

# Broadcasting Industry Ethics, the First Amendment and Televised Violence<sup>1</sup>

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## I. INTRODUCTION: THE PUBLIC'S CONCERN

Today an unprecedented level of gratuitous and graphic violence exists on network television and hundreds of independent and cable channels. Statistics show that by the time the average child - who watches two to four hours of television per day - is twelve, the child will have observed 8,000 murders and 100,000 other acts of violence.<sup>2</sup> Today's television content is similar to what Newton N. Minow, then Chairman of the Federal Communications Commission described over thirty years ago as

a procession of game shows, violence, audience participation shows, formula comedies about totally unbelievable families, blood and thunder, mayhem, violence, sadism, murder, western bad men, western good men, private eyes, gangsters, more violence and cartoons [laced with] commercials - many screaming, cajoling, and offending.<sup>3</sup>

In the wake of the September 11, 2001 terrorist attacks on the United States, television and movie producers reflexively moved to scratch violent content involving terrorism, explosions, hijackings and the like, saying they would replace them with patriotic stories and dramas with a "kinder, gentler" tone.<sup>4</sup> This response was similar to that of Hollywood during World War II and after the assassination of President John F. Kennedy, when displays of mayhem were curtailed in pop-

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<sup>1</sup> Presented at the annual meeting of the Society for Business Ethics, Washington, D.C., on August 4, 2001.

<sup>2</sup> See John Dillin, *Senate Hearings Lambaste High Level of TV Violence*, CHRISTIAN SCI. MONITOR, June 10, 1993, at 1.

<sup>3</sup> See Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101, 2101-2102 (May 1997) (citing Newton N. Minow, Address to the National Association of Broadcasters (May 9, 1961)).

<sup>4</sup> See Bernard Weinraub, *Scratching Violence for Family Fare and Patriotism*, N.Y. TIMES, Sept. 16, 2001, at A7.

ular films.<sup>5</sup> However, within a few weeks, producers started to say that they “shouldn’t be held accountable” for their initial kneejerk reaction, and that “television will be the same as always.”<sup>6</sup>

I will argue that, based on extensive social science data, there is a clear causal link between televised violence and clinical symptoms of violence and other antisocial behavior in children and adults. I will show that the broadcasting industry stands in the role of a trustee of the airwaves as a matter of law and, as such, has a fiduciary obligation to remedy concerns about gratuitous and graphic televised violence. I will further argue that “graphic and gratuitous violence” can be legally defined and regulated under the First Amendment, and that the FCC has legal authority to do so.

## II. THE EPIDEMIOLOGICAL LINKAGE OF TELEVISED VIOLENCE AND VIOLENT, ANTISOCIAL BEHAVIOR IN CHILDREN AND ADULTS

The evidence that demonstrates a cumulative effect linking the viewing of violent acts on television to violent or other antisocial behavior in children as well as adults is overwhelming. Nearly 1,000 scientific studies have been published in the past 40 years regarding the depiction of violence in television and its impact on society, particularly upon children.<sup>7</sup> Televised violence is now being framed as a public health issue in the same way that smoking was linked to cancer in the 1960s.<sup>8</sup> In the epidemiological sense, i.e. the most rigorous scientific standards applicable to medical conclusions, the causal link between the viewing of televised violence and aggressive behavior in children is demonstrable to the same standards of proof that link smoking and lung cancer.<sup>9</sup>

The convergence of evidence assures even skeptical scientists that watching violent television causes violent behavior. This conclusion is proven by the convergence of methods such as surveys, laboratory experiments, field studies, and field experiments. This conclusion is further corroborated by studying different populations such as many different age groups, many nations, and many cultures. Additionally,

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<sup>5</sup> Id.

<sup>6</sup> See Rick Lyman and Bill Carter, *In Little Time, Pop Culture Is Almost Back to Normal*, N.Y. TIMES, Oct. 4, 2001, at A1.

<sup>7</sup> See Lawrie Mifflin, *Many Researchers Say Link Is Already Clear on Media and Youth Violence*, N.Y. TIMES, May 9, 1999, at A-27.

<sup>8</sup> See SURGEON GENERAL’S SCIENTIFIC ADVISORY COMMITTEE ON TELEVISION AND SOCIAL BEHAVIOR, U.S. PUBLIC HEALTH SERVICE, *TELEVISION AND GROWING UP: THE IMPACT OF TELEVISED VIOLENCE* (1972).

<sup>9</sup> John C. Wright, *Child Viewers, Television Violence, and the First Amendment*, 4 KAN. J. L. & PUB. POL’Y (1995), at 33.

it is substantiated by the convergence of longitudinal studies over time, twenty or more years, following the lives of kids who were exposed early to violent television. This convergence holds true for these types of evidence, just *exactly* the way the evidence on smoking and lung cancer converges.<sup>10</sup>

Professional groups, such as the American Academy of Pediatrics, the American Medical Association, the American Academy of Child and Adolescent Psychiatry, and the American Psychological Association, have surveyed the research and arrived at the conclusion that heavy exposure to television violence is correlated with increased aggression among children.<sup>11</sup> Several meta-analyses - which collate the findings of all known studies on the subject, calculating compensations for the different methods - have bolstered the same conclusion.<sup>12</sup>

What is "truth"? In many fields of science there is no "smoking gun" proof of causal relations. Scientists are in near total agreement that the theory of evolution is valid, but they have no "direct" evidence of its workings. In criminal law, responsibility is often based on indirect or circumstantial evidence. Juries are asked to find the defendant guilty unless they harbor "reasonable doubt." There need not be an impossible standard of proof such as "absolute certainty," nor can there be. Not even in the tobacco studies could scientists prove the correlation between smoking and cancer with absolute certainty.

However, there is no room for doubt that cartoon depictions of violence cause aggressive behavior in children.<sup>13</sup> In January, 2001, the Surgeon General issued a report, based on long-term followup studies, concluding that repeated exposure to violent entertainment during early childhood causes children to exhibit more aggressive behavior throughout their lives.<sup>14</sup> This report also points out that the statistical evidence linking televised violence and aggressive behavior is similar in strength to the evidence linking smoking and lung cancer.<sup>15</sup> For example, studies used in the report found that people who had frequently watched "Road Runner" cartoons or "Starsky and Hutch" as children

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<sup>10</sup> *Id.*

<sup>11</sup> Kevin W. Saunders, *infra* note 45, at 9-12.

<sup>12</sup> See Mifflin, *supra* note 7.

<sup>13</sup> Richard E. Goranson, *A Review of Recent Literature on Psychological Effects of Media Portrayals of Violence*, in *MASS MEDIA AND VIOLENCE: A REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE*, app. III-A at 395.401 (Robert Baker, Sandra Ball eds., 1969).

<sup>14</sup> See, *Youth Violence: A Report of the Surgeon General*, Jan. 2001, available at <http://www.surgeongeneral.gov/library/youthviolence/youthviolence.htm> (visited at Nov. 27, 2001); see also, Jeff Leeds, *Surgeon Gen. Links TV, Real Violence*, L.A. TIMES, Jan. 17, 2001, at A1.

