

Fall 2005

What About Broadcast Violence?

Shalom C. Stephens

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It is unlikely that anyone in the United States is unaware of the half-time show at the 2004 Super Bowl. As Justin Timberlake sang the lyrics, "Bet I'll have you naked by the end of this song," he ripped the material covering Janet Jackson's breast and exposed her to an audience of millions who watched the broadcast on February 1, 2004.¹⁹² This began the regulatory and legislative crackdown of indecency on broadcast television and elsewhere. Shortly thereafter, the House of Representatives passed legislation, still lingering in the Senate, which would impose stricter fines on broadcast licensees that intentionally (or unintentionally) broadcast material that violates the FCC's shifting indecency standards¹⁹³. The increased FCC scrutiny that followed prompted radio performer Howard Stern (whose fines for indecent radio broadcasts total millions of dollars) to announce that his show would move to satellite radio, where FCC indecency guidelines do not apply.¹⁹⁴ Television stations have become so concerned that a number of ABC affiliate stations opted not to air the network's unedited version of *Saving Private Ryan*, for fear of regulatory and consumer repercussions.¹⁹⁵

In this flurry of concern about sexual content on television, scant attention has been paid to violent content in the same medium, violence that often occurs in tandem with sex. Despite the concerns that led to the V-chip legislation in the 1996 Telecommunications Act, and despite occasional studies that purport to link violent television programming to violent conduct, the FCC, Congress, and the general public have done nothing concrete about the amount of violence aired daily on the public airwaves. What struck many

* J.D., New York Law School expected 2006; B.A. Mount Holyoke College. The author would like to thank Professor Peter Johnson for his guidance and assistance and Michael Barkow for all of his patience and support.

¹⁹² Daniel J. Habib, *Breast In Show*, Sports Illustrated, Feb. 9, 2004, 2004 WLNR 17908023.

¹⁹³ H.R. 310, 109th Cong. (1st Sess. 2005).

¹⁹⁴ Krysten Crawford, *Howard Stern Jumps to Satellite*, CNN/Money, Oct. 6, 2004, [at http://money.cnn.com/2004/10/06/news/newsmakers/stern_sirius/?cnn=yes](http://money.cnn.com/2004/10/06/news/newsmakers/stern_sirius/?cnn=yes) (last visited July 18, 2005),

¹⁹⁵ Doug Halonen, *FCC Is Now 'Pvt. Ryan's' Battleground; Wildmon Lobby Floods Agency with Objections to Language*, TELEVISIONWEEK, Nov. 15, 2004, 2004 WLNR 13148551.

viewers most about the half-time show was not the slight glimpse of Janet Jackson's bare breast, but the violent manner in which it was exposed -- a concern that legislators and the FCC did not address. By contrast, the general public did not seem offended by the blood and gore in a broadcast, primetime airing of *Saving Private Ryan*.¹⁹⁶ It seems the government is more concerned about the effect on children of hearing the word "fuck," or seeing a nipple on television, than from viewing violence against women or the gore of war.

Looking historically at judicial and governmental actions, this paper will explore the regulatory history of indecency and violence, and what is currently being done (or not being done) by the FCC and the legislature on both fronts. I will also review studies on which the legislature, courts and regulators have relied to justify the regulation of both indecency and violence. Furthermore, I will examine the actions of one independent group, which seems to be largely responsible for the current wave of indecency regulation. Finally, I will look at both the European Union and United Kingdom's approaches to regulating broadcast content. In conclusion, I will analyze why, in light of this evidence, the United States appears to be more concerned with regulating indecency than violence.

I.
INDECENCY AND VIOLENCE LEGISLATION
AND JUDICIAL INTERPRETATIONS

A. How the Current Obscenity/Indecency Standard Evolved

1. Early Case Law

There is a plethora of case law that shows how the current definition or standard for indecent and obscene material were established. Any regulations that limit speech based on content are subject to strict constitutional scrutiny under the First Amendment. To pass the strict scrutiny test, the government must (1) show a compelling government interest in regulating the subject matter and (2) use the least restrictive means to meet that interest. Certain categories of speech (e.g. obscene speech) survive strict scrutiny analysis.¹⁹⁷

One of the Court's first cases to consider the limits of government

¹⁹⁶ As discussed below, this did not prevent more than 60 ABC affiliates from declining to air the broadcast in fear of retaliation from the FCC.

¹⁹⁷ *Miller v. Cal.*, 413 U.S. 15 (1973) at 39.

MEDIA LAW & POLICY

FALL 2005, 15 MEDIA L. & POL'Y

action was the 1956 case of *Butler v. Michigan*,¹⁹⁸ in which a man was convicted of selling books that contained allegedly obscene material in violation of a Michigan statute.¹⁹⁹ The Court held that the definition of obscene material in the legislation was not sufficiently narrowly tailored to meet the government's interest in protecting minors.²⁰⁰ Fifteen years later in *Cohen v. California*,²⁰¹ the Court held that Cohen, a man convicted under a California statute that prohibited disturbing the peace by offensive conduct, had a First Amendment right to place the phrase "Fuck the Draft" on the back of his leather jacket.

The Court further defined obscenity in the 1973 case of *Miller v. California*.²⁰² Miller was convicted of mailing unsolicited sexually explicit material in violation of a California statute.²⁰³ The Court used this opportunity to establish the following standard: the government has the power to regulate obscene speech;²⁰⁴ obscene speech is not protected by the First Amendment;²⁰⁵ and obscene speech is defined as "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value."²⁰⁶

Indecency litigation has a different history. In the Court's first major case dealing with indecency on the public airwaves, *FCC v. Pacifica Foundation*,²⁰⁷ the FCC filed a complaint regarding the mid-afternoon

¹⁹⁸ *Butler v. Mich.*, 352 U.S. 380 (1957).

¹⁹⁹ The statute at issue in this case (MICH. STAT. ANN. § 343 (1954)) made it a misdemeanor for "[a]ny person [to] import, print, publish, sell, possess with the intent to sell, design, prepare, loan, give away, distribute or offer for sale, any book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, including any recordings, containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, *tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth.* . . ." [emphasis added]

²⁰⁰ *Butler*, 352 U.S. at 383–384

²⁰¹ *Cohen v. Cal.*, 403 U.S. 15 (1971).

²⁰² *Miller v. Cal.*, 413 U.S. 15 (1973).

²⁰³ *Id.* at 15.

²⁰⁴ *Id.* at 19–20.

²⁰⁵ *Id.* at 23.

²⁰⁶ *Id.* at 24.

