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The Television Violence Act of 1990: A New Program for Government Censorship?

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The Television Violence Act of 1990: A New Program for Government Censorship?

Julia W. Schlegel*

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INTRODUCTION

Legislative attention to violence on television began in the 1950s.¹ The Senate Subcommittee on Juvenile Delinquency of the Committee on the Judiciary under Senators Kefauver and, later, Dodd conducted investigations into this area in 1954, 1955, 1961-62, and 1964.² In 1969 the National Commission on the Causes and Prevention of Violence, chaired by Dr. Milton Eisenhower, reported that "a constant diet of violent behavior on television has an adverse effect on human character and attitudes."³ The Commission's study, however, was based on a small number of lab studies, and little action took place on the subject until 1972, when the Surgeon General issued a report concluding that television violence has an adverse effect on certain members of society.⁴

These early studies represent the beginning of a long continuum of research on violence on television and its effect on society, especially children. On December 1, 1990, President George Bush signed the Television Violence Act⁵ into law. This Act, originally introduced in 1986 by Senator Paul Simon (D-Ill.), is designed to encourage the networks, the cable industry, and independent stations to reduce the amount of violence currently shown on television. The Act, according to Senator Simon, is not

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

2. Report on the Brdcast. of Violent, Indecent, & Obscene Material, *Report*, 51 F.C.C.2d 418 (1975).

3. *Id.* para. 1; see also *Media Violence: Hearing Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 22 (1984) [hereinafter *Media Violence*].

4. *Surgeon General's Report by the Scientific Advisory Comm. on Television and Social Behavior: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 2d Sess. 25-26 (1972); see also Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1128 (1978).

5. Television Program Improvement Act of 1990, 47 U.S.C. § 303c (Supp. III 1991).

direct government regulation of television content. It "simply permits the industry to establish standards on violence on a voluntary basis for limited purposes and a limited time. Nothing more. Nothing less."⁶

This Note examines the Television Violence Act. Part I discusses federal attempts to improve children's television including the 1974 Family Viewing Policy, a voluntarily imposed guideline found unconstitutional in 1976; the Television Violence Act; and the Children's Television Act of 1990. Part II discusses the relationship between violence on television and the behavior of certain segments of the population, including a discussion of various social science theories that purport to establish this relationship. A brief analysis of these theories establishes the difficulty in demonstrating a causal connection between violence on television and an individual's behavior. Part III provides a detailed analysis of the Television Violence Act, including the Act's problems, effectiveness, and constitutional implications. This Note concludes that, while the Act raises distinct First Amendment questions, it is constitutional. Irrespective of its constitutionality, however, the Act is unlikely to reduce violence on television enough to satisfy those in government who contend that violent television is a significant contributor to a violent society.

This Note, therefore, concludes with a discussion of alternatives to the Act for reducing television violence. Many of the proposed alternatives would be either unconstitutional or ineffective in accomplishing Congress's objective of decreasing the amount of violence in society by reducing it on television. Because the Television Violence Act is unlikely to change television content in any significant way, and because the proposed alternatives are either unconstitutional or unrelated to Congress's objectives, this Note recommends leaving regulation of violence on television to the market and allowing the public to show its approval or distaste for violent television by what

6. Paul Simon, *A Way to Curb Violence on TV*, WASH. POST, July 15, 1989, at A20 (letter to the editor).

programming it watches and what advertisers it supports. While the marketplace is not universally effective in inducing social change, it is far better than allowing the government to impose its values upon society by regulating the content of speech.

I. CONGRESSIONAL ATTEMPTS TO ENACT CHILDREN'S TELEVISION LEGISLATION

Concern over violent programming on television began to intensify in the early 1950s, when studies on the extent of television violence were first conducted.⁷ In response to these studies and because of its concern for children, the National Association of Broadcasters (NAB) developed a code that recognized broadcasters' responsibilities to present certain themes with greater sensitivity and with regard to their potential effects on children.⁸ The *National Association of Broadcasters Television Code* required broadcasters to present violence and sex without unnecessary emphasis and only as required by the plot development.⁹

After the National Commission on the Causes and Prevention of Violence released its report in 1969¹⁰ and the Surgeon General released his study in 1972,¹¹ Congress began to take action. In 1974 both the House and the Senate Committees on Appropriations directed the Federal Communications Commission (FCC or Commission) to submit a report to the Committees outlining specific actions planned by the Commission to protect children from excessive programming of violence and obscenity.¹² In response, Richard Wiley, then Chairman of the FCC, attempted to

7. *Violence on Television*, *supra* note 1, at 303.

8. *In re Primary Jurisdiction Referral of Claims Against Gov't Defendant Arising from the Inclusion in the NAB TV Code of the "Family Viewing Policy," Report*, 95 F.C.C.2d 700, 702 (1983) [hereinafter *NAB Report*].

9. *See Note, The Regulation of Television Violence*, 26 STAN. L. REV. 1291, 1313 (1974).

10. *Media Violence*, *supra* note 3, at 22.

11. Krattenmaker & Powe, *supra* note 4, at 1127.

12. *Id.* at 1129. In 1974 the FCC received 32,435 complaints about violent or sexually oriented programming. L.A. Powe, Jr., *Cable and Obscenity*, 24 CATH. U. L. REV. 719, 732 (1975).

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.¹³ Consequently, during the winter of 1974, the networks and the NAB Television Code Review Board adopted the Family Viewing Policy. The policy stated that programs broadcast during the first hour of prime time would be suitable for viewing by the entire family unless the network broadcast advisories warning parents that some of the materials might not be suitable for viewing by younger family members.¹⁴

Although the policy called for voluntary enforcement, the amount of violence aired on television did not change for three reasons. First, the broadcast industry is motivated by a desire for profits, and violence sells.¹⁵ Second, in order to maximize its profits, television airs programs of mass appeal, and violent programs further this appeal.¹⁶ Finally, violence is considered a key element of success for such programming. Therefore, the broadcast industry has little incentive to implement voluntarily any restrictions on violence.¹⁷

In response to the networks' failure to reduce violence on television, the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce held hearings on television violence.¹⁸ The Subcommittee issued a report containing five conclusions.¹⁹ First, it stated that while it may be impossible to "prove" a cause and effect relationship between television violence and aggressive behavior, excessive viewing of

13. Krattenmaker & Powe, *supra* note 4, at 1129.

14. *Id.*

15. *The Regulation of Televised Violence*, *supra* note 9, at 1313.

16. *Id.*

17. *Id.* In November 1976, a federal district judge found the Family Viewing Policy unconstitutional and unenforceable because broadcasters had come together in violation of antitrust legislation. *Writers Guild of Am., West v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated sub nom.*, *Writers Guild of Am., West v. American Brdcast. Co.*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980).

18. SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 1ST SESS., REPORT ON VIOLENCE ON TELEVISION 1 (Comm. Print 1977) [hereinafter VIOLENCE ON TELEVISION].