<sup>15</sup> *Id.*

in the 1970s were more likely to exhibit aggressive behavior 15 years later.<sup>16</sup>

A 1993 report delivered to the National Cable Television Association also showed that cartoons and other children's shows contain more violence than any other form of programming. A style of cartoons called anime, which was created in Japan, is now being broadcast as children's cartoon programs in the U.S. The genre is considered so violent that Nickelodeon refuses to show any of these cartoons on its programs. According to Cyma Zarghami, Nickelodeon's executive vice president and general manager, "it's more violence for violence's sake than I've ever seen."<sup>17</sup> On any given day anime-style programs may hold the majority of time slots on the after-school and Saturday morning schedules of the WB and the Cartoon Network. Most anime shows are given either the Y7TV rating - not recommended for children under 7 - or the Y7FV rating, for extreme violence.

Congress also cited a vast body of social science data cited in formulating the Telecommunications Act of 1996:

(a) Findings. The Congress makes the following findings:

- (1) Television influences children's perception of the values and behavior that are common and acceptable in society.
- (2) Television station operators, cable television system operators, and video programmers should follow practices in connection with video programming that take into consideration that television broadcast and cable programming has established a uniquely pervasive presence in the lives of American children.
- (3) The average American child is exposed to 25 hours of television each week and some children are exposed to as much as 11 hours of television a day.
- (4) Studies have shown that children exposed to violent video programming at a young age have a higher tendency for violent and aggressive behavior alter in life than children not so exposed, and that children exposed to violent video programming are prone to assume that acts of violence are acceptable behavior.
- (5) Children in the United States are, on average, exposed to an estimated 8,000 murders and 100,000 acts of violence on television by the time the child completes elementary school.
- (6) Studies indicate that children are affected by the pervasiveness and casual treatment of sexual material on television, eroding the ability of parents to develop responsible attitudes and behavior in their children.

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<sup>16</sup> Men who as boys had watched violence most frequently had "pushed, grabbed or shoved their spouse" at twice the rate of other men and had been convicted of crimes at three times the rate of other men. Similar effects were found for women.

<sup>17</sup> *Id.* The WB's "Batman Beyond," produced in the United States, has vivid fight scenes in which the hero, Batman, strangles a villain with two halves of a broken pole until he dies.

(7) Parents express grave concern over violent and sexual video programming and strongly support technology that would give them greater control to block video programming in the home that they consider harmful to their children.

(8) There is a compelling governmental interest in empowering parents to limit the negative influences of video programming that is harmful to children.

(9) Providing parents with timely information about the nature of upcoming video programming and with the technological tools that allow them easily to block violent, sexual, or other programming that they believe harmful to their children is a nonintrusive and narrowly tailored means of achieving that compelling governmental interest.<sup>18</sup>

Of course, not every child who watches large doses of television violence becomes a criminal. Studies show that glorification of violence on television has little effect on most children, and chiefly has an effect on children who are poorly socialized to begin with. Thus, the harm of violent television is felt most by the already vulnerable segments of the population.<sup>19</sup>

The effects of television violence fall into three major areas: (1) Desensitization, whereby children who watch a lot of violence on television may become desensitized to violence in the real world around them, less sensitive to the pain and suffering of others, and more willing to tolerate ever increasing levels of violence in society. (2) The mean world syndrome, whereby children or adults who watch a lot of violence on television may begin to believe that the world is as mean and dangerous in real life as it appears on television, and hence, they begin to view the world as a much more mean and dangerous place. This is one of the worst fallouts of violence in the media - the exaggerated sense of insecurity, vulnerability, dependence that such programming engenders.<sup>20</sup> (3) Direct effects, in which viewers may become more aggressive, but may also develop favorable attitudes and values about the use of aggression to resolve conflicts. Many also think that television fosters certain vices such as short attention span, lack of self-restraint, and erosion of human empathy, as associated with the desensitization just mentioned.

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<sup>18</sup> Telecommunications Act of 1996, Pub.L. 104-104, §551(a), 110 Stat. 56 (1996).

<sup>19</sup> Kopel *infra* note 57, at 18.

<sup>20</sup> John P. Murray, *Children and Television Violence*, 4 KAN. J. L. & PUB POL'Y 7, 9 (1995); see also, George Gerbner, *There is No Free Market in Television*, 22 HOFSTRA L. REV. 879, 883 (1994).

Many parents fear that with so much violence being portrayed, their children may acquire the belief that violence is normal or something to emulate.<sup>21</sup>

### III. FIDUCIARY ROLE OF BROADCASTERS

Broadcasters are public trustees of the airwaves as a matter of law: The government allocates licenses for use of the limited airwaves, in trust for the public-beneficiary.<sup>22</sup> The government is considered the "owner" of the airwaves and licenses its use to others, just as the government delegates or could delegate many other functions. But with licensing comes the attached string that broadcasters may be required to act for society's benefit. The government is permitted by law to require its licensees to broadcast in the public interest.<sup>23</sup> The fiduciary obligation of broadcasters is like many others who hold a relationship of trust - politicians, lawyers, guardians, doctors, and others - all of whom are duty bound to function according to fiduciary standards.

A fiduciary includes a "person. . . who undertakes to act in the interests of another"<sup>24</sup>; or a person on whom another "must rely. . . for a particular service"<sup>25</sup>; or a person who "receives a power of any type on condition that he also receive with it a duty to utilize that power in the best interests of another, and the recipient of the power uses that power."<sup>26</sup>

As trustee of the public airwaves, broadcasters have the duty to act in the interests of their beneficiary, the public, that would seem to include, among other things, a consideration in protecting the psychological and emotional well-being of children, in reducing societal violence, and in protecting society from causal mechanisms that induce violence.<sup>27</sup>

The fiduciary standard comes into sharper focus when we consider the intense commercial nature of broadcasting in which money is made by selling goods and services via commercials. As the marketplace for

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<sup>21</sup> This is exacerbated by endless news reports of violent crime, in this age when politicians, talk show hosts, rappers, journalists and infomercials saturate the environment with their aggressive messages, and further compounded by the resurgence of comic book violence and emergence of video game violence.

<sup>22</sup> *Red Lion Broadcasting, Co. v. FCC*, 395 U.S. 367 (1969). Otherwise, competitors might broadcast at the same frequency, causing interference or drowning each other out.

<sup>23</sup> *Id.* at 386-390.

<sup>24</sup> Austin W. Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539, 540 (1949).

<sup>25</sup> Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 800 (1983).

<sup>26</sup> J. C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 L.Q. REV. 51, 75 (1981).

<sup>27</sup> See Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW U.L. REV. 1487, 1535 (1995).

advertising has become more competitive, commercial television has focused more and more on building and maintaining mass audiences because advertisers want the largest possible audience. Producers operate under the premise that violence is a chief vehicle for attracting and keeping sizable and loyal audiences, worldwide. Producers believe that violence is popular, that adults want it, and that violent, fast-action situations in cartoons and other formats holds the attention of children.<sup>28</sup>

As discussed below, these premises are false as there are in fact higher Nielsen ratings for nonviolent programs. But another reason why there is so much violence on television is that producers cannot break even on the domestic market, but are forced to go into syndication on the world market, where half of the profits are derived - in order to make a profit.<sup>29</sup>

When you know that you are going to mass produce for the world market, then you are thinking about an assembly line with a formula that travels well, that needs no translation, that speaks action in any language, that can be injected and be sold cheaply in many countries. Over years of trial and error, the industry has found that formula, that key ingredient: violence.<sup>30</sup>

Violence, shooting, kicking, and maiming seem to be a universal language. Violent shows require less expensive actors and can be more readily sold in foreign markets. Violence is the one format that is easily exported to other languages and other cultures. By comparison, comedy does not travel well because you usually have to understand the culture to understand their humor. Thus, violence has become part of a global formula imposed even on the creative people who write scripts. In effect, there is a *de facto* censorship imposed on creative people based on the so-called key formula, which is cost per thousand viewers.<sup>31</sup>

Thus, there is a conflict of interest on the part of broadcasters because their commercial interests lock them into perpetuating televised violence, contrary to the public interest.

