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DOING RIGHT BY OUR KIDS: A CASE STUDY IN THE PERILS OF MAKING POLICY ON TELEVISION VIOLENCE†

Patricia M. Wald‡

I. THE PROBLEM

Americans—from the President to Bill Cosby—relentlessly insist that they will do anything—sacrifice anything—for the sake of our children. Yet, it is remarkable how inept we are in churning out public policy to benefit children, be it reducing the budget deficits they must pay for some day, health care they need now, or in the case I plan to discuss tonight, protection from overexposure to televised violence and to violence in films, and lately, to video games.

Almost everyone agrees there is a problem in the flood of violence that has enveloped television and other entertainment media. According to a recent poll, four out of five Americans believe television violence contributes directly to escalating violent behavior;¹ over fifty percent would support direct governmental regulation of violence on television.² A Citizens' Task Force on Television Violence, whose membership includes the American Medical Association, the American Psychiatric Association, and the National Associations of Elementary and Secondary School Principals wants a daily sixteen-hour ban on violent programming: "We've had the studies; we've had the discussion; we've had the debate," they say. "Enough is enough. There is simply . . . too much violence, and it needs to be

† This Article originally was presented as the Judge Solomon Liss Memorial Lecture at the University of Baltimore School of Law on April 20, 1994. Parts of the Lecture have been modified for publication.

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1. Byron Dorgan, *Good Clean Violence*, WASH. POST, Dec. 28, 1993, at A15 (citing L.A. Times Poll); *79 Percent in Poll Believe TV Violence Spurs Real Mayhem*, *Around the Nation*, WASH. POST, Dec. 19, 1993, at A12.

2. See Christopher Stern, *Viewers Trust TV News, Support Censorship*, BROAD-

reduced.”³ President Clinton, during a Hollywood appearance, implored industry leaders to curb murder and mayhem in the movies and on television.⁴ Attorney General Janet Reno warned at congressional hearings last fall that if the television producers didn’t take “immediate” steps to police themselves, she would support government regulation to do it for them.⁵ There are at least nine bills in Congress to back the threat.⁶ The new FCC Chairman says he will aggressively enforce and defend such laws.⁷ Why isn’t somebody doing something to follow through?

Harken back for a moment to thirty years ago. It’s 1961 and Senator Thomas Dodd—father of Senator Chris Dodd of Connecticut—is conducting headline-grabbing hearings of the Subcommittee on Juvenile Delinquency on the explosive subject of violence on television.⁸ At that time, little research had been done on its effect on children, a point made much of by the television industry who blamed family breakdown, inner city decay, the drug epidemic, and the ready availability of guns for what was perceived in 1961 as a precipitous increase in violent youth crime.⁹ Sound familiar? Reels of gory excerpts from television programs were shown in the hearing room.¹⁰ The three television networks which then controlled ninety percent of the airwaves had a formal code restricting television

CASTING & CABLE, Mar. 21, 1994, at 32 (52% of Americans favor censorship to limit TV violence); see also Thomas Hargrove & Guido H. Stempel, *Poll Shows Americans Support Regulation to Curb TV Violence*, WASH. TIMES, Dec. 22, 1993, at A3 (a majority of Americans said federal government should regulate amount of sex and violence on TV).

3. Joyce Price, *Senator Leads Groups’ Cry Against Violence on TV*, WASH. TIMES, Dec. 16, 1993, at A1 (quoting Senator Kent Conrad, organizer of a public task force on television violence).
4. Kim McAvoy, *Clinton to Weigh in on TV Violence*, BROADCASTING & CABLE, Dec. 6, 1993, at 18; Bernard Weinraub, *Despite Clinton, Hollywood is Still Trading in Violence*, N.Y. TIMES, Dec. 28, 1993, at A1.
5. Kim McAvoy & Steve Coe, *TV Rocked by Reno Ultimatum*, BROADCASTING & CABLE, Oct. 25, 1993, at 6; Russell Baker, *Candidate for Czar*, N.Y. TIMES, Oct. 26, 1993, at A21; *Janet Reno’s Heavy Hand*, N.Y. TIMES, Oct. 22, 1993, at A28; *TV Violence and the Feds*, WASH. POST, Oct. 23, 1993, at A22; Michael Wines, *Reno Chastises TV Executives on Violence in Programming*, N.Y. TIMES, Oct. 21, 1993, at A1.
6. Kevin Merida, *Pop Culture Takes the Rap As Congress Battles Violence*, WASH. POST, May 10, 1994, at A1.
7. John Eggerton, *Hundt Hits Television Violence*, BROADCASTING & CABLE, Jan. 31, 1994, at 10; Harry A. Jessell, *Hundt Sees Role for FCC in Limiting TV Violence*, BROADCASTING & CABLE, Sept. 27, 1993, at 14.
8. This account of the 1961 Hearings is taken from Paul Laskin’s manuscript. Paul Laskin, *Still Doing Violence* (1993) (unpublished manuscript on file with author). Laskin was the Chief Counsel to the Senate Subcommittee to Investigate Juvenile Delinquency in 1961-62.
9. *Id.* at 2.
10. *Id.* at 3.

violence, but as one committee witness testified, it was administered by middle-level executives who either were overruled by higher-ups or merely rubber-stamped the executive suite decisions about the kind of programming that was needed to sell the goods that supported TV.¹¹ There was even a smoking gun in those 1961 hearings: An alleged order, vehemently denied, by the President of NBC to a writer demanding "more sex and violence" to up the audience ratings of a particular series.¹² But after all the sound and fury the hearings signified very little; no legislation emerged. In the intervening years there have been twenty-seven congressional hearings on the subject of television violence, but not much has changed.¹³ We seem incapable of coming to closure on curbing what so many national leaders and citizens perceive to be a clear and present danger to our children's welfare.

Moreover, we now have empirical data to support that view. The 1961 hearings sparked serious scholarly research on the relationship between watching violence on television and acting it out in the real world. In 1969 the National Commission on the Causes and Prevention of Violence concluded that a "constant diet of violent behavior on television has an adverse effect on human character and attitudes."¹⁴ In 1972, a Surgeon General's Advisory Committee also found a causal connection between TV violence and aggressive behavior; a 1982 Surgeon General's update reinforced that conclusion.¹⁵ Later studies—188 of them involving 244,000 children¹⁶—supported the American Medical Association's conclusion that "TV's massive daily diet of symbolic violence is an environmental hazard,"¹⁷ "a risk factor threatening the health and welfare of American children and youth."¹⁸ By 1993, a noted professor of human development and family studies could confidently affirm that:

Hundreds of studies done since the early 1960s—experimental studies of small numbers of children and large field studies in different cultures, using a variety of techniques—broadly agree that children of both sexes who are heavy viewers of TV are more aggressive than children who are light viewers.¹⁹

11. *Id.* at 7-8.

12. *Id.* at 8-9.

13. *We Are Outraged!*, N.Y. TIMES, Oct. 3, 1993, at 16E (advertisement by American Family Association).

14. Julia W. Schlegel, *The Television Violence Act of 1990: A New Program for Government Censorship?*, 46 FED. COMM. L.J. 187, 188 (1993).

15. *Id.* at 188, 192.

16. See William Raspberry, *Cut the Act*, WASH. POST, Jan. 28, 1994, at A23.

17. Laskin, *supra* note 8, at 6.

18. *Id.* at 6 (citing New England Journal of Medicine).

