incommensurables—the value of knowledge versus the value of ignorance—and to apply contradictory premises—that informed adults are the best judges of their own interests, and that they are not." *Id.* at 528 (Thomas, J., concurring in judgment).

163. Id. at 506 (plurality opinion) (citation omitted). As if to indicate how far this analysis had evolved since the primitive *Posadas*, Justice Stevens pointed out in a footnote that even though the law's challengers had stipulated that they believed alcohol sales would go up if the law were repealed, that belief only indicated that they could compete more effectively without the ad ban, not that "they believe either the number of alcohol consumers, the number of purchases by those consumers, will increase in the ban's absence." *Id.* at 506 n.16.

164. 533 U.S. 525 (2001).

165. *Id.* at 555.

> of smokeless tobacco and cigars in an effort to combat the use of tobacco products by minors was based on mere "*speculation [and] conjecture*."[166]

In other words, the government proved, through documented evidence present on the record, that there was actually harm that needed to be remedied. It is important to understand that such scrutiny on the third prong of *Central Hudson*, requiring some level of documentation beyond mere speculation and conjecture, takes place despite the fact that commercial speech is treated as "second class"[167] expression and is not provided with the same safeguards as other types of expression, such as political speech,[168] which is subject to the heightened strict scrutiny standard of judicial review.[169] The bottom line is that while the FCC gets a free pass on issues of harm allegedly caused by indecency, government entities seeking to regulate commercial speech simply cannot pass constitutional muster "without any findings of fact, or indeed any evidentiary support whatsoever."[170]

At this point, then, the judicial inconsistency related to issues of causation of harm becomes even clearer. Laws targeting violent video games are subject to exacting scrutiny on the causation of harm issue,[171] while laws targeting commercial speech require less evidence but nonetheless demand that "a governmental body . . . must demonstrate that the *harms it recites are real* and that its restriction *will in fact alleviate them* to a material degree."[172] But when it comes to indecency, the FCC apparently carries no such burden whatsoever, either because the Justices believe that no empirical evidence can be marshaled or because they believe that commonsense and their own intuition is sufficient.

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166. *Id.* at 561 (alteration in original) (emphasis added) (quoting Edenfield v. Fane, 507 U.S. 761, 770 (1993)).

167. DANIEL A. FARBER, THE FIRST AMENDMENT 151 (2d ed. 2003).

168. *See* Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won't Go Away*, 41 LOY. L.A. L. REV. 181, 182 (2007) ("[T]he commercial speech doctrine creates a category of speech subject to intermediate scrutiny under the First Amendment.").

169. As the U.S. Supreme Court has observed, "[w]hen a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995). *See* Burson v. Freeman, 504 U.S. 191, 197–98 n.3 (1992) ("[A] content-based regulation of political speech in a public forum is valid only if it can survive strict scrutiny.").

170. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505 (1996).

171. *See supra* Part III.A (discussing commercial speech).

172. Edenfield v. Fane, 507 U.S. 761, 770–71 (1993) (emphasis added).

C. Trademark Dilution

This Article turns now to a relatively new branch of communications law—at the federal level, at least—in which empiricism appears to be inchoate. Trademark dilution law generally does not require the same degree of empirical validation of harm as does commercial speech.[173] Although trademark dilution is not based on the First Amendment,[174] as are other legal areas explored in this Article, it is nonetheless apposite because its prime focus is the effect of a particular trademark or service mark on the public and the resultant harm to the plaintiff, generally the owner of a famous trademark alleging dilution. The offending mark in a trademark dilution case is no less a "media message" than is indecent speech or commercial advertising, and a judicial determination of the message's harm is no less complex or appropriate for empirical investigation.

Federal trademark dilution law is a relatively recent addition to a famous trademark owner's armament at the federal level. Dilution law, which already existed in a number of states,[175] became effective at the federal level in 1996 through the passage of the Federal Trademark Dilution Act (FTDA).[176] The FTDA was important in that it provided owners of famous marks with much greater control over their marks than standard trademark infringement law, which relies upon consumer confusion as the basis of the harm.[177]

Dilution, on the contrary, was premised on the idea that, even absent consumer confusion, similar marks could cause harm by the "gradual whittling away or dispersion of the identity and hold upon the public

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173. *See supra* Part III.A (discussing commercial speech).