Time and again, the broadcasting industry has promised to mend its ways, but nothing has really changed. As former FCC Chairman Minow explains, “[t]he American ‘debate’ over children and television has. . .been something of a travelling circus, reappearing every few

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<sup>28</sup> See George Gerbner, *There is No Free Market in Television*, 22 HOFSTRA L. REV. 879, 881 (1994).

<sup>29</sup> *Id.* at 882.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

years, preceded by grand pronouncements and followed by meaningless gestures.”<sup>32</sup> The cycle repeats itself because “broadcasters tend to respond to pressure when the heat is on, only to return to business as usual later.”<sup>33</sup> The idea that self-regulation can succeed is increasingly eroded by the fact that the level of violence on television has increased year after year. “All the available research confirms that self regulation has failed. . . Self regulation by television on the violence problem is about as likely as self regulation by the tobacco industry on the cigarette problem.”<sup>34</sup>

#### IV. THE FCC’S AUTHORITY TO REGULATE VIOLENT CONTENT

Under existing law the FCC has broad authority to issue regulations to ensure that the public interest, convenience and necessity are served by the exercise of its licensing and regulatory authority.<sup>35</sup> Courts have interpreted the FCC’s power to regulate in the public interest to be due in part because television is uniquely pervasive and intrusive in the home, and involves a “captive audience,” especially among children, compared to other forms of media entertainment such as motion pictures. The law has always allowed more regulation over television than other media forms based on the public trustee concept.

Commissioner James Quello suggested that existing law grants the FCC rulemaking authority to regulate violent material in the same way it regulates the broadcast of indecent material.<sup>36</sup> The FCC clearly has the authority to regulate broadcasts that are “indecent,” but not obscene, including the authority to channel indecent programming into hours when children are unlikely to be in the viewing audience. Indecent material was broadly defined by the Supreme Court as material that is in nonconformance with accepted standards of morality<sup>37</sup> This power to impose “time, place and manner” restrictions on programs with indecent content was upheld in *FCC v. Pacifica Foundation*.<sup>38</sup> The Supreme Court has stated that unlike other forms of free speech, such

<sup>32</sup> See Ronald J. Krotoszynski, Jr., *supra* note 3, at 2111.

<sup>33</sup> *Id.*

<sup>34</sup> William Abbott, *What is the Constitutional Solution?*, 22 HOFSTRA L. REV. 891, 892-893 (1994).

<sup>35</sup> This authority stems from the Communications Act of 1934, 47 U.S.C. §151 (1999).

<sup>36</sup> *F.C.C. Chief Backs T.V. Violence Laws, Consumer Group Seeks Limits, Especially in Kids’ Hours*, CHI. TRIB., Mar. 14, 1993, at 9.

<sup>37</sup> *Id.* at 740. The Supreme Court went on to endorse the definition of “indecent” set forth in Webster’s Third New International Dictionary (1966): “a: altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: UNSEEMLY . . . b: not conforming to generally accepted standards of morality: . . .” *Id.* at n. 14. .

<sup>38</sup> *FCC v. Pacific Foundation*, 438 U.S. 726 (1978).

as in the press or in face-to-face communications, broadcasting is not entitled to the highest protection accorded under the First Amendment.

The Court in *Pacifica* emphasized that broadcasting was subject to lesser First Amendment protection because: (1) “the broadcast media have established a uniquely pervasive presence in the lives of all Americans,” (2) “[p]atently 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’s right to be left alone plainly outweighs the First Amendment rights of an intruder,” and (3) “broadcasting is uniquely accessible to children, even to those too young to read.”<sup>39</sup> And, “[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.”<sup>40</sup> Further, the government’s interest in the “well-being of its youth” and in supporting “parents’ claim to authority in their own household,” and the “ease with which children may obtain access to broadcast material,” justifies the regulation of otherwise protected expression.<sup>41</sup>

Further, in *Whitney v. California*<sup>42</sup> the Supreme Court said that it is permissible for government to design its free speech policy with the intention of shaping character in a way that makes people fit for self-government.

## V. ANALOGIZING VIOLENCE TO OBSCENITY

Some commentators believe that depictions of violence can be sufficiently explicit, offensive, and devoid of traditional free speech justifications as to be considered obscene and, therefore, completely outside of First Amendment protection.<sup>43</sup> The Supreme Court has consistently held that obscenity is simply “not within the area of constitutionally protected speech or press.”<sup>44</sup>

In his book, *Violence as Obscenity*, Professor Kevin Saunders argues that gratuitous violence in the media may be regulated in an analogous way to obscenity because:

Violence is at least as obscene as sex. If sexual images may go sufficiently beyond community standards for candor and offensiveness,

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<sup>39</sup> *Id.* at 748-49.

<sup>40</sup> *Id.* at 749.

<sup>41</sup> *Id.* at 749-50.

<sup>42</sup> *Whitney v. California*, 274 U.S. 357 (1927), *overruled by* 395 U.S. 444 (1969).

<sup>43</sup> Kevin W. Saunders, *Media Self-Regulation and Depictions of Violence: A Last Opportunity*, 47 OKLA. L. REV. 445 (1994).

<sup>44</sup> *Roth v. United States*, 354 U.S. 476, 485 (1957).

and hence be unprotected, there is no reason why the same should not be true of violence.<sup>45</sup>

Obscenity today is defined in *Miller v. California*,<sup>46</sup> which sets forth the modern criteria for identifying obscenity where

(a). . .“the average person, applying contemporary community standards” would find that the work, taken as a whole appeals to the prurient interest; (b). . .the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c). . .the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>47</sup>

Professor Saunders suggests the category, “violent obscenity,”<sup>48</sup> based on the *Miller* test, reworded to apply to material that explicitly appeals to a “morbid or shameful interest in violence” and which is “depicted or described in a patently offensive manner,” or showing “actual or simulated murder, manslaughter, rape, mayhem, battery, or an attempt to commit any of the preceding crimes,”<sup>49</sup> and which lacks “serious literary, artistic, political, or scientific value,” based on standards assessed by local juries.<sup>50</sup>

In *Eclipse Enterprises, Inc. v. Gulotta*,<sup>51</sup> the court considered and accepted the principle that violence can be regulated along the same lines as obscenity, but found an ordinance passed by Nassau County, New York, unconstitutional. The County tried to ban serial killer trading cards, on the idea that they contributed to juvenile crime. But the court felt the evidence of contested studies concerning TV violence were conclusionary and contradictory, and there was no evidence of any “studies or actual occurrences where crime trading cards were determined to be a factor in juvenile violence.”<sup>52</sup> Without conclusive proof that the cards had a causal nexus to juvenile violence, the court was not able to uphold the statute.<sup>53</sup>

If violence can be analyzed along the same lines as obscenity under the *Miller* test, the causal nexus might well be sufficient to persuade a jury that the two are related, just as has happened in wrongful death cases involving tobacco.

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<sup>45</sup> Kevin W. Saunders, *VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION* Duke University Press (1996).

<sup>46</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>47</sup> *Id.* at 24 (quotation marks in original).

<sup>48</sup> Saunders, *supra* note 45, at 185.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 196.

<sup>51</sup> *Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63 (2d Cir. 1997).