19. John Condry, *Thief of Time, Unfaithful Servant: Television and the American*

And Ted Turner, probably television's most visible mogul, was quoted as saying that television is the "single most significant factor contributing to violence in America."²⁰

Exposure to television violence has grown exponentially in thirty years.²¹ Newton Minow, the former Federal Communications Commission Chairman and author of the "vast wasteland" critique of television in the 1960s, said recently:

I think the most troubling change over the past 30 years is the rise in the quantity and quality of violence on television. In 1961 I worried that my children would not benefit much from television. In 1991 I worry that my grandchildren will actually be harmed by it.²²

In 1961 there were forty-seven million sets tuned on in America; in 1992 there were over two hundred million; cable reached one million homes then; now it reaches fifty-six million. Americans watched television for two hours a day in 1961; now they watch almost 7½ hours; in 1961 the networks dominated ninety percent of viewing; now they account for only sixty percent, as cable television's reach steadily stretches. We have VCRs in fifty-eight million American homes, and sales of video games are soaring. The information super-highway will, we are told, bring 400-500 channels into our homes within the foreseeable future.²³

But, while choice and diversity has exploded, quality has not. The President of CBS admitted recently: "We see a vast media-jaded audience that wanders restlessly from one channel to another in search of that endangered species—originality . . . more choices may not necessarily mean better choices."²⁴ Indeed, greater choice has meant a greater likelihood that our children will encounter proliferating violence with every click of the dial.

The current figures on television exposure, while familiar, are arresting. By the end of sixth grade a child will have watched 100,000 violent acts on television.²⁵ By the time he is eighteen, he will likely

Child, 122 DAEDALUS 259, 263 (Winter 1993); see also Elizabeth Kolbert, *Television Gets Closer Look as a Factor in Real Violence*, N.Y. TIMES, Dec. 14, 1994, at A1 (reviewing 30 years of studies on the effect of violent programming on children).

20. Congressional testimony quoted in *We Are Outraged!*, N.Y. TIMES, Oct. 3, 1993, at 16E (advertisement of American Family Association).

21. Newton N. Minnow, *How Vast the Wasteland Now?* XL V Bulletin, American Academy of Arts and Sciences No. 5 (1992) at 16.

22. *Id.* at 22.

23. *Id.* at 19-21, 25.

24. *Id.* at 21.

25. Minnow, *supra* note 21, at 22; Megan Rosenfeld, *And Now a Word from a Mother*, WASH. POST, July 18, 1993, at G1.

have spent 15,000 hours in front of the tube compared to 11,000 in school.²⁶

A child's playthings today are remote controls, cable television, and the VCR. Until the last half of this century, children spent most of their time observing adults at work and play, and learning from them the skills and attitudes needed to take their place in an intimate and familiar society. Now they spend four waking hours watching television to every three hours interacting with family members and peers.²⁷ Indeed, many experts think it is not simply the violent content of the programs but the nature of the medium itself that threatens the healthy development of children. They ask, "what happens when television, movies, videos, and video games provide more of children's experiences than do actual relationships with other people?"²⁸ Television watching distracts children from more active engagement in the world about them. The authors of *The Good Society* tell us: "[W]e are not happy when we are watching television . . . because we feel we are 'on hold' rather than really living during that time. We are happiest when we are successfully meeting challenges at work, in our private lives, and in our communities."²⁹ Television's effect on children is strong because it is filling a vacuum left by the default of other institutions in their lives—family, schools, church, community—that are supposed to teach them how to behave and react to the world around them.³⁰

Television can, of course, and in wide-ranging ways, does, educate as well as entertain. But commercial television is also ruled by the market, and to keep viewers' attention, it must startle, constantly move, and resolve dilemmas quickly. For the most part it does not have the time or the capacity to relate present problems to the past, to raise issues it cannot solve, to inspire curiosity or encourage further inquiry on the viewer's own time. It only haphazardly or superficially involves the viewer.³¹ An extreme expression of this theory is that the television itself allows the child, by a hand-held device (analogized to a handgun), to control what he sees without any effort; the set reacts, does not answer back; the child gets what he wants, shuts out what he doesn't; he can't get hurt; tigers are

26. Martha Minow & Richard Weissbourd, *Social Movements for Children*, 122 DAEDALUS 1, 5 (Winter 1993).

27. Condry, *supra* note 19, at 260.

28. Minow & Weissbourd, *supra* note 26, at 6 (citing DAVID HAMBURG, TODAY'S CHILDREN: CREATING A FUTURE FOR A GENERATION IN CRISIS 177 (1992)).

29. BELLAH ET AL., THE GOOD SOCIETY 49 (1991).

30. See, e.g., Dispute Resolution, Youth, and Violence, National Institute for Dispute Resolution (Spring 1994) (surveying experience in school and police programs to mediate disputes between youths).

31. Condry, *supra* note 19, at 265.

little and don't bite . . . fires are cold and don't burn.³² He never need deal with the consequences of his experience.

Beginning with cartoons, to which—we are told—ninety percent of children are addicted by age six, children's wavering attention is seduced by action-oriented events.³³ The message is "might makes right," eventually anyhow; might is identified with the good guys as well as the bad; superior violence is correlated with superior morality.³⁴ An especially alarming insight came from a 1992 study showing that between 6:00 a.m. and midnight, 1,800 violent scenes were shown on television and the aggressors were overwhelmingly white males while their victims were predominantly female, nonwhite, foreign-born, or aged.³⁵

Ideally, children should watch television with their parents or elders, talk about the programs, separate illusion from reality. But the studies show very little co-viewing except in limited evening hours. Despite the skeptics who wryly remind us that Socrates warned that teaching children to write things down would destroy their memories and that Plato warned that storytellers would corrupt their sense of reality,³⁶ the research is persuasive that relentless exposure to episodic violence for thirty to forty hours a week, with no opportunity to discuss its implications or context, will alter a child's or adolescent's perspective on life. Newspapers in the last year bombarded us with some horrific examples: In Austin, Texas, a five-year-old boy burned down his house, with his two-year-old sister in it, after watching *Beavis and Butt-Head* play with cigarette lighters.³⁷ A movie called *The Program* featured college football players straddling the middle of a highway and letting cars drive over them as a test of nerve; several teenagers, in imitation, were killed or maimed.³⁸ An eight-year-old boy swung a twelve-week-old infant around by his feet, smashed his head against the floor and killed him, protesting later that he was playing *Robocop*—a popular television movie—with the baby.³⁹ Though the connection is less direct, we know violence in the schools has risen to epidemic proportions; one of five high school

32. Sanford Redmond, *Evil Imprint*, N.Y. TIMES, Dec. 1, 1993, at A17.

33. Condry, *supra* note 19, at 262-63.

34. *Id.* at 262, 269-70.

35. John J. O'Connor, *Labelling Prime-Time Violence Is Still a Band-Aid Solution*, N.Y. TIMES, July 11, 1993, § 2, at 1, 26.

36. Patrick Cooke, *TV Causes Violence? Says Who?*, N.Y. TIMES, Aug. 14, 1993, at A19.

37. Anna Quindlen, *TV Guide*, N.Y. TIMES, Oct. 28, 1993, at A27.

38. Lawrence J. Siskind, *The Folly and Futility of Censoring Violence*, LEGAL TIMES, Nov. 22, 1993, at 28.

39. Stanley Greenspan & Amy Cunningham, *The Kids Who Will Be Killers*, WASH. POST, July 25, 1993, at C1.

students regularly carries a firearm, knife, club, or other weapon;⁴⁰ sixty percent of sixth through twelfth graders say they can get access to a handgun if they need one.⁴¹ In a survey of 729 urban, suburban, and rural schools, eighty-two percent reported dramatic increases in violence in the past five years. Next to family dysfunction or disruption, television and gangster rap lyrics were the most frequently cited causes of violence by teachers, parents, and principals.⁴²

Before going further, we need to tackle one fundamental question: Why can't parents handle this crisis by controlling what their children watch? To paraphrase the old television public service announcement: Where are your parents tonight? It's not an altogether foolish question; columnist Anna Quindlen asks: "Kids and violent TV, violent TV and violence, violence and kids. The only people missing from this discussion are the parents. Where are we? Gone. Abdicated."⁴³ Why, she comments, as in the case of poisonous cleaners stored under the sink, don't parents themselves take responsibility for their kids' television watching?⁴⁴ A representative of the Annenberg School of Communications, on the other hand, calls the notion of parental control "an upper middle class conceit. Passing the buck to parents is the greatest cop-out of this industry."⁴⁵

