

THE KNOCK-DOWN, DRAG-OUT BATTLE OVER GOVERNMENT REGULATION OF TELEVISION VIOLENCE

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One night during the "Weekend Update" segment of "Saturday Night Live," Gilda Radner, as the well-meaning but somewhat misguided commentator "Emily Litella," lashed out against those opposing "violins on television." After a few minutes of her tirade on the beauty of violin music and how it adds to society, "anchorman" Chevy Chase interrupted to explain that the subject was "violence on television" not "violins." She paused and looked sheepishly into the camera, "never mind."

Various governmental bodies have considered regulating violence on television for nearly forty years. Like Emily Litella, most are well-meaning, but somewhat misguided. Their efforts seem to be focused on the most visible aspect of the violence problem rather than the core issues, such as poverty, drugs, and inadequate supervision of children.

The catalyst for the most recent movement came in the late 1980s, when Senator Paul Simon of Illinois turned on the television set in a hotel room and unintentionally viewed a portion of "The Texas Chain Saw Massacre."² Aghast at the carnage he saw on the screen, Senator Simon began a push toward regulating violence on television. Various anti-violence bills have since been introduced in Congress

resulting in several hearings on the matter. At least two members of Congress have proposed requiring television set manufacturers to install a circuit that potentially could block out all violent programming.³

The anti-violence crusade has since spread to other federal governmental bodies. For example, the National Telecommunications and Information Administration ("NTIA") has begun an inquiry into "the role of telecommunications in crimes of hate and violent acts against ethnic, religious, and racial minorities."⁴

Government regulation of the violence portrayed on television is a tricky business, to say the least. The federal government would be making decisions as to the amount and types of violent acts that could be broadcast on television, as well as the time of day such acts could be aired. Another challenge facing the government is the constitutional double-standard involving the First Amendment rights of broadcasters and cable operators. Regulation may violate the rights of cable programmers, whose speech has been granted broader constitutional protection than that of broadcasters.⁵ Infringing on the rights of cable programmers may destroy the effectiveness of violence regulation, thus raising other legal challenges to the

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² See Steven W. Colford, *TV Ads to Get Violence Exam*, *ADVERTISING AGE*, July 4, 1994, at 40.

³ See H.R. 2888, 103d Cong., 1st Sess. (1993); S. 1811, 103d Cong., 2d Sess. (1994).

⁴ Role of Telecommunications in Hate Crimes, 58 Fed. Reg. 16,340 (1993).

⁵ See *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) (holding that cable operators' First Amendment rights are greater than those of broadcasters, because cable operators do not use radio frequencies). Writing for the Court, Justice Rehnquist alluded to the First Amendment rights of the various media:

Cable television partakes of some of the aspects of speech and the communication of ideas, as do the traditional en-

terprises of newspaper and book publishers, public speakers and pamphleteers. Respondent's proposed activities would seem to implicate First Amendment interests as do the activities of wireless broadcasters, which were found to fall within the ambit of the First Amendment in *Red Lion Broadcasting Co. v. FCC*, even though the free speech aspects of the wireless broadcasters' claim were found to be outweighed by the Government interests in regulating by reason of the scarcity of available frequencies.

Id. at 494-95 (citation omitted). Thus, because their transmission mode does not use radio frequencies, cable operators have an elevated First Amendment status as compared to broadcasters. However, the Court of Appeals, in the remand proceedings, noted that cable operators' rights are not as predominant as those of newspapers. See *Preferred Communications, Inc. v. City of Los Angeles*, 13 F.3d 1327, 1332 (9th Cir. 1994).

regulation of broadcast violence.

This Article explores the prospect of, and the legal issues involved in, the regulation of television violence. Part I examines the background of the issue and how the government has traditionally dealt with television violence, as well as recent congressional proposals concerning violent programming. Part II analyzes the difficulties in defining and regulating television violence in a manner that will withstand constitutional scrutiny. Part III identifies the First Amendment implications of regulation. Finally, Part IV focuses on the need to reconcile violence regulation as it applies to cable systems. This Article concludes that government regulation thus far proposed would infringe upon First Amendment rights of broadcasters and on adult viewers. This Article proposes that self-regulation is the most restrictive means by which to alleviate the problem.

I. THE "NEED" FOR REGULATION

A. Lack of a Causal Link Between Violent Programming and Violent Behavior

The changing American lifestyle has been accompanied by a new set of problems. Among them is the evolution of the American family. Once, nearly every American household had two parents. Increasingly, however, two-parent households find both parents working away from home, and more households have only one parent. As a result, children generally spend more time without parental supervision. At the same time, the youth crime rate has more than tripled. In 1965, there were 137 violent crime arrests per 100,000 youths. By 1990, the rate had risen to 430.6 violent crime arrests per 100,000 youths.⁶

Although most studies conducted on television violence link television viewing to a desensitization to-

ward violence, there is little direct evidence that viewing violence on television is a "root" cause of violent behavior.⁷ Without such a correlation, legislation singling out television violence would be Constitutionally suspect, since the government's interest in regulating such programming would be weakened. Most studies, instead, merely document the number of violent acts contained in programming and the context or manner in which violence is portrayed.⁸ For example, an annual violence profile conducted by Dr. George Gerbner merely summarizes the quantity of violence in a program, using a five-part formula: (1) the percentage of programs containing a violent occurrence; (2) twice the number of violent episodes per program; (3) twice the number of violent episodes per hour; (4) the percentage of leading characters involved in violent acts, either as perpetrators or victims; and (5) the percentage of leading characters involved in killing, either as perpetrators or victims.⁹ Gerbner's studies make no correlation between violent acts on television and violence in society.