19. James A. Albert, *Constitutional Regulation of Televised Violence*, 64 VA. L. REV. 1299, 1311 (1978).

violence may have harmful effects.²⁰ Second, the responsibility for the present level of violence rests largely with the networks and, to a lesser degree, with broadcast licensees, program producers, advertisers, and the viewing public.²¹ Third, parental supervision is probably the most effective way to curb the negative effects of excessive viewing of television violence by children.²² Fourth, industry self-regulation is a potentially effective way to limit television violence.²³ Finally, there are avenues through which the Subcommittee, the FCC, and the public can address the problem of television violence in a manner consistent with the First Amendment.²⁴ Congress took no action regarding this report because of the belief that the First Amendment and Section 326 of the Communications Act of 1934²⁵ prevented any type of governmental intrusion into the programming decisions of the broadcasting industry.²⁶

In 1982, ten years after the Surgeon General's first report on the effects of television violence,²⁷ the Surgeon General issued an updated report. The Surgeon General's new report stated that the great majority of observational or field studies and surveys indicate that there is a positive correlation between television viewing and a variety of behavioral influences including aggressive behaviors.²⁸ Congress and the Reagan administration largely ignored this report. In 1983, the NAB Code was eliminated.²⁹ In 1984, the FCC, as part of its efforts to deregulate the broadcast industry, discarded the Commission's rules curbing advertising time and separating commercials from programs on children's

20. VIOLENCE ON TELEVISION, *supra* note 18, at 4 (majority report).

21. *Id.* at 7.

22. *Id.* at 10.

23. *Id.* at 11.

24. *Id.* at 13.

25. 47 U.S.C. § 326 (1988).

26. Albert, *supra* note 19, at 1315-16.

27. *See supra* note 4 and accompanying text.

28. *Media Violence*, *supra* note 3, at 19.

29. *NAB Report*, *supra* note 8, at 704 n.15.

television.³⁰ After these actions, there was little legislation concerning children's television until the Television Violence Act.

A. *Overview of the Television Violence Act*

Senator Paul Simon introduced the Television Violence Act. Senator Simon reported first becoming interested in reducing the amount of violence on television when late one night he turned on the television and watched someone "being sawed in half by a chain saw." He wondered what happens when children see such programs.³¹ Senator Simon then asked representatives of the television industry about the issue. The television industry informed Senator Simon that an NBC study showed that there might not be any relationship between violence on television and violence in society.³² These representatives also told Senator Simon that they could not get together and agree on voluntary standards because it would violate the antitrust laws.³³ Consequently, Senator Simon introduced the first of a series of bills that would exempt the networks from the Sherman Antitrust Act³⁴ if they would reduce the amount of violence on television.

30. Michael J. Palumbo, *Broadcast Regulation, Has the Marketplace Failed the Children: The Children's Television Act of 1990*, 15 SETON HALL LEGIS. J. 345 (1991). Chairman Wiley, the NAB, and the Association of Independent Broadcast Television Stations created the time limits on advertising. The FCC also implemented and enforced the "commercial separation" requirement. See *In re* Petition of Action for Children's TV (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14-Hour Quota of Children's TV Programs, *Children's Television Report and Policy Statement*, 50 F.C.C.2d 1, paras. 49-51 (1974).

31. *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. 9 (1988) [hereinafter *Hearings on H.R. 3848*] (statement of Sen. Paul Simon).

32. *Id.* at 10. But see NAMJUN KANG, A CRITIQUE AND SECONDARY ANALYSIS OF THE NBC STUDY ON TELEVISION AND AGGRESSION (1990) (published Ph.D. dissertation, Syracuse Univ.) (questioning validity of the NBC study).

33. *Hearings on H.R. 3848*, *supra* note 31, at 10 (statement of Sen. Paul Simon).

34. See 15 U.S.C. §§ 1-7 (1988); see also BLACK'S LAW DICTIONARY 1376 (6th ed. 1990) ("The Sherman Antitrust Act prohibits any interference, by contract, or combination, or conspiracy, with the ordinary, usual and freely-competitive pricing or distribution system of the open market in interstate trade.").

The Television Violence Act exempts from the antitrust laws certain activities relating to the reduction of violence on television.³⁵ The Act allows the three networks, Fox Broadcasting, the cable industry, and independent stations to meet regularly for a period of three years to discuss violence in programming. Before Congress passed the Act, the Sherman Antitrust Act prohibited the networks from any joint discussions. Under the Television Violence Act, the networks receive a three year exemption from the Sherman Act—but only to develop joint guidelines to reduce the amount of violent television.³⁶

Significantly, the Act did not grant Congress or the FCC authority to enforce any guidelines that the networks create. Supposedly, if the networks do not reduce the amount of violence, the government will do nothing to enforce the Act. The Act provides the networks with the *opportunity* to meet and discuss this issue; it does not require them to do so. Before Congress passed the Act, it was difficult for one member of the television industry to impose internal standards on violence when the others could gain a commercial advantage by going in the opposite direction.³⁷ After all, violence is a “surefire ratings booster.”³⁸

The Act became law on December 1, 1990. The television industry, however, did not meet until December 1992, when under pressure from Senator Simon, ABC, CBS, and NBC finally came together to establish some guidelines to reduce violent television. In a joint statement, the networks said that their standards are intended to “prohibit depicting violence as glamorous or using it to shock or stimulate the audience.”³⁹ The standards also limit violence characterized as “gratuitous” or “excessive” and prohibit

35. *Television Violence Act of 1989: Hearings on H.R. 1391 Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 34 (1989) [hereinafter *Hearings on H.R. 1391*].

36. Kevin Goldman, *A Move to Consider Prime-Time Violence*, NEWSDAY, July 4, 1989, at 7.

37. Jason Moody, *States News Serv.*, Aug. 1, 1989, available in LEXIS, Nexis Library, Wires File.

38. *Id.*

39. *Three TV Networks Agree to Standards on Violence*, Reuter Libr. Rep., Dec. 11, 1992, available in LEXIS, Nexis Library, Wires File.

scenes depicting "excessive gore, pain or physical suffering."⁴⁰ They "also limit scenes depicting the use of force that are inappropriate for home viewing; unique or 'ingenious' methods of inflicting pain or injury; portrayals of dangerous behavior or weapons that invite imitation by children; and gratuitous animal abuse."⁴¹ In children's programs, the agreement also bars "realistic" portrayals of violence that are "unduly frightening."⁴²

The problems with these guidelines are numerous. First, who but the networks will apply and interpret the guidelines? Moreover, who will decide what is "gratuitous," "glamorized," or "excessive"?⁴³ Further, "violence" has not even been defined. It is unclear whether the networks drafted the guidelines out of a sincere desire to reduce the level of violence on TV or merely to placate Senator Simon, who became disturbed that the networks had taken no action. Moreover, these standards have not reduced the amount of violence on television enough to satisfy Congress. In fact, Senator Simon became so disturbed by the networks' inaction that in August 1993 he told the television industry that it had sixty days to reduce the amount of violence on television or face congressional action.⁴⁴ This differed significantly from Senator Simon's earlier statements that any guidelines that the networks develop would be voluntary and unenforceable by the government.⁴⁵