These two views are not necessarily inconsistent. No matter what corrective action industry and/or government takes—short of an impossible blanket ban on violence—the parental role should still be critical. The autonomy of the family to set its own child-rearing standards, barring neglect or abuse, is a constitutional freedom recognized by the Supreme Court.⁴⁶ Parents are as varied as our society, and differ radically in what they want their kids to watch, including how much violence and what kind, by whom and against whom. Some parents are actually quite sanguine. A cover story a few months ago in the *Washington Post* entitled "Group Portrait with Television, One Family's Love Affair with the Tube" told of an upper middle class family in Gaithersburg, Maryland with two young kids and six television sets that were on up to seventeen hours a day.⁴⁷ The obviously devoted parents didn't worry about television

40. Mary Jordan, *Summit Searches for Cease-Fire in Violence Enveloping Children*, WASH. POST, July 22, 1993, at A3.

41. *Id.*

42. *Survey of Schools Finds "Epidemic of Violence,"* WASH. POST, July 22, 1993, at A3.

43. See Quindlen, *supra* note 37.

44. See *id.*

45. Elizabeth Kolbert, *Entertainment Values vs. Social Concerns in TV-Violence Debate*, N.Y. TIMES, Aug. 3, 1993, at C13, C18.

46. *Pierce v. Society of Sisters*, 268 U.S. 510 (1924); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

47. David Finkel, *Group Portrait with Television; One Family's Love Affair with the Tube*, WASH. POST, Jan. 16, 1994 (Magazine), at 10.

sex or violence; there were no forbidden shows; the children were well-adjusted and doing fine in school.⁴⁸ "If the kids have a question, [the stay-at-home mother stated], they'll ask it, and if they don't they'll probably get bored and change the channel."⁴⁹ Unfortunately, all kids don't have a resident mother to run to with questions; a large percent of inner-city children are indiscriminate latch-key consumers of television fare.

And even otherwise attentive and caring parents complain that they don't have the time to act as full-time "gatekeepers" on television. While some, like the family in Gaithersburg, do not worry at all, most parents—and certainly children without parental supervision—need some outside help to control the amount and type of violence available at the flick of a switch.⁵⁰

In sum, we have a problem with what television is doing to our children that parents alone can't solve; Americans feel strongly about it; the academic research tends to support their fears. The subject has been discussed and debated *ad infinitum*. Why can't we now agree on a public policy that will benefit our children?

What I've said so far provides some critical clues. It has always been—and probably always will be—conceptually and practically difficult to disentangle children's problems from the broader social problems affecting society as a whole. The problem of television violence inevitably incites ideological, legal, and economic disputes.⁵¹ As the next part of my talk will illustrate, the best we seem able to do is to lurch towards partial solutions likely to inspire as much dissatisfaction as satisfaction. In the end, I will tell you now, I too can offer only some tentative and uneasy suggestions for improving this daunting policy making process.

II. THE SEARCH FOR SOLUTIONS

Any approach to reducing television violence must take account of several key truisms of American life: (1) the freedom of expression for all but obscene material guaranteed by the First Amendment; (2) the profitmaking nature of American television, cable, and video; (3) the constantly advancing state of the art technology simplifying viewer control of program choice; and (4) the sacrosanct view that government must not unduly interfere with parental choice. Over it all, hangs the invasive shadow of politics.

48. *Id.*

49. *Id.*

50. See generally Rosenfeld, *supra* note 25.

51. See Minow & Weissbourd, *supra* note 26, at 10-14.

A. *The First Amendment*

The First Amendment, which guarantees freedom of speech, expression, and the press, has been interpreted by the courts to apply to television and cable. But these same courts also give more leeway to regulation of the broadcast media than of the print media, because, at least until recently, the broadcast spectrum was considered a limited commodity under government's stewardship to be parceled out and supervised in the public interest.⁵² Thus, since 1927, the Federal Radio and Communications Acts have specifically permitted the FCC to regulate "indecenty"—defined originally by the FCC as the exposure of children to material that describes sexual or excretory activities in a patently offensive manner. Indecent programming is to be carefully distinguished from obscene material that appeals to the prurient interest and lacks serious artistic, political, or scientific value; obscene matter, unlike indecent material, is not protected by the First Amendment.⁵³ But the Congress has never enacted specific legislative authority for regulating violence on television, and there is even a section in the Communications Acts forbidding FCC censorship.⁵⁴ The history of the FCC's efforts to regulate indecenty, though, provides a valuable lens for viewing the potential problems of government regulation of violence in the interests of children.⁵⁵

"Indecent" material was originally defined by the FCC principally in terms of material that described or depicted sexual or excretory organs in a way that was offensive under community standards for children;⁵⁶ adult viewing of the same material at some reasonable time was recognized by the FCC as protected by the First Amendment. And, until 1987, the FCC implemented this restricted definition of "indecenty" simply by enforcing a ban against "filthy words" akin to those used in the famous monologue by George Carlin, which the Supreme Court, in its *Pacifica* decision in 1978,⁵⁷ said could be kept off the airwaves at least when children were likely

52. See generally Schlegel, *supra* note 14, at 204-12 (discussing, *inter alia*, the Television Violence Act of 1990 permitting industry to establish voluntary standards to limit violence, free of antitrust restraints, and the Children's Television Act of 1990 restricting advertising children's programs to 12 minutes per hour and mandating programs to meet educational and information needs of children).

53. See *FCC v. Pacifica Found.*, 438 U.S. 726, 732 (1978).

54. The Communications Act of 1934, 47 U.S.C. § 326 (1991).

55. The history is set out in *Action for Children's Television v. FCC*, 11 F.3d 170 (D.C. Cir. 1993), *vacated and en banc reh'g granted*, 15 F.3d 186 (D.C. Cir. 1994). See also *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*Act I*"); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992) ("*Act II*").

56. See *Action for Children's Television*, 11 F.3d at 172.

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

to be listening.⁵⁸ The FCC ban forbade use of the so-called "dirty seven" words before 10:00 p.m.⁵⁹ In 1987, however, the FCC extended the indecency ban to midnight, no longer regulating indecency in terms of the hours during which children would most likely be listening.⁶⁰

When the up-to-midnight ban was challenged in court, however, the FCC relied on protecting children as its justification. The ban was then struck down by the D.C. Circuit in 1988,⁶¹ as unsupported by any data showing how many children were in the audience of the offending stations at particular hours. Reacting to the court's decision, Congress passed a twenty-four-hour ban on indecent programming.⁶² The D.C. Circuit struck down that law as well, finding that some "safe harbor" for adults to view nonobscene material must exist under the First Amendment.⁶³ Congress thereupon promptly enacted new legislation setting the "safe harbor" hours of 12:00 p.m. to 6:00 a.m. in which indecent material could be broadcast.⁶⁴ Last fall a panel of our court on which I sat struck that law down too; that decision, I hasten to add, is currently awaiting an en banc decision by the full court.⁶⁵ The FCC had defended the latest ban on indecent programming from 6:00 a.m. to midnight on several grounds—as a way to ensure that parents could supervise their children's viewing; to protect the well-being of unsupervised minors during those hours; and to protect *all* members of the public—adults and children alike—from the invasion of indecent material into their homes during those hours. The court, however, citing Supreme Court precedent,⁶⁶ said that indecent speech is constitutionally protected, although the government could regulate it to further a compelling interest, if it chose the least restrictive means.⁶⁷ Here, we said, a ban that lasted during all but the hours when most people—children and adults—were asleep was too restrictive.⁶⁸

Neither the FCC nor the Congress, we found, had demonstrated due concern in fairly weighing the competing interests of children in

58. *Action for Children's Television*, 11 F.3d at 172.