174. Trademark law generally is a branch of the common law of unfair competition. Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 413 (1916), *superseded by statute*, Trademark Act of 1946, Pub. L. No. 79-489, 60 Stat. 433, *as recognized in* Park 'n Fly v. Dollar Park & Fly, 469 U.S. 189 (1985).

175. Gregg Duffey, *Trademark Dilution Under the Federal Trademark Dilution Act of 1995: You've Come a Long Way, Baby—Too Far, Maybe?*, 39 S. TEX. L. REV. 133, 140–42 (1997).

176. 15 U.S.C. § 1125(c) (2000). The act has since been amended by the Trademark Dilution Revision Act of 2006, codified as 15 U.S.C. § 1125(c)(1) (2006). The Trademark Dilution Revision Act, among other things, made it clear that liability can be established with a showing of a mere *likelihood* of dilution, rather than the *actual* dilution standard the U.S. Supreme Court set forth in *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003), *superseded by statute*, Trademark Dilution Revision Act of 2006, Pub L. No. 109-312, 120 Stat. 1730 (2006).

177. RICHARD L. KIRKPATRICK, LIKELIHOOD OF CONFUSION IN TRADEMARK LAW 1-1 (1995).

mind of the mark or name."[178] Dilution, even done by a noncompetitor and thus causing no confusion among the public, can reduce the distinctiveness of a famous mark and thus its ability to identify a specific product or service. Dilution is thought of as a long-term harm to the semiotic value of the mark; as a House report on the federal dilution act noted: "Confusion leads to immediate injury, while dilution is an infection, which if allowed to spread, will inevitably destroy the advertising value of the mark."[179]

The U.S. Supreme Court's first major assessment of federal dilution law, *Moseley v. V Secret Catalogue, Inc.*,[180] was cryptic on the place of empirical evidence of harm to the trademark owner. In *Moseley*, the owner of the Victoria's Secret trademark sued a Kentucky adult novelty store operating as "Victor's Secret."[181] Although the retailer, after receiving threats of litigation, changed its name to "Victor's Little Secret," the trademark owner nonetheless filed suit for a number of claims, including dilution under federal law.[182] In reversing a Sixth Circuit decision that injunctive relief for dilution was appropriate, the Supreme Court held that injunctive relief under the statute required a showing of actual dilution rather than a likelihood of dilution.[183]

The Court's discussion of how to determine whether dilution has taken place suggested a standard significantly lacking empirical rigor. Apparently accepting Victoria's Secret's assertion that "consumer surveys and other means of demonstrating actual dilution are expensive and *often unreliable*,"[184] the Court offered a weak and somewhat ambiguous account of what the required proof might be. Although the Court made it clear that "consequences of dilution, such as an actual loss of sales or

178. Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 825 (1927). Schechter is generally regarded as the key originator of U.S. dilution law. J. THOMAS MCCARTHY, 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:67 (2009).

179. H.R. REP. NO. 104-374, at 3 (1995) (quoted in *Moseley*, 537 U.S. at 427).

180. 537 U.S. 418.

181. *Id.* at 423.

182. *Id.* at 423–24.

183. *Id.* at 433. As noted above, the actual dilution standard was overturned by the Trademark Dilution Revision Act of 2006, *supra* note 176. There would appear to be no reason to assume, however, that the Court's attitude toward empirical evidence would be markedly different under a likelihood of dilution standard.