<sup>52</sup> *Id.*, at 68.

<sup>53</sup> See, *Youth Violence: A Report of the Surgeon General*, Jan. 2001, *supra* note 14.

Moreover, the Nassau County statute was not narrow enough to pass constitutional muster. Any law seeking to abridge First Amendment rights along the lines of banning something obscene must define the materials to be regulated so that a jury can identify it. This ordinance was too broad in that it banned cards that depicted crimes "in a sensationalized manner," or that treated violence as humorous, or that uncritically glamorized crime as a way of life. This is too broad in that it might also apply to ban political cartoons.

Nevertheless, *Eclipse Enterprises* affirms the principle that violence can be regulated by analogy to regulating obscenity, if such statute is narrow and specific. Some suggest the term, "depravity," to describe violent materials subject to regulation. One might define "depravity" as "patently offensive graphic depictions or descriptions of murder, torture, rape, or other violent felonies, particularly when the violent events being depicted or described (a) involve sexual assault or sexual perversion, e.g., necrophilia, incest, sado-masochism; or (b) are portrayed as humorous, entertainment, or erotic."<sup>54</sup>

## VI. DEFINING VIOLENCE

The studies that have connected the watching of violence with violent and antisocial behavior are sufficiently convincing to suggest that society may have reached a point where it will tolerate a measure of regulatory vagueness to gain a measure of security in our well-being. Any regulation dealing with televised violence would need to clearly define the objectionable violent expressions that are being targeted. This entails finding a generic definition of violence that is coherent and not overbroad. Such a system would regulate only the most dangerous and least valuable violent expression while preserving the values that current First Amendment jurisprudence attempts to protect.

It is important to distinguish between violence in Shakespeare, violence in the Bible, violence in fairy tales or in mythology, and violence in TV programming. Violence is a legitimate artistic and journalistic feature. It is even necessary to show the tragedy, the pain, and the damage that violence creates in human life.

But a distinction can be made between unobjectionable violent content, such as violence that is presented as socially or legally justified, news accounts, and humor and satire on the one hand - from violence that is gratuitous, that goes unpunished, that is excessive, or is motivated by a specific intent to harm, on the other. Exempted from a regulatory definition should be violence contained in comedy routines

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<sup>54</sup> Saunders, *supra* note 45 at 211.

such as slapstick; violent depictions in nature films, such as hyenas attacking and devouring a gazelle; and violence as a concomitant to broadcasting of sports, such as boxing, football and hockey, or wrestling. Clearly, regulators don't want to have a definition so broad as to include these latter depictions, nor violence in news coverage and, perhaps, real-life cop shows. It would seem obvious that "news certainly has sufficiently serious value to protect even the offensive depiction of violence from. . . prosecution" under any regulatory scheme.<sup>55</sup> Also exempted from regulation might be violence, otherwise objectionable, that furthers a plot or character development, or where the "message" in the end is that violence has repercussions, both physical and psychological, on victims, perpetrators, and society.

Regulators might also keep in mind the idea that some violent content, at least in sensible doses, can help teach important life lessons and help children face and overcome their fears.<sup>56</sup> Some think that violent entertainment functions to fulfill a natural adolescent need males have,<sup>57</sup> that violent content can help "pantomime what is too traumatic to learn by actual experience. . . . Like fairy tales that prepare the child for the anxieties of separation, sequences of preposterous violence prepare the teenager for the anxieties of action. [These are]. . . important distortions of real life situations" that can be helpful in socialization.<sup>58</sup> Teenage males, so the argument goes, in some way need violent entertainment.<sup>59</sup>

Another existing definition of violence is in the Code of the National Association of Broadcasters ("NAB"), which developed the current definition in issuing parental advisories and for use in its rating system and for the purpose of implementing the V-chip. (See Appendix A.) Thus, the broadcasting industry itself has conceded that violence is something that can be defined with sufficient certainty to work with in distinguishing violent programming from nonviolent programming.

Congress has proposed defining "dramatized violence" as "the dramatized portrayal of killings, rapes, maimings, beatings. . . or any

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<sup>55</sup> Saunders, *supra* note 45, at 198.

<sup>56</sup> See generally, Marie-Louise von Franz, AN INTRODUCTION TO THE PSYCHOLOGY OF FAIRY TALES (3rd ed., Zurich: Spring Publications 1975).

<sup>57</sup> David B. Kopel, *Massaging the Medium: Analyzing and Responding to Media Violence Without Harming the First Amendment*, 4 KAN. J. L. & PUB POL'Y 17, 19 (1995).

<sup>58</sup> James B. Twitchell, PREPOSTEROUS VIOLENCE: FABLES OF AGGRESSION IN MODERN CULTURE 262, Oxford University Press (1989).

<sup>59</sup> Kopel, *supra* note 57, at 19.

other acts of violence that, when viewed by the average person, would be considered excessive or inappropriate for minors.”<sup>60</sup>

Another approach that has been utilized to define violence is an index established by George Gerbner, whereby trained monitors apply this index to televised programs.<sup>61</sup>

## VII. EMERGING FIELD OF TORT LIABILITY

Tort law is in a state of flux. The early tobacco liability cases were lost, but stronger evidence and more sympathetic juries eventually led to success.<sup>62</sup>

The fairly modern tort of negligent incitement of harmful or outrageous conduct involves aiding and abetting another to commit harmful acts. The aider-tortfeasor is one who “assists, supports or supplements the efforts of another,” and an abettor is “one who instigates, advises or encourages the commission” of an act, or “counseling or encouraging” of an act. The tortious conduct need not involve specific intent, but must simply be the “natural consequence of one’s original act.”

An example of this tort reached national attention, at least in legal circles, in *Rice v. Paladin Enterprises, Inc.*<sup>63</sup> In 1995 there was a brutal shooting murder of Mildred Horn, her eight-year-old quadriplegic son Trevor, and Trevor’s nurse, Janice Saunders. Mildred Horn and Saunders were shot through the eyes, and young Trevor was strangled. The police linked the murder to a contract killer hired by Mrs. Horn’s ex-husband, whose motive was to get a \$2 million sum that Trevor had received in settlement for injuries that had previously left him paralyzed for life.

This case involved a tort case for wrongful death brought by the estates of the three murder victims. The defendant was the publisher of a “hit man” instruction book, which evidence showed the murderer had studied to solicit, prepare for, and commit the triple murder.

The court held that a cause of action can be sustained for aiding and abetting a murder by publishing and distributing this hit man book to the general public. The court found that the book, while not obscene, lacked “any political, social, entertainment, or other legitimate

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<sup>60</sup> S. Res. 122, 103d Cong., reprinted in 139 Cong. Rec. S.7526 (1993); H.R. Res. 202, 103d Cong., 1st Sess. 3 at 3-4 (1993).

<sup>61</sup> See George Gerbner & Nancy Signorielli, *Violence Profile 1967 Through 1988-89: Enduring Patterns* (Annenberg School of Communications, U.Penn., 1990).

<sup>62</sup> See Emily Campbell, *Television Violence: Social Science vs. The Law*, 10 LOY. ENT. L.J. 413 (1990); Anne K. Hilker, *Tort Liability of the Media for Audience Acts of Violence: A Constitutional Analysis*, 52 S. CAL. L. REV. 529 (1979).

<sup>63</sup> *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997).

discourse.” The court found that it would be unreasonable to accept the publisher’s argument that the book had any significant social value or that it had any entertainment value to law-abiding citizens.