59. *Id.*

60. *Id.*

61. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*Act I*).

62. *Action for Children's Television*, 11 F.3d at 172.

63. *Action for Children's Television v. FCC*, 932 F.2d 1504, 1510 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992) (*Act II*).

64. *Action for Children's Television*, 11 F.3d at 173.

65. *Action for Children's Television v. FCC*, 11 F.3d 170 (D.C. Cir. 1993), *vacated and en banc reh'g granted*, 15 F.3d 186 (D.C. Cir. 1994).

66. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989).

67. *Id.* at 174.

68. *Id.* at 183.

being protected from indecency and the constitutionally-based rights of adults in viewing, or stations in showing, nonobscene matters—when the safe harbor period of midnight to 6:00 a.m. was set; ergo, the ban could not withstand First Amendment scrutiny.⁶⁹

I stress again that this decision has been vacated by the court and the case is awaiting an en banc decision.⁷⁰

First Amendment law is complex, even dense, and politicians are understandably wary of it.⁷¹ This is one reason why, in the area of television violence, congressional forays have been quite tentative. Since any legislation dealing with television violence would undoubtedly have to pass constitutional muster in the courts, I would not—even if I could—offer a scheme as to what it should or should not contain. On the basis of a decade of experience in the indecency area, however, I can say that it will be extremely difficult to construct a constitutional law defining and regulating impermissible violence. Most members of Congress recognize that problem and, like Senators Simon and Hollings who have sponsored television violence legislation, prefer to focus on labelling, rating, and outside monitoring; others, like Representative Markey, have proposed technical devices allowing parents to block violent programs in advance; still others would set safe harbor time limits on violent programming; few legislators, however, talk about outright governmental bans. It may be that the law will some day recognize a category of violent material so outrageous and lacking in information or artistic merit as to fall outside the First Amendment altogether, in the manner of obscenity, but thus far such a concept is confined to the law journals alone.⁷²

So despite the comfort of more research on the effects of violence, than of indecency, on children, the job of defining what constitutes unjustified or unnecessary violence is more treacherous than defining indecency which can at least focus on the tangible presence of sexual or excretory activities or language. Comparable violence regulations would have to design the contours of “inappropriate” or “unjustified” or “excessive” degrees of violence shown in vastly different contexts.⁷³

69. *Id.* at 180.

70. *Action for Children's Television v. FCC*, 11 F.3d 170 (D.C. Cir. 1993), *vacated and en banc reh'g granted*; 15 F.3d 186 (D.C. Cir. 1994).

71. See Helen Dewar, *Free Speech Free-for-All*, WASH. POST, Oct. 2, 1993, at A1.

72. See Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL RTS. J. 107 (1994).

73. The debate on what kind of violence is gratuitous or excessive is furious. See, e.g., Floyd Abrams, *TV Violence: Survival vs. Censorship; Save Free Speech*, N.Y. TIMES, Nov. 23, 1993, at A21 (“Laws don't have vocabularies that distinguish between good and bad violence.”); Carol J. Greenhouse, *Reading Violence*, in LAW'S VIOLENCE 105 (Austin Sarat & Thomas R. Kearnes eds.

Although in an industry spokesman's words, "[t]here aren't any congressmen losing any votes over speaking out against TV violence[;] . . . it's a very popular issue,"⁷⁴ there are many Congresspersons "caught up in a web of controversies arising out of the clash between popular demands for reform and constitutional protections for freedom of speech and press."⁷⁵ The brooding omnipresence of the First Amendment causes legislators to move slowly and overshadows the bargaining process going on between the industry and Congress. One network official is quoted as saying, "I fully expect legislation to pass and that it will be struck down in the courts."⁷⁶

Thus, in February 1994, fifty top constitutional scholars signed a letter to Congress urging abandonment of all major television violence bills including safe harbors, warning labels, and FCC report cards on violence. They said the bills "involve a content and viewpoint bias that cannot be reconciled with the Constitution or prior precedent in the broadcasting field They are vague and overbroad because they do not adequately define and encompass only expressive activities that may constitutionally be subject to regulation."⁷⁷ And that same week, in an intriguing turnabout, following a broadcaster-cable agreement for an outside monitor to view and report on television violence, Senator Simon, previously a hawk on the subject, said he would henceforth "resist" any legislation by his colleagues.⁷⁸

1992); Bernd Huppau, *The Violence Among Us*, N.Y. TIMES, Nov. 21, 1993, § 4 at E17 (violence in all previous cultures accepted as part of a natural or God-given order); *Janet Reno's Heavy Hand*, N.Y. TIMES, Oct. 22, 1993, at A28; Richard Leiby, 'Lion King': *The Cubs' View*, WASH. POST, June 25, 1994, at G1, G5 (critics decry violence in Disney fable); Michael Moriarty, *Janet Reno's Drive-By Assault*, WASH. POST, Feb. 27, 1994, at G5 ("Violent drama has been the hallmark of every great civilization since the ancient Greeks."); Frank Rich, *Crime Crusaders on Parade*, N.Y. TIMES, Jan. 27, 1994, at A21 ("[V]iolence permeates television as thoroughly as it does society. News coverage of the Bobbitt case, the Long Island Railroad slaughter and the Menendez trial can desensitize and terrorize unsupervised young viewers as much as the made-for-TV movie versions to come.").

74. Steve Coe, *Network Chiefs Thrust and Parry*, BROADCASTING & CABLE, Sept. 20, 1993, at 28 (quoting Ted Harbert, President of ABC Entertainment).

75. Dewar, *supra* note 71; In the year since the speech on which this essay was based was first given, the political climate has of course changed dramatically on the Hill. Opinion is split on whether the new Republican-dominated Congress will press for anti-violence legislation or concentrate more strongly on sexual content and language on TV. See Ellen Edwards, *GOP Win Stirs Fears of TV Curbs*, WASH. POST, Nov. 17, 1994, at D1 and D6.

76. Price, *supra* note 3 (quoting Mark D. Frank, a vice president for CBS) (alterations omitted).

77. Marianne Lavelle *et al.*, *TV Violence*, NATIONAL L.J., Feb. 7, 1994, at 11; see also Kim McAvoy & Chris Stern, *Lawyers Say Leave TV Violence Alone*, BROADCASTING & CABLE, Jan. 31, 1994, at 12 (ACLU counsel says "violent speech has been protected by the First Amendment for more than 50 years").

78. Kim McAvoy, *Heat from Hill May Break*, BROADCASTING & CABLE, Jan. 31,

B. The Industry

Almost every discussion of violence on television and what to do about it ends up with a plea that the entertainment industry exercise greater voluntary restraint, followed by cynical predictions that they will not.⁷⁹ President Clinton was rousinglly cheered last year when he admonished Hollywood leaders to curb murder and mayhem in films and movies made for television. Within hours, however, it was reported, several of those same Hollywood leaders were bidding one million dollars for a movie script called "Overkill" in which eleven people are destroyed in the first seven pages.⁸⁰

The fact is "violence sells." There are bitter cross-media accusations as to who does violence the most. The television networks say they have cleaned up their act in the last decade while expanding cable networks make freewheeling use of violence.⁸¹ Some, but certainly not all, neutral surveys to a degree confirm the networks statement.⁸² A recent *NBC Dateline* show reported that in three nights of watching, their observers identified 227 acts of violence on the network entertainment shows, and 532 on cable.⁸³ Hit programs like *NYPD Blue*, *Homicide*, and *Law and Order* are keeping graphic violence to a minimum, consistent with the story line, but at the price of greater emphasis on sex.⁸⁴ Television broadcasters point on the other hand, to steadily escalating mayhem in films they describe

1994, at 12 (even though Simon backs off, broadcasters fear FCC Chairman Hundt will move forward with violence regulations).