184. *Id.* at 434 (emphasis added).

profits,"[185] need not be proved, it appeared to offer little other guidance as to what sort of proof might be acceptable. As the Court put it, "It may well be, however, that direct evidence of dilution such as consumer surveys will not be necessary if actual dilution can reliably be proved through circumstantial evidence—the obvious case is one where the junior and senior marks are identical."[186]

The Court provided no explanation as to what sort of circumstantial evidence would be sufficient. Nor did it offer any justification for its apparent skepticism about the reliability of survey research.[187] Since the Court's decision, the federal statute has been amended to make clear that the law requires only a *likelihood* of dilution, rather than actual, accomplished dilution.[188] It would seem, however, that whether the required showing is actual dilution or a mere likelihood of dilution, empirical evidence as to the effect of the offending mark would be enormously helpful, if not necessary, to demonstrate as opaque an effect as dilution.[189] In fact, a likelihood of dilution standard is, if anything, a more elusive concept given that it seeks to predict future dilution rather than identifying dilution that has already taken place.

Dilution by blurring, for example, which requires that the offending mark "whittle away" the power of the plaintiff's mark to identify a product in the mind of a consumer, is a tremendously subtle concept.[190] As trademark scholar J. Thomas McCarthy put it:

> How could there be any "whittling away" if the buyer, upon seeing defendant's mark, would *never*, even unconsciously, think of the plaintiff's mark? For example, if the person who sees the hypothetical ALBERT FORD brand hiking

185. *Id.* at 433.

186. *Id.* at 434.

187. A number of commentators have taken issue with the Court's understanding of survey research. *See, e.g.*, Matthew D. Bunker et al., *Proving Dilution: Survey Evidence in Trademark Dilution Actions*, 13 U. BALT. INTELL. PROP. L.J. 37 (2004).

188. 15 U.S.C. § 1125(c)(1) (2006).

189. Judge Richard Posner gave an unusually clear account of dilution by blurring that also points toward the empirical difficulties of establishing it:

> Suppose an upscale restaurant calls itself "Tiffany." There is little danger that the consuming public will think it's dealing with a branch of the Tiffany jewelry store if it patronizes this restaurant. But when consumers next see the name "Tiffany" they may think about both the restaurant and the jewelry store, and if so the efficacy of the name as an identifier of the store will be diminished. Consumers will have to think harder—incur as it were a higher imagination cost—to recognize the name as the name of the store.

Ty Inc. v. Perryman, 306 F.3d 509, 511 (7th Cir. 2002).

190. The current statute defines dilution by blurring as "association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark." 15 U.S.C. § 1125(c)(2)(B) (2006).

> boots would not even think of FORD autos, then there is no dilution. This could be proven in court only by a consumer survey.[191]

Dilution by tarnishment, which the revised federal act made clear is a covered injury to a famous mark owner, has been defined as "association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark."[192] This sort of reputational harm would also seem to require significant empirical support to prove.

Scholars have offered a variety of suggested approaches for proving dilution, whether actual or likely. One study, for example, suggested that "the most authoritative evidence will require a comparison of surveys administered to a sample of consumers unexposed to the junior party's use and surveys administered to an exposed sample. Through this comparison, a plaintiff can demonstrate that a mark has been diluted from some benchmark figure."[193] Other commentators have advocated a randomized experiment to prove dilution.[194] One commentator has challenged current methods of assessing dilution because consumers' very awareness they are participating in some sort of marketing study may significantly affect their responses: "Because dilution claims center on affect and association rather than on specific factual claims, dilution surveys are particularly vulnerable to . . . observation-induced distortions."[195]

Whatever the empirical difficulties in establishing as elusive a fact as dilution or the likelihood thereof, courts have barely begun even to grapple with the issues. Thus, dilution law leaves courts with a substantial zone of speculation about possible harms caused by supposedly offending junior marks.

In summary, this Part has demonstrated judicial inconsistency when it comes to establishing causation of harm from speech. This incoherence muddles First Amendment jurisprudence, as courts vary widely in the

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191. J. Thomas McCarthy, *The 1996 Federal Anti-Dilution Statute*, 16 CARDOZO ARTS & ENT. L.J. 587, 593 (1998).

192. 15 U.S.C. § 1125(c)(2)(C) (2006).