The court rejected the publisher’s argument that its book was essentially a comic book and that no one would take its “‘fantastical’ promotion of murder“ seriously.<sup>64</sup>

The court also rejected the argument that the book’s printed “disclaimer” (stating “for informational purposes only!” and “for academic study only!” and that “neither the author nor the publisher assumes responsibility for the use or misuse of the information contained in this book”) relieved the publisher of liability, but rather these were plainly insufficient in themselves to alter the objective understanding of the book.<sup>65</sup> Indeed, the court noted that “disclaimers” and “warnings” can be used not to dissuade others from engaging in the activity, but to titillate them.<sup>66</sup>

The court further rejected the publisher’s argument that this was not aiding and abetting but simply an expression of the First Amendment protected arena of abstract advocacy of lawlessness.<sup>67</sup> Rather, the court felt the government is permitted to regulate speech “brigaded with action,” given that the context and other circumstances of the book rise to aiding and abetting, and that this is justified for the purpose of protecting the public from the most pernicious criminal acts and civil wrongs.<sup>68</sup>

The court cited *United States v. Barnett*, which held that the First Amendment does not protect publishers from charges of aiding and abetting a crime through the publication of a book on how to make illegal drugs. The court rejected as “specious” the publisher’s argument that the First Amendment protects the sale of such an instruction manual simply because the First Amendment protects the written word.

The major networks and newspapers submitted amici briefs in *Rice* urging the court to rule in favor of the publisher so as to bar a cause of action for aiding and abetting the murder. The court said: “That the national media organizations would feel obliged to vigorously defend Paladin’s assertion of a constitutional right to *intentionally and knowingly assist* murderers with technical information which. . . would be

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<sup>64</sup> *Id.* at 254.

<sup>65</sup> *Id.* at 254, 265 n. 10.

<sup>66</sup> *Id.* at 265 n. 10.

<sup>67</sup> In the landmark case of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Supreme Court held that abstract advocacy of lawlessness is protected speech under the First Amendment.

<sup>68</sup> *Rice*, 128 F.3d 233 at 244 (citing *Brandenburg*, 395 U.S. at 456).

used immediately in the commission of murder and other crimes against society is, to say the least, breathtaking.”<sup>69</sup>

#### VIII. COPYCAT CASES INVOLVING IMITATION OF TELEVISED SITUATIONS

One method by which televised violence promotes violence is by simple imitation. Two surveys of young American male violent felons found that 22-34% had imitated crime techniques they watched on television programs.<sup>70</sup> Fictional treatments of crime can inspire and empower potential criminals.<sup>71</sup> The Centerwall study concluded that “long-term childhood exposure to television is a causal factor behind approximately one-half of the homicides committed in the United States, or approximately 10,000 homicides annually.” The Centerwall study further estimated that as many as half of America’s rapes and assaults could be related to television.<sup>72</sup>

An area distinguished from the aiding and abetting situation discussed above involves a theoretical tort in which children imitate situations they see on television and they or others sustain damages or death as a result. The theory under this tort is that injuries or wrongful death may be induced and proximately caused by the defendant’s negligence in programming. Courts have rejected claims of this type, ruling that the First Amendment protects broadcasters from liability in depicting violent acts that are later imitated by minors who had watched the programs.<sup>73</sup>

<sup>69</sup> *Id.* at 265

<sup>70</sup> Brandon Centerwall, *Television and Violence: The Scale of the Problem and Where to Go from Here*, 267 JAMA 3059, 3059 (1992), referred to as “the Centerwall” study.

<sup>71</sup> David B. Kopel, *Massaging the Medium: Analyzing and Responding to Media Violence Without Harming the First Amendment*, 4 KAN. J. L. & PUB. POL’Y (1995)

<sup>72</sup> Centerwall, *supra* note 70, at 3061.

<sup>73</sup> *Zamora v. CBS*, 480 F.Supp. 199 (D.C. Fla. 1979) (finding no cause of action against networks for child “intoxicated” by television who shot and killed a neighbor); *Bill v. Superior Court*, 187 Cal. Rptr. 625 (Ct. App. 1982) (holding film producers protected under First Amendment in action brought by girl shot outside theatre where producers’ violent movie was being shown); *Olivia N. v. National Broadcasting Co.*, 178 Cal. Rptr. 888 (Ct. App. 1981) (determining that a broadcaster was protected under First Amendment in an action brought by a nine-year-old sexually assaulted by minors emulating a televised dramatization); *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982) (holding broadcaster was protected under First Amendment in action of 13-year-old who hanged himself after watching a mock hanging on television). *See also, Violence on Television: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93d Cong., 2d Sess. 29-31 (1974) (statement of Leo S. Singer) (cab driver said he planned holdup after watching television crime show; gasoline dousing incidents occurred in Miami and Chicago; man charged with plotting to tape radio-controlled bomb to targeted kidnap victim after watching episode in which scientist was locked in an explosive belt; bomb threats to airlines following with broadcast of movie depicting placement of bomb aboard airplane and ransom demand).

One must not forget, though, that many present day torts started out as theoretical torts, such as invasion of privacy, negligent infliction of severe emotional distress, the idea of product liability, the idea of strict liability for ultrahazardous activities, the idea of nuisance law, and the idea of liability of tobacco companies for cancer in smokers.

One of the first reported instances of litigation involving an act of imitative violence was the case of *Olivia N. v. National Broadcasting Co.*<sup>74</sup> After NBC aired a movie in which a girl was raped with a plumbing tool, a nine-year-old girl was raped with a bottle by some teenagers who had watched and discussed the movie.<sup>75</sup> The plaintiff sought damages based on a theory of negligence and recklessness as distinguished from claiming that the film advocated or encouraged violent acts as an incitement to imminent lawless action within the meaning of *Brandenburg v. Ohio*.<sup>76</sup> The court dismissed the case on a motion for judgment of nonsuit after opening arguments to the jury and before evidence could be presented, ruling that incitement to imminent lawless conduct, not negligence, would have to be claimed, and that the television movie subject to this action concededly did not fulfill the requirements of the *Brandenburg* case.<sup>77</sup> The judge noted that, “[i]f a negligence theory is recognized, a television network or local station could be liable when a child imitates activities portrayed in a news program or documentary,” and that “[i]mposing liability on a simple negligence theory would frustrate vital freedom of speech guarantees.”<sup>78</sup>

In *Zamora v. CBS*,<sup>79</sup> a teenage boy’s parents unsuccessfully sued CBS for negligence, claiming that long-term exposure to violent programming had led him to shoot and kill an old woman.<sup>80</sup> The *Zamora* court made it clear, however, that television programming does present issues of too much violence being seen by children, and that if medical science advanced sufficiently to show a causal nexus, such data might convince the FCC or the courts to impose limitations on programming.

In what many might regard as a very unpleasant circumstance, the estate of an adolescent boy in Texas who strangled himself to death sued *Hustler Magazine*. The complaint alleged that *Hustler Magazine* incited the young man to try and imitate a potentially fatal act.<sup>81</sup> The

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<sup>74</sup> *Olivia N. v. National Broadcasting Co.*, 126 C.A. 3d 488 (1981).

<sup>75</sup> *Id.* at 492.

<sup>76</sup> 395 U.S. 444 (1969).

<sup>77</sup> *Olivia N. v. National Broadcasting Co.*, 126 C.A. 3d 488 at 495 (1981).

<sup>78</sup> *Id.* at 495, 497.

<sup>79</sup> *Zamora*, 480 F.Supp. at 199.