B. *The Children's Television Act of 1990*

The Children's Television Act of 1990⁴⁶ is Congress's latest effort at improving children's television through regulation. The 1990 Act applies to the content of both children's programming and advertising during children's television. The Act restricts

40. *Id.*

41. *Id.*

42. *Id.*

43. Howard Rosenberg, *Conferences Won't End TV Carnage*, L.A. TIMES, Feb. 1, 1993, at 1F.

44. Jennifer L. Stevenson, *Sen. Simon Warns TV to Cut Violence*, ST. PETERSBURG TIMES, Aug. 3, 1993, at 3A.

45. See *supra* note 37 and accompanying text.

46. 47 U.S.C. §§ 303a-303b (Supp. III 1991).

advertising on children's television to twelve minutes per hour during the week and 10.5 minutes per hour on weekends.⁴⁷ In addition, broadcasters must air programs specifically designed to meet the "educational and informational" needs of the child audience. Each station must comply with the Act's requirements in order to qualify for its license renewal.⁴⁸

In enforcing the Children's Television Act, the FCC assumes compliance with the educational programming requirement unless a formal complaint is filed with the agency challenging a station's compliance. "According to the FCC, it would be too burdensome for it to monitor compliance on its own."⁴⁹ The FCC's action, therefore, virtually assured that little change would occur in children's television.

Each station was to comply with the new children's educational programming requirements as of October 1991, but there has been little—if any—noticeable improvement. Networks have just taken shows such as *G.I. Joe* and *The Jetsons* and claimed they are "educational."⁵⁰ The lack of improvement is due both to the Act's vague standards, and also to the FCC's lack of visible interest in enforcing the Act.⁵¹

Despite its initial lack of enforcement, the FCC took action in March 1993.⁵² The Commission announced that cartoons like *The Jetsons* will no longer count as "educational and informational" programming. The FCC also delayed renewing the licenses of seven stations, demanding that they provide better evidence that

47. 47 U.S.C. § 303a(b) (Supp. III 1991).

48. Dale Kunkel, *Counterpunch: Despite Congress, Children's TV Still Lacking*, L.A. TIMES, Aug. 17, 1992, at F3. License renewal for television stations is once every five years. 47 U.S.C. § 307(c) (1988); see also Edmund L. Andrews, *Broadcasters, to Satisfy Law, Define Cartoons as Education*, N.Y. TIMES, Sept. 30, 1992, at A1.

49. Kunkel, *supra* note 48, at F3.

50. Andrews, *supra* note 48, at A3.

51. *Id.*

52. Radio Brdcast. Servs.; Children's TV Programming, *Proposed Rule; Notice of Inquiry*, 58 Fed. Reg. 14,367 (1993) [hereinafter *Children's TV Programming*] (to be codified at 47 C.F.R. ch. I).

they are meeting their educational responsibility in children's programming.⁵³

II. RELATIONSHIP BETWEEN VIOLENCE ON TELEVISION AND BEHAVIOR

The average child watches about twenty-seven hours of television per week.⁵⁴ In fact many children spend more time in front of the television than they do in the classroom. It is therefore reasonable to conclude that television likely has some impact on a child's learning process. Arnold Fege testified before Congress in 1988: "[F]or some children, television acts as the electronic baby-sitter and as a surrogate parent. With a T.V. in 96% of all American households, T.V. obviously has major effects on the attitudes, education and behavior of our children."⁵⁵

Because of the number of children watching large amounts of television, many people have understandably become concerned with the amount of violence occurring during each day's programs. A study released by the University of Pennsylvania's Annenberg School of Communications in 1990 reported that prime-time programs average five or six violent acts each hour, while Saturday morning children's programs average twenty-six violent acts each hour.⁵⁶ The National Coalition on Television Violence also released a study that showed that 50 percent of cartoons were found to "glorify violence or use violence to entertain."⁵⁷ According to Thomas Radecki, the Coalition's

53. Edmund L. Andrews, *Flintstones and Programs Like It Aren't Educational*, *F.C.C. Says*, N.Y. TIMES, Mar. 4, 1993, at A1. Unlike the Television Violence Act, the Children's Television Act itself grants authority to the FCC to enforce the Act's requirements. Therefore, while some action is being taken by the Commission to enforce advertising restrictions and to raise the level of educational and informational programming, it is questionable whether there will be any effective action taken to decrease the amount of violence on television.

54. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 257 (1992).

55. *Hearings on H.R. 3848*, *supra* note 31, at 113-14 (statement of Arnold Fege, National PTA Dir. of Governmental Relations).

56. Marilyn Gardner, *Turning Down the Volume on TV Violence*, CHRISTIAN SCI. MONITOR, Feb. 6, 1990, at 18.

57. *Sharp Rise in TV Cartoon Violence Cited*, BPI Entertainment News Wire, Apr. 1, 1991, available in LEXIS, Nexis Library, Wires File.

research director, by age eighteen the average child will have seen two hundred thousand violent acts on television, including forty thousand murders.⁵⁸ Moreover, after the 1980s and deregulation, violent acts increased by about eight acts per hour in children's television.⁵⁹

Despite the reports, the networks have not reduced the amount of violence on television. At least five possible reasons may explain why network television executives opt for violent programming. First, violent programming is "cheaper to produce than sophisticated drama, and it is far more profitable."⁶⁰ Second, "action shows require less talented, less expensive actors than drama."⁶¹ Third, the networks have found that violent shows sell much more quickly in foreign markets than drama or comedy. According to George Gerbner, former Dean of the Annenberg School of Communications, "Violence travels well in foreign markets. It is a low-cost, high circulation commodity."⁶² Fourth, violence is also "much easier to depict in cartoons than humor" because "producers of cartoons rely on an assembly-line approach to churn out six-to-eight minute episodes, each with standard plots and characters."⁶³ According to George Gerbner, "[P]roducers can develop new cartoons merely by using the same plots and types of characters, but by changing the cast."⁶⁴ Finally, violent programming attracts a large audience, and, therefore, advertisers are more likely to purchase space on such programs.

Because the networks seek profits, they are not eager to reduce the amount of violence on television. Moreover, the networks point to the weak link between violence on television and violence in society. The government, on the other hand, is

58. Peter Plagen et al., *Violence In Our Culture*, NEWSWEEK, Apr. 1, 1991, at 46, 51.

59. Sunstein, *supra* note 54, at 284.

60. D'Arcy Jenish et al., *Prime-Time Violence; Despite High Ratings for Violent Shows, Revulsion is Growing Over Bloodshed on TV*, MACLEAN'S, Dec. 7, 1992, at 40, 41.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

apparently less concerned with the networks' profits and more concerned with the *possibility* that violent television produces a violent society. The government's action suggests that by regulating violent television it can reduce the amount of violence *in society*. But the government's objective of decreasing violence in society by reducing violence on television ignores the ultimate question: Does television reflect society or does society reflect television? Considering that violence is intertwined with so many facets of society—sports, newspapers, plays, books, etc.—it appears that television is just one reflection of a society that has violent roots that will continue to sprout.

