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THE V-CHIP: GIVING PARENTS THE ABILITY TO REGULATE TELEVISION VIOLENCE

I. INTRODUCTION

Television has profoundly impacted American society since its introduction in 1939, and has come to play an integral role in the education and entertainment of the American people. However, not all television shows are educational and entertaining. Many television programs depict violence that might be seen as offensive or crude. Violence on television is available to all Americans, including school-aged children.¹ A continually arising question is whether “television is hindering rather than helping our efforts to teach values to our children?”²

Today, American children spend more time watching television than they spend in the classroom.³ American children and adolescents spend 22-28 hours per week viewing television; more than any other activity except sleeping.⁴ The average American child watches 8,000 murders and 100,000 acts of other violence on television by the age of eleven.⁵ American children grow up watching unnecessary violence on television—from the *Power Rangers* to the weekly *Adventures of Lois and Clark*.⁶ Television murders, fires, brutal combat,

1. See Telecommunications Reform Act of 1996, Pub. L. No. 104-104, § 551(a), 110 Stat. 139-42 (codified at 47 U.S.C. § 303 (1996)).

2. Chairman of the FCC Reed Hundt, Address at the National Press Club (July 27, 1995) (transcript available in Federal Information Systems Corp., available in LEXIS, News Library, Curnws File) [hereinafter Hundt].

3. Children Now, *Children and Television* (visited Sept. 20, 1995) <<http://www.childrennow.org>>.

4. *Id.*

5. See Telecommunications Reform Act of 1996 § 551(a)(5), 110 Stat. at 139-42 (codified at 47 U.S.C. § 303 (1996)).

6. See generally UCLA CENTER FOR COMMUNICATIONS POLICY, THE UCLA TELEVISION VIOLENCE MONITORING REPORT, Sept. 1995, at 44, 106 [hereinafter UCLA REPORT].

As will be discussed *infra* Part II.A, the UCLA REPORT divided prime time television series that have episodes of violence into four categories. *Id.* at 39. The shows with the most frequent issues of violence during the 1994-95 television season included CBS's *Walker, Texas Ranger* and *Due South*; FOX's *Mantis*, *X-Files*, *Fortune Hunter*, *Tales from the Crypt*, and *VR-5*; ABC's *Lois and Clark* and *America's Funniest Home Videos*; as well as the United Paramount Network's *Marker*. *Id.* at 40-48.

and other acts of violence seem real to a child who knows no better. On television, acts do not have consequences, yet young children do not know to differentiate this from real life. The broadcast networks continue to program violent television shows during hours children can easily watch. Although it is easy to complain about the programming on television, it is more difficult to actually lessen the violence on television. It is harder still to not lessen it without giving parents the ability to effectively regulate that which is seen by their children on television.

In February of 1996, Congress passed and the President signed the 1996 Telecommunications Reform Act, which attempts to regulate violence for the sake of children.⁷ The proposal is called the V-Chip ("V" for violence).⁸ Does Congress, however, have the right to regulate what Americans may or may not watch on their televisions?

The UCLA REPORT emphasized prime time television, but there was special mention of those children's television programs on the broadcast networks that displayed equal levels of violence. *Id.* at 100-07. From slapstick cartoons to combat violence, during the daytime or at night children are apt to see on television shows that have unnecessary violence in them, including FOX's *Mighty Morphin Power Rangers*. *Id.*

While these above shows have been selected as the most egregious in their portrayal of violence on television, it is important to note that in the UCLA REPORT, certain criteria were used to determine violence on television and its effects on various contexts, which will be discussed *infra* Part II.A.

Furthermore, because the UCLA REPORT focused on prime time network broadcasts, so too will this comment in its analysis of violence on television. While the UCLA REPORT divided network broadcast television into five areas, for the purposes of conciseness and organization only prime time series will be discussed in this comment. *Id.* at 37.

7. Telecommunications Reform Act of 1996 § 551, 110 Stat. at 139-42 (codified at 47 U.S.C. § 303 (1996)).

8. The V-Chip bill, introduced during the 104th Congress by Representative Markey of Massachusetts, became part of the Telecommunications Reform Act of 1996, which became law on February 8, 1996. *Id.*

The relevant sections of the V-Chip legislation require (1) the formation of an advisory committee, including parents and members of the industry, to develop a rating system to give parents advance warning of material that might be harmful to children; and if within one year of the enactment of this legislation the committee does not come up with a voluntary ratings system, one will then be implemented by the Federal Communications Commission; (2) the prescribing of rules for transmitting those ratings to television receivers; and (3) the requirement that television set manufacturers include blocking technology in new television sets so that parents can block programs by time or by program, according to their rating. Telecommunications Reform Act of 1996 § 551(b)-(d).

This comment begins by examining the definition of violence.⁹ The background will present the history of congressional regulation of television violence,¹⁰ the V-Chip legislation,¹¹ the Canadian model,¹² and First Amendment case law.¹³ This comment will then analyze the Court's development of First Amendment law, in general,¹⁴ its specific role in broadcasting cases,¹⁵ and finally, the limitations on the First Amendment in regards to children.¹⁶ This comment then suggests that the V-Chip is the right solution only if conditioned on the meeting of certain criteria that ensure parental choice with an appropriate ratings system which is voluntarily enacted.¹⁷

II. BACKGROUND

"Violence" must be adequately defined in order for it to be properly regulated by Congress, since it is Congress' stated goal to curb that violence which is considered harmful to America's youth.¹⁸

A. *Violence Defined: The UCLA Report*

While television violence has become a topic of much discussion recently, there is still no precise definition or understanding of "violence." Is violence acts of murder and obscenity, or is it more, extending to other acts on television?

In September 1995, the UCLA Center for Communications Policy released its Television Violence Monitoring Report.¹⁹ This report not only singled out television shows that

9. See discussion *infra* Part II.A.

10. See discussion *infra* Part II.B.1.

11. See discussion *infra* Part II.B.2.

12. See discussion *infra* Part II.C.

13. See discussion *infra* Part II.D.

14. See discussion *infra* Part III.A.

15. See discussion *infra* Part III.B.

16. See discussion *infra* Part III.C.

17. See discussion *infra* Part IV.

18. Telecommunications Reform Act of 1996, Pub. L. No. 104-104, § 551(a), 110 Stat. 139-42 (codified at 47 U.S.C. § 303 (1996)).

19. UCLA REPORT, *supra* note 6.

While this comment will emphasize the UCLA REPORT, during the past few decades there have been numerous studies on television violence's effect on children. However, for this comment, the focus will be on the most recent study, with discussion of the older studies when necessary.

Other studies that have been conducted include the 1972 Surgeon General's Scientific Advisory Committee on Television and Social Behavior (vio-

had excessive use of violence, but also commended those television programs that "achieve[d] a high level of gritiness and excitement without overemphasizing violence."²⁰ According to the UCLA Report, not "all violence . . . is created equal. The focus of the project is not on counting the number of acts of violence but on the contextual analysis of each of these acts."²¹ The UCLA Report used this "contextual analysis" to define what is violence on television, rather than purely adding up the number of violent scenes shown in any one program.²²

While "violence" may be defined as "exertion of any physical force so as to injure or abuse (as in warfare or in affecting an entrance into a house),"²³ the UCLA Report articulates a much more comprehensive and accurate definition for determining what is and is not violent television programming.²⁴ The UCLA criteria allows a thoughtful analysis of what may be considered violence on television, without trying to limit a definition of violence to one word or one sentence. Using the

lence on television does influence children who view violent programming); Robinson and Bachman's 1972 study (relationship between the number of hours of television viewed and adolescent self-reports of involvement in aggressive or antisocial behavior); the 1982 National Institute of Mental Health Review (violence does affect the aggressive behavior of children); George Gerber Report of 1967-1989 (studying violence on television); and the 1992 American Psychological Association Task Force on Television and Social Violence (harmful effects of television). John P. Murray, *Children and Television Violence*, 4 KAN. J.L. & PUB. POL'Y 7, 9-11 (1995); John P. Murray, *Impact of Televised Violence*, 22 HOFSTRA L. REV. 809, 813-21 (1994).

These above mentioned studies suggest that there is indeed a connection between violence seen on television and childrens' behavior. "The weight of evidence from correlation studies is fairly consistent: viewing and/or preference for violent television is related to aggressive attitudes, values and behaviors." Murray, *Impact of Televised Violence*, *supra* at 813. Again, it might seem artificial to remove from discussion the sociological impacts and correlation tests between television and violence, but this is an entire topic onto itself.

20. UCLA REPORT, *supra* note 6, at 61.

21. *Id.* at 27.