<sup>80</sup> *Id.* at 200.

<sup>81</sup> *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987). The article in question described the practice of autoerotic asphyxiation.

court dismissed the case based on First Amendment defenses. Another case, also dismissed on First Amendment grounds, involved an action by parents for the death of their son, who hanged himself after watching a hanging stunt on a popular television comedy and talk show.<sup>82</sup>

We may see more of these types of legal claims because there are more and more outrageous things being depicted in shows such as survival or reality programs. MTV's show, "Jackass," featured young men performing stunts such as being shot with a stun gun or swimming around in sewage. Recently, a 13-year-old Connecticut boy suffered severe burns trying to copy a stunt from that show.<sup>83</sup>

In theory, if a plaintiff can show that the defendant's communication is directed towards inciting potentially harmful action, one could chip away a First Amendment defense.<sup>84</sup>

## IX. SOLUTIONS

### A. Nonviolent Programming

The idea that violent programming and violence-based cartoons are a successful format for audience attention is a premise that producers may start to recognize as false.<sup>85</sup> Fast paced, fast moving, *nonviolent* programming such as "Sesame Street" are well designed to hold maximum attention, accomplished by a lively pace rather than by depicting violence. The ten highest-rated programs are nonviolent and always have been.<sup>86</sup> Nonviolent programs routinely get higher Nielsen ratings than violent programs in the same time slots.<sup>87</sup> What actually maintains audience attention and loyalty is more likely to be the action - fast pace, movement, and excitement - or the human emotion and drama, rather than elements of violence. A national survey by Arbitron, an audience ratings company, found that the two types of programs with the largest child audiences between ages two and eleven were those that had a robust content with action and excitement as well

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<sup>82</sup> De Filippo, 446 A. 2d at 1036.

<sup>83</sup> See Robin Rauzi, *Stunt Copycats Put MTV in a Spot*, L.A. TIMES, Feb. 2, 2001 at F1. MTV's president, Brian Graden, said that copycat behavior was a concern when producers developed the program, and said, "You can't program for young adults and not be a steward of those airwaves as well. . . ." In other words, Mr. Graden acknowledges the stewardship or fiduciary function of producing programs for young adults.

<sup>84</sup> Alan Stephens, J.D., *First Amendment Guaranty of Freedom of Speech or Press as Defense to Liability Stemming From Speech Allegedly Causing Bodily Injury*, 94 A.L.R. 26.

<sup>85</sup> See, Murray, *supra* note 20, at 13.

<sup>86</sup> Alf Siewers, *TV-Violence Link Elusive: Parents Seem Sure of Cause-and-Effect*, Chi. Sun Times, Oct. 26, 1994, at 7.

<sup>87</sup> See Pete Gallo, *Study: Non-violent Shows More Popular*, UPI, Oct. 5, 1994.

as humor, but that violence did not predicate children audience size.<sup>88</sup> Even “reality-based” crime programs that have a strong appeal to youthful audiences do not achieve their popularity primarily through violent content.<sup>89</sup> It is excitement and drama rather than violence which hold the audience. Thus, other types of programming can fulfill the commercial needs of attracting and maintaining audience attention.

### B. Teaching Audiences Critical Viewing

Parental responsibility over what their children watch (the idea behind the V chip) is a crucial feature in solving the problem of any causal nexus between violent programs and antisocial behavior. There are protocols for teaching children to use television effectively and constructively. For instance, the U.S. Department of Agriculture published a parent guide that it developed at Kansas State University on this topic.

Parents can view programs with their children and talk about what they see, such as talking about how the violence on the screen is not real. “Critical viewing” or media literacy can be taught in elementary school to help children develop critical skills necessary to protect themselves from exposure to violent images.

### C. Channeling or Zoning

Congress could enact a Family Viewing Hour,<sup>90</sup> much as was done years ago, to establish a permissible zone of time during which certain programs could be shown. A family viewing hour would prohibit the broadcast of violent programs during hours when children are likely to comprise a substantial portion of the viewing audience.<sup>91</sup> This type of regulation would clearly pass constitutional muster. Attorney General Janet Reno confirmed in a hearing before Congress that Senator Hol-

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<sup>88</sup> Wright, *supra* note 9, at 34.

<sup>89</sup> *Id.*

<sup>90</sup> As discussed in Appendix A, the broadcasting industry agreed to a Family Viewing Hour in the 1980s, but this was overturned in a case brought by the Writer’s Guild. These hurdles are not operative if the FCC itself acted to impose a family viewing hour rule pursuant to its own rule making authority. Regulation of television violence should address programming by broadcasters and cable operators alike. The Supreme Court has held that cable programmers have broader constitutional protection than network broadcasters. See *City of L.A. v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) (holding that cable operators’ First Amendment rights are greater than those of broadcasters, because cable operators do not use radio frequencies). The FCC has allowed indecent material to be shown on cable and other nonbroadcast distribution systems. See *In re Enforcement of Prohibitions Against Broadcast Indecency* in 18 U.S.C. §1464, Report, 5 F.C.C.R. 5297, para. 84 (1990).

<sup>91</sup> Children’s Protection from Violent Programming Act of 1993, S. 1383, 103d Cong., 1st Sess. (1993). See 139 Cong. Rec. S10,,581 (daily ed. Aug. 5, 1993).

ling's channeling bill to regulate television violence would be constitutional.<sup>92</sup>

This Family Viewing Hour would pass constitutional muster under the intermediate scrutiny test of *United States v. O'Brien*.<sup>93</sup> The *O'Brien* standard requires the government to show that the regulation in question advances a substantial state interest (in this case, reducing the effects of violence on children), that the government interest is unrelated to the suppression of free speech, and that the incidental restriction on speech is no greater than essential to further the interest.<sup>94</sup>

As one case on this point stated, "[A] prohibition upon violent programming during prime time weekdays and on Saturday mornings - would be the least burdensome means to achieve the government's compelling interest in combating the societal violence produced by television violence."<sup>95</sup>

#### D. Outright Banning of Violent Programming

Implementing an outright ban on violent programming is not likely to be practicable or desirable. This was attempted for many years in the area of obscenity. While obscenity can be prohibited, censored and otherwise restricted, a more permissive attitude in the United States and throughout the world appears to have eroded the desirability of devoting police manpower and prosecutorial auspices to cull obscenity from society, except for child pornography.

The problem is not in defining violence, for courts have not have difficulty establishing a constitutionally coherent definition of obscenity—a genre that is considered more difficult to define than is gratuitous or excessive violence.

If the political picture changed in the future, prohibition of violent programming could be justified based on findings from the data showing a causal connection between antisocial violent conduct and exposure to televised violence.<sup>96</sup> The Supreme Court has held that violence

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<sup>92</sup> See S. 1383, *Children's Protection from Violent Programming Act of 1993*; S. 973, *Television Report Card Act of 1993*; and S. 943, *Children's Television Violence Protection Act of 1993: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong., 1st Sess. 30 (1993).

<sup>93</sup> *U.S. v. O'Brien*, 391 U.S. 367 (1968).

<sup>94</sup> *Id.* at 377. Analogous regulations of the effects of violence have been upheld. For instance, the case of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), allowed a regulation limiting the location of adult theatres as a means of curbing the secondary effects such theatres have on the community. Other laws that are content-neutral are permitted to prohibit noisy picketing in front of schools during school hours.

<sup>95</sup> Edwards & Berman, *supra* note 27, at 1556.

