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LEGISLATIVE UPDATES


INTRODUCTION

For years, parents have complained about the excessive violence on television and the detrimental effect such programming has on their children. Often, both parents work outside of the home, and subsequently, television has become the "the modern day babysitter." Many parents would be outraged if their babysitter told their children to commit violent acts; yet, this is the precise message they feel the television networks are sending to their children. One recent poll revealed that eighty percent of Americans agreed that violence on television is harmful to our society. This result is hardly surprising when one considers the portrayals of violence which have become a daily feature of the evening news and assumed a ubiquitous presence on television. These concerns have prompted a call for action by Congress to regulate the airwaves.

Congress has closely scrutinized the issue of television violence since television’s widespread introduction in the early 1950s. Until recently, however, Congress has taken no serious legislative actions to combat televised violence, despite government reports on the linkage between portrayals of violence on television and antisocial violent behavior.

From the perspective of the major television networks, violent programs attract viewers. This, in turn, lures advertisers to support the program. Predictably, media leaders argue that violence is caused by the disintegration of the family unit and not the fictitious acts of violence children watch on television. The media leaders claim that the relationship between television violence and crimes committed by child viewers is tenuous at best. Congress seeks to create a compromise between these two competing interests by enacting the Parental Choice in Television Act of 1995. The Bill, which was recently approved by the House

1. Interview with Peggy Charren, Founder of Action for Children’s Television, a Washington-based media watchdog group (Oct. 15, 1994).
6. H.R. 2030, 104th Cong., 1st Sess. (1995). A similar bill was recently introduced in the Sen-
of Representatives, makes available the technology for parents to control the viewing of programming they believe is inappropriate for their children.

BACKGROUND

The Committee on Commerce, which sponsored the Bill, found that the average American child watches about twenty-five hours of television per week and as much as eleven hours per day. In fact, a study conducted in Washington, D.C., found that during one weekday of programming, children viewers witnessed 138 murders, 333 gunfights, and nearly 175 stabbings. Especially alarming for the Committee is the fact that most of these acts of violence were aired between 2:00 p.m. and 5:00 p.m., the hours during which children arrive home from school and are usually left without parental supervision. Based on these statistics, a large body of literature has linked exposure to violence on television with increased physical aggressiveness among children and violent criminal behavior. One study found that homicide rates in the United States rose steeply about ten to fifteen years after the introduction of television. In fact, one recent survey revealed that 22.34% of young American male felons imitated crime techniques they watched on television programs. Similarly, the American Psychiatric Association, found that children are extremely susceptible to psychological harm from violent and obscene images on television. In sum, these studies clearly indicate that the repeated acts of violence seen on television induce a systematic desensitization towards violence.

The Federal Communications Commission (FCC) is the main entity charged with regulating the airwaves. Congress regards it as the “public guardian of the airwaves.” Its power is derived from the Communications Act of 1934, which gave the FCC authority to issue, renew, and revoke broadcast licenses and to establish rules to insure that licensees comply with public policy. The statute does not specifically define what it means by “public policy,” it merely requires broadcasters to create programming that serves the needs of the community.
The statute was deliberately vague to give the FCC flexibility when promulgating broadcasting rules. The problem is that any FCC regulation will almost always confront broadcasters' First Amendment right of free speech. The First Amendment states that any law abridging freedom of speech is unconstitutional. However, the FCC must balance these free speech concerns against the statutory mandate that the FCC serve the public interest. One strong concern is the public's desire to eliminate the violent and dehumanizing programs on television.

Historically, the FCC has approached this conflict according to the "marketplace" theory: the FCC does not need to create specific rules for broadcasters because various forms of programming are available in the overall television market. If viewers are dissatisfied with their program options on one channel, they can simply watch programs on a different channel for other choices. The "marketplace" theory assumes that natural economic forces will encourage television licensees to create different types of programs so that viewing choices will appeal to every audience.