79. See Bernard Weinraub, *From Target of Reno's Attack, an Uneasy Defense*, N.Y. TIMES, Oct. 22, 1993, at C3 (discussing Attorney General Janet Reno's threat to take action against the television industry).

80. Weinraub, *Despite Clinton*, *supra* note 4.

81. *Id.* But see Ellen Edwards, *TV Violence, After the Showdown*, WASH. POST, Sept. 30, 1993, at B1 (CBS President angry that broadcast TV is target when cable, syndicated shows, and movies have greater sins); Mike Freeman, *Violence Study Targets First-Run*, BROADCASTING & CABLE, Feb. 14, 1994, at 30 (Center for Media and Public Affairs identifies first-run syndicated hours as 'most violent' series on prime-time; networks are credited with significant decrease in number of violent acts in their programming); John J. O'Connor, *Labeling Prime-Time Violence Is Still a Band-Aid Solution*, N.Y. TIMES, July 11, 1993, § 2, at 1 (Congress' powder-puff debate limited to prime-time networks; "[w]hy should the commercial networks stand on the embattled front lines when payable channels can show all the *Terminators* and *Lethal Weapons* they want, uncut?").

82. A study by the Center for Media and Public Affairs monitoring ten television outlets in April 1994, purported to show a dramatic increase of 40% in television violence as compared with an identical study two years earlier, although no increase was found in prime time television. The methodology was attacked by broadcasters and cable operators. See Steve McClellan, *Programmers Challenge Violence Survey*, BROADCASTING & CABLE, Aug. 15, 1994, at 14.

83. *Dateline: America the Violent* (NBC television broadcast, Jan. 25, 1994).

84. See Weinraub, *Despite Clinton*, *supra* note 4.

as featuring "violence inflicted by sexy young renegades in a highly stylized fashion with little or no conflict" or remorse.⁸⁵

Violence, moreover, not only sells domestically, it "travels well." Violent shows, movies, and videos are hits in foreign markets and one-half of all film revenue comes from abroad.⁸⁶ Violence-filled programs and films are cheaper to produce because they require less-talented actors. Violence is easier to depict in cartoons than is humor.⁸⁷ The *Dateline* survey reported 129 violent acts in three hours of Saturday morning cartoons.⁸⁸ The rating system the movie-makers have had in place for many years concentrates on sex, not violence: According to one film executive, "[I]f a man touches a woman's breast in a movie, it's an R rating, but if he cuts off a limb with a chain saw, it's a PG-13."⁸⁹

The television and cable industries feel under the gun, but they have been there before. The National Association of Television Executives says, "we're a scapegoat and we're all a little afraid to talk back because we're federally licensed."⁹⁰ The former Chairman of the National Coalition on TV Violence, in contrast, laments: "Are they taking this issue seriously? Of course not."⁹¹ Governor Cuomo, who blames the American people as well as the industry ("We're the ones with the blood lust, the taste for seeing people get blown away," he says), scoffs at self-regulation, citing the broadcasters' "overriding obligation to produce dividends for shareholders—no matter what."⁹² The track record for voluntary abstinence from violence at least until recently has not been very impressive.

A congressional staff veteran of the sixties TV hearings warns that the economics of network television will always work against internal reforms. "Violence not only breeds violence," he says, "[i]t also breeds large profits for the networks and the television industry at large."⁹³ The business of television and its cable competitors is to sell audiences to advertisers, and historically violence increases audiences. Still, the threat of some kind of government regulation and

85. Weinraub, *Despite Clinton*, *supra* note 4 (quoting, Hollywood Reporter article *Killer Chic*).

86. Weinraub, *Despite Clinton*, *supra* note 4; *see also* Paul Farhi, *Abroad, A Market for Mayhem*, WASH. POST, Feb. 3, 1995, at A1, A26 (violent programming is less popular domestically than abroad).

87. Schlegel, *supra* note 14, at 198.

88. *Dateline*, *supra* note 83.

89. Weinraub, *Despite Clinton*, *supra* note 4 (quoting Martin Shafer, a top executive at Castle Rock Entertainment).

90. Eggerton, *supra* note 7 (quoting Fox Broadcasting Chairman Lucie Salhany).

91. Weinraub, *Despite Clinton*, *supra* note 4 (quoting Dr. Lieberman).

92. Peter Viles, *Cuomo: Let the People Choose*, BROADCASTING & CABLE, Dec. 6, 1993, at 18.

93. Laskin, *supra* note 8, at 13.

the rising level of popular discontent may be great enough this time to make the industry forge meaningful internal controls. The old rationalization that television is merely a whipping boy for the more fundamental causes of violence among the young—an “easy way,” as one critic has said, “of avoiding the core issues of crime, poverty and gun control”⁹⁴—weakens in the face of new empirical data. Television may not be *the* cause but it is *a* cause.⁹⁵

In 1993, four major networks and fifteen cable channels began carrying parental advisories on the screen to warn parents of forthcoming scenes of heavy violence; cartoons, news, and sports events were not included. But channel “grazing” with remote controls severely dilutes the effectiveness of on-screen warnings. There is also much skepticism over the utility of a general warning that reads: “Due to some violent content, parental discretion advised.” Colman McCarthy, the columnist, writes that the warning might more accurately read: “Warning. The advisory that’s about to appear on your screen is an exercise in fake reform.”⁹⁶ An honest warning for the typical cop show, he says, would read: “The following program depicts six murders with handguns, three stabbings, four beatings of women, two rapes, seven fistfights, four people thrown out of penthouse windows, two high-speed chases ending in head-on collisions, three dynamitings of office buildings, one assassination, two acts of arson and three rifle butts to the jaw. Parental discretion advised.”⁹⁷ Even the simple advisory, placed in effect in July 1993, has had little effect. CBS immediately announced none of its fall schedule programs would require it; and the Fox network said the same for most of its programming.⁹⁸ In September 1993, Surgeon General Joycelyn Elders pointed out that only one program, *NYPD Blue*, carried the advisory.⁹⁹

94. Weinraub, *Despite Clinton*, *supra* note 4 (quoting Joel Silver, a successful producer of action films).

95. As a result of the studies, most voices in the debate admit a correlation between viewing violence and acting it out, but the industry and its supporters do not all admit that one is the cause of the other. See, e.g., John J. O'Connor, *Another Round on TV Violence*, N.Y. TIMES, Dec. 9, 1993, at C22 (major conclusions of studies are inconclusive); Siskind, *supra* note 38 (chicken and egg problem as to whether violent movies and shows cause violence or attract viewers disposed toward violence).

96. Colman McCarthy, *Network Discretion Advised*, WASH. POST, July 13, 1993, at C10.

97. *Id.*

98. Steve Coe, *No Warnings for Fall, Says Sagansky*, BROADCASTING & CABLE, July 26, 1993, at 20; Steve Coe, *Salhany Supports Violence-Warning Plan*, BROADCASTING & CABLE, July 19, 1993, at 24.

99. JAZ, *Elders Joins TV Violence Debate*, BROADCASTING & CABLE, Sept. 20, 1993, at 43.

Sterner stuff by way of self-regulation, however, could be in the offing. Under the goad of Congressional and Administration warnings, the industry has moved ahead a few squares in the past year. The four television networks, NBC, CBS, ABC, and Fox, have agreed to use the University of California Center for Communications Policy as an independent monitor to review and report on the violent content of their own programs, as well as competitive cable and public television programs, films, and video games.¹⁰⁰ We are told that the assessments of violence will be "qualitative," that is, made with context in mind, rather than indiscriminate rating of the number of violent scenes. The networks said at one point they have their own ratings systems in place for advisories, and the outside monitor will act primarily as an independent check on their efficacy.¹⁰¹

The major cable operators have gone a step further. Cable's eleven-point plan mandates the development of a violence rating system, also with an outside monitor.¹⁰² It also provides devices by which the consumer at home can automatically block-out programs rated as violent. The networks resist a single rating system applicable to television and cable, and they do not want a consumer-controlled device for blocking violent programs fearing advertiser defections. But the cable networks say no rating system will be effective unless it applies uniformly to all programmers, and Representative Markey of Massachusetts warns that he will press for compulsory rating and blocking systems in legislation unless the networks adopt them on their own.¹⁰³

100. *TV Violence to Be Monitored and Reported*, N.Y. TIMES, June 30, 1994, at C20.