22. *Id.*

23. WEBSTER'S THIRD NEW INT'L DICTIONARY 2554 (3rd ed. 1986).

24. The UCLA REPORT utilizes the following criteria to determine whether a television program is violent: the time the program is shown on television; whether an advisory is used; is the violence integral to the plot or story line; how graphic is the violence; how long are the violent scenes; how many scenes of violence are there; is the violence glorified; who commits the acts of violence; how realistic are the acts of violence; what are the consequences of the acts; is the violence used as a hook for the viewers; are there any alternatives available; what kinds of weapons are used; and is the violence intentional or reactionary? UCLA REPORT, *supra* note 6, at 26-28.

UCLA criteria, violence on television is not necessarily the program with the most murders, but rather may be the program that fails to take into account the types of violence used, the longevity of the violence used, and the way in which the violence is used.²⁵

For prime time series on network broadcasts, the UCLA Report divides the series into four categories: shows with frequent issues of violence, shows with occasional issues of violence, shows that raise interesting or special issues, and shows that deal well with violence.²⁶ The first category of shows is the heart of the controversy over television violence.²⁷ Shows that use violence for the sole sake of violence include CBS's *Walker, Texas Ranger* and FOX's *X-Files*.²⁸ For *Walker, Texas Ranger* the show is "simply a vehicle for [Chuck] Norris to demonstrate his physical abilities," with emphasis on long and graphic scenes of violence, which could leave the impression on a child that violence is the only way to solve problems.²⁹ Equally as disturbing, but in a different manner is FOX's popular *X-Files* which often "leaves the impression of violence without an actual scene of violence."³⁰ Such programs may help to define violence, not necessarily in terms of the highest quantity of violent acts, but rather in terms of the quality of the violence.

On the other side of the violence spectrum are television shows that deal well with violence. Many shows, such as ABC's *NYPD Blue* and NBC's *Law and Order*, are able to "handle violent themes while never resorting to excessive, graphic images or gratuitous or glorified violence."³¹ The UCLA Report concludes that television shows can be violent,³² however, the use of violence can be commendable when violence is part of city life and is shown as such without having to invent new methods of demonstrating violence.³³ Furthermore, the UCLA Report finds that violence must be realistic, characters who commit violent acts must under-

25. *Id.*

26. *Id.* at 39.

27. *Id.* at 37.

28. *Id.* at 40, 41.

29. *Id.* at 40.

30. UCLA REPORT, *supra* note 6, at 41.

31. *Id.* at 59-61.

32. *Id.* at 61.

33. *Id.*

stand what their actions mean, and finally, it is not always necessary for the television program to actually show the violent act to make the point.³⁴

While other definitions might describe violence on television differently, the UCLA Report most accurately attempts to show violence not as a single entity, but as a collective group of actions that must be analyzed before classifying a television program as violent for the purposes of regulation.

B. *Congressional Activity*

Some members of Congress have called congressional regulatory action in this area "Big Brother," while others find that "[i]t's more like allowing 'Big Mother' and 'Big Father'" to take control of their children's television viewing habits.³⁵ Whether this is the correct characterization of Congress' fifty years of action remains to be seen. It does represent, however, the current public opinion of many Americans in regards to giving parents the ability, through technology such as the V-Chip, to limit the violence seen on a family's television.

1. *Fifty Years of Congressional Regulation of Television*

Legislative action in addressing violence on television began in the 1950s.³⁶ In 1954, Senator Estes Kefauver's Senate Subcommittee on Juvenile Delinquency under the Judiciary Committee began hearings "exploring the possible links between juvenile crime and violence shown on television."³⁷ Because of these corollary studies, "the National Association of Broadcasters developed a code that recognized broadcasters' responsibilities to present certain themes with greater sensitivity and with regard to their potential effects on children."³⁸

34. *Id.*

35. See *Television Violence: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 104th Cong. 109 (1995) (statement by Rep. Markey).

36. *Violence on Television*, 6 COLUM. J.L. & SOC. PROBS. 303 (1970).

37. See *Juvenile Delinquency (Television Programs): Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 83rd Cong., 84th Cong. (1954-1955), noted in Thomas G. Krattenmaker and L.A. Powe, Jr., *Televised Violence: First Amendments Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1126 n.6 [hereinafter Krattenmaker].

38. Julia W. Schlegel, *The Television Violence Act of 1990: A New Program for Government Censorship?*, 46 FED. COMM'N L.J. 187, 199 (1993).

Ten years later the same subcommittee revisited the issue under the leadership of Senator Thomas Dodd.³⁹ Yet, it was not until the late 1960s and early 1970s, with the release of the Eisenhower Commission on the Causes and Prevention of Violence⁴⁰ and the Surgeon General's Report on Television Violence,⁴¹ that Congress began to take action.

Against the backdrop of these two studies, in 1972 Senator John Pastore called for the Surgeon General to testify before his Commerce subcommittee on the effects on violence on television viewers.⁴² Two years later, under pressure from Congress, the Federal Communications Commission ("FCC") "attempted to get the three networks (ABC, NBC, and CBS) to adopt a policy of self-regulation that would decrease the amount of sex and violence on television."⁴³ The FCC adopted the Family Viewing Hour policy, which called for programming suitable for family viewing, unless there was an advisory, to be broadcast during the first hour of prime time television (usually the 8:00 p.m. to 9:00 p.m. hour during Monday through Saturday, and the 7:00 p.m. to 8:00 p.m. hour on Sunday).⁴⁴ Yet, in 1976 this family viewing policy was found unconstitutional after members of the television industry brought suit.⁴⁵ The Family Viewing Hour was the last substantial congressional action for nearly a decade.

39. See *Juvenile Delinquency (Effects on Young People of Violence and Crime Portrayed on Television): Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary* (pt. 16), 88th Cong. (1965), noted in Krattenmaker, *supra* note 37, at 1126 n.7.

40. NAT'L COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY (1969), noted in Krattenmaker, *supra* note 37, at 1126 n.11.

The Commission stated that it "is reasonable to conclude that a constant diet of violent behavior on television has an adverse effect on human character and attitudes. Violence on television encourages violent forms of behavior and fosters moral and social values about violence in daily life which are unacceptable in a civilized society." *Id.*

41. SURGEON GEN.'S SCIENTIFIC ADVISORY COMM. ON TELEVISION AND SOCIAL BEHAVIOR, TELEVISION AND GROWING UP: THE IMPACT ON TELEVIEWED VIOLENCE (1972), noted in Krattenmaker, *supra* note 37, at 1127 n.18.

42. See *Surgeon General's Report: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong. 25, 26 (1972) (statement by the Surgeon General), noted in Krattenmaker, *supra* note 37, at 1128 n.18.

43. Schlegel, *supra* note 38, at 190.

44. FED. COMMUNICATIONS COMM'N, REPORT ON THE BROADCAST OF VIOLENT, INDECENT, AND OBSCENE MATERIAL, 51 F.C.C.2d 418 (1975).

45. *Writers Guild of Am., W., Inc. v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976).

It was not until 1986 that regulation of television violence had a new champion.⁴⁶ Between 1986 and 1990, Senator Paul Simon attempted to pass legislation that would grant the broadcast industry antitrust exemption from the Sherman Antitrust Act.⁴⁷ The exemption was to last for a three-year period so that a true discussion could take place between the networks to reduce violence on television.⁴⁸ In 1990, the Television Program Improvement Act (or the Television Violence Act) was passed by Congress and was signed by President George Bush.⁴⁹ While no immediate action was taken by the networks to discuss ways to reduce violence, in the fall of 1993 new guidelines were announced, such that "depictions of violence were to be relevant to the 'development of character or advancement of the plot,' and were not to be 'gratuitous or excessive' or 'depicted as glamorous or a solution to human conflict.'"⁵⁰ In addition to these new guidelines, the networks also introduced the "Advance Parental Advisory" plan which would warn parents in promotional materials whether an upcoming television show would include violent materials.⁵¹

The second of the two laws passed by Congress in 1990 to deal with regulation of television was the Children's Television Act.⁵² This Act not only set advertising limits in chil-

The U.S. Court of Appeals for the Ninth Circuit vacated the district court's decision and refused to reach the same First Amendment concerns, remanding the case to the FCC. *Writer's Guild of Am. v. Am. Broad. Co.*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980).

"In 1983, the FCC concluded that the [National Association of Broadcasters] and the major networks acted voluntarily when they adopted the 'Family Viewing Hour' policy and that there was no basis for concluding that efforts of [FCC] Chairman [Richard] Wiley or the Commission were coercive or intimidating," yet the FCC ruling meant little by 1983. Ian M. Ballard, *See no Evil, Hear no Evil: Television Violence and the First Amendment*, 81 VA. L. REV. 175, 180 (1995).

46. Senator Paul Simon, *Independent Audits and Self Regulation -Not Legislation- is Best Answer to TV Violence*, 47 FED. COMM'N L.J. 373 (1994).

