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Faith M. Sparr

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I. INTRODUCTION

Much has been said about the Federal Communication Commission's ("FCC") recent report addressing whether Congress can constitutionally regulate broadcast television violence.[1] Some have noted that the report was cursory in nature, especially in light of the fact that Congress asked specific questions when requesting the report which seemed to go largely unanswered.[2] Others argue that the main purpose in releasing the report is to prod television executives to alter programming—that neither the FCC nor Congress has the inclination or political will to truly regulate violence on television.[3] It remains to be seen whether the political will exists to implement the most restrictive FCC recommendation, content channeling.[4] Congressional bills attempting to confront this issue have been drafted in the past,[5] and at least one senator has indicated that he will use the report to

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1. In the Matter of Violent Television Programming and Its Impact on Children, 22 F.C.C.R. 7929 (2007). *See, e.g.*, Online Symposium for TV Violence & the FCC, http://www.firstamendmentcenter.org/collection.aspx?item=TV_violence_FCC (last visited Oct. 10, 2007).

2. *See* Robert Corn-Revere, *FCC Television Violence Report: A Conclusion in Search of an Analysis*, FIRST AMENDMENT CENTER, Apr. 27, 2007, *http://www.firstamendmentcenter.org/commentary.aspx?id=18493.*

3. *See* Marjorie Heins, *Politics of TV Violence Returns to Center Stage: FCC's TV-Violence Report*, FIRST AMENDMENT CENTER, Apr. 29, 2007, *http://www.firstamendmentcenter.org/commentary.aspx?id=18498.*

4. In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1.

5. *See, e.g.*, Craig R. Smith, *Violence & Media Overview*, *available at http://www.firstamendmentcenter.org/speech/arts/topic.aspx?topic=violence_media* (last visited Oct. 10, 2007) (describing several Congressional bills aimed at regulating television broadcast violence).

introduce legislation regulating violence.[6] What is certain, as is always the case when Congress steps so firmly into the First Amendment arena, is that the courts will be left to sort the constitutional laundry.[7] This is why the report's short shrift of the constitutional issues and jurisprudential history is surprising. The report's treatment of the research regarding the effect of violent media on minors and the FCC's suggestions for a definition of violence are equally brief and unpersuasive. Furthermore, the report's almost total reliance on one case, *FCC v. Pacifica Foundation*,[8] leaves a gaping jurisprudential hole in its legal analysis.

This Article examines the legal questions left unanswered in the FCC's report. For instance, is a court examining the constitutionality of broadcast violence regulations likely to rely primarily on *Pacifica*, or will other cases examining content regulations in different mediums be included in the court's analysis? Of course, *Pacifica* is highly relevant in the equation, given that it directly addresses the broadcast medium, but the content to be regulated under the FCC's new proposal is obviously different.[9] *Pacifica* specifically deals with regulating *indecency*, while the FCC's report deals with regulating *violence*—begging the question of whether the medium or the content is most relevant in a constitutional analysis.[10] If the latter is the answer, proponents of the channeling legislation will arguably lose the constitutional battle. However, if the medium really is the message, these warriors may have cause for hope.

II. THE FCC REPORT

The FCC's report, In the Matter of Violent Television Programming and Its Impact on Children ("Report"), was adopted by the Commission on

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6. *See* Associated Press, *Government Must Act to Curb TV Violence Says Sen. Rockefeller* (June 27, 2007), *available at http://www.firstamendmentcenter.org/news/aspx?id=18727* (Senator Jay Rockefeller stated that he would push for legislation to regulate violent media content, in response to the FCC's report.).

7. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978).

8. *Id.*

9. *See id.*; In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1.

10. While the Supreme Court has noted that "[e]ach medium of expression . . . may present its own problems" (Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975)), the Court has also focused heavily on the type of content to be regulated. For instance, the Supreme Court has established several categories of unprotected speech. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (commercial speech); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (defamation); Miller v. California, 413 U.S. 15 (1973) (obscenity); Brandenburg v. Ohio, 395 U.S. 444 (1969) (incitement); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words).

April 6, 2007 and released to the public on April 25, 2007.[11] The FCC issued the Report in response to a letter from thirty-nine House members to former FCC chair Michael Powell.[12] The letter asked the FCC to conduct a review of television violence, and more specifically requested the FCC answer the following questions:

> 1)What are the negative effects on children caused by the cumulative viewing of excessively violent programming?
>
> 2)What are the constitutional limits on the government's ability to restrict the broadcast of excessively violent programming when children are likely to be a significant or substantial part of the viewing audience? In particular, could television violence regulations, including possible time channeling requirements, be narrowly tailored to the governmental interests they are intended to serve?
>
> 3)Is it in the public interest for the government to adopt a definition of "excessively violent programming that is harmful to children," and could the government formulate and implement such a definition in a constitutional manner?[13]

The Report is organized around these three questions, with a separate section devoted to the exploration of each. Though this Article will focus mainly on the second question posed by the House members, it is worth discussing the FCC's analysis of the first and third inquiries as well.

A. Social Scientific Evidence

There is no shortage of debate among social scientists regarding whether violent media content has a specific, measurable, negative effect on children.[14] In addition, numerous law review articles have been written on the subject.[15] The debated question is closely linked to the constitutionality of any regulation aimed at limiting television violence in light of Judge Posner's opinion in *American Amusement Machine v.*

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11. In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1.

12. *Id.* at 2 ¶ 3.

13. *Id.* at 2–3 ¶ 4.

14. *See id.* at 3 ¶ 6 n. 10.

15. *See, e.g.*, Kevin W. Saunders, *The Cost of Errors in the Debate Over Media Harm to Children*, 2005 MICH. ST. L. REV. 771 (2005); Scott A. Pyle, *Is Violence Really Just Fun and Games?: A Proposal for a Violent Video Game Ordinance that Passes Constitutional Muster*, 37 VAL. U.L. REV. 429 (2002); Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427 (2000).