In fact, the only study definitively linking television viewing to an increase in violent behavior did not single out violent programming as the root of the problem.¹⁰ Apparently, substantial viewing of any television programming, violent or otherwise, increases the tendency toward violent behavior, because television viewing replaces essential child developmental experiences, such as play and socialization.¹¹ A child who watches nothing but "Nightmare on Elm Street" may have no more propensity toward violence than one who spends the same amount of time viewing "Barney." Thus, the fact that aggressive behavior may be caused by television viewing in general, weakens the government's argument that regulation specifically targeted at violent programming is furthering a government inter-

⁶ See Dennis D. Embry, *Studies Link TV, Violence, USA TODAY*, July 9, 1993, at A10.

⁷ See Schlegel, *The Television Violence Act of 1990: A New Program for Government Censorship?*, 46 *FED. COM. L.J.* 187 (1993). In addition, Congress has been unable to find positive proof that television violence leads to real life violence. See *H. REP. NO. 123*, 101st Cong., 1st Sess. (1989). The House Judiciary Committee report noted that "[t]he bulk of scientific research into this area seems to indicate that there is some link between television violence and real life aggression. Though there is no universal acceptance of this conclusion — a minority of studies have reached the opposite conclusion." *Id.* at 3. The Committee also cited a 1985 study on television violence conducted by Dr. George Gerbner, which focuses more on the effect television violence has on victims of crime and less on the causal connection between television violence and aggressive behavior. "While the convergence of research indicates that exposure to violence does

occasionally incite and often desensitize [sic], our findings show that, for most viewers, television's mean and dangerous world tends to cultivate a sense of relative danger, mistrust, dependence, and — despite its supposedly 'entertaining nature' — alienation and gloom." *H. REP. NO. 101-123* at 5 (citing *Television's Mean World: Violence Profile No. 14-15*, at 10 (Sept. 1986)).

⁸ See *id.*

⁹ See Prettyman and Hook, *The Control of Media-Related Imitative Violence*, 38 *FED. COM. L.J.* 317, 323 n.17 (1987).

¹⁰ See Schlegel, *supra* note 7, at 200. A study, conducted by Dr. Brandon Canterwell, a Washington psychiatrist and epidemiologist, found that the mere introduction of television caused a doubling of violent crimes as the first children to watch television were old enough to commit crimes as adults. *Id.*

¹¹ *Id.*

est. However, since most studies do show an increase in the amount of violent acts broadcast over the airwaves, television has become the most viable target for reform.

B. Historical Background on Efforts to Control Violence on Television

Congress first examined the issue of television violence as early as 1954, and addressed the matter at least six times during the following twenty-three years.¹² In 1969 the National Commission on the Causes and Prevention of Violence reported that "a constant diet of violent behavior on television has an adverse effect on human character and attitudes."¹³ In response to this finding, the Senate Subcommittee on Communications asked the Department of Health, Education and Welfare to study the "effect of entertainment television on children's behavior."¹⁴

The study conducted by the Department of Health, Education and Welfare, as well as other studies conducted from 1972 to 1974, provided support for the view that over-exposure to television violence adversely affects society in general, and children in particular.¹⁵ In response to the aroused concerns, the Federal Communications Commission ("FCC" or "Commission") initiated meetings with top executives from NBC, ABC and CBS to encourage them to propose and adopt their own poli-

cies curbing the amount of violence on television.¹⁶ Subsequently, in 1975, the networks and the National Association of Broadcasters ("NAB") adopted the "Family Viewing Policy." Under this policy, programs broadcast during the hours of 7 p.m. and 9 p.m. were appropriate for viewing by the whole family unless the network aired a warning advising parents that the program was unsuitable for children. Less than two years later, the "Family Viewing Policy" was found to be unconstitutional and unenforceable due to antitrust violations.¹⁷

The issue of televised violence lay relatively dormant thereafter until 1988, when the House held hearings on the matter.¹⁸ During these hearings, Senator Paul Simon expressed the concerns of television executives, who feared that a coordinated effort within the industry to reduce violence might violate antitrust laws. The first real law dealing with television violence was the Television Program Improvement Act of 1990 ("1990 Act").¹⁹ This Act provided a three-year antitrust exemption for broadcasters, cable operators, and programmers so that they could develop and disseminate voluntary guidelines for reducing the "negative impact of violence in telecast material."²⁰ The antitrust exemption was deemed necessary in order to prevent a reoccurrence of the litigation that resulted in the elimination of the "Family Viewing Policy."²¹ The exemption expired on November 30, 1993,²² however, with no agree-

¹² See, e.g., SUBCOMMITTEE ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 1ST SESS., REPORT OF VIOLENCE ON TELEVISION (Comm. Print 1977); *Hearings on Violence on Television Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93d Cong., 2d Sess. (1974); *Hearings in Review of Policy Matters of Federal Communication and Inquiry into Crime and Violence on Television and a Proposed Study Thereof by the Surgeon General Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. (1969); *Hearings for the Investigation of Juvenile Delinquency in the United States Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Judiciary Comm.*, 87th Cong., 1st & 2d Sess. (1961-62); *Hearings for the Investigation of Juvenile Delinquency in the United States Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Judiciary Comm.*, 84th Cong., 1st Sess. (1955); *Hearings for the Investigation of Juvenile Delinquency in the United States Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Judiciary Comm.*, 83d Cong., 2d Sess. (1954).

¹³ *Report on the Broadcast of Violent, Indecent and Obscene Material*, 51 F.C.C.2d 418 (1975) [hereinafter 1975 FCC Report].

¹⁴ *Id.* at 418.

¹⁵ See *id.*

¹⁶ See *id.* at 419.

¹⁷ See *Writers Guild of America, West, Inc. v. FCC*, 423 F.

Supp. 1064 (C.D. Cal. 1976), *vacated and remanded sub. nom.*, *Writers Guild of America, West, Inc. v. ABC*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980). The FCC reviewed the case on remand and found no First Amendment or Administrative Procedure Act violation. *In re Matter of Primary Jurisdiction Referral of Claims Against Government Defendant Arising From the Inclusion in the NAB Television Code of the Family Viewing Policy*, 95 F.C.C.2d 700 (1983). By then, however, the Justice Department had launched an attack on the commercial aspects of the NAB Code, particularly those that limited the number of products that could be advertised in a single commercial. In *United States v. NAB*, 553 F. Supp. 621 (D.D.C. 1982), the advertising restriction was held to be in violation of the antitrust laws. Seven days following this decision, the NAB canceled the Code's advertising provisions.