²⁰⁷ *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

broadcast of George Carlin's "Filthy Words" monologue on a New York City radio station owned by the Pacifica Network.²⁰⁸ The monologue set forth his commentary on the seven words you could not say on the public airwaves.²⁰⁹ The FCC granted the complaint and held that Pacifica had broadcast "indecent language" in violation of 18 U.S.C. § 1464.²¹⁰²¹¹

The complaint stated in part:

"The concept of indecent is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."²¹²

In sustaining the FCC's findings, the Court found that "broadcast media has established a uniquely pervasive presence in the lives of all Americans"²¹³ and that "patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual right to be left alone plainly outweighs the First Amendment rights of an intruder."²¹⁴ Furthermore, the Court determined that broadcasting is "uniquely accessible to children."²¹⁵ The Court made it clear that its holding was narrow and that many factors must be taken into consideration including the time of day the program is aired, the content of the program and the type of broadcast being aired.²¹⁶

2. ACT III

²⁰⁸ *Id.* at 729-30.

²⁰⁹ *Id.* at 729.

²¹⁰ *Id.* at 732.

²¹¹ 18 U.S.C. § 1464 impliedly influences the Radio Act of 1927 and states in part that, "[w]hoever utters any obscene, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." The FCC relies on 18 U.S.C. § 1464 to enforce its power in regulating the broadcast of obscene and indecent speech.

²¹² *Pacifica*, 438 U.S. at 732 (quoting 56 FCC 2d, at 98).

²¹³ *Id.* at 748.

²¹⁴ *Id.* at 748.

²¹⁵ *Id.* at 749.

²¹⁶ *Id.* at 750.

MEDIA LAW & POLICY

FALL 2005, 15 MEDIA L. & POL'Y

In *Action for Children's Television vs. FCC* ("Act III"),²¹⁷ the Court of Appeals for the D.C. Circuit allowed codification of the *Pacifica* "time of day" standard by approving specific time limits for indecent broadcasting. This decision stems from rules promulgated by the FCC,²¹⁸ requiring that broadcasters not broadcast indecent material between the hours of 6 a.m. to 10 p.m. Here, the Court of Appeals held that there was a compelling government interest to protect children from exposure to indecent broadcasts.²¹⁹

This case relies on the concept of "broadcast scrutiny,"²²⁰ a variation on the notion of strict scrutiny. Under this lesser-than-strict-scrutiny standard, public broadcasts receive the most limited First Amendment protection because of their pervasive presence and accessibility to children as was first noted by the *Pacifica* court.²²¹ "[T]here can be no doubt that the traditional broadcast media are properly subject to more regulation than is generally

²¹⁷ *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995)[hereinafter Act III].

²¹⁸ 47 CFR § 73.3999 (b) (2005) states that "[n]o licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent."

²¹⁹ ACT III, *supra* note 25, at 669.

²²⁰ Always looming in this case is the concept of spectrum scarcity. Spectrum scarcity derives from the reasoning that since there is a limited amount of spectrum over which public broadcasting can be broadcast, there can be more control of this commodity than traditional First Amendment scrutiny allows. The concept of spectrum scarcity as an excuse for regulating content on the public airwaves is not a new one. The Supreme Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), relied on spectrum scarcity to justify content-based regulations on radio broadcasting. The majority opinion in *Act III* never directly addressed the issue, however, in a dissent, Judge Edwards points out that the initial justification for "the Supreme Court's distinct First Amendment approach to broadcast originally centered on the notion of spectrum scarcity... The Court responded that the government could impose limited content restraints and certain affirmative obligations on broadcasters on account of spectrum scarcity.*** In my view, it is no longer responsible for courts to apply a reduced level of First Amendment protection for regulations based on an indefensible notion of spectrum scarcity. It is time to revisit this rationale (*ACT III* at 673-675)." Regardless of the increased availability of broadcast airwaves, making the scarcity argument nearly obsolete, it is an argument still embraced by both the courts and the FCC.

²²¹ *FCC v. Pacifica Foundation*, 438 U.S. 726,727 (1978).

permissible under the First Amendment.”²²²

The compelling government interests, according to the court, are 1) protecting children from broadcast indecency²²³ or a concern for children’s well being;²²⁴ 2) support for parental supervision;²²⁵ and 3) protection of the home against intrusion by offensive broadcasts.²²⁶ As for the second part of the strict scrutiny test, whether the government has used the least restrictive means available to further its articulated interest,²²⁷ the Court held that it has, with respect to age (17).²²⁸ As to the limited viewing hours, the Court concluded that 10 p.m. to 6 a.m. is a sufficient window of time to allow the broadcasting of indecent material for adults during times children are less likely to be in the audience.²²⁹ This finding addressed the holding in *Miller*, that regulation of sexual speech must take into account that adults are entitled to access such speech, and that, “[a]lthough the restrictions burden the rights of many adults, it seems entirely appropriate that the marginal convenience of some adults be made to yield to the imperative needs of the young.”²³⁰

3. 2004 and the FCC

After *ACT III* was decided in 1995, the FCC received and acted on numerous complaints regarding broadcast indecency. However, few of these complaints resulted in substantial fines. No decisions of major consequence were rendered until the 2004 Super Bowl, and the now infamous Janet Jackson incident. Since then, the FCC has grown increasingly active in its enforcement of broadcast indecency standards. In fact, a January 2005 report shows that in 2000, 111 complaints were received by the FCC, resulting in \$48,000 in fines. In 2004, 1,405,409 complaints were received, resulting in

²²² ACT III, *supra* note 25, at 660.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 660-61.

²²⁷ *Id.* at 663.

²²⁸ *Id.* at 664.

²²⁹ *Id.* at 669. The initial rule considered in this case required that indecent material be limited to the hours of 12 a.m. to 6 a.m., except for those broadcasters who went off the air earlier (10 p.m. to 6 a.m.). The court held that this was not sufficiently narrow and that the earlier time of 10 p.m. was sufficient for all broadcasters.

²³⁰ *Id.* at 667.

\$7,928,080 in fines.²³¹

A. The Golden Globe Awards

During the live Golden Globes television broadcast on January 19, 2003, rock band U2's Bono, accepting the award for Best Original Song, called the award "really, really, fucking brilliant."²³² Complaints followed, and in response, the FCC issued a Memorandum Opinion and Order that reiterated the threshold requirements for finding language indecent; *i.e.*, that the language (1) depict or describe sexual or excretory activities and (2) that it do so in a patently offensive manner. The staff report concluded that, "the word 'Fucking' may be crude and offensive, [in] the context presented [on the Golden Globes, but that it] did not describe sexual or excretory organs or activities." Rather, the Opinion concluded, "the performer used the word 'fucking' as an adjective or expletive to emphasize an exclamation."²³³ The word did not fall within the FCC prohibition on indecent program content, because the word "fucking" in this context, did not describe sexual activity.²³⁴ The complaint was determined in October 2003.

On March 3, 2004 (after the Jackson Super Bowl incident), the FCC overruled the earlier Memorandum Opinion and Order and issued a new Order regarding Bono's "utterance"²³⁵ at the Golden Globes. The FCC now

²³¹ FCC, Enforcement Bureau, *Indecency Complaints and NALs: 1993 – 2004* (Mar. 4, 2005), at <http://www.fcc.gov/eb/broadcast/ichart.pdf> (last visited July 19, 2005). The report notes that the total number of fines for 2004 includes amounts paid by Clear Channel, Emmis and Viacom that exceeded the amounts in Notices of Apparent Liabilities (NALs) settled in consent decrees.