Kendrick,[16] discussed later in this Article. The Report duly notes the tension amongst some scholars on this issue,[17] but concludes "that, on balance, research provides strong evidence that exposure to violence in the media can increase aggressive behavior in children, at least in the short term."[18]

The FCC's analysis of the research is somewhat cursory, with most of the pertinent analysis in the Report's footnotes which cite many studies on the issue.[19] Most of these studies, however, are not fully explored in either the text or footnotes.[20] The Report discusses a few studies which found that violent programming in fact had an effect, or tended to be associated with an effect, on children's behavior or their perception of the world.[21] One study conducted by Dr. Craig Anderson concluded that "exposure to media violence [movies, television, music, and video games] has a statistically significant association with aggression and violence among youth."[22] However, Dr. Anderson also noted that personal characteristics of the viewer can "influence the degree to which media violence affects aggression."[23]

Another researcher whose work is specifically discussed in the Report is Professor Joanne Cantor. Based on her findings, she concluded that "children show higher levels of hostility after exposure to media violence-ranging from being in a 'nasty mood' to an increased tendency to interpret a neutral comment or action as an attack."[24] Further, longitudinal research has shown that a child's habitual exposure to television violence at an early age is more predictive of increased aggression in later life, irrespective of other factors such as intellect or social status.[25]

The Report notes that while some of the research may show a correlation between viewing violent media and aggressive behavior, the research is not conclusive with respect to whether the violent content actually causes such behavior.[26] In exploring this distinction, the Report

16. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001).

17. In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1 at 6 ¶ 10.

18. *Id.* at 3 ¶ 6.

19. *Id.*

20. *Id.*

21. *Id.* at 4 ¶ 8.

22. *Id.* at 4–5 ¶ 8,n. 16.

23. In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1 at 5 ¶ 8.

24. *Id.* at 5 ¶ 9.

25. *Id.* at 7 ¶ 13.

26. *Id.*

cites the Federal Trade Commission's report on *Marketing Violent Entertainment to Children*,[27] which concluded that "[m]ost researchers and investigators agree that exposure to media violence alone does not cause a child to commit a violent act, and that it is not the sole, or even necessarily the most important, factor contributing to youth aggression, anti-social attitudes, and violence."[28] Furthermore, citing the Surgeon General's report, *Youth Violence*,[29] the Report notes that the research so far cannot "describe accurately how much exposure, of what types, for how long, at what ages, for what types of children, or in what types of settings will predict violent behavior in adolescents and adults."[30]

The FCC also gives cursory treatment to the critics of the studies drawing a link between violent content and harmful effects on children. The Report notes the various criticisms, but does not attempt to address the questions posed by the critics.[31] Furthermore, the Report does not provide any of the refutations offered by the authors whose studies are being criticized.[32] For instance, Professor Michael Males at the University of California Santa Cruz suggests a number of problems with the studies linking violent media with children's aggression.[33] First, Males argues that studies showing a statistically significant result is not proof of causality but only that the result is not likely to happen by chance.[34] Second, he suggests that the studies themselves are extremely inconsistent because they all use vastly different examples of violence.[35] Third, he believes that the nonviolent clips shown in many experiments are not equivalent to the violent clips shown with respect to many variables, such as the level of interest the children will have in the clips.[36] Lastly, he argues that the researchers use completely different examples or indicators of what

27. FTC, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN (2000).

28. In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1 at 6 ¶ 10 (quoting FTC, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN, at Appendix A (2000)).

29. DEPT. OF HEALTH & HUMAN SERVS., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL (Nov. 2001).

30. In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1 at 7 ¶ 12 (quoting DEPT. OF HEALTH & HUMAN SERVS., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL, at Appendix 4-B (Nov. 2001)).

31. *See* In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1.

32. *See id.*

33. *Id.* at 10 ¶ 18.

34. *Id.*

35. *Id.*

36. *Id.*

constitutes violence or aggressive behavior in children.[37]

There may be legitimate explanations for Males' concerns, but the Report does not provide them, nor does it refer the reader to other researchers who may have addressed the issues raised by Males. As a result, the Report's answer to the first question posed by the House members is conclusory and lacks thoughtful analysis. After breezing through the studies supporting a link between violent media and aggressive behavior in children, then noting the various criticisms of such studies, the Report simply concludes:

> Given the totality of the record before us, we agree with the view of the Surgeon General that: "a diverse body of research provides strong evidence that exposure to violence in the media can increase children's aggressive behavior in the short term." At the same time, we do recognize that "many questions remain regarding the short- and long-term effects of media violence, especially on violent behavior." We note that a significant number of health professionals, parents and members of the general public are concerned about television violence and its effects on children.[38]

B. Definition of Violence

The FCC's attempt to provide guidance on the definition of "excessively violent programming harmful to children" is not very instructive.[39] The definition established by legislation could be crucial to its success or failure on a constitutional level. In particular, an overbroad definition could lead to the legislation failing a strict or an intermediate scrutiny test for restricting more speech than necessary.[40] Indeed, far from providing clarity, the FCC suggests that the legislation might use different definitions for excessively violent programming depending on what the

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37. In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1 at 10 ¶ 18.

38. *Id.* at 10–11 ¶ 20 (quoting DEPT. OF HEALTH & HUMAN SERVS., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL, at Appendix 4-B (Nov. 2001)).

39. *Id.* at ¶¶ 18–21.

40. The Supreme Court has held that content-based speech restrictions will be subject to a strict scrutiny standard typically requiring a compelling government interest be shown, and that the restriction be narrowly tailored to further that interest. See United States v. Playboy Entm't Group, Inc., 529 U.S. 802, 813 (2000). Content-neutral speech restrictions are typically analyzed under an intermediate scrutiny test, requiring only an important or substantial government interest and a less burdensome requirement with respect to tailoring. *See also Am. Amusement Mach. Ass'n*, 244 F.3d at 578.

regulation prohibits.[41] For instance, the Report notes that defining excessively violent programming for the mere purpose of content ratings might not require the content be defined or described as having a likelihood of harm to children.[42] As opposed to this somewhat loose definition, the FCC suggests that a more narrow definition would be needed for a mandatory channeling provision.[43]

Furthermore, the Report explains that any definition of violence must be sufficiently clear to provide ample notice to broadcasters regarding the possibility of running afoul of the regulation.[44] This is easier said than done. The FCC has a history of expanding its reach within the realm of indecency, and the Second Circuit Court of Appeals recently vacated the FCC's revised "fleeting expletives" policy.[45] Thus, it is unlikely that broadcasters would have a notion of either Congress' or the FCC's intended scope of excessively violent programming. The FCC also briefly notes that any such definition would have to consider the context of the broadcast, similar to the Supreme Court's obscenity test in *Miller*,[46] which exempts material that has "serious literary, artistic, political or scientific value" from the definition of obscenity.[47] However, the Report argues, somewhat inconsistently, that the overall value of the broadcast does not change the impact of certain words or phrases on children.[48]

The Report does provide some specific suggestions for a definition, noting that the National Television Violence Study defines violence as "any overt depiction of a credible threat of physical force or the actual use of such force intended to physically harm an animate being or group of beings."[49] Another definition the Report cites is from Morality in the Media which defines violence as "intense, rough or injurious use of

41. In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1 at 18 ¶ 39.

42. *Id.* at 18 ¶ 39.