193. Patrick M. Bible, *Defining and Quantifying Dilution Under the Federal Trademark Dilution Act of 1995: Using Survey Evidence To Show Actual Dilution*, 70 U. COLO. L. REV. 295, 331 (1999).

194. Julie Manning Magid et al., *Quantifying Brand Image: Empirical Evidence of Trademark Dilution*, 43 AM. BUS. L.J. 1, 34–38 (2006).

195. Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 545 (2008).

need to demonstrate proof of causation depending upon the nature of the speech in question.

IV. CONCLUSION

In a 2004 article, Professor Wilson Huhn argued that "[i]n recent freedom of expression cases, the [Supreme] Court is increasingly turning its attention to the quality and quantity of proof of the causal link between speech and harm."[196] In partial support of this contention, he cited Justice Anthony Kennedy's assertion in 1994 from *Turner Broadcasting System, Inc. v. FCC*[197]:

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.[198]

To buttress this logic, Justice Kennedy referenced the High Court's decision the prior year in *Edenfield v. Fane*,[199] discussed earlier in this article,[200] in which it had opined, in the context of the commercial speech doctrine, that government entities "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[201] But this line of reasoning, and what Professor Huhn just six years ago called "the recent trend towards empiricism"[202] in speech cases, was rudely interrupted in 2009 by *Fox Television Stations*.

Justice Scalia's assertion that "[t]here are some propositions for which scant empirical evidence can be marshaled"[203] creates the potential for what might be thought of as a *harm causation gap*. In particular, when a judge or court makes the determination that such evidence cannot be marshaled on any given speech-harm proposition, then there is a evidentiary gap created on the causation question. The chasm often is filled by jurists' suppositions and assumptions about media messages and how communication processes work, as Justice Scalia's own

196. Wilson Huhn, *Scienter, Causation, and Harm in Freedom of Expression Analysis: The Right Hand Side of the Constitutional Calculus*, 13 WM. & MARY BILL RTS. J. 125, 197 (2004).
197. 512 U.S. 622 (1994).
198. *Id.* at 664 (citation omitted).
199. 507 U.S. 761 (1993).
200. *Supra* Part III.B.
201. *Edenfeld*, 507 U.S. at 770–71.
202. Huhn, *supra* note 196, at 201.
203. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1813 (2009).

statements indicate.[204] It also may be crowded with their own off handed anecdotal evidence in an area of speech-harm causation in which psychologists, communication scholars, and linguists might be better situated to address the issue. Indeed, as Professor Anthony Fargo has observed, "the uses of empirical data to inform judicial decisions about free-speech rights are scant, at least at the appellate level."[205]

In contrast, when a judge or justice determines that empirical evidence *can* be marshaled, then a much more exacting, even painstaking, analysis of the social science evidence takes place, as is the case with laws targeting violent video games.[206] This, in turn, greatly affects whether the law survives constitutional muster, as violent video game laws uniformly are struck down,[207] in part, because the social science evidence cannot prove an actual harm sustained by minors that is caused by playing the games. In fact, as Professor Robert H. Wood recently asserted:

> Until there are scientific studies demonstrating such a causal link, the efforts of state governments to regulate violent video games will meet the same fate as the ones that have gone before. Until that point, legislators will be merely beating their heads against the judicial wall, which has actually been shown to cause headaches, and has resulted in awards of attorney fees against some of the states that have sought to restrict video games.[208]

If there really is no social science evidence indicating that fleeting expletives on television cause harm to children[209] and if the courts are not demanding such evidence, then are courts censoring speech due to phantom fears of harm to minors? Twenty-five years ago, Professor Donald E. Lively cogently observed that "[t]he history of restricting freedom of expression to ease social discomfort teaches that fear of potential evil is a treacherous basis for control and, in the absence of

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204. *Id.*

205. Anthony L. Fargo, *Social Science Research in Judges' First Amendment Decisions*, *in* COMMUNICATION AND LAW: MULTIDISCIPLINARY APPROACHES TO RESEARCH 23, 24 (Amy Reynolds & Brooke Barnett eds., 2006).