While the marketplace theory circumvents the problem of violating the broadcaster's First Amendment rights, it has proved obsolete in the context of children's programming. Ironically, the FCC's own report shows a decrease in the availability of programs designed exclusively for children. One reason for this drop is due to a lack of economic incentive for broadcasters to provide programs for children. Advertisers reason that children have little buying power, compared to an adult viewer. In essence, children are not really valuable consumers, and thus, advertisers seek to sponsor programs with a large adult audience. Programs with violent content attracts viewers. Broadcasters, like most businesses in our capitalist economy, are governed by a profit motive and rely on advertisers to generate revenues. Subsequently, broadcasters will change their program schedule to accommodate more programs containing violence, since those programs receive the highest ratings. Unfortunately, children's programming often gets cut out of the schedule because it does not attract advertisers the same way in which violent programs lure viewers to watch.

17. U.S. CONST. amend. I.
20. 44 F.C.C. 2303 (1960). This report recognizes children as one of the fourteen groups television broadcasters must serve. In a later report, the Children's Television Task Force, the FCC's subcommittee assigned to analyze the availability of children's television, concentrated its exploration on four specific areas: 1) the overall amount of children's programming; 2) the educational, instructional and age-specific programming; 3) the time of day when licensees schedule children's programming; and 4) advertising practices during children's programs. The Committee found that, based on these four factors, television networks have not served the needs of children. 96 F.C.C.2d 634 (1984).
21. Uscinski, supra note 19, at 150. For a more detailed analysis of market forces that compel advertisers to sponsor certain programs, see Henry F. Waters, Kidvid: A National Disgrace, NEWSWEEK, Oct. 17, 1983, at 82.
In defense of the marketplace theory, the FCC claims that cable television provides a new market for children's programming. Because customers pay for cable services, cable stations do not succumb to the pressures from advertisers the same way in which non-cable networks do. This increased independence allows cable operators to create more children’s programming and even establish channels that are wholly devoted to children’s programming. However, this theory has also failed. Only 60% of television owners subscribe to cable services, leaving many children without the luxury of being able to watch children's programming. Therefore, the FCC has imposed closer regulations upon non-cable networks.

One approach the FCC has taken to insure that programming on non-cable networks is suitable for children is the creation of a “safe harbor” rule. The rule provides that the hours between midnight and six in the morning are “safe harbor” hours during which broadcasters can air programs that are generally inappropriate for a child audience. The FCC selected these hours as times of the day during which children are least likely to be watching television, and subsequently, the viewing audience consists of consenting adults.

The Supreme Court has upheld these rules, despite challenges from several broadcasters that the rule constitutes an unconstitutional abridgement of free speech. In Red Lion Broadcasting v. FCC, the Court held that broadcast regulation is subject to relaxed scrutiny due to the unique nature of the broadcast medium. In lieu of analyzing an abridgement of First Amendment under strict scrutiny stands a complex set of rules that directs a reviewing court to consider such diverse factors as the form and effect of the regulation, the purpose of the regulators, the value of the regulated free speech, and the type of media involved.

In the context of broadcast media, the Supreme Court justifies government control of broadcast licenses based on the theory of spectrum scarcity. The Court limited First Amendment protection with the following reasoning: the electromagnetic spectrum is a physically limited resource. Because more people wish to broadcast than there is broadcast space available, the government must assume control of the spectrum, allocating rights or licenses for its use. Otherwise competitors might broadcast at the same frequency, causing interference or possibly even drowning each other out. Because government owns the airwaves in trust for the public, individual licensees become trustees. The government may accordingly require its licensees to broadcast in the public interest. In FCC v. Pacifica Foundation, the Court reaffirmed the relaxed standard and held the safe harbor rule is constitutional. The Court also reaffirmed the authority of the FCC as a guardian of the airwaves, proclaiming that “it is the right of viewers and listeners, not the right of the broadcasters, which is paramount.”

ties and other improper language during certain hours of the day. The majority recognized that protected language may be prohibited in some contexts where it is especially offensive. In the situation at issue, the Court noted that the presence of children as part of the listening audience made the offensive nature of the radio broadcast particularly acute. In sum, broadcasting of risque material could be restricted to hours in which children were unlikely to hear or see it without running afoul of the First Amendment.