101. Ellen Edwards, *TV Networks Agree to Use of Monitor*, WASH. POST, Jan. 22, 1994, at A1, A8 (annual reports will be made to public and threat of negative reactions from advertisers and public will be only sanction).

102. The cable industry has chosen Mediascope, a nonprofit research group, as its monitor. See *TV Violence*, *supra* note 100.

103. Ellen Edwards, *Broadcast and Cable TV to Name Violence Monitors*, WASH. POST, Feb. 2, 1994, at A1 (networks and cable industry formally announce agreement for outside monitor to review programs for violent content and issue annual report card on findings; all but one cable network whose schedule includes significant number of violent movies is on board); Ellen Edwards, *Cable Leaders to Develop Violence Ratings*, WASH. POST, Jan. 11, 1994, at B1; Ellen Edwards, *Cable Networks Agree to Regulate Violence*, WASH. POST, Jan. 21, 1994, at A1 (networks say cable is less likely to be hurt by advertisers' discontent on ratings and V-Chip because their revenues based on subscriptions); Ellen Edwards, *TV Networks Agree to Use of Monitor*, WASH. POST, Jan. 22, 1994, at A1, A8; cf. *Cable's Self-Check on Violence*, WASH. POST, Jan. 26, 1994, at A20 ("earnest and commendable response to the dangers of congressional interference in program content").

Clearly the game has just begun; legislation may or may not be successfully warded off; the networks and cable operators, veterans of much bitter internecine warfare, are still vying with one another over the necessary ingredients of self-regulation, though they must surely realize that to satisfy parents and legislators self-regulation will have to be reasonably uniform across media.

The problem, of course, is in implementing the details, the self-regulation could deteriorate into a series of "you go firsts" between networks and cable. The nature of the rating system will be critical; the video game makers who are also at risk have put forth a rating system similar to the movie system that classifies programs by age categories—all ages, six through thirteen, thirteen through seventeen, and adults only.¹⁰⁴ There is also talk of an electronic viewer's guide that will enable parents well in advance to identify programs they don't want their children to see. Skeptics ask: "[W]hat parent would take the time to check each day's listing[s] and block out specific objectionable shows" even assuming accurate labels and effective technology?¹⁰⁵ The drafters and monitors of the rating system will themselves be tasked harshly to decide how much violence, in what context, and at what age is undesirable for children, even if they read all of the hundreds of studies on the subject. Self-serving comments aside, the industry has a point in admonishing that overzealous excision of violence can turn television into a bland mix that appeals to and educates no one, including children. And it is still unsettled whether television news—a prime source of violent footage¹⁰⁶—and spontaneous sports violence will be covered. A

104. See generally John Burgess, *Industry Group Proposes Rating System for Video Games*, WASH. POST, Jan. 9, 1994, at A5 (rating systems to be developed by industry-appointed council including psychologists, educators, and parents); John Burgess, *Video Game Firms to Take Hollywood Tack on Ratings*, WASH. POST, Mar. 2, 1994, at F1, F2 (anonymous rating group will resemble Motion Picture Association rating system; no final decision on number of tiers in rating system); *Zap, Blam, Label*, WASH. POST, Mar. 12, 1994, at A20 (Sen. Joseph Lieberman threatens government commission to develop ratings if video industry does not; "'voluntary' guidelines shouldn't be camouflage for senators dictating their exact preference to an industry made docile by the threat of government curbs"); Elizabeth Corcoran, *Video, Computer Game Industries Split on Ratings*, WASH. POST, July 29, 1994, at B1 (video and computer game makers divided on rating systems).

105. Raspberry, *supra* note 16.

106. There is a lively controversy over the violence-content of news programs. See, e.g., Susan Chira, *Hillary Clinton Seeks Balance in News Coverage of Violence*, N.Y. TIMES, Mar. 5, 1994, § 1, at 7 (President's wife urges journalists to strike better balance in reporting violence); Ellen Edwards, *Networks Make Crime Top Story*, WASH. POST, Mar. 3, 1994, at C1, C8 (coverage of murder three times as high on network evening newscasts in 1993 as in 1992 while murder

spokesman for the Association for Responsible Television dismisses it all as "smoke and mirrors . . . [i]t's a delaying tactic, so it will be business as usual for the next five years."¹⁰⁷

Canada, our neighbor to the North, has just adopted a violence code, written by the television broadcasters but formally approved by the Canadian equivalent of our FCC, and intended to be used in licensing decisions.¹⁰⁸ During hours exclusive of 9:00 p.m. to 6:00 a.m. the broadcasters will not show any program that "sanctions, promotes, or glamorizes" violence, or contains "gratuitous violence in any form," and they are classifying programs according to their violence content.¹⁰⁹ But the only casualty in its early days has been *Teenage Mutant Ninja Turtles*, which some said would have been dropped anyway because of low ratings.¹¹⁰ Congressional reaction to the Canadian code has been that it is "very attractive" but could not be replicated here because of constitutional obstacles.¹¹¹

At this point it is hard to tell in what direction the industry is moving. The annual TV "sweeps," that is, surveys of the ratings of all network shows compiled to attract advertisers, showed that in 1994 by comparison with 1993, the top shows were much less violent—"light on serial killers and hit men and heavy on wholesome programming."¹¹² Moreover, the advertisers themselves are beginning to shy away from heavy violence, worried about audience antipathy and legislation directed at them.¹¹³ Of the ten highest rated made-

rate remained unchanged; 48% of all stories about children in the news focus on crime and violence); Ed Fouhy, *Toward a New Agenda in TV News*, BROADCASTING & CABLE, Jan. 10, 1994, at 32 (people angry at preoccupation of news with crime).

107. CS, *TV Violence Critics Critical of Plans*, BROADCASTING & CABLE, Feb. 7, 1994, at 7 (quoting Terry Rakolta, Americans for Responsible Television).
108. Elizabeth Kolbert, *Canadians Curbing TV Violence*, N.Y. TIMES, Jan. 11, 1994, at C15 (code does not cover cable; requires violence in children's programs not shown as preferred way to solve problems and its consequences be demonstrated; bans "gratuitous violence" and demands "sensitivity about violence against vulnerable groups"); see also Charles Trueheart, *Hear No Evil, See No Evil: Canada Gets Tough on TV Violence*, WASH. POST, Nov. 23, 1993, at B1 (Canadian code includes sports programming; will not cover cable or large influx of foreign and American programming).
109. Trueheart, *supra* note 108, at B1; see also Kolbert, *supra* note 108, at C15.
110. Kolbert, *supra* note 108, at C15. But see Ann Swardson, *'Power Rangers' Fight for Life on Canadian TV*, WASH. POST, Nov. 3, 1994, at A1, A36 (Canadian television network pulls "action" cartoon from airwaves; Ontario branch of Broadcast Standards Council found program exceeded violence guidelines).
111. *Id.*
112. Tom Shales, *Sweeps Victory for Violence Weary*, WASH. POST, May 2, 1994, at B1, B7.
113. See Joe Flint, *TV Violence: What the Market Will Bear*, BROADCASTING & CABLE, Oct. 25, 1993, at 18 (advertisers are afraid of legislation if they support violent programming).

for-TV movies during the 1993-94 season, seven were completely nonviolent.¹¹⁴ Contrary to expectations, viewers did not desert the networks because the programs were less violent. The President of the ABC Entertainment Group was less optimistic, however, pointing out that if you went below the top ten, you find "a whole long list of families killing families—rape, murder, true crime. The bread-and-butter ratings, week in and week out, are [these] movies. . . . [T]his season ABC's best performance was with family crime."¹¹⁵ A survey released later in 1994 validated that appraisal by reporting more violence on television than in the preceding year, though not on prime time shows.¹¹⁶

C. Technology

Thirdly, communications technology has become increasingly prominent in the debate. There is little chance that salvation from television violence will emerge *deus ex machina*, but it is likely that emerging control technology over the black box will affect its resolution. For a decade, cable systems have been required by statute to offer subscribers a lockbox which they can use to block out in advance certain channels for certain periods of time;¹¹⁷ parents can even now theoretically prevent their children from viewing objectionable programs—that is, if they themselves know which ones to avoid and when they will be aired. Why then is this not enough, at least for cable, and why can't there be an analogous device for regular television?