Therefore, when the government makes an effort to reduce violence, it should consider whether the amount of violence on television impacts the amount of violence actually committed against real people. In other words, will any kind of regulation of television violence achieve the government's objective of reducing violence in society?

Congress, in addressing this concern, relied on numerous reports regarding violent television and its impact on society. These studies show a *possibility* that violence on television causes aggressive behavior. Unfortunately, the studies cannot offer more than a possibility. Because the studies cannot establish a causal link between violent television and violent behavior, they do not justify Congress's regulating the content of television. Nevertheless, Congress *does* regulate television violence, relying on four theories that have emerged from the various studies on television's effect on viewers.

The first theory is "imitative violence," that is, young viewers imitate what they see on television. For instance, there was a film on television about a man committing suicide, and twenty-eight young men around the nation committed suicide exactly the same way after seeing it on television.⁶⁵ Further, convicted felons have admitted to learning new tricks and improving their criminal expertise by watching television.⁶⁶

65. *Hearings on H.R. 3848, supra* note 31, at 10 (statement of Sen. Paul Simon).

66. Albert, *supra* note 19, at 1304.

A second theory is the "violence hypothesis." Advocates of this theory argue that viewing television violence causes aggression against individuals. One such advocate is Leonard Eron, research professor emeritus at the University of Illinois at Chicago and a psychologist at the University of Michigan Institute for Social Research.⁶⁷ While a psychologist at the University of Illinois, Dr. Eron and L. Rowell Huesman, another psychologist, studied four hundred males for more than twenty years. They found that children who watched significant amounts of television violence at the age of eight were more likely to commit violent crimes or abuse a child or spouse at age thirty.⁶⁸ A study by another advocate of this theory, Dr. Brandon Centerwell, a Washington psychiatrist and epidemiologist, showed that the mere introduction of television caused a doubling of violent crime as soon as the first children to watch television were old enough to commit crimes as adults.⁶⁹

Dr. Centerwell's study raises an important question: Is it violence on television that contributes to violence in society, or is it television itself? Marie Winn, author of *The Plug-In Drug: Television, Children and the Family*, wrote in *The New York Times*, "[T]he time-consuming act of watching replaces some crucial child experiences, notably play and socialization."⁷⁰ She suggests that it is not violence on television that is the culprit, but television viewing itself. "Even if the content is monitored, if all the child watches is *Sesame Street*, *National Geographic* specials or *60 Minutes*, the effect is the same."⁷¹ And as Florian Sauvageau, director of journalism studies at Laval University in Quebec

67. Marc Silver et al., *Troubling TV Ads*, U.S. NEWS & WORLD REP., Feb. 1, 1993, at 65.

68. Plagen et al., *supra* note 58, at 51. *But see* Silver et al., *supra* note 67, at 65 (stating that the study involved 875 third graders beginning in 1960 and that Dr. Eron concluded that large doses of television violence make children more likely to act aggressively and to think of the world as frightening).

69. *See* Plagen et al., *supra* note 58, at 51.

70. Marie Winn, *Does Television Itself Nurture Violence?*, N.Y. TIMES, Aug. 9, 1992, § 4, at 16.

71. James R. Petersen, *The Curse of the Boob Tube: TV, Socialization and Violence*, PLAYBOY, Dec. 1992, at 49, 49.

City, points out, "Why is our society so violent? That is the issue at hand. We're just making television the scapegoat."⁷²

While support for the "violence hypothesis" is substantial, it is not unanimous. Furthermore, while studies have easily established a *correlation* between television and violence, it is difficult to establish that television *causes* violence. Direct government regulation would almost definitely be unconstitutional unless at least a substantial link can be established between television and violence.⁷³

The third theory was formulated by George Gerbner of the Annenberg School for Communications. Gerbner postulates that violence on television makes viewers more afraid, less perceptive of the real world, and more prone to support "repression (more jails, more executions and more global policing) as long as it can be justified as enhancing security."⁷⁴ Gerbner's report, *Violence Profile*, involves the monitoring of samples of prime-time and weekend daytime television on all major U.S. networks each year.⁷⁵ Gerbner does not count violent episodes, but rather plugs the data into a formula designed to yield comparative measurements (called a "Violence Index") of the violence in overall yearly programming. In calculating this formula, Gerbner looks at the percentage of programs containing an occurrence of violence, the rate of violent episodes per program, the rate of violent episodes per hour of programs, and the percentage of leading characters involved in violent acts (either as perpetrators or as victims).⁷⁶ Gerbner arrives at an index number by examining the frequency with which violence occurs, of the roles assigned to victims and

72. Paul Gessell, *Violence and TV: How Clear Is the Link? Commons Committee Is Just Latest Attempt to Answer That Question*, MONTREAL GAZETTE, Feb. 20, 1993, at E7.

73. See *Hearings on H.R. 3848*, *supra* note 31, at 67 (statement of Gene R. Nichol, Dean, Univ. of Colo. School of Law).

74. George Gerbner, *Road Runner Begets Rambo*, NEWSDAY, Feb. 26, 1993, at 54.

75. GEORGE GERBNER & NANCY SIGNORIELLI, *VIOLENCE PROFILE 1967 THROUGH 1988-89: ENDURING PATTERNS* (1990).

76. See *id.*; see also GEORGE GERBNER ET AL., *VIOLENCE PROFILE NO. 8: TRENDS IN NETWORK TELEVISION DRAMA AND VIEWER CONCEPTIONS OF SOCIAL REALITY 1967-1976* (1977); Krattenmaker & Powe, *supra* note 4, at 1160.

aggressors, and of the relative frequency with which a violent act results in death.⁷⁷

While Gerbner is probably the most popular and well-known of social scientists who engage in this research, he fails to measure the correlation, if any, between violent behavior in real life and the frequency of violence on TV.⁷⁸ Consequently, it is difficult for the government to use Gerbner's *Violence Profile* as a justification to regulate violent television.