In recent years, Congress has realized that the safe harbor rule is becoming obsolete. In fact, many analysts reason that there is no such thing as a safe harbor anymore. Even though only .35% of the audience during the safe harbor hours consists of children between the ages of twelve and seventeen, that figure represents approximately 716,000 children watching programs that the FCC deems unsuitable for them.26 More importantly, most of these children probably watch these programs without any parental supervision. Because children are so susceptible to peer pressure, the message conveyed during the safe harbor hours really reaches far more than the number of children actually watching.

Another reason for Congress' urgency to protect children is due to the pervasiveness of television. Television is the most accessible form of media in the United States. The Supreme Court confirmed that the inherent nature of the broadcast medium justifies increased regulations over television broadcasters. What makes television so unique, in addition to its almost limitless accessibility, is the fact that there is no prior warning of the subject matter of a particular program. Children can turn on the television set at any point during a program's broadcast. If the program contains material that is not suitable for them, there will be an announcement stating that at the beginning of the program. Children who tune in during the middle of the program would miss the warning. Although some scholars argue that prior warnings deter children from watching programs that are meant for adults, these warnings often have the opposite effect. Therefore, these methods serve no purpose other than to perpetuate the success of violent programming.

In response to these concerns, Congress passed the Children's Television Act of 1990.27 In addition to enacting other stipulations designed to encourage more constructive programming for children, the 1990 Act required broadcasters to help contribute to meeting children's educational needs in order to continue to be licensed. To implement Congress' directive, the FCC directed broadcasters to provide educational and informational programming, defined as "any television programming which furthers the positive development of children sixteen years of age and under in any respect, including the child's intellectual, cognitive, social or emotional needs."28

Some broadcasters have risen to the challenge by providing new programs geared exclusively for children. In fact, several cable stations have created entire

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26. See Uscinski, supra note 19.
28. Id.
channels devoted exclusively to providing educational programs for children. Additionally, several stations have periodically announced new anti-violence initiatives.\(^{29}\) In response to viewer preferences, network television programming in the mid-1990s contains a smaller number of violent police and detective shows than it did in the 1970s.\(^{30}\) The problem is these statements of policy do not make economic sense for television executives.

However, there has been no dramatic increase in educational programming for children on both cable and non-cable networks.\(^{31}\) In fact, there is little evidence that commercial broadcasters have complied with either the spirit or the letter of the law.\(^{32}\) Violent programs require less expensive actors and can be sold more readily in foreign markets.\(^{33}\) The problem is even more serious for children's programming. It is easier for cartoonists, especially those working on network assembly lines, to depict violence rather than creating humorous animation.\(^{34}\)

The Parental Control in Television Act of 1995\(^{35}\) was created to curb the amount of violence on television in the wake of the failure of the safe harbor rule and the Children's Television Act. The sponsors of the Bill acknowledge that the pervasiveness of violent programming detracts from a parent's ability to control the upbringing of their children. In fact, Congress notes that the right of parents to control the education of their children serves a "compelling government interest." Thus, Congress justifies the Parental Control in Television Act of 1995 as a permissive limitation of the negative influence of video programming.

**PROVISIONS**

The Bill contains several provisions which limit the availability of violent programming to children. If the legislation passes in its present form, it will govern not only the decisions of television networks with respect to their respective programming schedules, but also the decisions of television manufacturers when designing and manufacturing the actual television machine.

First, the Bill requires the formation of an Advisory Committee to consist of television producers, broadcasters, cable operators, public interest groups, and other interested individuals from the private sector.\(^{36}\) Section 1 of the Bill man-

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32. *Id.* at 700.
34. *Id.* at 20.
36. Section 1(B) of the Bill provides:

On the basis of recommendations from an Advisory Committee established by the Commission that is composed of television broadcasters, television programming producers, cable operators, appropriate public interest groups, and other interested individuals from the private sector and that it is fairly balanced in terms of the points of view represent-
PARENTAL CHOICE IN TELEVISION ACT

dates that this Committee devise a rating schedule for every television program in order to identify the violent nature of the program. The Committee is required to promulgate rules for distributors of video programming so that the rating is translated into an electronic signal to be transmitted along with the television program. This signal will electronically feed into the television set and be displayed on the television screen so that parents can determine the violent content of programs coming into their home.