47. Schlegel, *supra* note 38, at 194.

48. *Id.*

49. The law allowed for "any joint discussion, consideration, review, action, or agreement by or among persons in the television industry for the purpose of, and limited to, developing and disseminating voluntary guidelines designed to alleviate the negative impact of violence in telecast material." Television Program Improvements Act of 1990, Pub. L. No. 101-650, § 501(c), 104 Stat. 5089, 5127 (codified at 47 U.S.C. § 303(c) (Supp. IV. 1992)).

50. Ballard, *supra* note 45, at 180.

51. *Id.*

52. Schlegel, *supra* note 38, at 196.

dren's programming but required the FCC, for the first time, to consider the extent to which a TV license has served the "educational and informational" needs of children when reviewing that station's application for renewal of license.⁵³

To further combat children watching violent programs on television, within the 1992 Public Telecommunications Act,⁵⁴ Congress restricted the hours within which indecent radio and television programs may be broadcast in order to protect minors.⁵⁵ In 1995, the District of Columbia Circuit Court of Appeals upheld the hours restriction, yet found the public television exemption unconstitutional, thereby changing the restriction period by only allowing indecent broadcasts between the hours of 10:00 p.m. to 6:00 a.m.⁵⁶

During the past and continuing today, members of Congress have found it necessary to confront the issues of television violence, thereby resulting in many legislative proposals. Some of these proposals have become law and some have been solely used to show the constituents back home that action is being taken. But no matter the reason for the legislation, regulating television has become a popular sport.

2. *The V-Chip Legislation*

At the center of the 104th Congress' regulation of television violence was the V-Chip.⁵⁷ Congress passed and President William J. Clinton signed the 1996 Telecommunications Reform Act into law on February 8, 1996.⁵⁸ In the Act, the V-Chip requirements include: (a) voluntary formation of a ratings system by the broadcast industry and formation of an advisory committee;⁵⁹ (b) rules for transmitting ratings to tel-

53. *Id.*

54. Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), Stat. 139-42 (codified at 47 U.S.C. § 303 (1992)).

55. *Id.*

56. *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995).

57. Besides the V-Chip legislation, other legislation introduced in the 104th Congress included Senators Byron Dorgan and Kay Bailey Hutchison's Television Violence Report Card Act, S. 772, 104th Cong. (1995); Senators Ernst Hollings and Daniel Inouye's Children's Protection from Violent Programming Act, S. 470, 104th Cong. (1995); Representative Andrew Jacobs and Senator Kent Conrad's Children's Media Protection Act, H.R. 1390, S. 332, 104th Cong. (1995).

58. Telecommunications Reform Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 139-42 (codified at 47 U.S.C. § 303 (1996)).

59. See discussion *infra* Part II.B.2.a.

evision sets;⁶⁰ and (c) that television set manufacturers include blocking technology in new television sets so that parents can block "violent" programs.⁶¹

a. *Voluntary Action by the Industry and a Ratings System*

Under the V-Chip proposal, an advisory committee had one year to voluntarily develop a ratings system to identify programming that contains sexual, violent, or other material, of which parents should be informed.⁶² If they had failed to do so, the legislation would have then required the FCC to take the necessary action to develop its own ratings system.⁶³

This advisory committee was to be composed of television broadcasters, television programming producers, cable operators, public interest groups, and other members from the private sector.⁶⁴ Together, they were to present a balanced opinion as to the violence on television, in order to give parents advance warning of material that might be harmful to children.⁶⁵

b. *Transmission of Ratings in Order to Block Violence*

The second phase of the legislation requires distributors of video programming to transmit signals that contain the rating of the program being broadcast in order to give parents the opportunity to block the display of violent programming.⁶⁶

c. *Manufacturers Installation Requirement*

The final area of this new regulation is the requirement that televisions with a picture screen thirteen inches or larger, manufactured in the United States or imported for use in the United States, be equipped with circuitry designed

60. See discussion *infra* Part II.B.2.b.

61. See discussion *infra* Part II.B.2.c.

62. Telecommunications Reform Act of 1996 § 551(b)(1)-(2), (e), 110 Stat. at 139-42 (codified at 47 U.S.C. § 303 (1996)).

63. *Id.*

64. *Id.*

65. *Id.*

66. Telecommunications Reform Act of 1996, Pub. L. No. 104-104, § 551(c), 110 Stat. 139-42 (codified at 47 U.S.C. § 303 (1996)).

to enable viewers to block the displays of channels, times, and programs rated as containing violent programming.⁶⁷

In a July 12, 1995 hearing before the Senate Committee on Commerce, Science, and Transportation, Representative Edward Markey, the original sponsor of the V-Chip legislation, stated that "until parents actually have the power to manage their own TV sets using blocking technology, parents will remain dependent on the values and programming choices of executives in Los Angeles and New York who, after all, are trying to maximize viewership, not meet the needs of parents."⁶⁸ The American Medical Association⁶⁹ and the National Parents and Teachers Association⁷⁰ testified in favor of Mr. Markey's legislation, while groups such as the Zenith Electronics Corporation testified against the government regulation.⁷¹

C. *The Canadian V-Chip*

During the past year, Canada has experimented with regulating violence on television through the use of a "V-Chip."⁷² In order for its V-Chip program to function, Canada offers parents four categories of ratings to guide the blocking of television programming.⁷³

67. *Id.*

68. *Television Violence: Hearings before the Senate Comm. on Commerce, Science, and Transportation*, 104th Cong. 107 (1995) (statement of Rep. Markey).

69. *See id.* at 407 (statement of Am. Med. Ass'n.).

The AMA has actively made combating violence one of our top priorities. The AMA maintains that '[v]irtual violence' is a major health concern requiring that appropriate steps be taken now . . . [T]here is a [p]ositive association between televised violence exposure and aggressive behavior across a wide range of ages and measures of aggressive behavior.

Id.

70. *See id.* at 182 (statement of Shirley Igo, National PTA). The National PTA's position is that it "supports federal legislation and regulations to urge the broadcasters to reduce children's exposure to programs depicting violence."

Id.

71. *See id.* at 114 ("Given the new technologies being developed voluntarily to empower and assist consumers in their programming choices as well as the technologies already in place . . . it is evident that a government mandate on television manufacturers is unnecessary.") (statement of Wayne C. Luplow, Zenith Electronics Corp.).

72. Charles Truehart, *Canada Finding Way to Turn Aside Violence on TV*, WASH. POST, Nov. 26, 1995, at A32.

73. *Id.*

The first category follows a movie-like ratings system,⁷⁴ with the other three categories rating each program on a scale of 0 - 5 for its violence, its sexual, and language content.⁷⁵ "Every household, in short, could tailor its censorship choices to its own standards"⁷⁶ to reduce the amount of violence on Canadian television sets.⁷⁷

D. *The First Amendment*

When the government decides to regulate an activity such as television broadcasting, there will be concerns about limiting the freedom of speech under the First Amendment.⁷⁸ In order to address these concerns it is important to lay out a framework for the discussion. The first section will focus on the Supreme Court's holdings that not all types of speech are protected.⁷⁹ The next area is that of the uniqueness of the broadcast medium.⁸⁰ Finally, and most importantly, is the Court's granting of special status to children when determining whether a certain type of speech meets a constitutional standard.⁸¹

1. *Limitations on Free Speech*

Over the past fifty years the Supreme Court has set certain limits on the First Amendment.⁸² In 1942, the Court held that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problems."⁸³ These types of speech included "[the] lewd and

74. *Id.* In the United States, the Motion Pictures Association of America (MPAA) rates the movies on a scale with the following categorizations: G, PG, PG-13, R, and NC-17. Paul Farhi, *TV Industry Agrees on Rating System; Age-Based Formula is Similar to that Used for Movies*, WASH. POST, Dec. 3, 1996, at A1.

75. Truehart, *supra* note 72, at A32.

76. *Id.*

77. See discussion *infra* Part III.B.1.

78. U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

79. See discussion *infra* Part II.D.1.

80. See discussion *infra* Part II.D.2.

81. See discussion *infra* Part II.D.3.

82. U.S. CONST. amend. I.; see *infra* notes 83-86; see also discussion *infra* Part II.D.

83. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

obscene, the profane, the libelous, and the insulting or 'fighting' words."⁸⁴ To these four categories of unprotected speech, the Court added a fifth category: commercial speech.⁸⁵ However, over the next three decades all but "obscenity" were moved by the Court from the category of unprotected speech to protected speech.⁸⁶

a. *Obscenity*

Obscenity is "utterly without redeeming social importance . . . and not within the area of constitutionally protected speech or press."⁸⁷ In the Court's opinion in *Roth v. United States*,⁸⁸ Justice Brennan wrote that obscenity can create a "clear and present danger of antisocial conduct."⁸⁹ In attempting to define obscenity, the Court compared obscenity with sex.⁹⁰ In other cases, however, this definition has been

84. *Id.* at 572.