The final theory offered by social scientists is the idea of "desensitization." This theory holds that "children become immune to the horror of [televised] violence, and they become passive when they see it occur in real life. Because children see violence so often on television, real life violence doesn't have as much impact—it can almost be perceived as another television show."⁷⁹

The problem with all of these theories is that they only show that televised violence *may* result in increased aggressiveness, desensitization, or fear. In order to regulate the content of television, Congress should be required to show at least a substantial, if not direct, link between violent television and violent behavior. While most scientists studying in this field agree that there may be a relationship between televised violence and aggressive behavior in children,⁸⁰ the scientists have not established a causal connection between violence on television and violence in society. But what these studies all have in common, however, is that they establish at least a correlation between television and violence. Consequently, many scholars, social scientists, and members of the government would like to see the amount of violence on television reduced. The question is how to do this without running afoul of the First Amendment. Regulating

77. GERBNER & SIGNORIELLI, *supra* note 75, at 5; see Krattenmaker & Powe, *supra* note 4, at 1159.

78. Krattenmaker & Powe, *supra* note 4, at 1161; see also BARRIE GUNTER, TELEVISION AND THE FEAR OF CRIME 19-34 (1987) (discussing Gerbner's studies).

79. *Hearings on H.R. 3848*, *supra* note 31, at 106 (statement of Frank M. Palumbo, M.D.); see also GERBNER & SIGNORIELLI, *supra* note 75.

80. *Hearings on H.R. 3848*, *supra* note 31, at 7 (statement of Rep. Dan Glickman (D-Kan.)).

the amount of violence on television is, after all, content control, which the Supreme Court has often found unconstitutional, even in the area of broadcast media.

III. AN ANALYSIS OF THE TELEVISION VIOLENCE ACT

The Television Violence Act became law on December 1, 1990; the three-year exemption to the antitrust laws will thus expire in December 1993. But even in the Act's last year, many questions remain to be answered. Is the Act government suppression of speech or a means by which the networks can join together to reduce what they too believe to be a social ill? Is the Act necessary, or is the government's goal—to reduce violence in society by reducing the amount of violence on television—misdirected? Is the Act effective or are the guidelines merely a way to appease Congress?

A. *Constitutional Concerns of the Television Violence Act*

Although the Television Violence Act is not subject to FCC enforcement and is merely a limited exemption from the Sherman Act, it is still a government measure to control the content of television programming. Even if the Act is not direct coercion, it is government regulation:

[T]he bill is a velvet glove. Though couched as an invitation to the industry to do something about violence, it actually is an order. In form it is an exemption from antitrust laws, giving members of the industry permission to conspire in a noble cause. Implicitly it is a threat: Unless a solution satisfactory to Congress is achieved within three years, sterner legislation will follow.⁸¹

Whether or not the Act is a "threat by Big Brother"⁸² or merely something that the networks have hoped for in order to reduce the amount of violence on television,⁸³ the question still remains

81. *Doing Violence Against Violence*, N.Y. TIMES, July 24, 1989, at A16; see also Stevenson, *supra* note 44 (reporting Sen. Simon's warning to the television industry that they had 60 days to reduce the amount of violence on television or face further congressional action).

82. Goldman, *supra* note 36, at 110 (statement by Rep. Don Edwards (D-Cal.)).

83. Professor Cass R. Sunstein of the University of Chicago Law School argues that the Act does not suppress the broadcast industry's speech. Rather, the Act eliminates the

whether the Act is constitutional. The main arguments for the Act's constitutionality are that the Act is limited to the broadcast arena, that any guidelines would be self-imposed and therefore the Act's provisions do not require or prohibit speech, and that, although it is content-based, it does not discriminate on the basis of viewpoint.

1. Standard of Review for the Regulation of Electronic Media

The Supreme Court has "traditionally applied more lenient standards to government regulation of broadcasting than to regulation of other media, even when such regulation is based on content."⁸⁴ Although the Supreme Court has not articulated a precise standard of review for regulation of electronic media, it has stated that "because broadcast regulation involves unique considerations, our cases have not followed precisely the same approach that we have applied to other media and have never gone so far as to demand that such regulations serve 'compelling' governmental interests."⁸⁵

The difference in treatment has been based on two arguments. First, the broadcast medium is "scarce" and therefore needs regulation to overcome problems caused by this scarcity.⁸⁶ Second, broadcasting is a public resource and therefore the government has the obligation to "set standards to make certain that the 'resource' is not wasted or misused."⁸⁷ Although both of

competitive pressures that force broadcasters to produce violent shows even though broadcasters would prefer not to produce such shows. Because advertisers buy advertising directly proportionate to the size of the audience a particular program attracts, a broadcaster would be reluctant to drop a type of programming that attracts large numbers of viewers unless other broadcasters are willing to do the same. *Hearings on H.R. 1391, supra* note 35, at 133.

84. *Id.* at 161 (statement of Prof. Cass R. Sunstein); *see also* FCC v. League of Women Voters, 468 U.S. 364 (1984); FCC v. Pacifica Found., 438 U.S. 726 (1978); *Red Lion Brdcast. Co. v. FCC*, 395 U.S. 367 (1969).

85. *League of Women Voters*, 468 U.S. at 378; *see also* Donald E. Lively, *Modern Media and the First Amendment: Rediscovering Freedom of the Press*, 67 WASH. L. REV. 599 (1992) (discussing government regulation of broadcast media).

86. *See Red Lion*, 395 U.S. 367; *see also* Krattenmaker & Powe, *supra* note 4, at 1221.

87. HARVEY L. ZUCKMAN ET AL., *MASS COMMUNICATIONS LAW IN A NUTSHELL* 377 (3d ed. 1988).

these reasons pose strong rationales for the Act's constitutionality, neither is a convincing argument. First, the scarcity argument is quickly becoming obsolete.⁸⁸ Today, the number of broadcasting outlets far exceeds the number of operating daily newspapers,⁸⁹ which receive more First Amendment protection than electronic media. In addition, it is questionable whether it is appropriate to exact a quid pro quo by requiring broadcasters to operate in the public interest.⁹⁰

Because electronic media, especially television and radio, receive a less stringent level of scrutiny, the regulation must only be narrowly tailored to serve a substantial (or perhaps only legitimate) governmental interest.⁹¹ The government here has two strong interests: protecting the nation's children and preventing physical injury. Because numerous studies have established a significant link between violent television and aggressive behavior, voluntary guidelines are "narrowly tailored" and seek "to accomplish [the] goal in a distinctly unintrusive fashion."⁹²

2. First Amendment Scrutiny for Content-Based Regulations

The Supreme Court, in a number of cases, has upheld various regulations that, although content-based, are not viewpoint-based.⁹³ The Television Violence Act is similar to these regulations. Although it is a content-based regulation, it is not viewpoint-based. Of course, the government could not "enact selective exemptions from the antitrust laws in order to encourage speech that it prefers, or discourage speech that it dislikes."⁹⁴ For example, the government could not give an antitrust exemption for the networks to get together and discuss how to broadcast

88. Lively, *supra* note 85, at 601.

89. *Id.* at 599.

90. ZUCKMAN ET AL., *supra* note 87, at 377.

91. FCC v. League of Women Voters, 468 U.S. 364 (1984).

92. *Hearings on H.R. 3848*, *supra* note 31, at 67 (statement of Gene R. Nichol, Dean, Univ. of Colo. School of Law) (citing *League of Women Voters*, 468 U.S. 364).