43. *Id.* at 18, 20 ¶¶ 39 & 44.

44. *Id.* at 18 ¶ 40.

45. The Second Circuit Court of Appeals recently held in Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007), that the FCC's revised fleeting expletives policy was arbitrary and capricious under the Administrative Procedure Act. For further discussion of the expansion of the FCC's indecency policy over the years, including the fleeting expletives revision, *see* Faith M. Sparr, *From Carlin's Seven Dirty Words to Bono's One Dirty Word: A Look at the FCC's Ever-Expanding Indecency Enforcement Role*, 3 FIRST AMENDMENT L. REV. 271 (2005).

46. Miller v. California, 413 U.S. 15, 23 (1973).

47. In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1 at 18 ¶ 40.

48. *Id.* at 19 ¶ 40.

49. *Id.* at 19 ¶ 42 (quoting CENTER FOR COMMUNICATION & SOCIAL POLICY, NATIONAL TELEVISION VIOLENCE STUDY VOLUME 3 (Joel Federman ed., 1998)).

physical force or treatment either recklessly or with an apparent intent to harm."[50]

Ultimately, the FCC does not endorse any particular definition. Instead, the Report simply notes various factors that would need to be considered and brushes aside criticisms that violence in various programs serves different purposes and no definition could possibly account for these differences.[51]

C. *The FCC's Constitutional Analysis*

Given that the FCC only provides a cursory look at the first and third questions the House members requested it to answer, it should be no surprise that its analysis of the legal issues is similarly brief and superficial. Of primary interest is the Report's almost sole reliance on *FCC v. Pacifica Foundation*.[52] Accordingly, in a medium versus message paradigm, it seems the FCC is heavily focused on the medium.

The Report quotes the Supreme Court's language in *Pacifica* that "each medium of expression presents special First Amendment problems" and that broadcast has typically received "the most limited First Amendment protection."[53] Additionally, the FCC's analysis concludes that in examining the constitutionality of any broadcast violence regulation, a court would not apply a strict scrutiny analysis, but instead should apply a more lenient intermediate scrutiny test.[54]

Despite its claim that strict scrutiny does not apply to broadcast speech regulation,[55] the FCC characterizes the government's interests in regulating violent material as "compelling."[56] Historically, this type of language is reserved for the interest the government must demonstrate under a strict scrutiny analysis.[57] The Report uses this language both to describe what it believes is the compelling government interest in this

50. *Id.* at 20 ¶ 42.

51. *Id.* at 20 ¶ 43.

52. FCC v. Pacifica Found., 438 U.S. 726 (1978). *Pacifica* involved a local radio program's broadcast of George Carlin's Filthy Words monologue at a time of day where children would likely be in the audience. A member of the public heard the show while in the car with his young son and filed a complaint with the FCC. The Supreme Court examined many issues in the case, one being whether the FCC could constitutionally regulate indecent speech over broadcast airwaves.

53. In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1 at 11 ¶ 22 (quoting *Pacifica*, 438 U.S. at 744 (internal quotations omitted)).

54. *Id.* at 11 ¶¶ 22–25.

55. *Id.* at 11 ¶ 22.

56. *Id.* at 11 ¶¶ 22–37.

57. *See* Bush v. Vera, 517 U.S. 952, 1065 (1996).

case—shielding kids from violent material based on the studies it referenced earlier in its report—and in citing what the D.C. Circuit Court of Appeals found to be a compelling government interest in upholding some of the FCC's indecency regulatory scheme in *Action for Children's Television v. FCC*.[58]

In fact, the Report only briefly addresses the important distinction that the content at issue here is different than the indecent material the Supreme Court in *Pacifica* allowed the FCC to regulate.[59] The Report relies on comments submitted during the public comment period by Pappas Telecasting Companies and states that a regulation would pass constitutional muster because the interests motivating the regulations are the same.[60] The FCC does not, however, address or mention Judge Posner's opinion in *American Amusement Machine*,[61] wherein the analysis focused heavily on the difference between sexually explicit content and violent content.[62]

In further support of its conclusion that violent content on broadcast television can be constitutionally regulated, the FCC appears to rely on the premise that violent content is simply not all that important. In particular, the FCC quotes language from *Pacifica*,[63] wherein the Court argued the Carlin monologue at issue was a low value category of speech and of "slight social value as a step to truth."[64] Combining this logic with the broadcast as a special medium argument, the FCC concludes that regulation of violent programming on broadcast television would be subject to "reduced First Amendment protection."[65]

Yet, even the FCC's analysis concedes that any such regulation would have to be narrowly tailored in furtherance of the purported governmental goal of protecting children from so-called harmful content.[66] The FCC preempts arguments regarding the technological options now available to

58. In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1 at 12 ¶¶ 23 & 25.

59. *Id.*

60. *Id.* at 12 ¶ 24.

61. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001).

62. *Id.* at 574–79 (drawing a distinction between "sexually graphic expression" and "a child's world of violent adventures" in holding that the First Amendment was violated).

63. *Pacifica*, 438 U.S. at 746 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

64. In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1 at 12 ¶ 25 (quoting *Chaplinsky*, 315 U.S. at 572.)

65. *Id.* at 12 ¶ 25.

66. *Id.* at 12 ¶ 26.

parents to help block out content they do not wish their children to see.[67] Specifically, the FCC argues that these measures may impose lesser burdens than a channeling regulation, but the FCC is "skeptical that they will fully serve the government's interests in promoting parental supervision and protecting the well-being of minors."[68]

1. Standard of Scrutiny

There are many notable items in the FCC's legal analysis. First, it is no longer entirely clear that the Supreme Court and lower courts, in addressing broadcast content regulations, are specifically applying an intermediate standard of scrutiny versus a strict standard of scrutiny. Language from previous Supreme Court cases on broadcast regulation has relied on the notion that the broadcast medium receives somewhat less protection under First Amendment analysis than other mediums.[69] However, those precedents alternatively relied on the scarcity rationale[70] or the justifications set forth in *Pacifica*.[71] According to some commentators, both the technological underpinnings and theoretical coherence of the scarcity rationale have been under attack recently.[72] The courts are reluctant to apply the doctrine to more recent cases and are avoiding extending it to other mediums.[73] Furthermore, the scarcity rationale has no bearing on regulating indecency, nor would it likely be the rationale behind regulating violent content. Instead, *Pacifica*'s defense of indecency regulations would most likely provide the legal basis for such regulation—the attributes of broadcast with respect to its pervasiveness in the home and

67. With the increasing availability of technology that enables parents to block undesirable content the need to regulate such content from its source is lessened—or at the very least this technological alternative is a less restrictive means for protecting minors. *See, e.g.*, Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 304 (2003).