85. *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942).

86. "Insulting or 'fighting' words" speech was found protected by the Court in *Cohen v. California*, 403 U.S. 15 (1971). The Court held that the language, "fuck the draft," while offensive to those present, was able to be avoided by averting one's eyes. *Id.* "While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not directed to the person of the hearer." *Id.* at 20.

"Libelous" speech was found protected by the Court in *New York Times Co. v. Sullivan* in that the Court required proof of actual malice when the plaintiff is a public official or public figure, which must be proven by the plaintiff. 376 U.S. 254 (1964).

"Commercial" speech was found protected by the Court in *Bates v. State Bar* and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*. *Bates v. State Bar*, 433 U.S. 350, 383 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 & n.24 (1976). Both of these cases, while advancing First Amendment protections, allow the states to sanction false, deceptive, or misleading advertising. *Bates*, 433 U.S. at 383; *Virginia State Bd. of Pharmacy*, 425 U.S. at 771.

87. *Roth v. United States*, 354 U.S. 476, 484-85 (1957). *Roth*, a New York publisher and seller, was convicted of mailing obscene advertising and books in violation of a federal obscenity statute. *Id.* In finding that obscenity was not constitutionally protected, the Court set forth the following test of obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." *Id.* at 489.

88. *Id.*

89. *Id.* at 486. However, a showing of clear and present danger of antisocial conduct alone would not be punishable. *Id.* at 489-90.

90. *Id.* at 487.

expanded.⁹¹ In *Roth*, the Court made clear that there was no place for obscenity in society and in the community.⁹²

In 1973 the Court reaffirmed *Roth* twice, in *Miller v. California*⁹³ and in *Paris Adult Theatre I v. Slaton*.⁹⁴ In *Miller*,⁹⁵ the Court formulated a new standard of reviewing obscenity where the States could regulate obscenity by looking at the conduct of the parties.⁹⁶ To do so, the Court set out certain "contemporary community standards" to determine whether material is obscene in order to remove it from protection of the First Amendment.⁹⁷ In *Paris Adult Theatre*⁹⁸ the Court felt that the suppression of obscenity as an unprotected First Amendment right was necessary for "the interest of the public in the quality of life and the total community environment."⁹⁹ Therefore, the tests that are utilized in determining whether material is obscene include prurient interests,¹⁰⁰ sexual conduct,¹⁰¹ and community environment.¹⁰²

b. Violence

Violence as a form of speech has been found to be protected, except where it is "directed to inciting or producing imminent lawless action and is likely to incite or produce

91. *Miller v. California*, 413 U.S. 15, 19-20 n.2 (1973).

92. *Roth*, 354 U.S. at 484 ("[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.").

93. 413 U.S. 15 (1973). *Miller* was convicted under a California statute of knowingly distributing obscene matter to unwilling recipients. *Id.* at 16-18.

94. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). *Slaton*, the local state district attorney, filed civil proceedings against the *Paris Adult Theatre* to enjoin the showing of allegedly obscene films available only to consenting adults. *Id.* at 50.

95. *Miller*, 413 U.S. at 15.

96. *Id.* at 24-25.

97. The guidelines are:

- (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interests;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

98. *Paris Adult Theatre*, 413 U.S. at 49.

99. *Id.* at 58.

100. *Roth*, 354 U.S. at 489; *Miller*, 413 U.S. at 24.

101. *Miller*, 413 U.S. at 23.

102. *Paris Adult Theatre*, 413 U.S. at 58.

such action."¹⁰³ One lower court has argued that there is no connection between television violence and an aggressive act committed after watching television,¹⁰⁴ yet there are studies that show a correlation between television violence and aggressive activities.¹⁰⁵

2. *Broadcasting and its Special Role*

While the Court limits the First Amendment protections of speech in the case of obscenity,¹⁰⁶ the Court also places limitations on the First Amendment in terms of broadcasting, for "it is broadcasting that has received the most limited First Amendment protection."¹⁰⁷ In 1969, the Court stated in *Red Lion Broadcasting Co. v. FCC*¹⁰⁸ that "broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the government."¹⁰⁹ "Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard."¹¹⁰ In order to impose any regulatory scheme upon the broadcasting medium, the FCC must act as "public convenience, interest, or necessity requires."¹¹¹ Thus, broadcast communication receives a less stringent level of scrutiny in determining whether the attacked speech is constitutionally permissible, for "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."¹¹²

a. *FCC v. Pacifica Foundation*

In *FCC v. Pacifica Foundation*,¹¹³ the Court found that there should be special protection of children from indecent

103. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

104. *Zamora v. Columbia Broad. Sys.*, 480 F. Supp. 199 (S.D. Fla. 1979) (dismissing complaint against three major networks for allegedly causing minor to shoot and kill his neighbor as a result of the minor's extensive viewing of violence on television).

105. See *supra* note 19 and accompanying text.

106. See *supra* Part II.D.1.a.

107. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

108. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

109. *Id.* at 376. In this case, the Court upheld the FCC's regulation requiring that free broadcasting time be made available to members of the public to reply to personal attacks and political editorials. *Id.*

110. *Id.*

111. Communications Act of 1934, 47 U.S.C. § 303 (1988).

112. *Red Lion Broad.*, 395 U.S. at 390.

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

exposures broadcast over the public airwaves.¹¹⁴ Before *Pacifica*,¹¹⁵ the Court relied on the issue of "spectrum scarcity" to prove broadcasting's limited First Amendment protection.¹¹⁶ In *Pacifica*,¹¹⁷ however, the Court found that broadcasters have two distinctions that separate themselves from others that might claim First Amendment protection: "a uniquely pervasive presence in the lives of all Americans,"¹¹⁸ and "broadcasting is uniquely accessible to children, even those too young to read."¹¹⁹

b. *Post* FCC v. *Pacifica* Foundation¹²⁰

In 1984, the Court found that Congress can regulate broadcasting under the Commerce Clause,¹²¹ in an attempt to ensure that the public receives a balanced presentation of views on diverse matters of public concern.¹²² Furthermore, broadcasters should be allowed "the widest journalistic freedom consistent with their public duties."¹²³ Yet, it is important to remember that the issue in television regulation today, as opposed to that in *FCC v. League of Women Voters*,¹²⁴ is that violence on television may be distinguishable from journalism on television.

If the government wishes to regulate broadcasting, it may only regulate the content of constitutionally protected speech to promote a compelling interest, and only if it chooses the least restrictive means to further the articulated interest.¹²⁵ In *Sable Communications*,¹²⁶ the Court found the

114. *Id.* at 750. In this case, comedian George Carlin's "Filthy Words" monologue was played over the radio during the afternoon, whereupon a father and his son happened upon the broadcast. *Id.* at 726. The man later wrote a letter to the FCC complaining of the broadcast, which the Court found to be "indecent." *Id.*

115. *Id.* at 726.

116. *National Broad. Co. v. United States*, 319 U.S. 190 (1943).

117. *Pacifica Found.*, 438 U.S. at 736.

118. *Id.* at 748.

119. *Id.* at 749.

120. *Id.* at 726.

121. *FCC v. League of Women Voters*, 468 U.S. 364, 376, 377 (1984). In this case, the Court struck down a congressional prohibition on editorializing by public broadcasters who receive federal funding. *Id.* at 364.

122. *Id.*

123. *Id.* at 378 (citations omitted).

124. *Id.*

125. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

126. *Id.* at 115.

statute prohibiting dial-a-porn telephone messages to be unconstitutional in that the state's means of restricting access to both children and adults alike did not meet the ends of the legislation.¹²⁷ Broadcasting regulations must necessarily be narrowly tailored to meet a specific interest in order to prevent discrimination against large classes of the population by limiting their First Amendment rights.

3. *Children and Limiting First Amendment Protections*

As with obscenity and broadcasting, one's First Amendment rights can be further restricted when children are threatened.¹²⁸ It seems clear that there should be special rules when dealing with minors who are easily impressionable by what they may watch, easily swayed by the issues they see and hear, and easily attracted to a colorful television broadcast. Throughout the Court's history, children have required special protection, different from those protections granted in regards to adults.¹²⁹

a. *Prince v. Massachusetts*

Over fifty years ago, the Court ruled that "the state's authority over children's activities is broader than over like actions by adults."¹³⁰ The Commonwealth of Massachusetts had passed a statute stating that "no boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers [or] magazines . . . in any street or public place."¹³¹ However, Mrs. Prince permitted her children to "engage in the [religious] preaching work with her upon the sidewalks."¹³² The Court made clear that while the First Amendment activity of the adult may be allowable, the child should be given extra protections.¹³³ "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for

127. *Id.* at 131.

128. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

129. *Id.*

130. *Id.* at 168.

131. *Id.* at 160-61 (citing Mass. Gen. L. ch. 149, §§ 80-81 (1939)).