<sup>96</sup> Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW U.L. REV. 1487, 1535 (1995).

or other types of potentially expressive activities that produce special harms distinct from their communicative impact. . . are entitled to no constitutional protection.<sup>97</sup>

#### E. Balanced Programming

Balanced programming means offsetting violent shows with educational children's programming, public interest programming, and similar fare. Congress could require that every station broadcast a specified hour or two of educational programming every day for children, during the three o'clock to five o'clock time slot. Broadcasters could put on public interest programs from independent producers or their own productions. They could have significant editorial prerogatives in deciding what sort of public interest shows to broadcast.

The FCC could implement a regulation to reallocate portions of airwaves for its own educational programs or for programs funded by the Corporation for Public Broadcasting.

Broadcasters can profit from broad-based and age-specific educational programming. There are examples of corporate sponsorship or underwriting that have been quite legendary. Sears, for example, underwrote "Mister Rogers' Neighborhood" on PBS for about 25 years. Corporate sponsorship of educational programs enhances a company's good will. Advertising in these contexts may be oriented more towards enhancing the corporate image than to advertising specific products.

#### F. Parental Advisories

There could be more comprehensive viewer discretion warnings based on the extent of violence in the programming. These viewer discretion warnings permit parents to act on the information concerning program content.

#### G. Teaching Broadcasting Ethics in Graduate School

Some curriculum of ethics is already part of standard business school curriculum today. This should be integrated into broadcasting in communication schools.

#### H. Consumer Boycotts

Consumer boycotts have been an impetus for reform. Producers no longer depict gratuitous drug use in large because they have been

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<sup>97</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). While this case dealt with actual, not fictionalized, violence, nevertheless the idea behind the case gives further impetus to the permissibility of enacting regulations regarding gratuitous violence in programming.

pressured by consumers' groups. An organized boycott in 1977 resulted in producers cutting back on action shows in the subsequent season, and those action shows that were aired contained significantly fewer depictions of violence.

Consumer groups can reassert boycotts by letters to sponsors to protest violent cartoons, violent reality shows, and violence in promotional advertising. Organization of boycotts has been accomplished with the collective help of such groups as the National Parent-Teachers Association, the American Medical Association, and the National citizens' Committee for Broadcasting. When such boycotts bring economic pressure to bear upon the networks, results occur.

For example, Time Warner was publicly embarrassed following its release of the song "Cop Killer" by the rap artist Ice-T. The CD was shipped to record stores in small body bags as a marketing gimmick. After months of claiming First Amendment protection, the song was withdrawn. Time Warner came to be regarded as a company that would sell its soul for a dollar, rather than as a firm dedicated to freedom of speech.

### I. Taxing Broadcasters for Violent Programming

The FCC is empowered to charge a spectrum fee or a royalty for use of the airwaves. Traditionally, however, the FCC has simply licensed the airwaves to applicants for free. Congress could authorize the FCC to require fees from broadcasters, in the form of a tax, and assessment could be based on the amount of violent content in a station's programming.

## X. CONCLUSION

The television industry *is* capable of making wonderful programs for children.<sup>98</sup> These programs provide informative, cultural, educational, scientific, intellectual, and artistic content that changes the world of childhood for the better. Many producers stretch the mind and the imagination of children, elicit active thought and learning, and utilize interactive mechanisms to reveal possible options for one's own life and the planet's future. This should be the widespread norm in children's programming. Ample data shows that the more children watch educational television, the better they do in school, the better their attitude towards school, and the better they score on nationally standardized

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<sup>98</sup> See John C. Wright & Aletha C. Huston, *A Matter of Form: Potential of Television for Young Viewers*, *American Psychologist* 835, 841-42 (July 1983) (discussing the beneficial impact that television can have on children).

achievement tests.<sup>99</sup> Conversely, there is no room for doubt that cartoon depictions of violence cause aggressive behavior in children.<sup>100</sup> The more children watch commercial cartoons and prime-time programming, the lower their test scores, the less ready they will be for school, and the poorer their adjustment when they begin school.<sup>101</sup>

Regulating violent programming would accomplish a compelling governmental interest of protecting the psychological and emotional well-being of minor viewers by reducing societal violence. Of course, this would be only a partial alleviation of the problem.

Society cannot ignore other problems pertaining to violence. Government can undertake innumerable policies to reduce societal violence - gun control, expanded job programs, juvenile justice reform, drug rehabilitation - but regulation of televised violence is not rendered unnecessary by the availability of other mechanisms that would likewise make partial contributions to alleviating the same problem. Television violence is not to blame for all of our societal ills. Many other factors have contributed to the general coarsening of America's moral sense. Nevertheless, curbing television violence is a strong start. Self-regulation may be unworkable in practice because there is an intrinsic conflict of interest with commercial broadcasters being in business to make and sell their product both domestically and worldwide, while utilizing a public resource. Commercial broadcasters need to think and act like public trustees, yet on balance they have failed to produce cognizable improvements in either the quality or scope of discharging their "public trustee" responsibilities. The programming needs of the nation's children need to be redressed, and children need to be viewed as more than a business opportunity. How broadcasters might honor in practice their statutory commitment to operate in the "public interest"<sup>102</sup> by providing social, political and educational programming remains an open question. But as discussed in this article, the best means of achieving excellence from the broadcasting community may be to rely on greater governmental regulation within the evolving standards of constitutional jurisprudence examined through the lense of public policy concerns of the impact that violence has on viewers. Time and again we have seen that the nation cannot leave the fox to guard the henhouse.

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<sup>99</sup> Wright, *supra* note 9, at 35.

<sup>100</sup> Richard E. Goranson, *A Review of Recent Literature on Psychological Effects of Media Portrayals of Violence*, in Robert Baker & Sandra Ball, *Mass Media and Violence: A Report to the National Commission on the Causes and Prevention of Violence*, app. III-A at 395.401.

<sup>101</sup> *Id.*

<sup>102</sup> See 47 U.S.C. §§303, 309(a) (1994).

## APPENDIX A

## BROADCASTING INDUSTRY'S CODE OF ETHICS

Self-regulation is in principle a desirable route towards achieving some measure of control over violence in programming. Self-regulation in broadcasting has never been successful. Attempts at self-regulation occurred in the 1920s when there were wave jumpers and pirates creating chaos in radio signals. Things became so intolerable that sales of radio sets dropped off drastically, and for a time it appeared that all of the great hopes for a future of broadcasting were gone. The National Association of Broadcasters ("NAB"), founded in 1923, tried to end the airwave chaos through self-regulation with a plan to assign frequencies in an orderly manner, but that failed to occur. It quickly became apparent that the only real solution was to enact federal legislation. That happened with the Radio Act of 1927, which established a government agency to regulate the airwaves via the Federal Radio Commission.

In 1928 the NAB issued a code that lacked both specifics and an enforcement mechanism, and "not only had no teeth, but very soft gums." It was quickly replaced by a 1929 Code of Ethics and Standards of Commercial Practice.

The NAB Code of Ethics prohibited "offensive" material, "fraudulent, deceptive or obscene" matter, and "false deceptive or grossly exaggerated" advertising claims. The Code provided that if a violation were charged in writing, the Board of Directors would investigate the charges and notify the station of its findings, but there was no enforcement mechanism. In November, 1938, the FCC Chairman Frank R. McNinck (the FCC was the successor to the Federal Radio Commission), referring to the furor surrounding the broadcast of Orson Wells' *War of the Worlds*, warned that if the industry could not police itself, someone else would do it for them. In response to the FCC's attack, the NAB passed a more specific Code and created an enforcement group call the NAB Code Committee.<sup>103</sup>

The 1938 Code called for close supervision of children's programs, required broadcasters to allot time fairly for the discussion of controversial views, and urged broadcasters to cooperate with educational groups for the airing of educational programs, and other provisions such as limitations on advertising time.