68. *Id.*; In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1 at 12 ¶ 26.

69. In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1 at 12 ¶¶ 22–25.

70. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (setting forth the scarcity rationale and examining whether the FCC's fairness doctrine violated broadcasters' First Amendment rights). In upholding the doctrine, the Court in part reasoned that broadcast frequencies were scarce and without governmental assistance many in the public would be unable to gain access to those frequencies to express their viewpoints.

71. FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978).

72. *See, e.g.*, Yoo, *supra* note 67 at 283–84 (arguing the scarcity doctrine is implicitly collapsing).

73. *See, e.g.*, *id.* at 253–54.

unique accessibility to children.[74] There is little consensus on the test that the Supreme Court in *Pacifica* applied to the indecency regulations.

One need only examine the various opinions in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*[75] to see this uncertainty on full display. Justice Breyer's plurality opinion in *Denver Area* found that the Court need not determine what standard of scrutiny the Court applied in *Pacifica* because either way, the provision being addressed in *Denver Area* did not pass either the Court's strictest or somewhat less strict requirements.[76]

Additionally, Justice Souter's concurring opinion noted that the Court in *Pacifica* had failed to assign a specific level of scrutiny for reviewing the indecency regulations addressed in the case.[77] Furthermore, Justice Kennedy's opinion in *Denver Area* found that the *Pacifica* decision relied on a rule that broadcasting had received the most limited First Amendment protection of any medium.[78] At the same time, Justice Kennedy specifically rejected any notion that indecent speech itself was subject to a lower standard of review.[79]

The D.C. Circuit Court of Appeals decision in *Action for Children's Television v. FCC* ("*ACT III*")[80] further demonstrates how appellate courts have applied the strict scrutiny standard test to analyze content regulations in broadcast media. In *ACT III*, the D.C. Circuit was explicit about the standard it applied in analyzing the revised and more constricted safe harbor hours for indecent speech on broadcast television. The court applied the strict scrutiny standard in analyzing the regulation which changed the safe harbor hours. However, the court stated, "[w]hile we apply strict scrutiny to regulations of this kind regardless of the medium affected by them, our assessment of whether section 16(a) survives that scrutiny must necessarily take into account the unique context of the

74. *Pacifica*, 438 U.S. at 748–49.

75. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 727–32 (1996) (examining three sections of the Cable Television Consumer Protection and Competition Act of 1992. The three sections were challenged on First Amendment grounds. The sections allowed leased and public access channels to prohibit sexually explicit programming, while another provision required leased channels to segregate sexually explicit programming into a single channel).

76. *Id.* at 755.

77. *Id.*

78. *Id.* at 803.

79. *Id.* at 803–04 ("Pacifica did not purport, however, to apply a special standard for indecent broadcasting.").

80. *See* Action for Children's Television v. FCC, 58 F.3d 654, 656 (D.C. Cir. 1995) (examining whether section 16(a) of the Public Telecommunications Act of 1992, which restricts the safe harbor hours during which indecent material could be broadcast, was constitutional).

broadcast medium."[81]

The FCC Report's legal analysis on this point is at best misleading. In fact, courts apply a strict scrutiny analysis to content based regulations in the broadcast arena, albeit a slightly modified strict scrutiny analysis that takes into account the unique history of the broadcast medium.[82] Even with this modification, the language used is unmistakable: the government must demonstrate a compelling government interest, and the means used to further that interest must be narrowly tailored. The modification for the broadcast medium does not seem to be applied when asking which standard of scrutiny to use, but instead it is used in analyzing the strict scrutiny test itself. It is disingenuous for the FCC to state in its Report that strict scrutiny will not be applied[83] and, therefore, content based regulations of violence on television are constitutional.

2. Speech Valuations

Another interesting assertion made in the FCC's Report is the approval of the concept of "low value" speech categories.[84] The FCC makes this pronouncement relying heavily on Justice Stevens' opinion from *Pacifica* where in Part IV(B), he argues that the Carlin monologue in question has limited "social value," noting "it is undisputed that the content of . . . [the] broadcast was 'vulgar,' 'offensive,' and shocking."[85] Further, Justice Stevens argued that the words used by Carlin in the monologue "offend for the same reasons that obscenity offends."[86]

As is well known by those who are familiar with the *Pacifica* case, this part of Justice Stevens' opinion garnered only three votes.[87] In fact, Justices Powell and Blackmun issued a concurring opinion, in part to specifically note their disagreement with Justice Stevens' contentions in Part IV-B of his opinion, which states:

> I do not join Part IV-B, however, because I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the

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81. *Id.* at 660.

82. *See generally id.* (referring to precedent that discusses various levels of scrutiny).

83. In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1 at ¶ 21.

84. *Id.* at 12 ¶ 25.

85. FCC v. Pacifica Found., 438 U.S. 726, 747 (1978).

86. *Id.* at 746.

87. Yoo, *supra* note 67 at 297.

> most protection, and which is less "valuable" and hence deserving of less protection . . . . In my view, the result in this case does not turn on whether Carlin's monologue, viewed as a whole, or the words that constitute it, have more or less "value" than a candidate's campaign speech. This is a judgment for each person to make, not one for the judges to impose upon him.[88]

Interestingly, according to one legal scholar, it was only after Justice Stevens failed to assemble a majority on his low value argument that he turned to the medium specific logic found in Part IV-C, which became the lasting impression of the *Pacifica* case.[89]

III. MISSING THE MARK

Still, the most troubling aspect of the FCC's legal analysis is its failure to fully explore and recognize that the content it proposes to regulate is entirely different from indecency. The FCC relies heavily on a medium-specific analysis, with little concern for the difference in the content proposed to be regulated.[90] A loose analogy can be drawn from the FCC's medium-centric analysis to Marshall McLuhan's famous assertion that the "medium is the message."[91]

In his book, *Understanding Media: The Extensions of Man*,[92] McLuhan set forth his theory regarding the importance of understanding communication technologies in the context of broader societal impacts and in the context of those technologies that preceded them.[93] McLuhan claimed that communication and other technologies shape society, our experiences, and the way we conceptualize and act—regardless of what a medium's actual content might be.[94] McLuhan deemphasized the importance of the given message's content and instead focused on the characteristics of the medium.[95] Similarly, the FCC appears to be latching onto the importance of the medium—broadcast television—at the expense of paying attention to the content to be regulated—violence. Some may find McLuhan useful for analyzing the relationship between technology

88. *Pacifica*, 438 U.S. at 761.