93. *See, e.g.*, Young v. American Mini Theatres, 427 U.S. 50 (1976) (upholding city ordinance regulating non-obscene pornography).

94. *Hearings on H.R. 1391*, *supra* note 35, at 166 (statement of Prof. Cass R. Sunstein).

Democratic views at the exclusion of Republican views. This action would be an unconstitutional viewpoint-based regulation. In contrast, when it enacted the Television Violence Act, the government did not suppress a particular point of view. The government is remaining neutral in its regulation of protected expression.⁹⁵ The government is not trying to suppress a “social, political or philosophical message a [broadcaster] intended to communicate.”⁹⁶

“The Supreme Court has never held that content regulation is subject to a *per se* ban”⁹⁷ A court will likely uphold a content-based regulation as long as the regulation “furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that governmental interest.”⁹⁸

The Television Violence Act is directed at the “secondary effects” on the country rather than a point of view.⁹⁹ In other words, the Act “is aimed not at the suppression of free expression, but at the control of messages thought to be harmful because of the manner in which they are delivered.”¹⁰⁰ In *City of Renton v. Playtime Theatres*, the Court held that a regulation that concentrated a city’s adult movie theaters into a particular area was constitutional.¹⁰¹ The Court based its holding on the district court’s finding that the City’s “*predominate* concerns” were with the secondary effects of adult theaters—for example, increased crime and a deterioration of the quality of life—and not with the

95. *Id.* at 167.

96. *Id.* (quoting *Young v. American Mini Theatres*, 427 U.S. 50 (1976)).

97. *Id.* at 166.

98. *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

99. *Cf. City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986) (upholding regulation of speech on the grounds that it sought to prevent the “secondary effects” of the speech—an interest unrelated to the suppression of free expression).

100. *Hearings on H.R. 3848*, *supra* note 31, at 66 (statement of Gene R. Nichol, Dean, Univ. of Colo. School of Law).

101. *City of Renton*, 475 U.S. at 52.

content of the adult films themselves.¹⁰² Similarly, the Television Violence Act's purpose is to reduce the amount of violence in society, not to suppress certain ideas violent television may contain.

Content-based regulations that are not designed to censor any particular viewpoint do not trigger the most exacting First Amendment scrutiny. The regulation must only be narrowly tailored to serve an important governmental interest.¹⁰³ Here, the interests in preventing the public from violence and protecting children from unwilling exposure are indeed strong. Further, because the Act does not ban violent television, but merely asks that the networks reduce the amount they air, a court would likely find that the Act is the least restrictive means to further the government's interests. Consequently, a court could find the Act constitutional under this rationale.

3. The "Pervasiveness" of Television and its Unique Accessibility to Children

Perhaps the best argument for the Act's constitutionality is based on the Supreme Court's holding in *FCC v. Pacifica Foundation*.¹⁰⁴ In *Pacifica*, the Court, in a 5-4 opinion, "upheld the power of the FCC to regulate 'adult speech' over the radio air waves [sic], at least in some limited circumstances."¹⁰⁵ The speech involved was George Carlin's comedy routine, *Seven Dirty Words*. The Court said that although the speech was "indecent," it was not "obscene," and therefore deserved some First Amendment protection. However, the Court then turned around and said that broadcasting receives "the most limited" free speech protections of all forms of communication because it is "a uniquely pervasive presence in the lives of all Americans" and "is uniquely

102. *Id.* at 47 (emphasis in original).

103. *Id.*; see also *United States v. O'Brien*, 391 U.S. 367 (1968).

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

105. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 16.18, at 983 (4th ed. 1991).

accessible to children, even those too young to read."¹⁰⁶ These factors limited the Carlin broadcast's First Amendment protection. If Carlin had presented his monologue in a theater rather than on the radio it presumably would have received greater protection.¹⁰⁷

On its face, the *Pacifica* holding seems to support Congress's power to regulate violent television. Television is, after all, a broadcast medium, and therefore courts accord it less First Amendment protection. Moreover, many children have almost unlimited access to a television. Like a radio, the viewer may turn it on without being aware of the programming to be faced. There are, however, several factors that may limit the holding of *Pacifica* to the radio.

First, radio may be more pervasive than television. Many people have a television guide and therefore will not turn on the television unless they know what they want to watch. In addition, warnings are often placed in television listings and even made on the air at the beginning of programs and/or during commercial breaks.¹⁰⁸ On the other hand, people are constantly turning off and on the radio without knowledge of the programming content. When it comes to children, however, a court could easily recognize that either children are too young to read television listings or would never think to look at them. Therefore, this argument presumes that parents are present to censor their children's viewing habits.

Second, while regulations to protect children are understandable, the regulations should not abridge other viewers' First Amendment interests.¹⁰⁹ While the Television Violence Act is

106. *Pacifica*, 438 U.S. at 749; see also *Hearings on H.R. 1391*, *supra* note 35, at 168 (statement of Prof. Cass R. Sunstein).

107. Krattenmaker & Powe, *supra* note 4, at 1220. Carlin did not perform his routine on the radio; the radio station played a recording. *Id.* at 1214 n.526.

108. See *id.* at 1229.

109. The First Amendment protects the interests not only of the speaker, but also the audience. See, e.g., *Young v. American Mini Theatres*, 427 U.S. 50, 77 (1976) (Powell, J., concurring) ("The central First Amendment concern remains the need to maintain free access of the public to the expression."); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976) (First Amendment protection

primarily designed to protect children, the Act abridges the First Amendment rights of willing adults, the First Amendment rights of children,¹¹⁰ and the constitutional rights of parents to determine whether their children should be exposed to certain types of programming.¹¹¹ After *Pacifica*, however, it is doubtful the Court would take these factors into account, especially when considering the substantial link between violence on television and violent behavior.

Another reason *Pacifica* may not apply is that the Act is really only an exemption from an already existing law and not a newly created law enforceable by the government. Congress is not directly censoring the material the networks broadcast (although it may be indirect censorship). On the other hand, the FCC's actions in *Pacifica* were much more intrusive on the editorial discretion of a broadcaster because the FCC made the decision regarding what can and cannot be broadcast on the radio. The Television Violence Act allows broadcasters to make this decision. In this way, a court would likely find that the Act is *less* offensive to the First Amendment than in *Pacifica* and therefore would apply less scrutiny to the regulation.

Because the courts accord electronic media less First Amendment protection than other forms of media and because of the societal interest in protecting both children and the rest of society from harm, a court will no doubt find the Act constitutional. And Congress has already hinted that it may take further action if the networks do nothing to reduce violence on television.

extends to a communication, its source, and its recipients); *Kleindienst v. Manden*, 408 U.S. 753, 762-63 (1972).

110. "First, except for material obscene as to minors, children presumptively would enjoy full First Amendment protection. Second, a state could not justify censoring materials aimed at children simply because the speech contained 'ideas or images that a legislative body thinks unsuitable for them.'" *Krattenmaker & Powe*, *supra* note 4, at 1257 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n.11 (1975)); *see also id.* at 1213-14, 1257.