However, when NAB again amended its Code in 1945 (to conform to a new FCC ruling that time should be sold for the airing of contro-

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<sup>103</sup> *Id.*

versial views), the Code was stated to be merely a "guide" to individual broadcasters, again with no enforcement capability.

Congress has taken an interest in the subject of television violence since the early days of television. In 1952, Congress held its first hearing on the issue of television violence; however, no legislative action resulted.

In 1951 Senator William Benton introduced a bill to establish a National Citizens Advisory Board for Radio and Television to oversee programming and to submit a yearly report to Congress and the public concerning the extent to which broadcasting was serving the public interest. To ward off that bill, the NAB establishing a Television Program Standards Committee to consider promulgating a television code, and the first NAB television Code was adopted at the end of 1951. It provided for a review board to act as a clearinghouse for complaints. The Code was purely voluntary, but did, however, contain explicit content restrictions on material that is "excessively violent." Provision (1) read: "Violence and illicit sex shall not be presented in an attractive manner nor to an extent such as will lead a child to believe that they play a greater part in life than they do. They should not be presented without indications of the resultant retribution and punishment." The NAB apparently felt its provisions on this point were clear to its members without the need to define what was meant by "excessively violent."

In 1955, a staff report to the Senate Judiciary Committee recommended that the FCC develop standards for programming violent content, with enforcement by the FCC through sanctions such as fines and license revocation. Senator Estes Kefauver brought these concerns to the general public in a 1956 article in *Readers' Digest* magazine called "Let's Get Rid of Televised Violence." A succession of other hearings on the effect of televised violence on young people followed, including studies by the Surgeon General on the effects of televised violence on the attitudes and behavior of children.

In the 1960s as concerns grew about the dangers of smoking, the industry failed to voluntarily restrict tobacco advertising. Cigarette advertising accounted for ten percent of broadcast advertising revenue, and this economic fact may have prevented the industry from adjusting its Code to restrict such commercials. Therefore, Congress imposed a much more draconian rule - a total ban on television cigarette advertising.

In 1974 the NAB Code proscribed "exploitative" uses of violence, urging that programs show the consequences of violence, avoid excessive, gratuitous, and instructional displays of violence, reject the use of violence for its own sake, and increase sensitivity in the handling of

conflict in programs designed for children. However, public outcry on television violence continued, suggesting that these voluntary mechanisms were ineffective.

In 1974, the chairman of the FCC, Richard Wiley, responded to congressional pressure by meeting with the broadcast networks and the NAB to discuss the problem of television violence. From this meeting, the parties forged a voluntary agreement known as the Family Viewing Hour policy. Under this policy, two hours of evening television programming, one hour of prime time and the hour before it, would be dedicated to programming deemed appropriate for all the members of a family. The NAB adopted the Family Viewing Hour as part of its Television Code. However, this policy was successfully challenged in the case of *Writers Guild of America, West v. FCC*. Although the FCC later reaffirmed the Family Viewing Hour policy and the NAB put it back into its Television Code, the policy was again successfully challenged, this time as violating the antitrust laws, in *United States v. National Ass'n of Broadcasters*. Ever since that case networks have been hamstrung to agree to *any* self-regulation because of concerns of violating antitrust laws. Because of antitrust concerns in the wake of that case, the role of NAB was deflated, and the NAB abandoned all parts of its Code.

In response to the case of *United States v. National Ass'n of Broadcasters*, Congress passed the Television Program Improvement Act of 1990 which exempted the broadcast networks from antitrust laws for a three-year period so that they could establish standards for violent programming.

In 1990, the NAB issued new voluntary guidelines which reinvigorated its earlier standards on the presentation of violence, principles which essentially were part of the old NAB Code. The NAB was careful, due to antitrust concerns, to emphasize that there was no enforcement mechanism of its Code, and that it was simply stating what it regarded as generally accepted standards of the broadcast community.

In 1992, the major networks adopted voluntary standards to decrease the amount of television violence. In addition, the broadcast networks adopted a plan in 1993 to provide warnings to viewers of television specials, movies, and mini-series that contained violent programming inappropriate for children. These warnings were to be shown before a program was broadcast and to be placed in promotional materials. The cable industry followed suit in 1994 and revealed its plan to utilize an outside monitor to rate the violent content of its programs. Furthermore, the cable industry's plan would enable subscribers to electronically block out violent programming. These parental adviso-

ries, however, do nothing to reduce the amount of violence on television, but simply put a label on it.

The Telecommunications Act of 1996 pushed the broadcast and cable television industries to establish a rating system that categorized television programming based on its level of violent or sexual content, and required broadcasters and cable operators to electronically label any programs that are rated for violent or sexual content. The law also required new televisions to contain a "V-chip" to permit users to block-out programs containing an electronic rating that is based on the amount of violence in a program. The "V-chip" benefits parents who wish to screen out violent programming, but the law does nothing to respond to the dangers children face when their parents do not have televisions with "V-chips" or who do not activate the chips.

## APPENDIX B

## ATTEMPTS AT REGULATING VIOLENCE IN VIDEO GAMES

The relationship between violent video games and aggressive behavior is not as well established as the relationship between television violence and aggression. It would seem that, owing to the interactive nature of violent video games, in which the game player actually participates in violent situations (e.g., the player may “finish” his opponent by tearing off his head, complete with blood splattering), aggression is more likely to follow from the player’s direct and active involvement in video game violence than from passive involvement in televised violence. That issue has, however, not yet received much attention, compared to the effort devoted to the study of the effects of television violence. While not yet proven, it would seem reasonable that, as the simulated participation in violence becomes more realistic, the effect is likely to be greater.

Various cases have upheld or acknowledged the view that the First Amendment does not protect speech that involves or depicts violence.

The court in *Eclipse Enterprises, Inc. v. Gulotta*<sup>104</sup> considered whether violent expressions in serial killer trading cards could be regulated. The case involved a Nassau County ordinance that made it a misdemeanor to distribute “serial killer” trading cards (featuring pictures of famous criminals and detailed information about their misdeeds), to minors. The lawmakers were concerned that these cards glamorized violent crime by encouraging children to view murderers on the same level as sports heroes. The most offensive of the cards depicted and described in lurid detail serial killers whose crimes involved sexual perversion, rape, or cannibalism. The Nassau County ordinance was patterned under narrow guidelines for obscenity regulation enunciated under *Miller v. California*.

Under the *Miller* test, offensiveness and prurience are defined according to local community standards, thereby allowing for cultural and moral diversity throughout the country. Nassau County felt that a similar narrow exemption ought to allow its community to regulate violent, hard core entertainment, as distinguished from sexual hardcore entertainment.

Trading cards that were declared “harmful to minors” under the Nassau County law were those depicting “heinous” crimes or criminals. “Heinous” crimes were defined by means of a list of serious felonies

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<sup>104</sup> *Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63 (2d Cir. 1997)

such as murder and rape. The law's definition of "harmful to minors" was nearly identical to the *Miller* definition of obscenity, except that it applied to depictions of heinous crimes rather than sexual conduct, and the standard examined suitability for minors rather than for the general public.