89. Yoo, *supra* note 67 at 297.

90. In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1 at ¶ 22.

91. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (MIT Press 1994) (1964).

92. *Id.* at 6.

93. *Id.* at 4.

94. *Id.* at 9.

95. *Id.* at 8.

and society. However, this framework does not translate well into First Amendment case law analysis, where the type of content that is regulated is relevant and cannot be ignored.

The FCC Report's only reference to the difference in regulated content is a reference to Pappas Telecasting Companies' public comments submission.[96] These comments simply note that Pappas believes the protected interests are the same whether the regulations restrict indecency or violence.[97] However, no mention is made of what these interests are, or explicitly what legal authority Pappas is relying on in its comments.[98] Moreover, the FCC's reliance on such sparse reasoning is surprising, especially given the existing case law examining violent media, which on the whole seems to indicate a distinctly different treatment of violence versus indecency.[99]

The question regarding the difference in the content is distilled down to the question Pappas Telecasting addressed (albeit briefly) in its comments—are the reasons behind regulating violent content similar to those for regulating indecency?[100] The answer to this question is highly relevant to whether a court accepts the interest advanced by the government as compelling (assuming, as previously discussed, the court applies a strict scrutiny analysis in examining the regulation).

Answering this question is not clear cut, given the varying interests that are stated for regulating both indecency and violent material. Several consistent themes emerge after examining several cases that analyze attempts to regulate both kinds of content. As will be discussed, these cases demonstrate that the motivations for regulating indecency and violent content differ and consequently should affect whether violent content regulations are upheld—regardless of the medium.

One only needs to examine Justice Stevens' opinion in *Pacifica* to see that several of the main concerns regarding indecency regulation stem from the need to protect children from offensive speech, rather than concern for a measurable psychological harm to minors.[101] According to Justice Stevens, the Carlin monologue at issue in *Pacifica* "offend[s] for the same

96. In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1 at 12 ¶ 25.

97. *Id.* at 12 ¶ 24.

98. *Id.* at 12 ¶ 25.

99. *See, e.g.*, Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001).

100. In the Matter of Violent Television Programming and Its Impact on Children, *supra* note 1 at 12 ¶ 24.

101. *See generally* FCC v. Pacifica Found., 438 U.S. 726 (1978).

reasons that obscenity offends."[102] Stevens specifically equates indecency with obscenity and further reasons that such speech has slight social value, and any benefit it has "is clearly outweighed by the social interest in order and morality."[103] Finally, Justice Stevens concluded "it is undisputed that the content of Pacifica's broadcast was 'vulgar,' 'offensive,' and 'shocking.'"[104]

Justice Powell's concurring opinion hews to some of these same themes, even though more broadly; his opinion refused to classify the monologue as "low value" speech.[105] Justice Powell's opinion notes that most people would find the Carlin monologue "vulgar and offensive."[106] In fact, Justice Powell concludes that this kind of "verbal shock treatment" is "'patently offensive' to most people regardless of age."[107] Furthermore, in describing the concern with protecting children from this sort of speech, Justice Powell states society has a "right to protect its children from speech generally agreed to be inappropriate for their years," and an interest in ensuring "unwilling adults [are not] assaulted by such *offensive* speech."[108]

It seems clear that the majority's focus in *Pacifica* with respect to the Carlin monologue was not that the broadcast caused specific psychological harm to children who might hear it, or that it would necessarily have a specific negative effect on society.[109] Instead, the majority justices seemed to rely on an overall concern that listeners, including children, would be offended by such vulgar and offensive speech.[110] Certainly, the majority relied heavily on the proposition that such offensive speech is subject to more regulation in the broadcast medium because it assaults people in their homes and is uniquely accessible to children, but the content of the speech clearly mattered as well.[111]

Similarly, examining the D.C. Circuit Court of Appeals decision in *ACT III* demonstrates a heavy reliance on the type of content being regulated. In *ACT III*, the court was examining whether a revision of the

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102. *Id.* at 746.

103. *Id.* at 746 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

104. *Id.* at 747.

105. *Id.* at 761 (noting the Justices of the Court were not free to decide, on the basis of content, which speech was more valuable and more deserving of protection and which speech was less valuable and less deserving of protection).

106. *Id.* at 757.

107. *Pacifica*, 438 U.S. at 757.

108. *Id.* at 762 (emphasis added).

109. *See id.* at 750 (noting that the court seemed to be more concerned with the case where children may obtain access to broadcast material).

110. *Id.* at 748–49.

111. *Id.* at 748.

broadcast indecency safe harbor hours from the original ten p.m. to six a.m. regulation to a new and more restrictive twelve a.m. to six a.m. time frame should be upheld.[112] The court considered petitioners' arguments that the constriction of the safe harbor hours violated the broadcasters' First Amendment rights.[113] Although the court applied a strict scrutiny standard to the statute restricting the safe harbor hours, the court noted in its application it would take into consideration that broadcasting had historically received the most limited First Amendment protection of any medium.[114]

The government put forth three interests it deemed compelling enough to support the statute's constitutionality: "support for parental supervision of children, a concern for children's well-being, and the protection of the home against intrusion by offensive broadcasts."[115] The D.C. Circuit found the first two interests persuasive, so it did not consider the third interest.[116]

The government's second interest, concern for children's well-being, demonstrates the importance of content in the court's analysis. The petitioners in *ACT III* argued that while the government has an interest in children's well-being, the government could not prove any causal nexus between the indecent material being regulated and harm to minors.[117] However, the D.C. Circuit reasoned that "the Supreme Court has never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech."[118]

While this may seem to bolster the case of those who support violence regulations, the language used by the D.C. Circuit is limited to indecent speech.[119] After making the above-referenced statement, the court cites *Ginsberg v. New York*[120] for further support that a causal link between harm and the regulated material is not needed to uphold legislation aimed at protecting children from certain material.[121] The *Ginsberg* case dealt

112. Action for Children's Television v. FCC, 58 F.3d 654, 656 (D.C. Cir. 1995).

113. *Id.* at 659.