206. *See supra* Part III.A.

207. Robert H. Wood, *Violent Video Games: More Ink Spilled than Blood—An Analysis of the 9th Circuit Decision in* Video Software Dealers Association v. Schwarzenegger, 10 TEX. REV. ENT. & SPORTS L. 103, 114 (2009) (analyzing violent video game case law and observing that "none of the legislative efforts have survived constitutional scrutiny despite the different approaches that have been attempted").

208. *Id.* at 115.

209. *See supra* note 55 and accompanying text.

strict constitutional standards, a potent chilling force."[210] He adds that "[m]uch energy is wasted, and enormous constitutional damage done, by focusing on differences that are inconsequential and evil that is not demonstrated."[211] Despite the cautioning words of Justice Louis D. Brandeis more than eighty years ago that "[f]ear of serious injury cannot alone justify suppression of free speech and assembly,"[212] and that "[m]en feared witches and burnt women,"[213] when children are put into the mix, the fear factor, as it were, seemingly is ratcheted up.

During a 1997 panel discussion on children, media, and the law, George Washington University Law School Professor Catherine J. Ross remarked:

> The contemporary anxiety about the nexus between child development and popular culture, whether it's rock lyrics, TV or the Internet, is sometimes couched in the secular language of the social sciences and sometimes in overt religious concern about morality. But in each instance, the underlying concern invests a great deal in an *image* of childhood that does not always conform to social realities.[214]

This article has attempted to point out that the "social realities"[215] of precisely how children might be affected by the use of fleeting expletives are much more complex that Justice Scalia acknowledges when he graciously provides the FCC with a pass on the causation question. Perhaps this pass really was given not so much because there is no scholarly literature on expletives, swearing, and profanity—to the contrary, more than twenty different books and articles on these topics are cited in Part II of this Article[216]—but because the target of the alleged harm was children.

It is impossible to know, of course, precisely how much of Justice Scalia's decision on causation might have been based on the none-too-subtle fact that the alleged victims of whatever harm fleeting expletives might cause were minors. As Yale Law School Professor Jack Balkin writes, we often

> turn to children as the master trope, the perspective through which we can talk about cultural control, while at the same time professing our respect for freedom of speech. Because children have fewer first amendment rights than adults,

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210. Donald E. Lively, *Fear and the Media: A First Amendment Horror Show*, 69 MINN. L. REV. 1071, 1095 (1985).
211. *Id.* at 1097.
212. Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).
213. *Id.*
214. Ass'n of Am. Law Schs., Section on Mass Commc'ns Law, *1997 Annual Conference Panel: Sex, Violence, Children and the Media: Legal, Historical and Empirical Perspectives*, 5 COMMLAW CONSPECTUS 341, 351 (1997) (quoting Catherine J. Ross).
215. *Id.*
216. *Supra* Part II.A (including more than twenty such citations).

> because children need to be protected, shaped, educated, and so on, and because children are the future of our culture, we can reconcile our conflicting desires by viewing all cultural issues in terms of children and their interests and needs.[217]

The question becomes does the legal system, be it Congress or federal agencies or courts, in latent and even unacknowledged fashion, subtly embrace different evidentiary standards when minors are the focus of the harm? The obvious answer, as demonstrated in Part III, Section A, is *not always* and, in particular, not when it comes to the rash of relatively recent laws designed to shield minors from violent video games.[218] But *Pacifica Foundation* was built more than thirty years ago on mere assumptions of harm,[219] and now *Fox Television Stations* is following that same path. How, then, can one explain the discrepancy between the causation free pass given to the FCC by Justice Scalia for regulating fleeting evidences but not for violent video game laws that have been closely scrutinized by federal courts across the nation?

A possibly disturbing answer, although it is not clear whether this is what Justice Scalia intended, is that the level of scrutiny on the causation question will vary, depending upon the nature of the government entity that adopts and enforces the policy or regulation. In the case of indecency, it was a *federal agency* that had been vested with delegated statutory authority from Congress to regulate indecency.[220] Do regulations created

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217. Ass'n of Am. Law Schs., Section on Mass Commc'ns Law, *supra* note 214, at 353 (quoting Jack Balkin).