The problem is that lockboxes are presently underused. The newly-invented V-Chip, a relatively cheap, mass-produced computer chip, which some proposed legislation would mandate but which cable has already voluntarily agreed to make available, will go beyond the lockbox in allowing parents to block out, or more accurately blur out, parts of any scene as well as whole scenes or programs that are too violent or sexually graphic.¹¹⁸ With the aid of a small decoder, the adult user can remove the obscuring blur when using

114. Shales, *supra* note 112, at B7.

115. *Id.*

116. See McClellan, *supra* note 82, at 14.

117. 47 U.S.C. § 544(d)(2)(A) (1991). Lockboxes vary in their level of sophistication; some permit a parent to lock out a particular channel with the lock to be automatically lifted at a set time; others permit an entire channel to be locked out with unlocking to be done manually.

118. Sean Scully, *TV Self-Editing System Offered*, BROADCASTING & CABLE, Aug. 23, 1993, at 63; see also Sean Scully, *V Blocker Is Easy Chip Shot Away*, BROADCASTING & CABLE, Aug. 23, 1993, at 64 (discussing H.R. 2888, Rep. Ed Markey's "V block bill").

the set herself.¹¹⁹ The V-Chip would operate in conjunction with a rating system programmed into the set. There could potentially be four levels of restriction on sex and violence to accommodate different age groups.¹²⁰ The price of the decoder is expected to come down to five dollars as soon as usage reaches respectable levels.¹²¹ Some redesigning of smaller sets will be necessary to accommodate the circuitry, but satellite television is already using such a device in conjunction with a rating system.¹²²

Broadcasters, it is reported, are cool to the V-Chip because it will result in some additional cost to viewers as well as enlarge viewer control capabilities and so potentially diminish the audience for advertisers.¹²³ One broadcasting official laments sanctimoniously: "The very idea of the V-Chip scares me. . . . [H]ave we as parents so abrogated our responsibilit[ies] . . . to talk about things like violence on television with our children that we have to ask technology to stand in for us?"¹²⁴ The answer may be "Yes."

Parents would still have to trigger the system, regardless of the sophistication of the control apparatus. Cynics point out that adoption of the V-Chip "presume[s] that parents are more technically facile than their kids, and nothing could be further from the truth."¹²⁵ But, says Congressman Ed Markey, "[e]ven if a small percentage of parents used the technology, the networks will see declining ratings for violent programs. The result will be less violence on [t]elevision."¹²⁶

A few holdouts press for segregating all violent programs on one channel, available to subscribers only by advance registration for a fee (and in conjunction with a decoder or lockbox), an approach that television broadcasters and cable operators predictably will oppose strongly.¹²⁷ The FCC is incidentally pursuing this route in regulating indecent programming on the public access leased channels of cable.¹²⁸ Its approach assumes that parents simply don't use their

119. Scully, *supra* note 118, at 63.

120. *Id.*

121. See Edmund L. Andrews, *A Chip That Allows Parents to Censor TV Sex and Violence*, N.Y. TIMES, July 18, 1993, at F14.

122. *Id.*

123. *Id.*

124. Steve Coe, *Salhany Supports Violence-Warning Plan*, BROADCASTING & CABLE, July 19, 1993, at 24 (quoting Lucie Salhany, chairman, Fox Broadcasting).

125. Andrews, *supra* note 121, at F14 (quoting Gary Shapiro of Consumer Electronics Group).

126. Ellen Edwards, *TV Networks Agree to Use of Monitor*, WASH. POST, Jan. 22, 1994, at A1, A8.

127. Rosenfeld, *supra* note 25, at G5.

128. *In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 7 FCC Rec. 7709 (1992); 8 F.C.C.R. 998 (1993); 8 F.C.C.R. 2638 (1993).

lockboxes or cannot know in advance when indecent programming will be aired so as voluntarily to screen out those channels. The technology and on-screen guides might, however, overtake some of those arguments.

D. Family Values

The fact that many parents feel inadequate to the task of controlling their children's intake of television violence, should not mean parental discretion is, in fact, impotent or irrelevant. To be politically acceptable in a democratic society, a solution to television violence should not be allowed totally to supplant the role of parents in guiding their children. Until recently, the FCC has defended its regulations restricting indecency on grounds that its main interest is in helping parents make decisions, though of late it has muddied the waters by citing as an additional ground the government's own compelling interest in protecting children from sinister influences.¹²⁹ This latter claim, incidentally, provoked a spirited rebuke from my colleague, Judge Edwards, in the court's recent panel opinion striking down the FCC's 6:00 a.m. to midnight ban on indecent programming. Judge Edwards found the two FCC justifications "irreconcilabl[e]" and admonished that in setting itself up as a final arbiter on what children may see and hear, "the Government tramples heedlessly on parents' rights to rear their children as they see fit and to inculcate in them moral values of the parents' choosing."¹³⁰ The question of whether the FCC censors or parents should decide what kind and how much violence kids can see is a fundamental one, worthy of a more intense focus than it is currently getting.

Assuming the government does move to regulate television violence, and assuming further that it decides to use the safe harbor technique for violent material, the hours during which such fare could be shown would differ depending on whether the regulation was truly seeking to aid parental choice or simply to keep violent material away from kids altogether, regardless of their parents' desires. Before you quickly retort, "no right-minded parent wants her kid watching murder and mayhem," consider for a minute what that reaction could mean.

Do we really want our children protected from true depictions of our country's violent history: lynchings, assassinations of Presidents, wars fought in the name of justice and freedom, the Rodney King tapes? One critic points out that "[t]he . . . movie 'Gettysburg' depicts more deaths than an entire season's worth of TV police

129. See *Action for Children's Television v. FCC*, 11 F.3d 170, 176-77 (D.C. Cir. 1993), *vacated and reh'g en banc granted*, 15 F.3d 186 (D.C. Cir. 1994).

130. *Id.* at 183-84.

shows. Should 'Gettysburg' be edited so that it depicts the event as a mere skirmish instead of the blood bath it was?"¹³¹

Is there a cultural difference between Shakespeare's violent works, like *Titus Andronicus*, in which "out of the fifteen personages, six are stabbed, two beheaded, two have their throats cut, one is hacked to pieces and burnt, one buried alive and left to perish of hunger," and the notorious video game, *Mortal Kombat*, where the winning fighter rips out his victim's heart and lets his head splash for fifteen seconds on the pavement while the background voice shouts, "FINISH HIM, FINISH HER"?¹³² And if so, should it be the government or the parent who decides which can be viewed? Will news and sports programs be covered? As the *New York Times* points out: "The spectacle of a Michael Jordan slugging players on a basketball court, for example, probably sends a more immediate and damaging message to the youth of this country than all the violence on network entertainment programs."¹³³ Is that what the concerned families want when they call for government controls on violent programming? Their pleas are broadly phrased—"less violence" or maybe "no violence." "When" and "how much" should control the inquiry. Do the incessantly cited studies help in the refinement; if so, nobody has shown how. Even during her impassioned plea for industry-or-else-government controls, Attorney General Janet Reno admitted there would be a problem in defining what kind of violence to legislate against.¹³⁴

Parent and family organizations have been quite active in the crusade against television violence. They have collected signatures, mobilized, and lobbied for both industry and government restrictions. Some monitor television and cable themselves for unnecessary violence, and then organize citizen boycotts of the products advertised on the programs. The American Family Association boasts 1,700,000 families who support their anti-violence boycotts and is soliciting 3,300,000 more to insure maximum effect. They have already issued one call to arms in a full-page *New York Times* advertisement for parents to write the listed sponsors of *NYPD Blue* objecting to its violent and sexual content. Attorney General Reno and columnist William Safire have encouraged this kind of grass-roots activity.¹³⁵ But what kind of solution do they want—one that relies upon parental involvement or rather one that delegates sensitive choices to the industry or the government? It's not always clear.