Section 2 provides rules for manufacturers of television sets. This provision requires all television sets manufactured in or imported into the United States to be equipped with circuitry designed to enable viewers to block the display of certain programs with a common rating. This blocking device is able to receive the rating signal from the video distributor. Parents can program the blocking device on their individual television set to block the transmission of certain violent programs into their home.

IMPACT

This Bill makes possible the implementation of innovative V-Chip technology, an electronic blocking device that enables parents to block out certain programs. This technology has been used in Canada successfully for over five years. However, our country and our Constitution are very different from Canadian government, and therefore, the introduction of the bill brings greater controversy.

A. The Bill and Its Abridgement of First Amendment Rights

To many people, this legislation is tantamount to censorship. From the perspective of the television industry, nothing justifies censorship, no matter how compelling the academic evidence detailing the harm of television on American youth. Regulating violence on television presents a deceptively simple and popular way to combat the extremely high levels of anti-social violence and the perceived moral degradation of children. Such regulations, however, implicate First Amendment concerns that limit the government’s ability to restrict televised violence.

ed and the functions to be performed by the Committee, rules to identify and rate video programming that contains sexual, violent or other material about which parents should be informed before it is displayed to children.

37. Section 2 of the Bill provides:

In the case of apparatus designed to receive television signals that are manufactured in the United States or imported for use in the United States and that have a picture screen thirteen inches or greater in size, that such apparatus be equipped with circuitry designed to enable viewers to block the display of channels, programs and time slots; and enable viewers to block display of all programs with a common rating.


39. Thomas G. Krattenmaker, Televised Violence: First Amendment Principles and Social Science Theory, 64 VA. L. REV. 1123 (1978) (arguing that social science data that suggest a correlation between violence on television and societal violence do not satisfy constitutional scrutiny and should not be used to justify restrictions on television violence.)
However, proponents of this legislation maintain that violence, like indecency or obscenity, may be lawfully restricted by the FCC. In effect, these advocates argue that restrictions on television violence carry similar legislative justifications and social goals as do the prohibitions on indecency and obscenity. The Supreme Court, however, has neither articulated a precise definition for violence, nor has it addressed whether depictions of violence could constitute a category of speech subject to government restriction. This lack of judicial guidance has further complicated the issue of limiting televised violence. Consequently, judicial assessment of the constitutionality of restrictions on broadcast television violence must weave the legal principles derived from past efforts to impose general regulations on the content of speech transmitted through the broadcast medium.

The separate constitutional niche for broadcasting does not exist in a vacuum. Instead, it co-exists with general principles of First Amendment law, which have developed concurrently with the widespread use of broadcasting. The television industry must evaluate the constitutionality of the proposed legislation against the backdrop of First Amendment law outside the broadcasting context. It must explore the implications of cases involving offensiveness and indecency, obscenity, and the government’s compelling interest in protecting children. In each of these areas, the Court’s rationale for allowing certain kinds of speech restrictions highlights the differences between broadcasting and non-broadcasting content-based restrictions.

B. Further Controversy Over the V-Chip and the Proposed Rating System

The issue of a mandatory V-Chip installed into every television set also brings a complex set of problems. While it may not be a panacea to rectify the social ills that may result from television violence, many believe that it is first step in the right direction. Equally as compelling are the arguments of television executives who claim that it will lead to further government intrusion into the privacy of Americans.

The main opposition from the television industry is that the industry believes that government should be spending its money on regulating weapons and creating educational programs to encourage parental responsibility. One critic of the V-Chip claims that any kind of government regulation is unlawful because of the “slow intrusion into the outer perimeter of the First Amendment.” Moreover, many television networks are not convinced that there has to be an explicit rating system created under government duress. They feel that publications are available for parents who wish to learn about the content of programs their children watch. Therefore, the mandatory rating system is the beginning of undue government interference with the television broadcasting industry.