¹⁸ *Television Violence Act of 1988: Hearings on H.R. 3848 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988).

¹⁹ Pub. L. No. 101-650, 104 Stat. 5127 (codified at 47 U.S.C. § 303(c) (Supp. IV 1992)).

²⁰ 47 U.S.C. § 303(c).

²¹ See *supra* note 17.

²² See 47 U.S.C. § 303(d) (providing that the exemption only applies to agreements made during the three year period beginning Dec. 1, 1990).

ment and, in fact, little discussion within the industry.

C. Congressional Response

Largely due to the lack of activity under the 1990 Act, and the public perception of television's effect on violence,²³ the 103d Congress saw a flurry of legislative proposals addressing violence on television. No fewer than ten bills and two resolutions concerning the issue were introduced. One proposal, Senate Bill 1383, would create a "safe harbor" by prohibiting the production or distribution of violent programs to the public during hours when children are reasonably likely to be a substantial portion of the audience.²⁴ Because there is no clear message as to whom would be covered by the legislation, this bill seemingly could be applicable not only to broadcasters and cable operators, but also to satellite distributors and other programmers who distribute their wares by FCC-regulated transmission systems. The Bill specifically exempts premium and pay-per-view cable programming, as well as documentaries, educational programs, and sporting events, which do not contain the "negative influences of violent video programming."²⁵

Two fairly similar proposals require the FCC to conduct a rulemaking to establish violence standards for all programming, with the possible exception of news, sports, documentaries and educational programming. The House version, House Bill 2837,²⁶ merely requires the FCC to establish standards by which broadcasters and cable operators would air less violent programming. Senate Bill 943,²⁷ however, requires broadcasters to air warnings before and during programs that "may contain violence, or unsafe gun practices, and may adversely affect the mental or physical health, or both, of a child"²⁸ Criminal penalties could be imposed on the broadcaster, the cable operator, or the

programmer "if the events portrayed in the programming occur in real life."²⁹ Thus, the legislation would place a duty of care on the media, which the courts have refused to recognize.³⁰

Senate Bill 973³¹ and House Bill 2159³² would require the FCC to issue report cards that rate programs for violent content and publish quarterly reports of its findings. The Commission would not only evaluate and rate television programs as to the extent of the violent content, but also would rate advertisers as to their sponsorship of programs containing a high degree of violence. The two proposals assert that the ratings would be used to empower parents and the community to make programming decisions themselves.³³

House Bill 2756 would require the FCC to establish a toll-free number by which the public could voice complaints about violent programming.³⁴ The Commission would compile the information and pass along to each station any complaints, suggestions, or comments made about its programming. In addition, the FCC would publish a quarterly summary in the Federal Register, listing the complaints and identifying the fifty programs receiving the most complaints, along with the production company and principle advertisers of the program.³⁵ Moreover, the Commission would report annually to Congress, evaluating whether, consistent with its public interest obligations, the broadcasting industry responded to the complaints.³⁶

House Bill 2888³⁷ and Senate Bill 1811³⁸ address the violence issue from the technical side by requiring that all television sets manufactured in or imported into the United States be capable of blocking violent programming. Programs would be coded with electronic signals based on a standardized violence rating system. Devices within the sets would read the coded signals and block any programming the viewer believes to be violent.

None of these proposals have progressed through

²³ For example, nearly 80% of people surveyed in a December 1993 *Los Angeles Times* poll saw a direct link between television violence and real life violence. See Browning, *Push-Button Violence*, NATIONAL JOURNAL, Feb. 26, 1994, at 458.

²⁴ S. 1383, 103d Cong., 1st Sess. (1993).

²⁵ *Id.* at 2-3.

²⁶ H.R. 2837, 103d Cong., 1st Sess. (1993).

²⁷ S. 943, 103d Cong., 1st Sess. (1993).

²⁸ *Id.* at 4. The term "unsafe gun practices" is not defined, and therefore would be left to the discretion of the Commission.

²⁹ *Id.*

³⁰ See *Zamora v. CBS*, 480 F. Supp. 199 (S.D. Fla. 1979)(rejecting a mandatory duty of care on broadcasters for airing violent programming).

³¹ S. 973, 103d Cong., 1st Sess. (1993).

³² H.R. 2159, 103d Cong., 1st Sess. (1993).

³³ There is no indication as to how the dissemination of the rating of advertisers' program sponsorship would help families and communities decide which programs to watch. Obviously, the purpose is to apply pressure on the advertisers who sponsor programs deemed to be the most violent.

³⁴ H.R. 2756, 103d Cong., 1st Sess. (1993).

³⁵ *Id.* at 3-4.

³⁶ *Id.* at 5. No such evaluation is required for the cable industry because, unlike broadcasters, cable system operators and programmers are not required to program in the public interest.

³⁷ H.R. 2888, 103d Cong., 1st Sess. (1993).

³⁸ S. 1811, 103d Cong., 2d Sess. (1994).

Congress, although at the time this Article was published, the "safe harbor" bill (S. 1383) and the "violence report card" measure (S. 973) were being championed for inclusion in the authorization legislation for the NTIA.³⁹ If no action is taken, these and other ideas likely will resurface during the 104th Congress.⁴⁰

II. THE DIFFICULTY IN DEFINING VIOLENCE

One of the major problems in government regulation of violence is in the definition itself. In defining violence, an unlimited number of issues must be answered, including: whether the definition includes all violence or just "gratuitous" violence (violence that is not essential to the development of a plot or character); physical actions or verbal and psychological abuse; and violence in animated cartoons, or should the definition only extend to acts committed by living beings. Other issues that must be addressed include: whether the definition of violence incorporates comedic violence such as slapstick; violent depictions in nature films, such as a cheetah chasing, catching and devouring a gazelle; and physical sporting events, such as boxing, kick-boxing, football and hockey, or quasi-sporting events, such as professional wrestling.