218. *See supra* Part III.A (addressing how courts have considered the question of harm allegedly caused by violent video games).

219. For instance, Justice Louis Powell wrote, without citing a shred of evidence to support his view, that

> children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the unwilling through the exercise of choice. At the same time, such speech may have *a deeper and more lasting negative effect on a child* than on an adult.

FCC v. Pacifica Found., 438 U.S. 726, 757–58 (1978) (Powell, J., concurring) (emphasis added). He failed to specify what this negative effect was. Justice Powell added that the FCC "properly held that the speech from which society may attempt to shield its children is not limited to that which appeals to the youthful prurient interest. The language involved in this case is as potentially degrading and *harmful to children* as representations of many erotic acts." *Id.* at 758 (emphasis added). Once again, Justice Powell failed to specify what this harm is.

220. As the Federal Communications Commission states on its website, "[i]t is a violation of federal law to air obscene programming at any time. It is also a violation of federal law to air indecent programming or profane language during certain hours. *Congress has given the Federal Communications Commission (FCC) the responsibility*

by federal agencies that supposedly have expertise in certain areas receive greater deference on the causation issue than those adopted by nonagency general legislative bodies, such as the State of California or County of St. Louis, Missouri, both of which adopted laws targeting violent video games that were rigorously scrutinized?[221] This would seem to be a perversion of First Amendment protection for expression by making the constitutionality of a regulation turn, at least in part, on the nature of the entity that adopted it.

Although much of this Article has argued for empirical rigor in judicial determinations of the harm allegedly caused by media messages, some words of caution about the limits of empiricism are essential. Although a jurisprudence leavened with an empirical attitude has much to recommend it, there indeed can be too much of a good thing. As Professor Timothy Zick put it, "[D]etailed consideration of empirical evidence should not be allowed to displace more normative and robust constitutional discourse."[222] Professor Zick worries that courts may allow empirical data to short-circuit the adjudicative process, leading to just another sterile brand of constitutional formalism: "More and more, it is a calculation, rather than a constitution, that is being expounded."[223] Empirical data must only be the beginning, not the end, particularly in determinations affecting the scope of First Amendment rights. Even armed with reliable studies suggesting the harm caused by particular media messages, for example, courts must nonetheless reflect deeply about whether such harms justify overriding important First Amendment values because statistical significance certainly is not equivalent to constitutional significance.

Ultimately, the United States Supreme Court now has a propitious opportunity to resolve at least some of the issues surrounding causation harm. In April 2010, it granted a petition for a writ of certiorari in the violent video game case of *Schwarzenegger v. Entertainment Merchants Ass'n*.[224] One of the two questions it will consider during the 2010–2011 term in *Schwarzenegger* is whether a state is required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before it can prohibit the sale of the games

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for administratively enforcing these laws." Fed. Commc'n Comm'n, *FCC Consumer Facts: Obscene, Indecent, and Profane Broadcasts*, http://www.fcc.gov/cgb/consumer facts/obscene.html (last visited July 25, 2010) (emphasis added) (bold omitted).

221. *See supra* Part III.A (regarding violent video game laws).

222. Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 220 (2003).

223. *Id.*

224. 78 U.S.L.W. 3627 (U.S. Apr. 26, 2010) (No. 08-1448).

to minors.[225] As discussed earlier in this Article,[226] the United States Court of Appeals for the Ninth Circuit in 2009 had declared unconstitutional the California law at the center of the case.[227] How the Court resolves this issue remains to be seen, but perhaps its opinion will add some clarity that will begin to extricate the Court and other judicial bodies from the causation quagmire.

225. Questions Presented, Schwarzenegger v. Entertainment Merchant, No. 08-1448, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/qp/08-01448qp.pdf (last visited July 25, 2010).

226. *Supra* Part III.A.

227. Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 953 (9th Cir. 2009).