²³² *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 18 F.C.C.R. 19859 (Oct. 3, 2003) [hereinafter Golden Globes I], available at <http://www.fcc.gov/eb/Orders/2003/DA-03-3045A1.html> (last visited July 19, 2005) ¶ 2. Citations in this article to specific language and quotations from the Oct. 3, 2003, Opinion are to specific paragraphs in the Opinion.

²³³ *Id.* ¶ 5.

²³⁴ *Id.* ¶ 6.

²³⁵ *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, FCC 04-43, File No. EB-03-IH-0110 (Mar. 18, 2004) [hereinafter Golden Globes II], available at

MEDIA LAW & POLICY

FALL 2005, 15 MEDIA L. & POL'Y

determined that the broadcast did indeed violate the FCC's indecency and profanity prohibitions.²³⁶ According to the Order, the new ruling stemmed from the Parent's Television Council's Application for Review where it criticized the staff report as "legally incorrect, [and] that it is patently offensive to use the "F-word"²³⁷ in any shape, form or, meaning on broadcast network television. . ."²³⁸

The commissioners agreed, and stated that, "[a]ny use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition. . .²³⁹ ²⁴⁰ and is patently offensive under contemporary community standards for the broadcast medium."²⁴¹ Apparently considering the word "fuck" inappropriate even for FCC commissioners to utter, the Commission delicately stated, "the F-word is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image."²⁴² The commissioners held that cases holding that "isolated or fleeting use of the 'F-Word' or a variant thereof is not indecent" were no longer good law.²⁴³

The FCC also pointed out that the broadcaster, NBC, made no effort to curtail the broadcast of such language on a televised event.²⁴⁴ The FCC, however, did not levy a fine, but instead, noted that broadcasters were "on notice."²⁴⁵

In the accompanying statements, Chairman Michael Powell and Commissioner Kathleen Abernathy noted the drastic departure from precedent, but advised that from this day forward there will be no more

<http://www.fcc.gov/eb/Orders/2004/FCC-04-43A1.html>. (last visited July 19, 2005).

²³⁶ *Id.* ¶ 2.

²³⁷ It is interesting to note that in the FCC Opinion and Order of March 3, 2004, the word "Fuck" is referred to as the "F-word" throughout, whereas the full word was used throughout the earlier Opinion and Order.

²³⁸ *Id.* ¶ 3.

²³⁹ *Id.* ¶ 8.

²⁴⁰ As articulated in *Pacifica*, language that depicts or defines sexual or excretory organs or activities.

²⁴¹ *Id.* ¶ 9.

²⁴² Golden Globes II, at ¶ 9.

²⁴³ Golden Globes II, at ¶12.

²⁴⁴ *Id.* ¶ 11.

²⁴⁵ *Id.* ¶ 17.

tolerance.²⁴⁶

B. Howard Stern and Clear Channel Communications

Radio was not immune in 2004. In June, Clear Channel Communications, Inc. and its subsidiaries, which once broadcast Howard Stern's morning radio program, settled with the FCC for \$1.75 million. This settlement resolved all pending investigations and complaints against Clear Channel's stations for the airing of obscene, indecent and profane material.²⁴⁷

As part of the settlement, Clear Channel agreed to a Compliance Plan (included in the settlement) that included obscenity/indecency training for all on-air talent. Clear Channel also agreed to participate in an industry-wide effort to develop a "voluntary" industry-wide response to indecency and violence.²⁴⁸

C. The 2004 Super Bowl

In September 2004, the FCC issued a formal response to the Janet Jackson incident that had occurred at the Super Bowl the previous January. They found that the exposure of Ms. Jackson's breast met both prongs of the two-prong test for broadcast indecency: it (1) described or depicted sexual or excretory organs or activities and (2) was patently offensive as measured by contemporary community standards for the broadcast medium.²⁴⁹ The FCC levied a fine of \$550,000 on Viacom and its owned and operated stations for

²⁴⁶ *Id.* Statements of Chairman Powell and Commissioner Abernathy.

²⁴⁷ Press Release, FCC, FCC and Clear Channel Communications, Inc., Enter Into \$1.75 Million Consent Decree Concerning Indecency Restrictions (June 9, 2004) at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-248237A1.doc (last viewed July 19, 2005).

²⁴⁸ \ *In the Matter of Clear Channel Communications, Inc., et al, Notice of Apparent Liability for Forfeiture*, Consent Decree, FCC 04-128, File Nos. EB-03-0121, EB-IH-0736 and EB-03-IH-0737 (June 9, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-128A1.doc (last visited July 19, 2005).

²⁴⁹ \ *In the Matter of Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, Notice of Apparent Liability For Forfeiture, File No. EB-04-IH-0011 (September 22, 2004) ¶ 15 [hereinafter Super Bowl], available at <http://www.fcc.gov/eb/Orders/2004/FCC-04-209A1.html> (last visited July 19, 2005).

willfully airing the indecent material.²⁵⁰

D. *Saving Private Ryan*

On February 28, 2005, the FCC issued an Order in response to complaints issued by the American Family Association regarding ABC's complete, unedited airing of the film *Saving Private Ryan* on broadcast television between the hours of 8 p.m. and 11 p.m. Eastern Standard Time on November 11, 2004.²⁵¹ This film is a graphic portrayal of the D-day landing at Normandy Beach and is riddled with "profanity," including utterances of the word "fuck."

In the *Order*, the FCC found that the broadcast, when viewed as a whole, was not indecent by current standards.²⁵² At first blush, its decision seems to contradict the absolutist view regarding the word "fuck" as stated in the *Golden Globes* decision. In reaching its conclusion, the FCC differentiated the *Golden Globes* from *Saving Private Ryan*. The use of the word "fucking" at the *Golden Globes* "was shocking and gratuitous, where no claim of 'any political, scientific or other independent value'²⁵³ was made, and during which children were expected to be in the audience."²⁵⁴ *Saving Private Ryan*, by contrast, used the words in a more acceptable context. Here, the FCC also noted that Senator John McCain and a World War II veteran, Dr. Harold Baumgarten, introduced the broadcast. The network also aired numerous warnings regarding the graphic content of the film both before the broadcast and in the intervals leading out of each commercial break.²⁵⁵

As a final note, the FCC concluded that even though complaints were also received regarding the violent content of the film, "the Commission's current standard for determining whether material falls within the prohibitions

²⁵⁰ *Id.* ¶ 30.

²⁵¹ *In the Matter of Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* Memorandum Opinion and Order, File No. EB-04-IH-0589 (Feb. 3, 2005) [hereinafter *Ryan*], available at <http://www.fcc.gov/eb/Orders/2005/FCC-05-23A1.html> (last visited July 19, 2005).

²⁵² *Id.* ¶ 1.

²⁵³ Here, the FCC seems to borrow from the obscenity definition articulated in *Miller*, even though the decision rested on the decision of indecency.