132. *Id.* at 162.

133. *Id.* at 170.

growth"¹³⁴ which can only be ensured through special protections.

b. *Ginsberg v. New York*

In *Ginsberg*,¹³⁵ the Court held that the state could prohibit the sale of constitutionally protected publications to minors if those publications contained obscene materials in them, thereby convicting the person who sold the "girlie" magazine to the child.¹³⁶ While it would be best if parents supervised their children, supervision cannot always be provided, thereby requiring the state to protect the welfare of children through regulations.¹³⁷ Furthermore, the statute passed by the legislature was found to be constitutional in that there was a legitimate state rationale for its actions and that the state had "an independent interest in the well-being of its youth."¹³⁸

c. *New York v. Ferber*

In *New York v. Ferber*,¹³⁹ the Court found the state statute prohibiting promotions of a sexual performance by a child under sixteen to be constitutional and not in violation of the First Amendment.¹⁴⁰ The Court ruled that "a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"¹⁴¹ The Court held that this is a clear case of child sexual abuse, and should be given no protection; just as obscenity is unprotected by the First Amendment, so too is child pornography.¹⁴² In his concurring opinion, Justice Brennan stated that the actions taken against the children in this case were of "exceedingly 'slight social value,'" with which the "State has a compelling interest in their regulation."¹⁴³ With a strong state interest in protect-

134. *Prince*, 321 U.S. at 165.

135. *Ginsberg v. New York*, 390 U.S. 629 (1968).

136. *Id.* at 637.

137. *Id.* at 640 (quoting *People v. Kahan*, 206 N.E.2d 333 (N.Y. 1965)).

138. *Id.* at 639-40.

139. *New York v. Ferber*, 458 U.S. 747 (1982).

140. *Id.* at 773-74.

141. *Id.* at 756-57 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

142. *Id.* at 764.

143. *Id.* at 776.

ing the rights of children, no First Amendment argument would defeat such a protection of minors.

Today, over a decade after *New York v. Ferber*,¹⁴⁴ the courts still fervently protect children.¹⁴⁵ “[T]he Government has an independent and compelling interest in preventing minors from being exposed to indecent broadcasts”¹⁴⁶ through regulations designed to uphold the *Prince* standard.¹⁴⁷ Moreover, like society in general, parents have an interest not just in the physical health of their children, but also in their quality of life which could be affected by unnecessary violence on television.¹⁴⁸

The next two sections of this comment will address and analyze the V-Chip legislation as codified in the 1996 Telecommunications Reform Act.¹⁴⁹ The above mentioned materials will demonstrate that the limited scope of the V-Chip legislation meets the requirements of a narrowly defined governmental interest by regulating only those violent programs that parents wish to block from their children’s viewing habits.

III. ANALYSIS

The text of the First Amendment simply states, “Congress shall make no law . . . abridging the freedom of speech, or of the press,”¹⁵⁰ yet over time the reading of these words has been expanded and retracted according to the type of speech wished to be protected.¹⁵¹ Congress’ current regulation of television violence, through the V-Chip, has come under intense constitutional scrutiny.¹⁵² Some claim that the V-Chip is a call for censorship that will “undermine the First Amendment,”¹⁵³ while others see the regulation as simply pa-

144. *Ferber*, 458 U.S. at 747.

145. *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995).

146. *Id.* at 663. “[T]he Government has an independent and compelling interest in preventing minors from being exposed to indecent broadcasts” through regulations designed to uphold the *Prince* standards. *Id.* at 146.

147. *Id.* at 663.

148. *Id.* at 662.

149. See discussion *infra* Parts III, IV.

150. U.S. CONST. amend. I.

151. See discussion *supra* Part II.D.

152. BNA DAILY REP. FOR EXECs., *President Signs Telecom Reform Measure*, Feb. 9, 1996, at A27.

153. John Corry, *Salty V-Chips*, AM. SPECTATOR, Sept. 1995.

rental control, deflating any constitutional arguments.¹⁵⁴ This section will examine these two arguments.¹⁵⁵

A. *The First Amendment*

1. *Comparing Violence with Obscenity*

In asserting that violence on television should not be granted First Amendment protection, the proponents of the V-Chip may argue that, like "obscenity," violence should receive no constitutional protection.¹⁵⁶ On the other hand, those who will argue that the regulation of television violence is unconstitutional will do so from the standpoint that violence is not the same as "obscenity," as defined by the Court in *Roth*,¹⁵⁷ and later in *Miller*.¹⁵⁸ However, using both of the definitions laid out by the Court in these two cases, it seems that violence on television can be properly analogized to obscenity.

a. *Violent Interests*

In the case of regulating violent acts on television, if "prurient," as defined by *Roth*,¹⁵⁹ is replaced with the term violence, the *Roth* test should apply.¹⁶⁰ There is no necessity for violent harmful acts on television, which Congress' current regulation, through the V-Chip, addresses. There is no redeeming value in a society whose children are watching countless murders, rapes, and pillages.

In *Roth*,¹⁶¹ the Court makes clear that obscenity is not protected within the First Amendment,¹⁶² just as the V-Chip's regulation of violence on television should be found outside of the First Amendment's protection. As the Court stated in *Roth*, "all ideas having even the slightest redeeming social importance . . . have the full protection of the [First

154. Former Chairman of the FCC Newton Minow, *quoted in* Christopher Stern, *Face-off on the V-Chip*, BROADCASTING AND CABLE, Oct. 2, 1995, at 19.

155. *See* discussion *infra* Part III.A.

156. David Horowitz, *V is for Vacuous Censorship; TV: The Government V-Chip to Block Violent Shows will Require Government Ratings*, L.A. TIMES, Feb. 8, 1996, at B9.

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

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

159. *Roth*, 354 U.S. at 476.

160. *See supra* note 86 and accompanying text.

161. *Roth*, 354 U.S. at 476.

162. *Id.* at 485.

Amendment] guarantees, unless excludable because they encroach upon the limited area of more important interests.”¹⁶³ Just as obscenity is one of those “areas,” so too is violence on television. Allowing parents to protect their children from harmful conduct on television should outweigh the necessity of full protection of violence on television. In no manner should all acts of violence on television be outlawed. However, if an attack on the V-Chip makes it to the Court, the Court should quickly dismiss the challenge under the *Roth* test, for the V-Chip is not a mandated censorship of all programs, but rather a parental choice of blocking out the violence.

b. *The Constitutionality of Television Violence Regulation*

In *Miller v. California*,¹⁶⁴ the Court agreed on a new definition of “obscenity” expanding *Roth*,¹⁶⁵ but also added some new qualifications and categories.¹⁶⁶ The first prong of the *Miller* test is very similar to *Roth*.¹⁶⁷ Just as in *Roth*,¹⁶⁸ if the actions on television are shown to be unnecessarily violent to the children viewing the programming or to the parents blocking the program from their children, the “obscenity” test should be extended to congressional regulation of violence through the V-Chip.

The second prong of the *Miller* test questions “whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law?”¹⁶⁹ In analogizing the unnecessary violent acts on television to “sexual conduct,” all that is necessary for this analogy is to turn on the television any Saturday evening and watch *Walker, Texas Ranger* or any Sunday evening to watch the *X-Files*.¹⁷⁰ These types of programs appear to have no redeeming value, and seem to be aimed at the worst level of

163. *Id.* at 484.

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

165. *Roth*, 354 U.S. 476.

166. *Miller*, 413 U.S. at 24.

167. See *supra* note 97 and accompanying text. The first prong of *Miller* is “whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interests.” *Miller*, 413 U.S. 15.

168. *Roth*, 354 U.S. 476.

169. *Miller*, 413 U.S. at 24.

170. UCLA REPORT, *supra* note 6, at 40-42.

violence: violence for violence's sake, violence that is purely offensive to the viewer, and violence that is plainly unnecessary for children to be watching.¹⁷¹ In one episode of FOX's *X-Files* a serial killer murdered her sister with a straight razor and carved the word "[s]lister" into her chest.¹⁷² On another episode a young boy's palm was attempted to be cut open with a dagger.¹⁷³

The final test from *Miller*¹⁷⁴ is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."¹⁷⁵ The V-Chip will not outlaw all violent programming, for it is not the government's role to censor programs that may contain "literary, artistic, political, or scientific value."¹⁷⁶ Rather, the choice to block programming will reside with parents, not the government.¹⁷⁷ Furthermore, it is difficult to justify that shows are of a "literary, artistic, political, or scientific" value,¹⁷⁸ when they include violence as an integral part of the storyline, contain graphic elements of violence throughout the program, and contain many scenes glorifying violence.¹⁷⁹

The opponents of the V-Chip will point to shows that use violence in an appropriate manner, or because it is necessary for the story, such as *Schindler's List*. In a network broadcast of such a movie, "the use of violence may be critical to a story that actually sends an anti-violence message."¹⁸⁰ However, for every *Schindler's List*, there are dozens of *Lethal Weapon*, *Terminator*, and *Total Recall* movies.¹⁸¹ While these movies may be entertaining to the average viewer both

171. *Id.* at 26-30.