114. *Id.* at 660 (noting that "radio and television broadcasts may be subject to different—and often more restrictive—regulation than is permissible for other media under the First Amendment.").

115. *Id.* at 660–61.

116. *Id.* at 661.

117. *Id.*

118. *Action for Children's Television*, 58 F.3d at 661–62.

119. *Id.* at 663.

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

121. *Action for Children's Television*, 58 F.3d at 662.

specifically with limiting the sale of "girlie" magazines to minors that appealed to "the prurient, shameful or morbid interest of minors" and were "patently offensive to prevailing standards."[122] In *Ginsberg*, the Supreme Court's reasoning depended heavily on the concept of a "variable obscenity" test for minors.[123] This rationale informs the remainder of the Court's analysis in *Ginsberg*, including its conclusion that the Legislature need not provide evidence constituting scientific fact that such material is harmful to minors.[124] It was enough for the Court in *Ginsberg* that the Legislature had a rational basis for such a finding[125]—clearly a far different standard than strict scrutiny requires. The Court in *Ginsberg* specifically bracketed the variable obscenity statute for minors with obscenity itself, thus lessening the burden the government must meet in order to defend the statute.[126]

Beyond a reliance on *Ginsberg*, which was clearly focused on the sexual nature of the content being regulated, the D.C. Circuit's decision in *ACT III* placed a heavy reliance on the content and context of the speech being regulated under the proposed safe harbor scheme.[127] Again noting that there is no need for specific scientific evidence, the court reasoned that "Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material just this side of legal obscenity."[128] Furthermore, the court referenced the fact that most states also prohibit minors from accessing sexually explicit material.[129] Based on this "social consensus" and the Supreme Court precedent discussed above, the *ACT III* court concluded that the government has a compelling interest in shielding children from sexually explicit material that is "not obscene by adult standards."[130]

The FCC's own definition of indecency similarly does not focus on any specific harm that might be caused by the material. Instead, it is

122. *Ginsberg*, 390 U.S. at 633–34.

123. *Id.* at 635–37 (focusing on variable obscenity and whether it is constitutionally permissible for New York to judge and determine the sexual materials for themselves).

124. *Id.* at 641–42 (noting that the court can determine the issue even without scientific facts).

125. *Id.* at 641.

126. *Ginsberg*, 390 U.S. at 638.

127. *See Action for Children's Television*, 58 F.3d at 660 (noting that because broadcast audiences have no choice in being confronted with offensive material, they are subject to more restrictive regulations).

128. *Id.* at 662.

129. *Id.* at 663.

130. *Id.* (citing Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)).

concerned with offensiveness—"language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[131] In fact, according to the FCC's 2001 Industry Guideline on its indecency enforcement policies, the FCC must make two findings before broadcasted material is deemed indecent: "[f]irst, the material . . . must describe or depict sexual or excretory organs or activities," and "[s]econd, the broadcast must be patently offensive as measured by contemporary community standards."[132]

In contrast to the indecency and sexually explicit material cases, which focus on the material's offensiveness, are those cases addressing attempts to regulate violent content.[133] The most recent and prominent examples of such attempts arise in the area of violent video games. While the medium is different, the focus in these cases is on what motivates regulators to restrict violent content, which seems to be the determining factor.[134]

Of course, one of the best known decisions on attempts to regulate violent video games is *American Amusement Machine v. Kendrick*.[135] Many subsequent cases and law review articles on the issue have cited Judge Posner's decision in *American Amusement*.[136] Of importance to the medium versus message question is Judge Posner's discussion of the varying rationales the government provides for regulating sexually explicit material as opposed to violent material.[137]

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131. In the Matter of Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 2 ¶ 4 (2001).

132. *Id.* at 4 ¶¶ 7–8 (emphasis added).

133. *See generally* Interactive Digital Software Ass'n. v. St. Louis County, 329 F.3d 954 (8th Cir. 2003); Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004); Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); Entm't Software Ass'n v. Granholm, 404 F. Supp. 2d 978 (E.D. Mich. 2005); Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034 (N.D. Cal. 2005).

134. *See, e.g.*, *Interactive Digital Software Ass'n*, 329 F.3d. 954; *Video Software Dealers Ass'n*, 325 F. Supp. 2d 1180; *Blagojevich*, 404 F. Supp. 2d 1051; *Granholm*, 404 F. Supp. 2d 978; *Video Software Dealers Ass'n*, 401 F. Supp. 2d 1034.

135. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001).

136. *See generally Interactive Digital Software Ass'n*, 329 F.3d at 957; *Video Software Dealers Ass'n*, 325 F. Supp. 2d at 1183; *Blagojevich*, 404 F. Supp. 2d at 1056; *Granholm*, 404 F. Supp. 2d at 982; *Video Software Dealers Ass'n*, 401 F. Supp. 2d at 1039; Russell Morse, Comment, *If You Fail, Try, Try Again: The Fate of New Legislation Curbing Minors' Access to Violent and Sexually Explicit Video Games*, 26 LOY. L.A. ENT. L. REV. 171, 172 (2006); Clay Calvert, *Violence, Video Games, and a Voice of Reason: Judge Posner to the Defense of Kids' Culture and the First Amendment*, 39 SAN DIEGO L. REV. 1, 2 (2002).

137. *Am. Amusement Mach. Ass'n*, 244 F.3d at 573.