40. 51 F.C.C.2d 418 (1975).
41. Jack Valenti, Whose Children Are They Anyway?, L.A. TIMES, Oct. 4, 1993, at B7. (Mr. Valenti is the President of the Motion Picture Association).
Some consumers agree with these criticisms. These viewers feel that rating a television program is inherently subjective and that the committee that determines a program's ratings is making viewing decisions for the parent. By allowing a committee of disinterested parties to substitute its judgment for that of the parent would defeat the purpose of creating a bill to empower parents to control the viewing choices of their children. They feel the current rating system is too simplistic. The V-Chip would block out all programs containing a certain amount of violence, but it would not give parents the ability to block out specific programs. Some parents would rather watch the program for themselves so that they, rather than an anonymous committee, can assess the violent nature of the program. Thus, the V-Chip would leave parents without much choice: the parent either blocks everything at a certain violent level or does not use the V-Chip at all.

Another objection of consumer groups is that all violence is not equal. Many parents look at the context in which the violent acts are depicted. For some parents, it is important whether or not the violent acts are rewarded and whether it is realistic, repetitive or portrayed in a humorous tone. In fact, violence can even be pro-social, such as instances in which violent characters are punished for their behavior. With the lack of precise definitions of exactly what constitutes violence, combined with the increase in outlets for television programming, the debate surrounding televised violence has become more complicated and difficult to analyze.

Some parents feel this problem can be alleviated by a more practical rating system, rather than just a simple blanket method. They fear that a rating system would become self-regulatory, leaving the television industry to create a rating system for its programming schedule without regard to congressional directives. If the business should become so deregulated, the FCC will have less influence over broadcast licensees. Program producers would need clear guidelines and a regulatory board composed of parents, industry representatives and media specialists to provide feedback on the effectiveness of the rating system.

Proponents of the V-Chip counter that the most effective way to protect children against violence on television is to empower parents to block out programs they find inappropriate for their children. Surveys suggest that parents would very much like the television networks to clean up their programs. Another recent survey showed that 83% of parents want a rating system, in part because television has sunk to new lows. Parents can turn the blocking device on and off as they desire, and therefore, they can decide what kind of programs come into their home. This is the very point of the blocking device. It gives parents some ability to make viewing choices for their children rather than allowing television networks to make these decisions for them.

44. See supra note 42.
45. Interview with Donna Shalala, supra note 18.
46. Adult Themes in Children's Hour, ATLANTA CONST., Oct. 25, 1995, at 14A.
This aspect leads to another point of potential controversy. Many people feel that television should not be a child's "babysitter," a role which television has assumed in recent years. More than ever, children are raised in homes where both parents work outside the home, and unfortunately, parents do not have as much time to devote to their children as they used to generations ago. The blocking device allows parents to passively guide the education of their children rather than taking an active role in their upbringing. For instance, a parent can simply program the V-Chip to block out programs with a certain rating instead of taking the time to educate their children about the moral turpitude of such programs. Perhaps this device will only make it easier for parents to stay removed from the education of their children.

The blocking device is no solution for children who watch too much television. There are simply too many channels of programming and too many hours in the day for parents to monitor and chart their children's television viewing. While the V-Chip enables parents to screen out certain programs, many groups feel that it does not go far enough. Some legislators feel that the only solution is to force television networks, not the government, to rate television programs for violent content, the same way in which the movie industry rates its films.47

With more children having access to television, it is increasingly easier for children to watch adult programs without their parents' knowledge. Even an overwhelming majority of the entertainment industry agrees that violence in entertainment contributes to the level of violence plaguing the nation.48 Without some kind of blocking device, parents are helpless to control the messages being sent to their children through the television industry. In short, it may be better for parents to have some control than to have none at all. The only screening devices that presently exist are the manual blocking devices on many popular brands of cable boxes and a warning at the beginning of the television program. While the intentions of such devices are to dissuade children from watching such programs, it actually has the opposite effect. Therefore, these devices do not serve a purpose other than to attract more viewers for certain programs, thereby perpetuating the success of violent programs on television.

CONCLUSION

The relation between impressionable children and the powerful impression of television will not be regulated by lawyers and judges, but by parents who raise children and whose responsibility for doing so is irreplaceable. Perhaps all of the controversy surrounding this bill and the V-Chip comes down to one important determination: whether television is a reflection of society or vice versa. If tele

48. Id.
vision merely represents what occurs every day in our society, then maybe the best solution is to help curb violence outside the home rather than concentrating on the violent programs coming into it.

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