172. *Id.* at 42.

173. *Id.*

174. *Miller*, 413 U.S. 15.

175. *Id.* at 24.

176. *Id.*

177. Telecommunications Reform Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 139-42 (codified at 47 U.S.C. § 303 (1996)).

178. *Miller*, 413 U.S. at 24.

179. UCLA REPORT, *supra* note 6, at 26-28.

180. *Id.* at 21.

181. *Id.* at 81. Using these movies as examples is not to say that they are not quality works. What it shows is that these types of movies contain the types of violent acts on television that are just not necessary. According to the violence criteria in the UCLA REPORT, when aired on broadcast television, *Lethal Weapon* contained twenty-one scenes of violence, *Terminator 2* contained twenty-nine scenes of violence, and *Total Recall* contained thirty-five scenes. UCLA REPORT, *supra* note 6, at 81.

in theaters and on television, many of the violent scenes are done without any societal value. Moreover, in the theaters these movies will receive an "R" rating, thus ensuring that children cannot view the movie; yet in the home on television, there is no control over the viewership of the very same program.

c. *A Compelling Governmental Interest: Protecting the Quality of Life*

While obscenity and violence are distinguishable on their surface, as the Court states in *Paris Adult Theater I v. Slaton*,¹⁸² the government has a strong interest in protecting "the quality of life in the total community environment, the tone of commerce in the great city centers, and possibly, the public safety itself."¹⁸³ Like obscenity, regulating violence through the V-Chip is designed to safeguard the children of America from unwanted and unneeded violence.¹⁸⁴ As Representative Edward Markey stated:

In my view there is no more compelling governmental interest in the United States than providing families a healthy, safe environment in which to raise healthy, productive children. The fact is that television is one of the most important influences in children's lives. For all too many children, the electronic teacher is equal to parents and the school in the influence it has in developing values in our society.¹⁸⁵

As the Court held in regards to pornography being obscene in *Paris Adult Theaters*,¹⁸⁶ "what is commonly read and seen and heard and done intrudes upon us all, want it or not."¹⁸⁷ Extending this analysis to violent programming, the same should hold true. Violence on television affects all viewers, including children who know no better. In order to protect those children from the violent programming, a device such as a V-Chip gives parents control of their children's

182. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973).

183. *Id.*

184. Telecommunications Reform Act of 1996, Pub. L. No. 104-104, § 551(a), 110 Stat. 139-142 (codified at 47 U.S.C. § 303 (1996)).

185. BNA WASH. INSIDER, *Markey Introduces Bill to Require "V-Chip" to Block Violent TV Shows*, July 14, 1995 (quoting Rep. Markey).

186. *Paris Adult Theatre*, 413 U.S. at 49.

187. *Id.*

viewing habits, and should be found constitutional under the obscenity analogy.

2. *Broadcasting*

a. *Limitations on Broadcasting*

Broadcasting is a unique limitation upon the First Amendment's protection of free speech. Television shows and radio broadcasts are a "scarce" commodity and are therefore treated differently than other mediums given First Amendment protection.¹⁸⁸ In *Red Lion*,¹⁸⁹ the Court upheld public access to the television medium by compelling broadcasters to grant individuals the right to reply to political editorials or personal attacks on the air.¹⁹⁰ Similarly, the V-Chip is a regulation upon the broadcast medium, which, like public access to the medium, has closer regulatory acceptance than would speech in a public arena.¹⁹¹

b. *Regulating the Content of Television Broadcasts*

In *FCC v. Pacifica Foundation*,¹⁹² the Court extended a special means of regulating broadcasting.¹⁹³ The question the Court confronted was "whether a broadcast of patently offensive words dealing with sex and erection may be regulated because of its content?"¹⁹⁴ While offensive language does not necessarily become obscene language and therefore unprotected speech, in this case the Court referred to the language broadcast over the airwaves as "indecent" content which should be afforded no constitutional protection.¹⁹⁵ The Court's rationale rested with two prongs: broadcasting is a "uniquely pervasive presence in the lives of all Americans"¹⁹⁶

188. *Red Lion Broad. v. FCC*, 395 U.S. 367, 376 (1969).

189. *Id.*

190. *Id.* at 401.

191. Assembly and debate is at its greatest protection in a public forum or open market. *Hague v. CIO*, 307 U.S. 496 (1939). Therefore, unlike a television signal over which one does not have control, a person can walk by a public square or open market, can decide not to attend such an event, or can respond himself or herself to the debate. *Id.*

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

193. *Id.* at 731.

194. *Id.* at 745.

195. *Id.* at 750.

196. *Id.* at 748-49.

and is "uniquely accessible to children, even those too young to read."¹⁹⁷

One need not leave their home to be confronted by the effects of broadcasting, for the Court has described broadcasting as an "intruder" into one's home through the airwaves.¹⁹⁸ In one's home, the "right to be left alone plainly outweighs the First Amendment rights of an intruder," who in this case is the radio or television broadcast.¹⁹⁹ The audience watching television or listening to the radio is captive at home, on the road, at a restaurant, in a bar, everywhere.²⁰⁰ "[B]roadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasts," thereby limiting one's ability to escape the violence on television.²⁰¹

Furthermore, broadcasting is uniquely accessible to children.²⁰² Turning one switch on the television or the remote control is all that it takes for a child, even a very young one, to gain access to the broadcast medium. "Pacifica's broadcast could have enlarged a child's vocabulary in an instant."²⁰³ It is this concern that the state has great interest in regulating and which the Court finds sufficient for such regulation of indecent materials.²⁰⁴

In arguing against broadcasting receiving "the most limited First Amendment protection" of all forms of communication,²⁰⁵ opponents of the V-Chip may claim that the government is no longer a neutral observer, but rather an intruder regulating the marketplace of ideas. However, when limiting speech (or in this case, limiting violence on television) is the only way to protect children from harmful ideas, the government may regulate the content of that which might otherwise

197. *Id.* at 749-50.

198. *Pacifica Found.*, 438 U.S. at 748 (paraphrasing *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970)).

199. *Id.*

200. The Court attempts to distinguish *FCC v. Pacifica* from *Cohen v. Cal.*, 403 U.S. 15 (1971), and *Erzsznik v. Jacksonville*, 422 U.S. 205 (1975) on the basis that neither of these cases would have caused a controversy by taking place within the privacy of one's own home, as does a radio or television broadcast. *Pacifica Found.*, 438 U.S. at 749 n.27.

201. *Action for Children's Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995).

202. *See supra* Part II.D.3. *See also infra* Part III.A.3 for a greater discussion of the role of the First Amendment and children.

203. *Pacifica Found.*, 438 U.S. at 749.

204. *Id.*

205. *Id.* at 748.

be considered protected.²⁰⁶ As Justice Murphy stated, in regards to the "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words,"²⁰⁷ "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."²⁰⁸ In regards to the V-Chip, there is no societal interest in allowing continued, unabated, and unnecessary violence on television. While it is true that the government is regulating the content of speech, violence on television carries no redeeming social value, and therefore, the regulation is allowable.

The Court has upheld content-based regulations, such as the V-Chip, in order to "assure that the public receives . . . a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcast stations."²⁰⁹ Furthermore, in order for the government to regulate the content of what might otherwise be considered constitutionally protected speech, it must do so in the least restrictive means possible, and in a narrowly tailored fashion.²¹⁰ Allowing parents to control what their children will view, and requiring that the V-Chip be a voluntary, not mandated regulation, will ensure that the V-Chip does not invade the broadcasters' First Amendment protections of free speech.²¹¹

Along with Congress' compelling governmental interest in protecting the youth of America from the violence on television, and the narrowly tailored regulatory device that places control in the hands of parents to block specific programming, the content-based restrictions on broadcasters' First Amendment rights should be upheld.

206. *Id.* at 749-50.

207. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

208. *Id.*

209. *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984).

210. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

211. In reference to the V-Chip, Senator Paul Simon said that he "was uncertain whether the V-Chip issue would go to court, but if it did, 'it's a slam-dunk case that it's constitutional.'" BNA DAILY REP. FOR EXECs., *President Signs Telecom Reform Measure*, Feb. 9, 1996, at A27.