In *American Amusement*, the Seventh Circuit Court of Appeals considered an Indianapolis ordinance that limited minors' access to video arcade games that the ordinance defined as harmful to minors.[138] The definition included games that appealed not only to the minors' prurient interests in sex, but also to the minors' interest in violence.[139] Both categories (sex and violence) had to be "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for persons under the age of eighteen (18) years" and had to contain either graphic violence or strong sexual content.[140] The ordinance defined graphic violence as the "visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed, mutilation, maiming or disfiguration."[141] The game manufacturers challenged the ordinance's limitation only with respect to the graphic violence provision.[142]

Judge Posner determined that despite the intersections between the reasons for regulating obscenity and violence, "in general the concerns are different."[143]

> The main worry about obscenity, the main reason for its proscription, is not that it is harmful, which is the worry behind the Indianapolis ordinance, but that it is offensive. A work is classified as obscene . . . upon proof that it violates community norms regarding the permissible scope of depictions of sexual or sex-related activity. . . . Obscenity is to many people disgusting, embarrassing, degrading, disturbing, outrageous, and insulting, but it generally is not believed to inflict temporal (as distinct from spiritual) harm; or at least the evidence that it does is not generally considered as persuasive as the evidence that other speech that can be regulated on the basis of its content, such as threats of physical harm, conspiratorial communications, incitements, frauds, and libels and slanders, inflicts such harm. . . . No proof that obscenity is harmful is required either to defend an obscenity statute against being invalidated on constitutional grounds or to uphold a prosecution for obscenity.

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138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Am. Amusement Mach. Ass'n*, 244 F.3d at 574.

Offensiveness is the offense.[144]

Judge Posner also found a historical difference between regulating violent content and obscenity, noting "[c]lassical literature and art, and not merely today's popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial."[145] Thus, "[t]he notion of forbidding not violence itself, but pictures of violence, is a novelty, whereas concern with pictures of graphic sexual conduct is of the essence of the traditional concern with obscenity."[146]

This did not, however, end Judge Posner's inquiry. He reasoned that protecting children from violence is as worthy a goal as protecting them from sexually explicit content.[147] In order to do so, though, the government's grounds "must be compelling and not merely plausible."[148] The court believed that the city might be concerned with the welfare of and the psychological harm to the children playing violent video games and a more general concern that such game playing might increase violence in society at large.[149] Judge Posner stated that the city "rightly [did] not rest on 'what everyone knows' about the harm inflicted by violent video games"—which he implied is what the *Ginsberg* Court did on the issue of the girlie magazines.[150]

In *American Amusement*, the city defended its ordinance on the basis that the "violent video games incite youthful players to breaches of the peace."[151] To support that proposition, the city introduced two studies, both of which found that playing violent video games tended "to make young persons more aggressive in their attitudes and behavior."[152] Judge Posner did not find the studies to be compelling for several reasons. First, the studies involved video games that were not similar to those in the video arcade rooms in Indianapolis or those likely to be marketed there.[153] Second, the studies did not show that playing violent video games "ha[d] ever caused anyone to commit a violent act" or "caused the average level of

144. *Id.* at 574–75 (citation omitted) (emphasis added).

145. *Id.* at 575.

146. *Id.* at 575–76.

147. *Id.* at 575.

148. *Id.* at 576.

149. *Am. Amusement Mach. Ass'n*, 244 F.3d at 573.

150. *Id.* at 578. *See also id.* at 579 (Judge Posner indicates that the *Ginsberg* decision may in fact just be a product of its time: "*Ginsberg* did not insist on social scientific evidence that quasi-obscene images are harmful to children. The Court, as we have noted, thought this a matter of common sense. It was in 1968; it may not be today; but that is not our case.").

151. *Id.* at 575.

152. *Id.* at 574.

153. *Id.* at 578.

violence to increase anywhere."[154] In Judge Posner's opinion, the city could not identify anything unique about the interactivity of the video games that made them more dangerous than other violent media to which children were routinely exposed.[155]

The rationale used in *American Amusement* has been echoed many times by other courts, which have held that violent content cannot be bracketed with obscenity or sexually explicit material and emphasized that different motivations exist for regulating each.[156] The importance of the distinction between sexually explicit material and violent content cannot be overstated. As Judge Posner noted, the *Ginsberg* Court simply relied on common sense in deciding that exposure to the girlie magazines could harm children.[157] Furthermore, the *Ginsberg* Court assumed that the material fell within a variable obscenity standard and therefore applied a deferential rational basis standard, as opposed to a more rigorous strict scrutiny standard that would demand a showing of a compelling state interest.[158] While *Ginsberg* has allowed subsequent courts to take at face value the government interest in protecting children from sexually explicit material, this interest has not been expanded to violent content on the basis of a common sense appeal.[159] Indeed, as one scholar has noted, it makes little sense to extend *Ginsberg*'s common-sense reasoning to other areas of protected speech.[160]

The distinction between what is motivating legislators to adopt violence regulations versus indecency or obscenity regulations, is further

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154. *Id.* at 578–79.

155. *Am. Amusement Mach Ass'n*, 244 F.3d at 579.

156. *See, e.g.*, *Interactive Digital Software Ass'n*, 329 F.3d. at 958 (striking down ordinance requiring parental approval before minors can rent, buy or have access to graphically violent video games); *Video Software Dealers Ass'n*, 325 F. Supp. 2d at 1185, 1191 (granting plaintiff's motion for summary judgment, finding the Washington statute prohibiting minors' purchase or rental of violent video games depicting the killing of law enforcement both under inclusive and overbroad); *Blagojevich*, 404 F. Supp. 2d at 1076 (granting permanent injunction to plaintiffs enjoining enforcement of Illinois law prohibiting selling or renting violent video games to minors); *Granholm*, 404 F. Supp. 2d at 980 (enjoining enforcement of Michigan law prohibiting display of graphically violent video games to minors without parental consent); *Video Software Dealers Ass'n*, 401 F. Supp. 2d at 1045 (granting preliminary injunction to plaintiffs barring enforcement of California law that prohibited the rental or sale of violent video games to minors).

157. *Am. Amusement Mach. Ass'n*, 244 F.3d at 579.

158. *See Ginsberg*, 390 U.S. at 641.

159. *See Interactive Digital Software Ass'n*, 329 F.3d. at 960; *Video Software Dealers Ass'n*, 325 F. Supp. 2d at 1191; *Blagojevich*, 404 F. Supp. 2d at 1080; *Granholm*, 404 F. Supp. 2d at 983; *Video Software Dealers Ass'n*, 401 F. Supp. 2d at 1048.