111. *See Erznoznik*, 422 U.S. 205. "[B]ecause parents retain a recognized constitutional right to direct the rearing of their children, in some cases the minors' First Amendment rights could be diluted to accommodate the right of parental control." *Krattenmaker & Powe*, *supra* note 4, at 1257.

B. *Effectiveness of the Act to Reduce the Amount of Violence on Television*

Judging from the networks' actions so far, it is not clear whether they will actually reduce the amount of violence on television. The Act expires in December 1993. The networks convened for the first time in December 1992 to discuss the voluntary guidelines,¹¹² and it was not until June 30, 1993, that ABC, NBC, CBS, and Fox Broadcasting offered to air warnings preceding violent shows.¹¹³ And the networks developed the parental advisory plan only to avoid a federally imposed system of ratings for violence on television.¹¹⁴ Moreover, critics of the networks' actions have already pointed out numerous problems with the networks' plan. First, the networks will decide for themselves which shows are violent.¹¹⁵ Second, the plan assumes the presence of parents both to catch the warnings and to switch the channel. This assumption ignores the millions of children who watch television without supervision.¹¹⁶ Third, the advisories may be "just a faster road map to the violent material."¹¹⁷ In other words, many children may watch a program simply because the network issued a warning.¹¹⁸ Fourth, many cable and syndicated programs remain exempt.¹¹⁹ Finally, broadcasters could use

112. See *News Conference With Senator Paul Simon*, Fed. News Serv., Dec. 11, 1992, available in LEXIS, Nexis Library, Omni File (reporting Sen. Simon's announcement that the three major networks had agreed on joint standards on entertainment violence on television).

113. Edmund L. Andrews, *4 Networks Agree to Offer Warnings of Violence on TV*, N.Y. TIMES, June 30, 1993, at A1. Note that no warnings will be aired before cartoons, athletic events, or news programming.

114. *Id.*

115. *Id.*; see also Harry F. Waters et al., *Networks Under the Gun*, NEWSWEEK, July 12, 1993, at 64.

116. Andrews, *supra* note 113, at A1.

117. Waters et al., *supra* note 115, at 65 (statement of Terry Rakolta, founder of Americans for Responsible Television).

118. The recording industry uses a similar advisory for explicit lyrics, and the warning has actually prompted children to purchase these recordings. Waters, *supra* note 115, at 64.

119. Waters et al., *supra* note 115, at 65. *But see* Andrews, *supra* note 113, at A1 (reporting that four days before the Los Angeles Conference on Television Violence in August 1993, 15 cable channels, including HBO, USA, MTV, and Nickelodeon

the warning system as a license to air programs that are more violent than those broadcast before the advent of a warning system.¹²⁰ This development would frustrate the government's goal of reducing the amount of violence on television.

Because the networks' actions are so recent, viewers may not have an opportunity to see the results of the warning plan until the 1993 fall season is well under way. At a conference on television violence in Los Angeles, California, on August 2, 1993, however, Senator Simon said that the television industry "had sixty days to start reducing and monitoring violence on television or face congressional action."¹²¹ Senator Simon has not described what the "congressional action" would entail.

For an industry supposedly eager to cure a violent society, the networks have proceeded very slowly. This may be due to the fact that at the time of the Act's passage, the networks claimed that it was unnecessary because they had their own standards departments. If they felt the Act was unnecessary in 1990, who is to say that they feel differently now? Additionally, because of the market lure of violent programming, the networks do not have a strong economic incentive to change their current programming.

If the Act does indeed prove to be ineffective in prompting the networks to act, how will Congress respond? At one time, Senator Simon suggested that the government would do nothing. His recent statements, however, suggest otherwise.¹²² There are a number of alternatives for the government if the broadcast industry does not reduce the amount of violence on television. The same questions that were asked about the Television Violence Act must also be asked with regard to any alternatives: Is the regulation constitutional? Is it effective?

announced that they would join the networks in airing the warnings).

120. Waters et al., *supra* note 115, at 64.

121. Stevenson, *supra* note 44, at 3A. At the time this Note was submitted for publication, the 60 days had not yet expired.

122. *See id.*

IV. ALTERNATIVES IF THE NETWORKS FAIL TO REDUCE VIOLENCE ON TELEVISION

If the Television Violence Act fails to reduce the amount of violence, it will be largely because the networks are the ones to apply and interpret the guidelines. They decide what violence is glamorized, excessive, and/or gratuitous.¹²³ Therefore, any subsequent regulation will probably be a statutorily imposed FCC regulation. An FCC regulation will require the same scrutiny in a court that the Act would receive. A court, however, may very well find a statutorily imposed regulation not to be the least restrictive means to reduce violent television.¹²⁴ Further, although the Communications Act of 1934 requires the FCC to ensure that broadcast licensees operate in a manner consistent with the "public interest,"¹²⁵ Section 326 of the Act prevents the FCC from using its powers to censor broadcast media.¹²⁶ But, because of the limited First Amendment protection electronic media receives, and because of the strong interest the government has in protecting children, the manner in which the FCC could regulate television violence may affect a regulation's constitutionality.

A. *Ban Violence Completely*

The first alternative, which involves FCC action, is to ban violence on television completely. This alternative would not only be unconstitutional, it would be unnecessary to achieve the government's objective of reducing the amount of violence in society. The television, after all, is not the only culprit of our violent society. This nation witnesses acts of violence everywhere. "Violence is a part of life and has a place in drama. The problem therefore becomes one of narrowing the use of violence on television in a manner designed to combat the creation of increased aggression in the viewer."¹²⁷

123. Rosenberg, *supra* note 43, at 10F.

124. *Cf. United States v. O'Brien*, 391 U.S. 367 (1968).

125. 47 U.S.C. § 303(g) (1988).

126. 47 U.S.C. § 326 (1988).

127. *Violence on Television*, *supra* note 1, at 313.

B. *Limit Violence to Certain Times or Days*

A more constitutionally acceptable regulation of violent television would be to limit violence to certain times or days in the week. For instance, the FCC could remove violent television from the early evening hours. In light of *Pacifica*, a court would most likely find this type of regulation constitutional.

This regulation would, however, face similar problems that a voluntarily enforced guideline would. The government would be limiting violent television solely because of its content. "Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."¹²⁸ However, in light of *Renton* and *Pacifica*, a court would uphold zoning violent television for the same reasons the Television Violence Act could be upheld: the medium is television, Congress is regulating the "secondary effects," and it has a unique accessibility to children.

Like the Television Violence Act, zoning violent television abridges the rights of parents and other adults. However, if a court were to weigh the interests of willing viewers against the government's interest in protecting society and its children from harm, a regulation that would merely limit the amount of violence, although posing First Amendment problems, would pass constitutional muster.