3. Children²¹²

Children have been protected by the Court by limiting the First Amendment rights of those who allow children to read, view, listen, or induce children to take part in pornographic activities.²¹³ The natural extension of these First Amendment limitations shall undoubtedly be extra protections for children, who are exposed to materials on television that to some extent, are as a graphic and obscene as pornographic materials.²¹⁴

In 1982, the Court made explicitly clear in *New York v. Ferber*²¹⁵ that the First Amendment does not protect depictions of children engaged in sexual conduct, just as the Court did with obscenity in *Miller*.²¹⁶ Along with the obscenity standard from *Miller*,²¹⁷ the *Ferber*²¹⁸ standard strengthens the argument that a regulation designed to protect children from unseemly activities, including violence on television, will be upheld, for the government as well as parents have an interest in the well-being of its youth.²¹⁹ The values and beliefs of children are central to the advancement of society, and one manner in which they can be strengthened, albeit a small step, is by limiting that which they can view on television. This governmental interest allows "constitutional power to regulate" a child's activities.²²⁰ Furthermore, it allows parents to "direct the rearing of their children, [which] is basic in the structure of our society."²²¹ The V-Chip fulfills both of these requirements.

212. It is important to note throughout this analysis that in no way will adults' rights to view whatever they wish be impaired by the V-Chip. It is the parents who are able to control the viewing habits of their children, not the government. See Telecommunications Reform Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 139-142 (codified at 47 U.S.C. § 303 (1996)). Violent television programming will not cease to exist, and adults can opt to watch it whenever they wish. Throughout the Court's history, children have required special protection, different from those protections granted in regards to adults. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

213. *Ginsberg v. New York*, 390 U.S. 629 (1968); *New York v. Ferber*, 458 U.S. 747 (1982).

214. See UCLA REPORT, *supra* note 6.

215. *Ferber*, 458 U.S. at 747.

216. *Miller v. California*, 413 U.S. 15 (1973); *Ferber*, 458 U.S. at 764.

217. *Miller*, 413 U.S. at 15.

218. *Ferber*, 458 U.S. at 764.

219. *Ginsberg v. New York*, 390 U.S. 629, 640 (1968).

220. *Id.* at 639.

221. *Id.*

The governmental interest that Congress wishes to protect through the V-Chip is to reduce the levels of violence by "providing families a healthy, safe environment in which to raise healthy, productive children,"²²² which is a lofty goal advocated by all, but very difficult to achieve. In order to advance this goal, the government uses its independent and compelling interest in the hopes of ensuring that minors are not exposed to indecent broadcasts on television.²²³ Parents' interests, similarly, are to "reduce children's exposure to programs depicting violence."²²⁴

B. *The V-Chip: Pros and Cons*

The V-Chip legislation in the 1996 Telecommunications Reform Act²²⁵ has three essential elements to it: the ratings portion, the transmission section, and the manufacturing requirement.²²⁶

1. *Ratings System*

The most controversial requirement of the V-Chip proposal is the section dealing with the ratings system.²²⁷ Opponents claim that this section is the one that most violates the First Amendment in its imposition of specific types of ratings upon television programs.²²⁸ However, in the current V-Chip legislation, the government would only become involved in ratings of television programs if, after one year, the industry

222. 141 CONG. REC. E. 1436 (July, 13 1995).

223. *Action for Children's Television v. FCC*, 58 F.3d 654, 663 (D.C. Cir. 1995); see *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). "The Government's compelling interest in well-being of minors extends to 'shielding [them] from the influence of literature that is not obscene by adult standards.'" *Action for Children's Television*, 58 F.3d at 663.

In addition to the compelling interests laid out by Congress and the Courts, the FCC also identifies compelling governmental interests: support for parental supervision of children, a concern for children's well-being, and the protection of the home against intrusion by offensive broadcasts. *MASS MEDIA*, 64 U.S.L.W. 2039 (1995).

224. See *Television Violence: Hearings before the Senate Comm. on Commerce, Science, and Transportation*, 104th Cong. 183 (1995) (statement of Shirley Igo, National PTA).

225. Telecommunications Reform Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 139-42 (codified at 47 U.S.C. § 303 (1996)).

226. See *supra* notes 62-67 and accompanying text.

227. Telecommunications Reform Act of 1996 § 551(b), 110 Stat. at 139-42 (codified at 47 U.S.C. § 303 (1996)).

228. See Corn-Revere, "V" is not for Voluntary, *CATO INST.*, *CATO BRIEFING PAPERS*, No. 24, Aug. 3, 1995.

and the rest of the advisory committee did not come up with their own ratings structure.²²⁹ While "the technology is a snap[, d]eciding which shows deserve a 'V' for violence is the problem."²³⁰

On December 19, 1996, the Parental Guidance System was introduced, thereby meeting the one year deadline for the voluntary implementation of a television ratings system.²³¹ The ratings system, not based on content as many had hoped, is instead modeled after the Motion Pictures Association of America ratings system.²³² The television ratings are divided into two main categories: television programs for children only, and all other programs.²³³ Under the children programs, there are two different categories: TV-Y: themes and elements in these programs are designed for a very young audience, including children two to six years old;²³⁴ and TV-Y7: this rating is intended for children over seven years old, for there might be mild physical or comedic violence that may frighten children.²³⁵

The ratings for all other non-children specific programs are: TV-G: these shows are suitable for all ages of people, with little or no violence, no strong language, and little or no sexual dialogue or situations;²³⁶ TV-PG: this rating category calls for parental guidance, for these programs may contain infrequent coarse language, limited violence, and some suggestive dialogue and situations;²³⁷ TV-14: under this category parents are strongly cautioned, for the programs may contain sophisticated themes, sexual content, strong language, and more intense violence;²³⁸ and TV-MA: this rating is for mature audiences only, since the programs may contain

229. Telecommunications Reform Act of 1996 § 551(b), 110 Stat. at 139-42 (codified at 47 U.S.C. § 303 (1996)).

230. Marc Silver, *Sex and Violence on TV*, U.S. NEWS AND WORLD REP., Sept. 11, 1995, at 62.

231. Paul Farhi, *TV Industry Sticks with Age-Based Ratings Plan*, WASH. POST, Dec. 19, 1996, at C1 [hereinafter Farhi, *TV Industry*].

232. *Id.* See also *supra* note 74.

233. Farhi, *TV Industry*, *supra* note 231, at C1.

234. *Id.* See also Paul Farhi, *TV Ratings to Have Six Vague Levels*, WASH. POST, Dec. 10, 1996, at A1 [hereinafter Farhi, *TV Ratings*].

235. Farhi, *TV Industry*, *supra* note 231, at C1; Farhi, *TV Ratings*, *supra* note 234, at A1.

236. Farhi, *TV Industry*, *supra* note 231, at C1.

237. *Id.*

238. *Id.*

mature themes, profane language, prolific violence, and explicit sexual content.²³⁹

It is predicted that most prime-time sitcoms will fall into the TV-PG category,²⁴⁰ with shows such as FOX's *X-Files* and *Millennium*, as well as ABC's *N.Y.P.D. Blue* fitting into the TV-14 category.²⁴¹ Very few network shows will be rated under TV-MA, for most of the programming under this category will be late-night pay-per-view channels.²⁴²

In determining the rating of a television show, it will be up to the producer, the network, and the television stations.²⁴³ This is one reason why much controversy surrounds the Parental Guidance System.²⁴⁴ On the day of the announcement of the new system, the chairman of the advisory committee that formulated the new ratings, Mr. Jack Valenti, stated that there will be a monitoring oversight board made up of nineteen people that will attempt to settle any ratings controversies or discrepancies.²⁴⁵ Once the television show's rating is determined, one of the six symbols will appear at the beginning of the program for fifteen seconds in the upper left-hand corner of the screen so that parents may, if they so desire, turn off the program immediately.²⁴⁶

Not all television shows, however, will be rated.²⁴⁷ News and sports shows are exempt from the Parental Guidance System.²⁴⁸ While talk shows, such as *Oprah* and *Rosie O'Donnell* will be rated, it is unclear if tabloid "news" shows such as *Hard Copy* and *Inside Edition* will be.²⁴⁹

Critics of the age-based Parental Guidance System argue that the new system is too broad, too vague, and does not take into account the content of the program.²⁵⁰ These crit-

239. *Id.* When introduced on December 19, 1996, the original classification was TV-M, but because TV-M was already a copyright logo, the National Association of Broadcasters changed the rating to TV-MA. Christopher Stern, *TV Relents on New Code*, DAILY VARIETY, Mar. 10, 1997, at 1.

240. Farhi, *TV Ratings*, *supra* note 234, at A1.

241. *Id.*

242. *Id.*

243. Farhi, *TV Industry*, *supra* note 231, at C1.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. Paul Farhi, *Panel Must Decide What Rates as News*, WASH. POST, Dec. 16, 1996, at C1.