²⁵⁴ *Ryan*, ¶ 18.

²⁵⁵ *Id.* ¶¶ 2, 3.

of section 1464 is not applicable to violent programming.”²⁵⁶

B. Violence Legislation

1. Telecommunications Act of 1996

The first attempt by Congress to regulate violence on broadcast television came with Section 551 of the Telecommunications Act of 1996,²⁵⁷ known as “Parental Choice in Television Programming.” The two main components of the law are (1) the requirement that a voluntary ratings system be established for rating programming on both broadcast *and cable* [emphasis added] television that contains sexual, violent or other materials that parents may deem inappropriate and (2) the establishment of a mandatory blocking system (v-chip) for all new television sets over 13”.²⁵⁸ The rating established for each program must appear for the first fifteen seconds of broadcast and the v-chip must be programmable to block those programs with a rating at a level deemed by a parent to be unacceptable.²⁵⁹ Cable content providers were given the choice of whether to rate programming.

A voluntary rating system was created by the National Association of Broadcasters, the National Cable Television & Tele-communication Association, and the Motion Picture Association of America.²⁶⁰ The ratings begin at TV-Y (acceptable for all children) and progress to TV-MA (mature audiences only).²⁶¹ In a Report and Order issued on March 12, 1998, the FCC found the *TV Parental Guidelines* to be acceptable, despite the fact that the ratings do not apply to “[sports], news, commercials or promotions.”²⁶² On the same day, the FCC also released an *Order* requiring that v-chip technology “respond to ratings based on [the TV Parental Guidelines].”²⁶³

²⁵⁶ *Id.* ¶ 17.

²⁵⁷ Section 551 of the Act as reflected in Public Law 104-104, was not codified as part of the final statute and is only referenced in a footnote to 47 U.S.C. § 551.

²⁵⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

²⁵⁹ FCC, *V-Chip: Viewing Television Responsibly*, at <http://www.fcc.gov/vchip/> (last updated July 8, 2003).

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* ¶ 21.

²⁶³ *In the Matter of Technical Requirements to Enable Blocking of Video Programming of Sections 551(c), (d), and (e) of the Telecommunications Act*

One year later, the FCC established a task force to monitor and assist in the rollout of the v-chip.²⁶⁴ In a July 1999 news release, the FCC announced that a survey showed “[a]ll of the major broadcast networks, as well as most of the top 40 basic cable networks, are currently transmitting ratings that can be received by V-Chip equipped TV sets.”²⁶⁵

In April of 2000, the FCC issued the statement of Commissioner Gloria Tristani, noting that “[t]he TV ratings system has been established and found acceptable. Virtually all major TV programming distributors are now encoding and transmitting the ratings information. And as of last January 1, 2005 v-chips are now standard equipment in all television sets 13” or larger.”²⁶⁶ The Commissioner then announced the task force’s new mission, educating parents about the existence and use of the v-chip technology.²⁶⁷ The call to action was for the major networks to produce and run public service announcements regarding the V-Chip.²⁶⁸

Thus far, the V-chip legislation is the only law passed by Congress that affects violent content on television.

2. Congress Revisits Violence

of 1996, Report and Order, FCC 98-36, ET Docket No. 97-206, (March 12, 1998) [hereinafter Technical Report] at http://www.fcc.gov/Bureaus/Engineering_Technology/Orders/1998/fcc98036.html (last viewed July 19, 2005).

²⁶⁴ Press Release, FCC, FCC Chairman William E. Kennard Establishes Task Force To Monitor and Assist in the Roll-Out of the V-Chip To Be Chaired By Commissioner Gloria Tristani (May 10, 1999) at http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1999/nrmc9026.html (last visited July 19, 2005).

²⁶⁵ Press Release, FCC, FCC's V-Chip Survey: Top TV and Cable Networks Encoding TV Ratings Information; Programming Like "South Park" and "Jerry Springer" Lagging Behind (July 20, 1999) at http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1999/nrmc9052.html (last visited July 19, 2005).

²⁶⁶ FCC, Statement of Commissioner Gloria Tristani on Network V-Chip PSAs (April 4, 2000) at <http://www.fcc.gov/Speeches/Tristani/Statements/2000/stgt019.html> (last visited July 19, 2005).

²⁶⁷ *Id.*

²⁶⁸ *Id.*

On January 21, 2004, the House introduced H.R. 3717, the "Broadcast Decency Enforcement Act of 2004." The main purpose of the bill was to increase the maximum penalty for a single violation of 18 USC §1464 from \$27,000 to \$500,000.²⁶⁹ The bill passed on March 11, 2004 by a vote of 391-22 and went to the Senate.

The Senate bill maintained the increase in penalties and added an additional section titled "Children's Protection from Violent Programming."²⁷⁰ Among its provisions, the bill authorized fines for individual performers.²⁷¹ An American Civil Liberties Union (ACLU) letter urging opposition to the entire bill found performer liability to be the most damaging element to free speech.²⁷² It stated that the "FCC's definition of indecency [is] vague [and] because of this vagueness, speakers must engage in speech at their peril, guessing what the FCC will determine to be prohibited... Rather than face a potentially ruinous fine, speakers and smaller broadcasters are more likely to remain silent."²⁷³

The Senate bill was also designed to make unlawful the distribution of violent programming "[n]ot blockable by electronic means specifically on the basis of its violent content during hours when children are reasonably likely to comprise a substantial portion of the audience".²⁷⁴ The bill charged the FCC with promulgating rules that included definitions of "violent video programming" and "hours when children are reasonably likely to comprise a substantial portion of the audience."²⁷⁵ The bill was to provide an exemption for programming "whose distribution does not conflict with the objective of protecting children from the negative influences of violent video programming," specifically news programs and sports events.²⁷⁶

The ACLU, in its opposition letter, grappled with the inherent

²⁶⁹ H.R. 3717, 108th Cong. (2d Sess. 2004).

²⁷⁰ S. 2056, 108th Cong. (2004).

²⁷¹ *Id.*

²⁷² Letter from Laura W. Murphy, Director of the ACLU, to the Senate, Urging Opposition to S. 2056, the Broadcast Decency Enforcement Act of 2004 (Mar. 23, 2004) at <http://www.aclu.org/news/NewsPrint.cfm?ID=15300&c=84> (last visited July 19, 2005).

²⁷³ *Id.*

²⁷⁴ S. 2056, 108th Cong. § 715(a) (2004).

²⁷⁵ *Id.* § 715(b)(3).

²⁷⁶ *Id.* § 715(b)(1).

difficulty in defining violence and concluded that,

Having been unable to adequately define “indecent,” the FCC will now be tasked with defining “violence,” as well as “excessive” or “gratuitous” violence. . . If not all violence is bad, then [it follows that] any regulation must accomplish a gargantuan task of distinguishing between what is “good” violence from “bad” or “gratuitous” violence. The task is even more difficult, because, as the Federal Trade Commission noted in September, 2000, those who research the effects of media violence inconsistently define “violence.” If the researchers cannot concur on an objective definition, then how will any regulation provide truly objective definitions that please all parents and are constitutionally permissible?²⁷⁷

The Senate bill died in committee.