There is little consensus as to exactly what constitutes violence. Definitions used in academic studies generally involve the use or threat of physical force against a person. Some definitions include psychological harm, as well. The Center for Media and Public Affairs recently conducted a study⁴¹ defining violence as "deliberate acts of physical force by people against people or property."⁴² The definition of violence, also has been defined to include discussions about violent acts.⁴³

Congress also is unable to pin down the types of activities it would have the FCC regulate. For example, during a Congressional hearing on television violence in October of 1993, Senator Ernest Hollings chided CBS for airing a segment of the situation comedy "Love & War" featuring a satirical barroom brawl.⁴⁴ Senator Hollings said the scene was an example of the excessive violence plaguing television.⁴⁵ Senator Conrad Burns, on the other hand, saw absolutely nothing wrong with the scene.⁴⁶

Moreover, most proposed television violence legislation fails to define the very activity it seeks to regulate. Only two of the proposals discussed above provide the FCC with guidance in defining violence. Senate Bill 943 and House Bill 2837 define violence as:

any action that has as an element the use or threatened use of physical force against the person of another, or against one's self, with intent to cause bodily harm to such person or one's self. For purposes of this Act, an action may involve violence regardless of whether or not such action or threat of action occurs in a realistic or serious context or in a humorous or cartoon type context.⁴⁷

Similarly, the House and Senate resolutions define violence as the use or threat of physical force against another person or one's self.⁴⁸ Exceptions, however, are made for "idle threats, verbal abuse, and gestures without credible violent consequences."⁴⁹ Both resolutions define "dramatized violence" as "the dramatized portrayal of killings, rapes, maiming, beatings . . . or any other acts of violence that when viewed by the average person, would be considered excessive or inappropriate for minors."⁵⁰ In defining violence, the bulk of legislators share the view of Senator Simon, who has stated, "I'm not the person to define it, but there are people who can."⁵¹ As is often the case, Congress likely will defer the issue to the "expert

³⁹ Jenny Hontz, *Lawmakers Pushing New Violence Bill*, ELECTRONIC MEDIA, Sept. 12, 1994, at 1.

⁴⁰ Two other bills also addressed the violence issue. One bill requires television stations and cable operators to maintain, for one year, copies of commercials and program promotions about which they have received complaints due to violent programming. S. 1556, 103d Cong., 1st Sess. (1993). The other bill establishes a presidential commission to study television violence and to issue a report within one year. H.R. 2609, 103d Cong., 1st Sess. (1993).

⁴¹ See Prettyman and Hook, *supra* note 9, at 330 n.55.

⁴² See Ellen Edwards, *How the Study Was Conducted*, WASH. POST, Aug. 5, 1994, at C4 (citing Center for Media and Public Affairs, *TV Violence - 1992 vs. 1994*, Aug. 8, 1994). The Center monitored six Washington stations and four cable networks over an 18 hour period. The study counted a total of 2,605 scenes of violence, of which 1,411 were defined as contain-

ing "serious violence." *Id.*

⁴³ Graham, *What Is Violent? Definitions Defy Logic*, USA TODAY, Feb. 17, 1994, at D3.

⁴⁴ See *One Man's Brawl Is Another's Farce*, BROADCASTING & CABLE, Oct. 25, 1993, at 14.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ S. 943, 103d Cong., 1st Sess. 1 (1993); H.R. 2837, 103d Cong., 1st Sess. 2 (1993).

⁴⁸ See S. Res. 122, 103d Cong., 1st Sess. 3 (1993); H.R. Res. 202, 103d Cong., 1st Sess. 3 (1993).

⁴⁹ See *supra* note 48.

⁵⁰ S. Res. 122, *supra* note 48 at 3-4; H.R. Res. 202, *supra* note 48 at 3-4.

⁵¹ *Senator Simon's Message*, BROADCASTING & CABLE, Aug. 9, 1993, at 25, 26.

agency": the FCC.

A. The FCC's Role in Defining Violence

The Commission also faces similar obstacles in defining violence. First, under the Administrative Procedure Act ("APA"),⁵² courts grant less deference to administrative agency decisions than to Congress in enacting laws. However, where Congress does not provide a specific definition, an agency regulation will generally withstand scrutiny if it is "a reasonable choice within a gap left open by Congress," where the agency has compiled an adequate record on the issue and the decision is supported, or at least supportable, by the record.⁵³ Where an agency chooses among several options, courts refrain from substituting their judgment for the agency's, unless the agency's decision is not supported by the record.⁵⁴

Developing and implementing a violence regulation likely will be an extraordinarily complex and time-consuming task for the FCC. The agency likely will receive voluminous comments from numerous parties on all sides of the issue. Many, if not all of the definitions discussed above likely will be recommended by commenting parties. Most of the congressional initiatives discussed above give the FCC only six months in which to develop regulations. If Congress decides to force the FCC into regulating television violence, the time constraints must be relaxed.

B. First Amendment Constraints on the FCC

In regulating television violence, the FCC also must contend with section 326 of the Communications Act, which categorically denies the FCC authority to censor broadcast programming and prohibits the FCC from issuing any "regulation or condition" that interferes with broadcasters' right of free speech.⁵⁵ Section 326 generally means that the Commission's power to regulate broadcasting must be reconciled with broadcasters' First Amendment rights. Thus, any FCC-developed definition of violence must comport with the Constitutional boundaries concerning freedom of speech.⁵⁶

The FCC has recognized the difficulties concomitant with government-imposed regulation of violent content. In the 1975 Report, the Commission noted the inherent difficulties in defining and regulating violence:

Regulatory action to limit violent and sexually-oriented programming which is neither obscene nor indecent is less desirable than effective self-regulation, since government-imposed limitations raise sensitive First Amendment problems. . . . Government rules could create the risk of improper governmental interference in sensitive, subjective decisions about programming, could tend to freeze present standards and could also discourage creative developments in the medium.⁵⁷

Developing a violence definition capable of withstanding judicial scrutiny will not be an easy task for the FCC because it is new territory for the agency. There are few sources to which the Commission

⁵² 5 U.S.C. §§ 500-576 (1988).