C. *Technical Solutions*

A third alternative involves "lock boxes," or other technical solutions, which provide a potential means of reducing the amount of violence children see on television. Lock boxes are appealing because they preserve the rights of both adult viewers and parents, the group that should exercise the greatest control over their children's access to the television set. A lock box, or other similar technical facility, requires attaching a device to the television set that prevents access to certain programs. The FCC could possibly

128. *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972).

require the television manufacturer to attach such devices to the television.

Moreover, the "lock box" rule may be justified on grounds unrelated to the suppression of expression. Two scholars have pointed out that lock boxes conserve energy for all owners of television sets and that pay-television subscribers may save billing costs from undesired or inadvertent use of the set.¹²⁹

Two potential problems arise with the possibility of using a lock box. First, a technical device is unlikely to address the central concerns of those who believe televised violence is a social ill, because lock boxes do not guarantee a reduction (or elimination) of televised violence. Nevertheless, the fact that some members of society may be offended by television violence is not a permissible basis for censorship of speech.¹³⁰

The second potential problem is that parents might be unwilling or unable to supervise their children's television viewing even if the means to do so were readily available. For those who believe televised violence is a social ill, the lock box does not adequately address the concerns. But for those who believe that parents should retain the right to supervise the rearing of their children, a lock box is a good solution. As for the argument that parents may be unable to supervise their children's television fare, it may be possible to design lock boxes to "lock out" certain channels even while a parent is not in the home.

Regardless of the potential problems, technical solutions such as lock boxes seem to be an effective way to help parents to control the amount of television their children watch. But these alternatives are unlikely to have much political appeal because they will not reduce the amount of violence in television programming, and there is no guarantee that parents will prevent their children from viewing excessive violence. The current tenor of Congress seems to be toward action that will reduce the amount

129. Krattenmaker & Powe, *supra* note 4, at 1276.

130. *Cf.* Cohen v. California, 403 U.S. 15 (1971).

of violence on television—and reduce it as quickly as possible.¹³¹

D. *The Marketplace*

Because lock boxes do not relieve the anxiety of those who view violent television as a social ill, and because other statutorily imposed regulations seem too intrusive, the marketplace may be the only other alternative. While a market alternative may not address the concerns of those who believe in complete or partial regulation, it is the alternative that most effectively addresses the concerns of viewers. After all, it is the First Amendment rights of viewers that are paramount.¹³² And the viewers have manifested in the market their enjoyment of violent television and their willingness to pay for it.

The television industry is part of the marketplace and is likely to respond to market pressures. Thus, public outcry against certain programming or a boycott of advertisers that consistently advertise their products on a particular type of program may be preferable to Congress acting as arbiter.¹³³ The television industry will often receive thousands of letters in response to a certain type of programming. Shouldn't it be up to the industry to determine when to remove a particular program?

Even if viewers do not find a program harmful, and therefore do not respond through the marketplace, the viewers should control the content of television programming. Control of television content should not be left to Congress. Today, Congress wants to control the amount of violence on television. Tomorrow,

131. *But see* H.R. 2888, 103d Cong., 1st Sess. (1993). On August 5, 1993, Representative Edward J. Markey (D-Mass.), chairman of the House Subcommittee on Telecommunications and Finance of the House Energy and Commerce Committee, proposed a bill that requires new television sets to have a built-in "V chip" to allow parents to block the display of programs rated "violent." The Bill would also require television sets to be capable of blocking programs or time slots even if they do not carry an advisory. Robert Green, *U.S. Bill Introduced to Block Violent TV Shows*, Reuters, Aug. 5, 1993, available in LEXIS, Nexis Library, Wires File. At the time this Note was submitted for publication, this bill was still pending in the House.

132. *Red Lion Brdcast. Co. v. FCC*, 395 U.S. 367, 389 (1969).

133. *Krattenmaker & Powe*, *supra* note 4, at 1131 (providing an example of when the public successfully reduced the amount of violence on television).

Congress may want to control the amount of drugs shown on television. The Senate bill that preceded the Act is a perfect example of how Congress may use antitrust exemptions to regulate all kinds of controversial subjects. When the Bill passed the Senate unanimously in 1989, it contained an amendment introduced by Jesse Helms (R-N.C.) that would have included sexual activity in the Act's coverage. The House version limited the antitrust exemption to violence. After both versions passed, the Bill went through a joint conference committee to resolve the differences, and the committee eventually omitted the "sexual activity" language. Thus, the Television Violence Act could set the stage for further censorship.¹³⁴

Because the purpose of our communication system is to allow, where possible, the free market to determine matters,¹³⁵ television violence should be left to the control of the market. Moreover, one of the goals of the FCC is to promote diversity.¹³⁶ This goal focuses on *adding* voices to provide viewers with a full range of programming options. Diversity does not countenance eliminating voices or viewpoints.¹³⁷ Therefore, regulating violent television is in conflict with promotion of diversity. The market will provide a fair degree of diversity, especially in a time of numerous outlets.¹³⁸

CONCLUSION

Protecting children is a worthy goal, and it is indeed hard to ignore the substantial social science data that links television with violence in society. However, one must remember the importance of the First Amendment. For years, the government has attempted to impose its values on society by suppressing unpopular ideas. The Court, usually remaining faithful to the tenets of the First Amendment, has struck down these various regulatory activities.

134. *Doing Violence Against Violence*, *supra* note 81.

135. ZUCKMAN ET AL., *supra* note 87, at 369.

136. *Red Lion*, 395 U.S. at 390.

137. Krattenmaker & Powe, *supra* note 4, at 1274.

138. Sunstein, *supra* note 54, at 257.

Pacifica represented an erosion of these First Amendment principles. Hopefully, this departure will not continue. Even when regulating the media, one must keep in mind the First Amendment, the values attached to it, and the dangerous suppressive action it prevents.

While the Television Violence Act appears to fall in line with a number of Supreme Court cases that allow regulation, the government must not go too far. If, as predicted, the networks fail to reduce television violence under the Act, government should allow television to return to the free market system—its rightful place.

An antitrust exemption is not the answer either. With an exemption, the government is basically manipulating the antitrust laws to bring about government censorship.¹³⁹ The government should not be able to hand out antitrust exemptions in order to impose its own values on the television industry. This is a dangerous activity and not “a sensible way to overcome the deleterious effects of cutthroat competition.”¹⁴⁰

Consequently, although the Television Violence Act may be constitutional, any further direct regulation of television violence would violate the First Amendment because it impedes the freedom of expression long enjoyed by Americans. In December 1993, the Act will expire, and the government should return television to where it belongs: the marketplace. Congress may then work to eradicate crime and violence by focusing on the deeply rooted social conditions that create them. Congress should stop blaming an electronic box that merely reflects the society that already exists.

139. *See Congress Asserts Its Dominion Over F.C.C.*, BROADCASTING, Aug. 7, 1989, at 27, 29.

140. *Doing Violence Against Violence*, *supra* note 81, at A16.