On January 21, 2005, the House tried again, introducing House Resolution 310, the “Broadcast Decency Enforcement Act of 2005.” This bill practically mirrors the 2004 House bill, and contains no provisions related to violent content.²⁷⁸ This legislation quickly passed the House and moved to the Senate.

In response to the new House bill, on March 14, 2005, the Senate introduced the “Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005.”²⁷⁹ The Act is much more comprehensive than anything previously introduced. It charges the FCC with evaluating the current V-chip and ratings system. If the conclusions are negative, the FCC is directed to institute a rulemaking proceeding to (1) prohibit the broadcast of “gratuitous and excessively violent programming during the hours when children are reasonably likely to comprise a substantial portion of the audience,” or (2) adopt measures to protect children from “indecent or gratuitous and excessively violent video programming.”^{280 281} The Act also charges the FCC with defining “gratuitous and excessively violent programming,” “hours when children are reasonably likely to comprise a

²⁷⁷ Murphy, *supra* note 81.

²⁷⁸ H.R. 310, 109th Cong. (1st Sess. 2005).

²⁷⁹ S. 616, 109th Cong. (2005). As of this writing, the bill is still in committee.

²⁸⁰ The term “video programming” is used throughout the bill, however it is never defined.

²⁸¹ S. 616, 109th Cong. at Sec. 4(c)(1)(A)-(B) (2005).

substantial portion of the audience,” and “indecent video programming.”²⁸² In addition, factors are provided for the FCC to consider when evaluating indecent²⁸³ programming, including whether the material is live, recorded or scripted; whether the violator has a chance to review the material or had a reasonable basis to believe the live material would contain obscene, indecent or profane material; whether a time delay mechanism was used; and the size of the audience and the market.²⁸⁴

There is no indication whether this bill will garner any more success in the Senate than the 2004 version. It is more comprehensive and more pointed than any prior legislation and seems to indicate that the Senate is looking for action. Furthermore, it is difficult to gauge what the FCC’s rules would contain. Besides, defining violence is no easy task.

3. Defining Violence

Perhaps a large part of the problem in regulating violent content on the public airwaves is that it is so difficult to define. The questions that may arise include: Should we regulate the local news and particularly violent sports, such as hockey?; or, what constitutes violence that may have an adverse effect on children? The answers cannot be easily reduced to a sentence or two unlike the standard for indecency set forth in the *Pacifica* case, which, although arguable, is quite specific.

An attempt is being made with the 2004 FCC *Notice of Inquiry* (NOI) regarding violent television and its impact on children. In the NOI, the FCC noted that different research on the subject applied different definitions: “the overt expression of force intended to hurt or kill,”²⁸⁵ or “any overt depiction of a credible threat of physical force or actual use of such force intended to physically harm an animate being or group of beings [that also] includes certain depictions of physically harmful consequences against an animate being or group that occur as a result of unseen violent means.”²⁸⁶ Another

²⁸² *Id.* Sec. 4(e)(2)-(3).

²⁸³ Based on the language of the bill, I believe this includes gratuitously and excessively violent programming as well.

²⁸⁴ H.R.310, *supra* note 87 at Sec. 5(b)(F)(i)-(v).

²⁸⁵ *Notice of the Inquiry in the Matter of Violent Television Programming and Its Impact on Children*, 19 FCC Rcd. 14394 ¶ 14399 (citing National Commission on the Causes and Prevention of Violence, a 1960’s study) [hereinafter *Notice of Inquiry*].

²⁸⁶ *Id.* ¶ 14399 (citing The National TV Violence Study).

report defined violence as “the act of, attempt at, physical threat of or the consequences of physical force.”²⁸⁷ These vastly different definitions show that violence is difficult to define with any precision.

Furthermore, regulating violence may necessarily limit important content of well-respected literature, such as the Iliad, the Odyssey and even the Bible.²⁸⁸ As the NOI points out, “descriptions of violence in the Bible have been important for teaching lessons and establishing a moral code. Lessons of the evils of jealousy and revenge are learned from the story of Cain and Abel.”²⁸⁹ It would be difficult to regulate violence and not, in some form, censor broadcast versions of the Bible stories, including crucifixions.

Is there a workable definition of violence that allows for some images and not others – that allows the graphic violence portrayed in *Saving Private Ryan* or *Schindler’s List* and limits the graphic violence on an evening of *CSI*? The National TV Violence Study states that, “if consequences of violence are demonstrated, if violence is shown to be regretted or punished, if its perpetrators are not glamorized, if the act of violence is not seen as justifiable, if in general violence is shown in a negative light, then the portrayal of violence may not create undesirable consequences.”²⁹⁰ This may offer some suggestions, but it may not be enough of a solid definition to cure the problem.

These issues make the regulation of violence much more difficult. The final request of the NOI regarding a definition comes not from the FCC but from the House Commerce Committee, which charged the FCC with examining if, “it would be in the public interest to define “excessively violent programming that is harmful to children,” and if so, how [they] might do so.”²⁹¹

A study undertaken by the Federal Trade Commission (“FTC”) noted this difficulty: “many [courts] and First Amendment scholars note that it would be difficult to create a workable definition of violence that would not be overbroad or vague.”²⁹² They argue that definitions that attempt to define

²⁸⁷ *Id.* ¶ 14399 (citing The UCLA Violence Reports).

²⁸⁸ *Id.* ¶14399.

²⁸⁹ *Id.* ¶14399.

²⁹⁰ *Id.* ¶ 14400.

²⁹¹ *Notice of Inquiry.* ¶ 14401

²⁹² FTC, Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording &

violence by describing it either in terms of the *Miller* test²⁹³ or in terms of specific violent crimes (e.g. murder, rape, aggravated assault, mayhem, and torture) would be overbroad because they would apply to large categories of valuable speech protected by the First Amendment or they would be too vague as to give sufficient notice to product developers as to what would be considered obscene violence.”²⁹⁴

II.

STUDIES ON THE HARM OF SEXUAL AND VIOLENT CONTENT

a. Sexual Content: On What Basis Do We Regulate Indecency?

While there are numerous studies on both sides of the debate regarding the effect violence has on children,²⁹⁵ few, if any, studies have been published regarding the adverse effect on children viewing indecency. If no solid evidence has been presented, then on what basis do courts, legislators and regulators rely to regulate indecency?

The courts, it seems, have taken a *res ipsa loquitur* approach. Thus, in *ACT III*, the court states that,

Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable young minds that can result from persistent exposure to sexually explicit material just this side of legal obscenity. The Supreme Court has reminded us that society has an interest not only in the health of its youth, but also in its quality. [Therefore] the government’s dual interest in assisting parents and protecting minors necessarily extends beyond merely channeling broadcast indecency to those hours when

Electronic Game Industries, September 2000, Appendix C, First Amendment Issues in Public Debate Over Governmental Regulation of Entertainment Media Products With Violent Content, 9 (at <http://www.ftc.gov/reports/violence/Appen%20C.pdf>) [hereinafter referred to as FTC Appendix C] (citing Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 Nw. U.L. Rev. 1487, 1526 (1995)).