⁵³ See *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984) (upholding an Environmental Protection Agency interpretation of the term "stationary source" under the Clean Air Act, although Congress had already defined the term).

⁵⁴ See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978) (ruling that the appellate court should review whether the Nuclear Regulatory Commission's decision is supportable by the administrative record "and not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good").

⁵⁵ 47 U.S.C. § 326 (1988).

⁵⁶ An analogy can be drawn between the dilemma in defining "violence" on television and the problem with the violence-related pornography ordinance struck down in *American Booksellers Association v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). The City of Indianapolis had defined pornography as the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

(1) women are presented as sexual objects who enjoy pain

or humiliation; or (2) women are presented as sexual objects who experience sexual pleasure in being raped; or (3) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or (4) women are presented as being penetrated by objects or animals; or (5) women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or (6) women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display. *Id.* at 324. The purpose of the ordinance was to "alter the socialization of men and women rather than to vindicate community standards of offensiveness." *Id.* at 325. The ordinance was touted as a means of changing the male view of women as sex objects, "a tendency that leads to both unacceptable attitudes and discrimination in the workplace and violence away from it." *Id.* The purpose behind most violence legislation is to change society's view that violence is acceptable social behavior, and *American Booksellers* supports this view. See, e.g., S. 1383, *supra* note 4.

⁵⁷ 1975 FCC Report, *supra* note 13, at 420.

could turn. The courts have not yet addressed the issue of regulating violence on television, thus, there is no judicial precedent upon which the FCC can rely. The Commission could choose to adopt one of the definitions considered by Congress, but whether any such definitions could pass Constitutional muster will be problematic, at best.

III. REGULATING VIOLENCE - FIRST AMENDMENT IMPLICATIONS

Violence in television programming is a form of speech. Although violence itself is behavior, it is often used in the context of conveying a story line, developing a character or making a social, moral, or political statement. A ban on all violence would sweep with too broad a brush.⁶⁸ Regulating violence will deeply embroil the FCC in the morass of examining each program's content, a path the FCC has avoided since the mid-1980s.⁶⁹ The FCC likely will be concerned with "gratuitous" violence, that is, violence that could be construed as added to the program merely for the shock value or as an enticement for viewers to watch the program. However, determining what is "gratuitous" violence is an enormously difficult task. Just as one person's nectar is another's poison, what may be "gratuitous" to one person may be viewed by another as an integral part of the plot line or the development of a character.

A. The Indecency Standard

Some advocates of violence legislation believe violence can be regulated in a similar manner as indecency.⁶⁰ Regulating the violent content of programming, however, may not be as simple as some have surmised. Nearly twenty years ago, the Commission addressed the subjects of violence and indecency in the same proceeding.⁶¹ At that time, the FCC decided it could regulate indecency, but when it came to regulating violence, the Commission deferred to industry self-regulation stating that "the adoption of rules might involve the government too deeply in programming content, raising serious constitutional questions, and judgments concerning the suitability of particular types of programs for children are highly subjective."⁶²

In the realm of broadcasting, indecency was initially defined as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience."⁶³ Initially, however, FCC enforcement against indecency was limited to the repeated use of any of the seven "filthy words" used by George Carlin in a monologue that was broadcast over the radio during the afternoon hours.⁶⁴ In *FCC v. Pacifica Foundation*,⁶⁵ the Supreme Court found the "filthy words" to be "patently" offensive, and thereby held the Commission's enforcement against the use of these seven words constitutional.⁶⁶

⁶⁸ A 24-hour ban on indecency was held unconstitutional in *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991).

⁶⁹ In 1983, for example, the FCC eliminated regulations dealing with such areas as alcoholic beverage advertising, repetitious broadcasts of musical recordings, call-in polls on radio and television stations, the use of sirens in commercials, broadcasts of astrology material, and the presentation of off-network programs and feature films. See *In re Elimination of Unnecessary Broadcast Regulation, Memorandum Opinion and Order*, 54 R.R.2d (P&F) 1043 (1983). The FCC deleted restrictions on the use of horse race information in 1984. See *In re Elimination of Unnecessary Broadcast Regulation, Report and Order*, 56 R.R.2d (P&F) 976 (1984).

⁶⁰ See McAvoy and Coe, *TV Rocked by Reno Ultimatum*, BROADCASTING & CABLE, Oct. 25, 1993, at 6, 14.

⁶¹ See 1975 FCC Report, *supra* note 13. This proceeding concerned the "family viewing policy." See *supra* note 17 and accompanying text.

⁶² 1975 FCC Report, *supra* note 13, at 419. Then Chairman Richard Wiley noted the problems inherent in government regulation of violent programming:

Short of an absolute ban on all forms of "violence" —

including even slapstick comedy — the question of what is appropriate for family viewing necessarily must be judged in highly subjective terms. Under a rigid objective test, I suppose that it would be argued that many traditional children's films should be banned because they include some element of violence — for example, episodes in *Peter Pan* when Captain Hook is eaten by a crocodile or in *Snow White* where the young heroine is poisoned by the witch. Such an extreme result simply does not make sense and would not be acceptable to the American people. Indeed, the lack of an acceptable objective standard is one of the best reasons why — the Constitution aside — I feel that self-regulation is to be preferred over the adoption of inflexible governmental rules.

Id. at n.5 (citing a Feb. 10, 1975, speech to the National Association of Television Program Executives in Atlanta, Georgia)(on file with *CommLaw Conspectus*).

⁶³ *In re Citizens Complaint Against Pacifica Foundation Station WBAI, Memorandum Opinion and Order*, 56 F.C.C.2d 94, para. 11 (1975).

⁶⁴ *Id.*

⁶⁵ 438 U.S. 726 (1978).

⁶⁶ *Id.* at 747-50.