160. *See* Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 612–13 (2005) ("The Court would better serve First Amendment interests by insisting upon some empirical evidence of harm from sexual speech, just as it should do with other areas of speech.").

demonstrated in a 2004 report from the Senate Committee on Commerce, Science, and Transportation.[161] The committee report analyzed the possibility of prohibiting the broadcast of violent material when children compose a "substantial portion of the audience."[162] In doing so, the committee's report noted that strict scrutiny is the likely constitutional test that would be applied, which would at least require that the government have a compelling government interest to justify regulation.[163] The report noted four such interests: moderating the harmful effect broadcasting has on children, minimizing the harmful effect on society, helping parents supervise their children, and supporting the privacy of the home from intruding violent content.[164]

The first stated interest is a concern regarding the harm violent broadcasting has on children.[165] Noting various studies on the issue, the report indicates that violent material can have many harmful effects on children, including anti-social behavior, increased violent behavior, becoming distant from others, being unproductive members of society, fearfulness, de-sensitization, and an increased desire for more violence.[166]

This first interest stems from a completely different rationale from that supporting the regulation of sexually explicit material. Typically, the concern with sexually explicit material is the offensiveness, rather than a measurable psychological harm.[167] If the governmental interest in regulating violence specifically focuses on eradicating harm to children, the regulations will likely encounter the same problems that regulation agencies have faced when attempting to restrict minors' access to violent video games. The proponents of regulation will need to show that the harm is real. This was the problem that the regulators had in *American Amusement Machine*, where Judge Posner concluded the studies did not demonstrate that playing violent video games caused children to commit crimes.[168] If this "real harm" standard continues to be used (and as noted earlier, it has been used in subsequent cases in violent video game situations), it will be very difficult for the government to establish harm to

161. *See* S. REP. NO. 108–253 (2004).

162. *Id.* at 1.

163. *Id.* at 14.

164. *Id.* at 15–16.

165. *Id.* at 15.

166. *Id.* at 8.

167. *Compare* S. REP. NO. 108–253, at 15 (2004) (justifying regulation of television violence by citing adverse psychological affects in children), *with Ginsberg*, 390 U.S. at 633 (affirming conviction for selling pornography to a minor because it was offensive and not suitable for minors).

168. *See Am. Amusement Mach. Ass'n*, 244 F.3d at 578–79.

children as a compelling government interest. Again, the distinction between harm to children in the violence arena versus the sexually explicit material cases, is that the courts take for granted that it is inappropriate for children to be exposed to sexually explicit material. This was evident from the ruling in *Ginsberg* wherein the Court considered the harm to minors argument as a matter of common sense.[169] It appears unlikely that this default to common sense will be replicated in the area of violent material, given that the regulating agencies continue to rely on social science studies to prove the harm, as opposed to "what everyone knows."[170]

The committee cites harm to society as a second concern stemming from children's exposure to the broadcasting of violent content.[171] The report notes that while the government needs to protect children from the potential effect of violent content, the government may also need to protect society from the detrimental effects these now more-violent children may have on society.[172] This concern has the same potential problems as the interest of harm to children. Subsequently, when the government is suggesting a solution to a specifically measurable problem, they will need to show that violence actually caused the problem.[173]

The third interest listed in the Report is the need to help parents supervise their children.[174] This interest was recognized in the *Ginsberg* case and other courts have cited it with approval.[175] However, this interest rests on the assumption that the general public believes that questionable material is inappropriate for minors. When it comes to sexually explicit material, the courts have been willing to accept at face value that such material is inappropriate or harmful for minors, but the application of this axiomatic reasoning to violent content has not been forthcoming.[176] Thus, it seems the regulators would need to show that there is a reason to support parental supervision concerns on this issue, lest the FCC censors a whole slew of topics in the name of supporting parents' wishes.

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169. *See Ginsberg*, 390 U.S. at 641.

170. *Am. Amusement Mach. Ass'n*, 244 F.3d at 578.

171. S. REP. NO. 108–253, at 15 (2004).

172. *Id.* at 9.

173. *See Am. Amusement Mach. Ass'n*, 244 F.3d at 576 (noting that the city needed to show it had grounds for believing the games caused harm to children and that such grounds had to be compelling not merely plausible).

174. S. REP. NO. 108–253, at 16 (2004).

175. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 865 (1997); *Action for Children's Television*, 58 F.3d at 679.

176. *See generally Interactive Digital Software Ass'n*, 329 F.3d. 954; *Video Software Dealers Ass'n*, 325 F. Supp. 2d 1180; *Blagojevich*, 404 F. Supp. 2d 1051; *Granholm*, 404 F. Supp. 2d 978; *Video Software Dealers Ass'n*, 401 F. Supp. 2d 1034.

The last interest included in the committee's report is the governmental concern for protecting the home from intrusive violent content.[177] In support of the sanctity of the home theory, the report cites a Ninth Circuit Court of Appeals decision which upheld a prohibition against automated telephone calls to homes and businesses.[178] Of course, there is a distinct difference between automated, unsolicited telephone calls to homes and the content delivered via a television set where a homeowner voluntarily tunes into a channel programmed by a particular broadcaster. The analogy made by the committee's report is simply inapt. The report also relies on the majority's reasoning in *Pacifica*,[179] which in turn relied heavily on television's "uniquely pervasive presence in the lives of all Americans . . . [which] confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[180] However, according to the *Pacifica* Court, citizens have the right to be free from "patently offensive, indecent material" which confronts the citizen without warning.[181] As noted throughout, this "offensiveness" rationale does not seem to be applicable in the violent content analysis and further expansion of this reasoning would certainly lead to unprecedented and unsupported censorship of the broadcast airwaves.

IV. CONCLUSION

The FCC Report was supposed to provide Congress guidance on an issue of great importance to many. Unfortunately, the Report fails to substantively address the questions posed by the House members in any great detail. Although the Report provides conclusions, they are supported by superficial and often inaccurate reasoning. These flaws permeate the Report on every question posed by the House members, but the most glaring defect from a legal perspective is the FCC's failure to account for the distinct effect regulating violent content will have on a constitutional analysis of any broadcast violence regulation.

It is of no small importance that the body charged with overseeing the broadcast medium has issued a report concluding that Congress may constitutionally regulate broadcast television violence. Congress may very well rely upon the FCC's expertise to introduce and possibly pass

177. S. REP. NO. 108–253, at 16 (2004).

178. *Id.* at 16 (2004) (citing Moser v. FCC, 46 F.3d 970 (9th Cir. 1995)).

179. *See* S. REP. NO. 108–253, at 16 (2004).

180. *Pacifica Found.*, 438 U.S. at 748.

181. *Id.*

legislation in accordance with the Report. Even if Congress ultimately does not pass any legislation, it sends a strong message to broadcasters that the possibility is still there, conceivably encouraging programmers to engage in self-censorship to avoid future legislative action. Given the implications, the Report's flaws seem even more unacceptable.