²⁹³ From *Miller supra* at 5, “works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value.”

²⁹⁴ FTC Appendix C at 6.

²⁹⁵ see studies cited in H.R. REP. NO. 108-253 (2004).

parents can be at home to supervise what their children see and hear. It is fanciful to believe that the vast majority of parents who wish to shield their children from indecent material can effectively do so without meaningful restrictions on the airing of broadcast indecency.²⁹⁶

The FCC, like the courts, provides no solid basis for the reasoning behind the push to regulate indecency. Chairman Michael Powell's statement to the House Committee on Energy and Commerce regarding the Broadcast Decency Enforcement Act of 2004 notes that, "we have increased our indecency enforcement efforts to protect our children against the increase in coarse programming and in response to the growing concerns expressed by the public about the content being broadcast over our airwaves. Protecting children and giving parents tools to prevent inappropriate programming from invading our family rooms requires action on all fronts."²⁹⁷

Finally, in a paper presented by Dean of the University of Arizona College of Social & Behavior Sciences, Edward Donnerstein, at a Hofstra University symposium on television and violence, he emphatically stated, "I am appalled at the lack of evidence being used by the [FCC] to support their conclusion that there is a harmful effect. In fact, when you look at the social science evidence on indecency, there is none. The evidence cited for harm against children from indecency is evidence citing television violence or pornography. It has absolutely nothing to do with children and indecency."²⁹⁸

b. On What Basis Do We Regulate Violence?

There have been numerous studies on the impact of television violence on children. The studies cited by those who advocate increased regulation tend to indicate that increased viewing of television violence can lead to increased aggression and violent behaviors in children. There are, however, many who believe these studies show little if no proven impact.

²⁹⁶ *ACT III*, 58 F.3d at 662-663.

²⁹⁷ Prepared Witness Testimony, The House Committee on Energy and Commerce, Michael K. Powell, Chairman, Federal Communications Commission, February 11, 2004 (at <http://energycommerce.house.gov/108/Hearings/02112004hearing1200/Powel11857.htm>).

²⁹⁸ Edward Donnerstein, *Mass Media and Violence: Thoughts On the Debate*, 22 Hofstra L.Rev. 827 at 827 (1994).

In a symposium held at Hofstra University in 1994, entitled "Television and Violence: a Symposium," papers were presented on both sides of the debate. These papers often derived differing conclusions from the same results. Much of the correlation between television and violent behavior can be directly linked to the increase in television viewing, rather than an increase in viewing *violent* television. According to 1988 Nielsen results "the average American household has the television set on for more than seven hours each day."²⁹⁹ The results of Correlational Studies, Experimental Studies, and Field Studies all point to an increase of violent tendencies and aggressiveness in children.³⁰⁰

Television violence affects youngsters of all ages, of both genders, at all socio-economic levels and all levels of intelligence. The effect is not limited to children who are already disposed to being aggressive and is not restricted to this country. The fact that we get this same finding of a relationship between television violence and aggression in children in study after study, in one country after another, cannot be ignored. The causal effect of television violence on aggression, even though it is not very large, exists. It cannot be denied or explained away. We have demonstrated this causal effect outside the laboratory, in real-life, among many different children. We have come to believe that a vicious cycle exists in which television violence makes children more aggressive and these aggressive children turn to watching more violence to justify their own behavior.³⁰¹

On the other side of the debate, two papers were presented, one by a social scientist, Edward Donnerstein and the other by a psychologist, Jonathan L. Freedman. Mr. Donnerstein's approach was that it is not so much *what* is broadcast but *how* children are taught to respond by parents who monitor the viewing habits of their children.³⁰² "Children can learn to be informed viewers. Children can learn to critically evaluate the mass media. There is research to suggest that if children are aggressive and watch many violent programs but their parents give them information on how to view those

²⁹⁹ John P. Murray, *The Impact of Televised Violence*, 22 Hofstra L.Rev. 809, 811 (1994).

³⁰⁰ see generally *Id.*

³⁰¹ see *Id.* at 823 (quoting Leonard Eron, *The Impact of Televised Violence: Testimony on Behalf of the American Psychological Association Before the Senate Committee on Governmental Affairs* (June 18, 1992) (on file with author of the paper)).

³⁰² Donnerstein 831.

programs, the impact of media violence can be mitigated. Education would go an incredibly long way to deal with this problem.”³⁰³

Mr. Freedman completely denied that there is any correlation between television violence and aggressive/more violent children. He examined a number of well-known and respected studies and pointed out where each is or may be flawed.³⁰⁴ He believed Congress only cites research that justifies its own purposes.³⁰⁵ Furthermore, Mr. Freedman pointed out that the differences in rates of violence between different countries whose television is equivalent cannot be explained away so easily:

Consider the differences among countries that have equally violent television. Children in Canada and the United States watch virtually the same television. Yet, the murder rate in Canada, and the rate of violence in general, is much lower than in the United States. Children in Japan watch probably the most violent, the most lurid and graphic television in the world, and the rate of violent crime there is miniscule compared to Canada and the United States. If television really had a substantial effect, these differences among countries would be unlikely. It makes it clear that if television violence has any effect at all, it is vanishingly small.³⁰⁶

These opinions show that while there is research cited in report after report from Congress and the FCC, the research provides no hard and fast answer as to whether or not violence really has an adverse effect on the behavior of children. Unlike indecency, there are at least studies, as controversial as they may be in certain circles, which lead toward a correlation between violence on television and more aggressive, more violent children.

In 2000, the FTC undertook a study of self-regulation in media and the impact of violence in children.³⁰⁷ The report evaluated numerous studies and noted that media violence, in all likelihood, only “explains a relatively small

³⁰³ *Id.* 831.

³⁰⁴ see generally Freedman.

³⁰⁵ *Id.* 834.

³⁰⁶ *Id.* 854.

³⁰⁷ FTC, Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries, September 2000.

amount of the total variation in youthful violent behavior.”³⁰⁸ It went further to qualify that media cannot be wholly to blame for youth violence, as there are other factors to consider including “genetic, psychological, familial, and socioeconomic characteristics... The typical profile of a violent youth is one who comes from a troubled home, has poor cognitive skills, and exhibits psychological disorders such as anxiety, depression, and attention deficit hyperactivity.”³⁰⁹

The report also puts a great deal of weight on parental ability to monitor and control what children watch. This theme has appeared before in the court’s justification for regulation of indecency in *ACT III*. The FTC report seems to put some blame back into parent’s hands, when it said “parents have a substantial impact on their children’s media exposure (as do other adults such as teachers and relatives). Parents may exert influence by restricting a child’s access or exposure to some media depending on their content, limiting the time spent with media, discussing media with children to help them understand and interpret it, or providing supplementary sources of information.”³¹⁰

It seems the research is no more conclusive about the actual effects of media or broadcast violence on the actual nature of youth violence and aggression than the courts or Congress were on the effects of indecency on youth. The absolute differences in results and interpretation may be in conflict with the ability to legislate, define and justify any kind of regulatory action, court intervention or restriction on content-based speech on the public airwaves. Furthermore, the studies seem to indicate that some responsibility should be on parents, not governments, and regulators to determine what is best for an individual’s children.