250. Farhi, *TV Industry*, *supra* note 231, at C1.

ics, including the original sponsor of the V-Chip, Representative Markey, would rather have a system that delineates the violence, language, and sexual content of each program, known as the "V-L-S" system.²⁵¹ This V-L-S system is similar to the one tested in Canada, where "each household [will soon be able to] customize its viewing options and block unwanted" violence, sex, and inappropriate language.²⁵² In order for its V-Chip program to work, Canada offers parents four categories of ratings to guide their blocking of television programming.²⁵³

The American advisory committee might have looked at the Canadian ratings system, realizing that Canadian parents are pleased with the results,²⁵⁴ and implemented a similar one that ensures First Amendment protections by making its usage truly voluntary. A multi-prong ratings system might even calm the fears of those of say that "a single-scale" movie-like ratings system "not only fail[s] to discourage obscenity and violence — films are worse than ever in this respect, in spite of a uniform motion-picture code — but have some undesirable side-effects."²⁵⁵ While it is undoubtedly true that there are many more hours of American television than there are of Canadian television that would have to be rated, the advisory committee through the Parental Guidance System seems to have attempted to find some common ground, ensuring a voluntary constitutional ratings system.

2. *Implementation and Transmission of Ratings*

There is already precedent for Congress to require television makers to install the V-Chip, and to require the transmission of such a ratings system into all televisions in America.²⁵⁶ "[W]ithin the past five years, in the matter of closed captions, the government did exercise its right to influence the television broadcast service, and did it without affecting its content."²⁵⁷ Just like closed captioning gives the

251. *Id.*

252. Truehart, *supra* note 72, at A32.

253. *Id.* See also *supra* Part II.C.

254. Truehart, *supra* note 72, at A32.

255. Lewis M. Andrews, *Private Ratings*, NAT'L REV., Sept. 25, 1995, at 80.

256. Telecommunications Reform Act of 1996, Pub. L. No. 104-104,

§ 551(c), 110 Stat. 139-42 (codified at 47 U.S.C. § 303 (1996)).

257. John E. D. Ball, *A Precedent for the V-Chip*, WASH. POST, July 21, 1995, at A21. See also Hundt, *supra* note 2.

viewer—deaf or not—an option whether to use the device, the V-Chip will not mandate that all people switch on the device.²⁵⁸ It will be just as easy to turn on the V-Chip, as it will be to turn it off. “To oppose the addition of this simple, effective feature makes as much sense as to have restricted volume controls and channel switches when television was first introduced in the late 1950s.”²⁵⁹

3. *Manufacture of the V-Chip*

It is not surprising to learn that television manufacturers oppose the implementation of the V-Chip, for they claim that it will add five to forty dollars to the retail price of a new television set equipped with the blocking device.²⁶⁰ Television manufacturer Zenith argues that their televisions already have a “parental choice” feature, thereby making the installation of the V-Chip in all televisions unnecessary.²⁶¹ However, in that the technology is similar to that of the closed captioning feature, the installation of the V-Chip should not be too great a burden on the manufacturer, which, in turn, would be passed onto the consumer.²⁶²

The following proposal focuses on the implementation of the V-Chip in order to ensure that this portion of the 1996 Telecommunications Reform Act is constitutional.²⁶³

IV. PROPOSAL

In order to ensure that there are minimal constitutional problems with the V-Chip, the ratings of the television shows must be accomplished voluntarily by the television industry, with assistance from private interest groups whose common goal it is to enact a ratings system that truthfully and honestly rates television programs.

258. Telecommunications Reform Act of 1996 § 551(c), 110 Stat. at 139-42 (codified at 47 U.S.C. § 303 (1996)).

259. John E. D. Ball, *A Precedent for the V-Chip*, WASH. POST, July 21, 1995, at A21.

260. Frederick H. Lowe, *V-Chip Would Raise TV Cost*, CHI. SUN-TIMES, Aug. 8, 1995, at 47. See also *Television Violence: Hearings before the Senate Comm. on Commerce, Science, and Transportation*, 104th Cong. 114 (1995) (statement of Wayne C. Luplow, Zenith Electronics Corp.).

261. Lowe, *supra* note 260, at 47.

262. Telecommunications Reform Act of 1996, Pub. L. No. 104-104, § 551(d), 110 Stat. 139-42 (codified at 47 U.S.C. § 303 (1996)).

263. See discussion *infra* Part IV.

With the December 19, 1996 announcement of the Parental Guidance System for rating television programs, a new era has begun. The six different categories for rating television programs, for the first time, gives parents the ability to turn off the television before an inappropriate television show begins.²⁶⁴ While not the perfect ratings system, the Parental Guidance System should be allowed to operate for a period of twelve months to determine its effectiveness.

A more workable proposal, however, might be for the United States to test a ratings system similar to that of Canada, which has had much success.²⁶⁵ A ratings system should do more than just give a letter grade to a show in order for the V-Chip to be effective in informing a parent of which shows contain unnecessary violence. A multi-scale rating system, modeled partially after the Canadian ratings scale, should be developed. This ratings scale will focus on the following four ratings: a movie-like system, language, sexual content, and storyline. In addition, the American rating system should factor in the time and day that the program is to be broadcast. No matter how the ratings are implemented there will most likely be cries of abuse, but the most important factor in the entire process is to ensure that parents gain greater control in what their children view so that fewer children will have the opportunity to view violence on television.

The Parental Guidance System's monitoring board, as announced by Mr. Jack Valenti, on December 19, 1996,²⁶⁶ is not the best route for rating a program. A different type of monitoring board should be formed in which ratings will be applied to the individual programs. The person or persons who rate an individual television show must be removed from the program to effectively and honestly rate the show. To allow a television show's own producer to rate the program is ridiculously improper. With fixed criteria, a five point scale for the movie-like ratings, language content, sexual content, and storyline, should result in a fair and accurate rating system.²⁶⁷ In this five point scale, a "one" will be least accepta-

264. Farhi, *TV Industry*, *supra* note 231, at C1.

265. Truehart, *supra* note 72, at A32.

266. Farhi, *TV Industry*, *supra* note 231, at C1.

267. The movie rating system (MPAA) itself is already on a five point scale: G, PG, PG-13, R, and NC-17. UCLA REPORT, *supra* note 6, at 76. As President

ble and a "five" will be the most acceptable for children to watch. Using the UCLA Report, a show such as NBC's *Law and Order* would rank closer to rating of "five," while a show such as CBS' *Walker, Texas Ranger* would score closer to a "one."²⁶⁸ Moreover, a program at eight o'clock on a Friday night when children are at home should have a rating closer to a "five" than would a program at ten o'clock on a Wednesday evening. While, initially, not all television shows will have this five-point ratings system, gradually all newly produced shows will be required to adopt this system.

Before the Parental Guidance System was introduced on December 19, 1996, it would have been wise for the advisory committee to have tested the new ratings system in various American households. This testing would have given parents the necessary time to respond to the system before it was officially announced in order to determine its strengths and weaknesses, and to eliminate any problems in the system. Ideally, only after a successful testing period should the Parental Guidance System have been introduced. Yet, this was not done; therefore the System should be given a year test-run before its critics call for removal is heeded.

The actual V-Chip will be an effective device upon its implementation in all televisions beginning sometime after 1997, but it must be used in the proper manner for parents to have the alternatives and choices that will make it constitutionally allowable, and not seen solely as a censorship device. Used in conjunction with the new voluntary ratings system, whether it be the Parental Guidance System or some variation of it, the V-Chip puts the power of blocking a program, not in the hands of the government, but in the hands of the parent.²⁶⁹ It is the parent who has the final say as to which programs a child watches.

Clinton stated when he signed the 1996 Telecommunications Reform Act into law, "[t]o make the V-Chip as effective as it can be, I have challenged the broadcast industries to do what the movies have done, to rate programming in a way that will help the parents to make these decisions." BNA DAILY REP. FOR EX-ECs., *President Signs Telecom Reform Measure*, Feb. 9, 1996, at A27.

268. UCLA REPORT, *supra* note 6, at 40, 60.

269. Telecommunications Reform Act of 1996 § 551(a), 110 Stat. at 139-42 (codified at 47 U.S.C. § 303 (1996)).

VI. CONCLUSION

The V-Chip is not about censorship; it is about parental choice; it is about a parent's choice to decide what their child watches; it is about a parent's choice to limit the amount of violence seen by their children on television. The V-Chip is not the answer to all of society's ills, nor is it the only means of reducing violence on television, but it is a step in the right direction.

Parents are not always home to simply turn off the television set, yet the V-Chip will enable them to have a "remote control." The V-Chip represents an elaborate off-switch to reduce the incredible levels of violence broadcast on television.

The opponents of the V-Chip, most of whom are either part of the television industry or television manufacturing industry, argue that the V-Chip censors one's First Amendment right to watch whatever one wishes. If the V-Chip legislation outlawed all television programs with violence, there would be a very real First Amendment concern. But the V-Chip does nothing close to this. The government is not turning off violent programs, but rather it will be offering parents information enabling them to choose whether or not to turn violence off.

American children have seen enough blood and gore on television; it is time for parents to have the choice, the option, of limiting that violence.

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