1. Channeling Indecency: A Play in Three ACTs

In regulating indecency in broadcasting, the FCC developed a "nuisance" theory.⁶⁷ The Commission likened the patently offensive nature of indecent language to a nuisance, which need not be prohibited, only channeled.⁶⁸ "The law of nuisance does not say, for example, that no one shall maintain a pigsty; it simply says that no one shall maintain a pigsty in an inappropriate place, such as a residential neighborhood."⁶⁹ The Commission determined that the "pigsty" of indecency should be channeled to those times when children are not likely to be in the audience.⁷⁰ The Commission, however, had problems justifying a narrow channeling of indecent programming. Up until 1987, the Commission had allowed the airing of programs containing indecent language between the hours of 10:00 p.m. and 6:00 a.m., thus creating a so-called "safe harbor" for indecent programming.⁷¹ In 1987, the Commission narrowed the safe harbor period to midnight to 6:00 a.m., and broadened its enforcement to include all material encompassed by the indecency definition.⁷²

This narrowing of the safe harbor was struck down in 1988, in *Action for Children's Television v. FCC* ("ACT P"),⁷³ on the grounds that it was arbitrary and capricious. The court reasoned that channeling hours is a content-based regulation of speech that can be sustained only if the government can show that the regulation is narrowly tailored to advance the government's compelling interest.⁷⁴ Although the court found that the protection of children is a compelling interest, the court lacked the evidence it needed to justify the ban. Later that year, Congress directed the FCC to enforce a twenty-four hour ban on indecency as part of the Commission's reauthorization legislation.⁷⁵ After an FCC rulemaking proceeding executing Congress's mandate, the Commission found that there is a reasonable risk

that children are in the audience at all hours.⁷⁶ In *Action for Children's Television v. FCC* ("ACT IP"),⁷⁷ the Court overturned the twenty-four hour ban.⁷⁸ The *ACT II* court interpreted *ACT I* as allowing a safe harbor for indecent programming; however, a mandate by Congress did not justify a total ban on indecent programming, nor could it withstand constitutional scrutiny.⁷⁹ The case was again remanded to the FCC to address, among other things, what constitutes a "reasonable risk" that children might be in the audience.⁸⁰

Congress, however, intervened once again. In the Public Telecommunications Act of 1992, Congress directed the FCC to establish a midnight to 6:00 a.m. safe harbor for indecency.⁸¹ Noncommercial stations that sign off by midnight would have a safe harbor beginning at 10:00 p.m. Again, in *Action For Children's Television v. FCC* ("ACT IIP") the FCC conducted a rulemaking and the new rules were vacated again by the court.⁸² Among its arguments, the court opined that the FCC's ban impeded on the First Amendment rights of adults who were in the audience during those hours. The court again concluded that the FCC had not tailored its 6:00 a.m. to midnight ban on constitutionally protected speech narrowly enough so as to pass Constitutional muster.⁸³

2. Channeling Violence - First Amendment Implications

Constitutionally permitted channeling of programming containing violence might not be possible. Unlike indecency, violence cannot categorically be considered "patently offensive." As discussed above, most studies have not faulted violence *per se*, but rather, the amount and types of violence. That is why "excessive" and "gratuitous" violence are most

⁶⁷ Memorandum Opinion and Order, *supra* note 63, para. 11.

⁶⁸ Channeling is the practice of ensuring that programming that is inappropriate for children is aired only during hours when children are less likely to be in the audience.

⁶⁹ Memorandum Opinion and Order, *supra* note 63, para. 11.

⁷⁰ *Id.*

⁷¹ See *In re Infinity Broadcasting Corp. of Pennsylvania*, Memorandum Opinion and Order, 3 FCC Rcd. 930 (1987).

⁷² *Id.* at para. 27 n.47.

⁷³ 852 F.2d 1332 (D.C. Cir. 1988).

⁷⁴ *Id.* at 1343.

⁷⁵ Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988).

⁷⁶ See *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, Report, 5 FCC Rcd. 5297, para

38 (1990).

⁷⁷ 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992).

⁷⁸ *Id.* at 1509.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Pub. L. No. 102-356, 106 Stat. 949 (1992).

⁸² 11 F.3d 170 (D.C. Cir. 1993), *vacated and reh'g en banc granted*, 15 F.3d 186 (D.C. Cir. 1994). The *ACT III* court stayed the Commission's latest safe harbor rules pending appeal, but recognized that the Commission may enforce its indecency rules only on programming that airs between 6:00 a.m. and 8:00 p.m. See *Sagittarius Broadcasting Corp.*, 8 FCC Rcd. 3600, para. 3 n.5 (1993).

⁸³ *ACT III*, 11 F.3d at 183.

often the subject of regulatory efforts. Channeling "excessive" violence alone necessitates a quantification standard, which in turn suggests a standard that ignores context. Channeling "gratuitous" violence alone could allow unlimited violence to be shown at times when children are present so long as it is necessary to the plot or character development. A standard that channels violent programming based on both the excessiveness and gratuitousness of the violence could either cut too narrow, and thus be ineffective, or sweep too broadly, stifling speech and creativity.

The court in the *ACT* cases applied a strict scrutiny analysis to indecency regulation.⁸⁴ Under this standard, the government generally must show it is using the least restrictive means possible to further a compelling state interest. The same level of scrutiny would likely be applied to an FCC violence regulation, because violence would likely have greater constitutional protection than indecency.⁸⁵ Thus, any FCC violence regulation would be required to further a compelling state interest in the least restrictive means possible.

Obviously, the government has a compelling interest in abating violent behavior in society and in pro-

tecting children. Violent crime among youths is continuously increasing. However, as yet, there is no conclusive evidence definitively linking violence on television to real life violent crimes. Instead, the root causes seem to be elements of an individual's environment: poverty, lack of education, the absence of strong parental guidance, and the violence surrounding drug and gang wars. Although the media has been cited for influencing isolated incidents of what can be described as foolish behavior,⁸⁶ there is no proof that violent behavior generally can be attributed to violent depictions on television.