³⁰⁸ *Id.* Appendix A, A Review of Research on the Impact of Violence in Entertainment Media, 9 (at <http://www.ftc.gov/reports/violence/Appen%20A.pdf>) [hereinafter referred to as FTC Appendix A].

³⁰⁹ *Id.* at 9-10.

³¹⁰ FTC, Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries, September 2000, Appendix B, Children As Consumers of Entertainment Media Usage, Marketing Behavior and Influences, and Ratings Effects, 5 (at <http://www.ftc.gov/reports/violence/Appen%20B.pdf>) [hereinafter referred to as FTC Appendix B].

One final note on the prevalent attitudes on regulating violence is that in dismissing the findings of a Canadian organization that no connection between televised violence and increased aggression exists, “the chairman replied that [the connection] was self evident,”³¹¹ and he proceeded just as if it were proven.

III.
THE INFLUENCE OF OUTSIDE GROUPS:
THE PARENTS TELEVISION COUNCIL AND THE FCC

The Parents Television Council (“PTC”) was founded in 1995 to “ensure that children are not constantly assaulted by sex, violence and profanity on television and in other media.”³¹² Commentators have suggested³¹³ that the recent major increases in activity at the FCC can be directly correlated to a rise in mass letter writing/email campaigns conducted by groups like PTC. In fact, the Commission order in the *Golden Globe Awards* case mentioned that it reevaluated the staff order at the request of the PTC.³¹⁴ A quick review of the group’s website³¹⁵ shows that the attacks on indecency on television are far ranging. The group also provides links to the websites of sponsors/advertisers of what it deems to be offensive viewing. At the top of the homepage, a scrolling bar with the word “Victory” states that over 12,000 complaints have been filed with the FCC regarding violence on the television series *CSI*.³¹⁶ However, it is interesting to note that aside from the *CSI* “victory” there are few complaints on the website regarding violence in broadcasting.³¹⁷

IV.

³¹¹ Jonathan L. Freedman, *Viewing Television Violence Does Not Make People More Aggressive*, 22 Hofstra L. Review 833, 852 (1994).

³¹² Parents Television Council, About Us at <http://www.parentstv.org/PTC/aboutus/main.asp> (last viewed March 25, 2005).

³¹³ Frank Rich, *The Great Indecency Hoax*, N.Y. Times, November 28, 2004.

³¹⁴ Golden Globes II ¶ 4.

³¹⁵ See generally <http://www.parentstv.org> (last viewed March 25, 2005).

³¹⁶ <http://www.parentstv.org> and Press Release, Parents Television Council, PTC Files Indecency Complaint Against CSI ‘Infantilism’ Episode (February 28, 2005) (at <http://www.parentstv.org/ptc/publications/release/2005/0228.asp>).

³¹⁷ *see generally* <http://www.parentstv.org/ptc/publications/ealerts/welcome.asp>

EUROPEAN UNION AND UNITED KINGDOM PERSPECTIVE

A. European Union (“EU”)

An amendment to the Television Without Frontiers Directive³¹⁸ required research into “the possible advantages and drawbacks of further measures with a view to facilitating the control exercised by parents or guardians over the programmes that minors may watch.”³¹⁹ Similar to the Telecommunications Act of 1996, the study set out to establish a system for adding filtering to televisions and the establishment of a ratings system; however, this study also instituted a policy for “encouraging family viewing policies and other educational and awareness measures,”³²⁰ and specifically took into account the views of interested parties such as broadcasters, producers, and media specialists.³²¹

Some of the conclusions mirror those found in studies conducted in the United States. First and foremost, the conclusions recognize that supervised viewing has declined, while the amount of available content has increased rapidly.³²² Furthermore, the study recommended, “[b]roadcasting certain programmes late in the evening or at night.”³²³ The European Union study recognizes that the member states are varied and that cultural differences require a more sophisticated and multi-level rating system that takes into account the diversity of community standards. However, it recommends that the criteria used to evaluate the programs be common while leaving it up to local authorities to determine the specific programming to be rated.³²⁴ Finally, in a marked difference from the United States’ policy, “the study places great emphasis on the importance of educational and awareness measures, in particular media literacy education and critical approaches to television viewing, for parents and children alike.”³²⁵ The study places as much

³¹⁸ European Council Directive 89/552/EEC as amended by Directive 97/36/EC.

³¹⁹ European Commission, Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee – Study on Parental Control of Television Broadcasting, COM/99/0371 final, July 19, 1999.

³²⁰ *Id.* at ¶ 1.

³²¹ *Id.*

³²² *Id.* at ¶ 6.

³²³ *Id.* at ¶ 6.

³²⁴ *Id.* at ¶ 8.

³²⁵ *Id.* at ¶ 8.

emphasis on parental supervision as it does on changes in the marketplace. It also allows for a much broader rating scale based on cultural differences not only from country to country but also region to region. On its face, the EU Directive seems to reach many of the same conclusions as the studies undertaken by regulatory bodies in the United States, though the conclusions as to where to place emphasis are somewhat more grounded in education.

B. The United Kingdom (“UK”)

The UK’s “Family Viewing Policy, Offence to Good Taste and Decency, Portrayal of Violence and Respect for Human Dignity,”³²⁶ is a comprehensive regulation of broadcast content for the UK. Unlike legislation in the United States, it provides suggestions for broadcasters in an easy to understand format. Viewers are invited to submit complaints regarding questionable content, and Ofcom, the UK’s equivalent to the FCC, responds accordingly, posting all complaints and responses on the agency’s official website.³²⁷ The Policy establishes a “watershed”³²⁸ time period of 5:30 am – 9 pm, during which nothing can be shown that is unsuitable for children.³²⁹ The Policy goes further to offer that, “care should be taken in the period immediately after the watershed. There should be a gradual transition and it may be that a programme will be acceptable at 10:30pm for example that would not be suitable at 9pm.”³³⁰

The Policy also regulates many specific types of program content during the family viewing time, such as imitative behavior (e.g. hanging or preparations for hanging),³³¹ depictions of smoking and drinking,³³² bad language,³³³ sex and nudity,³³⁴ as well as demonstrations of hypnotism,³³⁵

³²⁶ Ofcom, Family Viewing Policy, Offence to Good Taste and Decency, Portrayal of Violence and Respect for Human Dignity (at http://www.ofcom.org.uk/codes_guidelines/broadcasting/tv/programmes_code/p) [hereinafter referred to as Family Viewing Policy].

³²⁷ see generally www.ofcom.org.uk.

³²⁸ A “safe harbor” provision.