131. Siskind, *supra* note 38, at 28.

132. Amy E. Schwartz, *Kombat, Then and Now*, WASH. POST, Dec. 29, 1993, at A19.

133. O'Connor, *supra* note 35, at 26.

134. See *TV Violence and the Feds*, WASH. POST, Oct. 23, 1993, at A22.

135. William Safire, *The Porn Is Green*, N.Y. TIMES, Nov. 25, 1993, at A27.

This is not to say there is no consensus among parents, educators, and regulators that certain kinds of violent programming serve no narrative or educational purpose at all, and should be severely curtailed during most viewing hours. But the vast array of programs containing some violence also contain history, literature, documentary, sports, news, or even good storytelling. The censor—be she parent or FCC bureaucrat—carries a heavy burden of discretion in deciding when violence is excessive or gratuitous. If a major solution to the television violence problem allows for significant parental choice, rather than government fiat, it will be more in keeping with our democratic tradition of letting families do their own thing.

III. CONCLUSION

Americans love to talk about how much they care about children. But public policy making for children's welfare inevitably becomes entangled in the ideological and material conflicts that seem to beset all important issues of public policy in a democratic society. In the case of violence on television, we have a clearly aroused public—with the politicians close behind—calling for action of some kind. Substantial majorities of Americans polled want government intervention if necessary. Indeed, for a change, there is even a body of recognized research to support the ill-effects of indiscriminate violence-viewing on developing youngsters.

On the other hand, in our market economy, violence sells products. For decades the entertainment industry has piously eschewed "gratuitous violence"; it has adopted and intermittently enforced voluntary codes of good behavior; very recently, under intense political pressure, it has signalled an intent to update such codes; the networks and cable systems have agreed to put parental advisories on programs they think are too violent for children; both will let outside monitors review their programs and publicize the results;¹³⁶ cable will devise a graduated rating system and offer devices to let parents block out V-rated programs. Whether the public or its elected representatives will be satisfied with these innovations remains to be seen. Proponents of more aggressive control want segregated

136. The cable industry named as its outside monitor, MediaScope, a nonprofit "pro-social" California organization. The monitor will review four weeks of random programming a season from 25 cable channels including news magazines, children's programming, and talk shows as well as prime-time entertainment; the monitoring council of 13 experts in medicine, law, psychology, and education, as well as media representatives, will "define what constitutes an act of violence" and "assess the context"; test groups of children will be used to determine effectiveness of advisories. Ellen Edwards, *Cable TV Names Monitor*, WASH. POST, May 17, 1994, at C3.

channels, or restricted hours for violent programming when children are not likely to be watching, or violent-free family-viewing "zones" in prime time.¹³⁷ Whatever control mechanisms are adopted, voluntarily or by government, broadcast television wants cable included and vice versa; entertainment programmers want cartoons, sports events, and even news programs covered. Any of these techniques, some more than others, has the tendency to decrease broadcast and even cable profits. Yet, for perhaps the first time in television history, the media seems genuinely fearful of government censorship if they fail to act. According to one network head, "[w]hat's clear is that Congress has had an effect, and without passing any legislation or putting cockamamie "V" Chips in TV sets . . . [Senator Simon has] convinced us that rather than just sit around and argue about whether violent TV causes violent behavior, we should look at our schedule and just try to do good programming."¹³⁸ We'll see.

The thorniest problem in any control system—by whomever administered—is deciding what violence should be screened out. There is a genuine risk of overreaction; so many aspects of our life and society do involve violence that it must inevitably be reflected in our art forms and entertainment, if they are to make any valid comment on our life and times. The government's flawed record in regulating indecency provides little promise that it can regulate violence more sensitively. If, for example, violence bans are to be defined in terms of inappropriateness for children's viewing, surely there must be gradations between ages six and seventeen. Yet in its indecency regulations the government has so far rejected any such steps.

What has been conspicuously missing from the debate are explicit models or examples of programming the involved groups think should be restricted or banned. Shakespeare's plays and *Mortal Kombat* do not define the terrain. Canada's new television code has detailed standards but so far only *Teenage Mutant Ninja Turtles* has reportedly felt its impact.

There is also the First Amendment to contend with, even when children's welfare is at stake. No violence cases have yet come to court. But in the indecency field, some government-imposed safe harbor viewing hours have been found too restrictive, when no attempt was made to explain the failure to differentiate between the ages of children in the viewing audience.¹³⁹ While there certainly are some extreme forms of violence on the airwaves which titillated

137. See Tom Shales, *Family Hour: An Idea Whose Time Has Gone—and Come*, WASH. POST, Oct. 20, 1993, at B1; Schlegel, *supra* note 14, at 213.

138. Tom Shales, *Sweeps Victory for the Violence Weary*, WASH. POST, May 2, 1994, at B1, B7.

139. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

adults can reasonably be permitted to view only at selected hours away from children, that kind of regime if imposed by law would seem to require a far more precise kind of research and explicit balancing than government has heretofore engaged in. If an effective scheme can be devised, industry self-regulation, by avoiding constitutional line-drawing, promises more certainty and less delay.

In the end, the role of parents cannot be ignored or passed on to some other authority. Conscientious parents differ all over the lot as to what they want their children to see. The problem of the violence-prone child without any supervision at all cannot be settled within the framework of this debate.¹⁴⁰ Even on-the-job parents need help in controlling the use of home media. But they should not expect or want to escape responsibility altogether by delegating program control to the government, either through formal or *de facto* twenty-four-hour bans or segregated channels to which all violent programming will be relegated. Advancing technology, like the V-Chip, and on-screen viewer guides would lend a helping hand to parents, allowing them to scan a day's television fare rated for differing degrees of violence, and to lock out undesirable programs or parts of programs for their children's viewing. Surely the industry should be able to work out the vulnerability in present technology to assure that smart kids—at least in the lower age ranges—cannot circumvent the circuitry. Making it next to impossible for adults or older adolescents to see anything not fit for a six-year-old does not seem a legally or socially tolerable alternative.

The lessons of this exercise in public policy formulation for children seem reasonably clear but daunting. There has been a massive public debate over the past few years on this issue, but it has not yet focused convincingly on what can be done, what is at stake, or even what kind of programs we are talking about. The rhetoric on all sides is too strident—children's welfare is pitted against freedom of expression—the debate is full of accusation and condemnation. It is as if fixing the blame will solve the problem. It will not. Yet with all the differences, it seems as though we are about to see some changes made under political pressure driven by unhappy parents, by schools and churches, by our law enforcement establishment; perhaps even by our society's better nature. The solutions are complex. They will fail if they reduce television fare to pap or deny adults any freedom of choice, or simply produce a kind of television

140. See Stanley Greenspan & Amy Cunningham, *The Kids Who Will Be Killers*, WASH. POST, July 25, 1993, at C1 ("[W]ithout loving contact in infancy and early childhood, a sense of human connectedness may never materialize and other people can soon become viewed as things to be kicked or destroyed when they stand in the way.').

totalitarianism by giving too much power to government to determine what we can see or hear. We must use our window of opportunity with wisdom and restraint.

There is no assurance that we will be successful, we can only try.