In fact, courts have refused to accept a causal link between televised programming and real-life antisocial behavior. For example, in *Zamora v. CBS*,⁸⁷ the plaintiff, a fifteen year-old who had been convicted of killing his neighbor, contended that he had "become involuntarily addicted to and completely subliminally intoxicated by the extensive viewing of television violence" contained in programming aired by three broadcasting companies.⁸⁸ The *Zamora* court, however, rejected the plaintiff's argument, noting the First Amendment problems inherent in imposing civil liability on broadcasters who air violent programming.⁸⁹

⁸⁴ See *ACT II*, 932 F.2d at 1509; *ACT I*, 832 F.2d at 1342.

⁸⁵ The government could argue that it is regulating the effects of television violence, and not violence itself. Such a violence regulation arguably could then be examined under the intermediate scrutiny test of *United States v. O'Brien*, 391 U.S. 367 (1968). The *O'Brien* standard requires the government to show that the regulation in question is within the Constitutional power of the government, is advancing a substantial state interest, the government interest is unrelated to the suppression of free speech, and the incidental restriction on speech is no greater than essential to further the interest. *Id.* at 377. However, in order for this argument to succeed, a direct causal link must be established between the increase in real life violence (or even violent crime) and violence on television. See *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986) (upholding a regulation limiting the location of adult theaters in the city as a means of curbing the "secondary effects" such theaters have on the community).

⁸⁶ Several recent incidents have drawn considerable media attention. A fatal fire set by a child was blamed on the alleged influence of an episode of the cable cartoon, "Beavis and Butt-head." See *Can TV Violence Be Curbed?*, *NEWSWEEK*, Nov. 1, 1993, at 96-97. Two teenagers were killed while lying on the center line of a busy highway. The movie, "The Program," contained a similar scene that producers deleted from the film subsequent to the incident. *Id.* A woman in France filed suit after her son was killed while making a homemade bomb, which he allegedly learned to make from watching an episode of the American television series, "MacGyver." See Marlise Simons, *Blaming TV for Son's Death, Frenchwoman Sues*, *N.Y. TIMES*,

Aug. 30, 1993, at A5.

Prettyman and Hook, *supra* note 9, at 331-32 n.55, note several cases of violent criminal behavior that were imitative of news reports concerning violent incidents. For example, after a 1982 incident where Tylenol laced with cyanide killed seven people, over 300 "copycat" cases of drug tampering occurred within weeks. *Id.* In addition, a twelve-year-old boy sexually assaulted a girl on a pool table, apparently after hearing news coverage about a similar incident. *Id.* However, none of the incidents were actually broadcast — they were merely reported during newscasts. One violent incident, however, that may be attributable to television, involved the television movie, "The Burning Bed," a dramatization of the true story of a woman who doused her husband's bed with gasoline and set it afire while he slept. Later, a man who had watched the program allegedly set fire to his estranged wife while she was in bed. *Id.* The argument can be made, of course, that millions of people who viewed the program did *not* torch their spouses.

⁸⁷ 480 F. Supp. 199 (S.D. Fla. 1979).

⁸⁸ *Id.* at 200.

⁸⁹ *Id.* The court stated:

[T]he plaintiffs here seek, in fact, some kind of pervasive judicial restriction upon the three defendants incident to a determination of the violation of a heretofore undefined duty. . . . The point here, of course, is that improper judicial limitation of first amendment rights is as offensive as unwarranted legislative incursion into that area.

Id. at 204 (citing *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

B. Viewing Only That Which is Fit for Children

The state interest must be limited to the protection of children in a sufficiently narrow fashion so as to avoid infringing the rights of adults to view violent programming. This view is embodied in cases dating back to *Butler v. Michigan*.⁹⁰ *Butler* was charged with violating a state obscenity law by selling a book described as "containing obscene, immoral, lewd, lascivious language, or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth."⁹¹ In overturning the conviction, Justice Frankfurter noted that "[w]e have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children."⁹² The Court found that the statute in question infringed upon the First Amendment rights of adults.⁹³

The *ACT* cases carry the same message for FCC channeling of indecency. In *ACT I*, the circuit court found that "in view of the curtailment of broadcaster freedom and adult listener choice that channeling entails, the Commission failed to consider fairly and fully what time lines should be drawn."⁹⁴ The *ACT II* court alluded to the same principle, citing an earlier FCC finding that the Commission could not interfere with adults' access to indecent programming.⁹⁵ Moreover, the court in *ACT III* suggested that the Commission find a time when adults are in the audience and the risk that children are in the audience is low.⁹⁶ Such a view is easily transferable to depictions of violence. Adults who wish to view violent programming should be able to do so.

⁹⁰ 352 U.S. 380 (1957) (addressing the issue of a state's right to ban obscene material from the whole population where the material was found to be obscene only to children).

⁹¹ *Id.* at 381.

⁹² *Id.* at 383.

⁹³ *Id.* at 384.

⁹⁴ *ACT I*, 852 F.2d at 1341.

⁹⁵ *ACT II*, 932 F.2d at 1509.

⁹⁶ *Id.*

⁹⁷ See *Preferred Communications*, 476 U.S. 488.

⁹⁸ See *Turner Broadcasting System v. FCC*, 114 S. Ct. 2445 (1994) (vacating lower court which affirmed "must carry" provisions of the Cable Consumer Protection and Competition Act of 1992, and remanding to District Court for a more complete record).

⁹⁹ See *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969) (ruling that the Fairness Doctrine, which required broadcasters to air diverse viewpoints, was not a violation of broadcasters' First Amendment rights due to the scarcity of the electromagnetic spectrum); see also *Turner*, 114 S.Ct. at 4651-52.