³²⁹ Family Viewing Policy ¶ 1.2.

³³⁰ *Id.*

³³¹ *Id.* ¶ 1.2(i).

³³² *Id.* ¶ 1.2(i).

³³³ *Id.* ¶ 1.5. “There is no absolute ban on the use of bad language. But many people are offended, some of them deeply, by the use of bad language, including expletives with a religious (and not only Christian) association. Offence is most likely if the language is contrary to audience expectation. Bad

MEDIA LAW & POLICY

FALL 2005, 15 MEDIA L. & POL'Y

exorcisms, the occult,³³⁶ and other paranormal and related activities.³³⁷ Interestingly, the Policy includes a section on “Respect for Human Dignity and Treatment of Minorities,” which regulates content that may be racist, sexist, homophobic or offensive to the mentally and physically disabled.³³⁸

Regulation of violence is broken into specific categories; offensive violence,³³⁹ psychological harm to young and vulnerable viewers,³⁴⁰ imitable

language must be defensible in terms of context and scheduling with warnings where appropriate. The most offensive language must not be used before the watershed and bad language of any sort must not be a frequent feature before then. (See also Section 1.8). Bad language (including profanity), should not be used in programmes specially designed for children.”

³³⁴ *Id.* ¶ 1.6. “Much great fiction and drama have been concerned with love and passion which can shock and disturb. Popular entertainment and comedy have always relied to some extent on sexual innuendo and suggestive behaviour but gratuitous offence should be avoided. Careful consideration should be given to nudity before the watershed but some nudity may be justifiable in a non-sexual and relevant context. Representations of sexual intercourse should not occur before the watershed unless there is a serious educational purpose. Any portrayal of sexual behaviour must be defensible in context. If included before the watershed it must be appropriately limited and inexplicit”.

³³⁵ *Id.* ¶ 1.9.

³³⁶ *Id.* ¶ 1.10(i).

³³⁷ *Id.* ¶ 1.10 (ii).

³³⁸ *Id.* ¶ 1.8.

³³⁹ *Id.* ¶ 1.7(a). “At the simplest level, some portrayed acts of violence may go beyond the bounds of what is tolerable in that they could be classified as material which, in the words of the Broadcasting Act, is 'likely to be offensive to public feeling'. Licensees must consider the editorial justification carefully, including the context of the violence portrayed, the time of the broadcast, any warning provided and the likely audience. There can be no defence of violence shown or heard for its own sake, or for the gratuitous presentation of sadistic practices. Research indicates that viewers are most likely to be offended by explicit images of distress and injury, and of blood, particularly if they occur suddenly or unexpectedly.”

³⁴⁰ *Id.* ¶ 1.7(b). “There is portrayed violence which is potentially so disturbing that it might be psychologically harmful, particularly for young or emotionally insecure viewers. Research evidence shows that the socially or emotionally insecure individual, particularly if adolescent, is especially vulnerable. The susceptibilities of this minority must be balanced against the rights of the

violence,³⁴¹ cumulative effects of violence,³⁴² sexual violence,³⁴³ suicide, suicide attempts, and risk of imitation.³⁴⁴ Furthermore, the Policy does not allow for gratuitous violence in news or public affairs programs³⁴⁵ and provides that, “special consideration [be] given to the possible effect of coverage of violent events upon local viewers in the United Kingdom (or other countries where the programme is seen) for whom it might cause particular anxiety.”³⁴⁶

This specific breakdown of violent content, how to recognize it, why it should be regulated, etc., while still recognizing that some necessary violence is required, may be the answer for what is keeping violence from being regulated in the United States. The UK approach is realistic and flexible. There is no hard and true definition, and even the regulation allows one to look at the overall context of the programming when making a determination. Oddly enough, like the United States, a quick review of complaints filed in the last year shows that the vast majority of complaints received pertain to indecency. In fact, in the last year, only one complaint was filed with Ofcom regarding an instance of violence and Ofcom dismissed the complaint.³⁴⁷

more robust majority. Responsible scheduling and appropriate content advice to viewers are both particularly relevant here.”

³⁴¹ *Id.* ¶ 1.7(c). “Violence portrayed on television may be imitated in real life. Portrayals of dangerous behaviour, capable of easy imitation, must always be justified by the dramatic and editorial requirements of the programme. Unfamiliar methods of inflicting pain and injury capable of easy imitation should not be included.”

³⁴² *Id.* ¶ 1.7(d). “The regular and recurrent spectacle of violence may lead viewers to become less sensitive to violence or to overestimate the level of violence in the real world. Licensees must take into account the potential cumulative effect of violent material.”

³⁴³ *Id.* ¶ 1.7(e). “Scenes of rape, or other non-consensual sex, especially where there is graphic physical detail or the action is to any degree prolonged, require great care. Graphic portrayal of violent sexual behaviour, or violence in a sexual context, is justifiable only very exceptionally.”

³⁴⁴ *Id.* ¶ 1.7(i).

³⁴⁵ *Id.* ¶ 1.7(ii).

³⁴⁶ *Id.* ¶ 1.7(ii)(b).

³⁴⁷ Ofcom Broadcast Bulletin, Issue number 28, Feb. 14, 2005 (at http://www.ofcom.org.uk/tv/obb/prog_cb/pcb67/issue28.pdf) describes complaints regarding a number of episodes of the UK television series *Emmerdale*. The complaints stated that the violence portrayed normalized this behavior.

**V.
CONCLUSION**

It is difficult to draw conclusions when so many issues remain open. Overall, it seems the struggle to regulate violent content is only beginning. Though certain members of Congress seem to believe it is an important battle, the majority is not following this lead. Much will depend on the attention paid by the American public to the issues raised in the debate. As mentioned, not even PTC, one of the more active groups in forcing the FCC to take notice of indecent television and radio content, seems to be bothered much by the extent of televised violence or its potential effects on children.

Obviously, a major problem with regulating violent content is defining "violent content". The experts, the regulators, even the legislature, cannot seem to agree. The EU did not seem to fare much better in this respect. The UK approach may be more feasible for creating a regulatory framework, though, it is doubtful that the United States Congress would be able to pass such a comprehensive piece of legislation. There are too many lobbyists and special interests to allow for such complex administrative code. Furthermore, there is still disagreement regarding the true effects that violent content has on children. However, as we have seen from the justifications provided by the courts, legislature, and regulators for obscene/indecent content regulation, solid research may not necessarily be required. Finally, it is difficult to determine how the courts would respond concerning the First Amendment issues presented in this type of regulation.

In the end, perhaps the research is correct in pointing out quantity, not content, of television viewing by children as the most likely predictor of anti-social conduct, including violent conduct. Perhaps it would be best if the regulators, courts and legislature turned to parents to monitor the content children are exposed to – to discuss frankly what is good and bad and instill in children values that allow them to make decisions for themselves. The mandated education program for v-chip awareness should be expanded to include education in schools and on broadcast television itself to inform children and parents alike about responsible, informed television viewing. Maybe the best solution is simple – turn the television off.