IV. CABLE VS. BROADCAST: RECONCILING FIRST AMENDMENT RIGHTS

The heightened First Amendment rights of cable programmers presents another obstacle to a workable violence regulation. Cable operators have been granted a higher First Amendment status than broadcasters.⁹⁷ While the monopoly status of cable operators has been justified as a means of regulating their business practices,⁹⁸ the courts have rejected a scarcity rationale, which has shackled broadcasters with content regulations for a quarter of a century.⁹⁹

Except for commercial speech restrictions,¹⁰⁰ federal content regulations do not apply to cable programming. The FCC has recognized that indecency may be shown on cable and other non-broadcast distribution systems.¹⁰¹ In addition, the FCC has refused to impose other content-based regulations on cable, such as requiring cable system operators to provide access to their channels by candidates for federal office.¹⁰²

Unless a violence regulation addresses the cable issue, it will be ineffective. Many cable and satellite-delivered services, such as HBO and Showtime, provide unedited movies. Many of the programs offered are action-adventure and horror movies which contain much violence, often far more than the programming contained on broadcast stations.¹⁰³ While most of the programs contain warnings, some of the regulatory efforts have been spurred by the view that warnings are ineffective.¹⁰⁴ Thus, violence regulation applicable only to broadcasters does little to alleviate the perceived problem.

The so-called "nuisance" theory used to justify regulating broadcast speech is not as compelling for

¹⁰⁰ See, e.g., 18 U.S.C. §§ 1304-1307 (restricting lottery advertising); 15 U.S.C. §§ 1331-1340, 4402 (prohibiting advertising of certain tobacco products); Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (1990) (codified at 47 U.S.C. § 303a) (Supp. IV 1992) (restricting the amount of advertising contained in children's programming).

¹⁰¹ See *In re Enforcement of Prohibitions Against Broadcast Indecency* in 18 U.S.C. § 1464, *Report*, 5 FCC Rcd. 5297, para. 84 (1990).

¹⁰² *In re Codification of the Commission's Political Programming Policies*, *Report and Order*, 7 FCC Rcd. 678, para. 6 n.11 (1991).

¹⁰³ It is surprising, then, that a bill which is designed to prohibit violent video programming during the hours when children may be in the audience should exempt premium and pay-per-view cable programming from its regulation. See S. 1383, *supra* note 24.

¹⁰⁴ See S. 1811, 103d Cong., 2d Sess. (1994); S. 1383, 103d Cong., 1st Sess. (1993).

cable regulation.¹⁰⁵ Unlike broadcasting, cable is not pervasive in the home. It must be "invited" into the home, through subscription to the service. In addition, with the variety of packaging arrangements, called "tiers," offered by cable operators, parents may have greater control over the programs that come into the home. Unwanted programming choices may be less of a problem in a cable environment. Still, the problem persists. Although most cable programmers target specific audiences, some resemble the broadcast networks by offering a variety of programs, often interspersing "family" programs with action-adventure programs. Thus, unsupervised children still can partake of much of the violent fare carried by cable.¹⁰⁶

Congress and the FCC have, in the past, applied some commercial content restrictions to cable in order to effectuate the purpose of the law. Certain tobacco advertising is banned on all electronic media.¹⁰⁷ By the same token, the advertising restrictions of the Children's Television Act were imposed on cable programmers.¹⁰⁸ The FCC also has restricted casino and certain lottery advertising on local origination cable programming.¹⁰⁹ All these restrictions deal with the *commercial* aspects of speech by cable operators and programmers. Violence regulation restricts the *creative* speech rights of cable and satellite programmers. Whether the state could infringe upon those rights merely as a means to effectuate a statute, the purpose of which is to improve the well-being of unsupervised children, is argumentative at best.

¹⁰⁵ See *Memorandum Opinion and Order*, *supra* note 63, para. 29.

¹⁰⁶ The situation may be exacerbated with the advent of common carrier delivery of video programming via "video dialtone" systems. See *In re Telephone Company-Cable Cross-Ownership Rules*, *Second Report and Order*, *Second Notice of Proposed Rule making*, 7 FCC Rcd. 5781 (1992). In a video dialtone world, viewers might have access to 500 or more channels of video programming and other services. Some services may be provided on a subscription basis, while others could be accessed as pay-per-view programming. Because the common carrier providing the access facilities would be prohibited from altering the content of the signal, children may have access to many services that may be inappropriate for them. Moreover,

V. CONCLUSION

Government regulation of televised violence is not an easy proposition. Violence is a recognized form of speech that has Constitutional protection. The government, therefore, must clearly define what it proposes to regulate, and regulate it as narrowly as possible in order to achieve its objectives. The government must give due consideration to the First Amendment rights of programmers to speak and adults to receive the programs.

The final resolution of a government-imposed violence standard is probably years away. Litigation over FCC and Congressional attempts to make the indecency standard more stringent is now in its third incarnation in the courts. To date, the process has taken more than six years, and it has yet to reach the Supreme Court. Because the governmental basis for regulating violent programming is much less distinct than for indecency, a similar — or longer — court battle could result.

The best solution seems to be self-regulation. The government may be limited to requiring that broadcasters provide warnings before programs *the broadcasters* consider to be inappropriate for children. Despite their early balkiness, the broadcast and cable industries now respond to government and public pressure. Both have established monitoring and notification procedures.¹¹⁰ Although these efforts may not fully address the concerns about unsupervised children, they should aid those charged with the care of children by ensuring that appropriate programming is being viewed. Industry self-regulation is not perfect, but it offers the quickest, least restrictive means of dealing with the situation.

the indecency analogy to violence regulation would be less persuasive, since the Supreme Court has ruled that indecent language may be transmitted over common carriers. See *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989) (allowing indecent telephone services to use common carrier facilities).

¹⁰⁷ 15 U.S.C. § 1335 (1988).

¹⁰⁸ 47 U.S.C. § 303a(d) (Supp. IV 1992).

¹⁰⁹ 47 C.F.R. § 76.213 (1993).

¹¹⁰ See *TV Violence to Be Monitored and Reported*, N.Y. TIMES, June 30, 1994, at C20; *Cable Industry Picks a Non-profit Company to Study TV Violence*, WALL ST. J., May 19, 1994, at B7.

