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Television Violence: The Impact on Children versus First Amendment Rights

Television Violence: The Impact on Children versus First Amendment Rights

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I. Background

Violence is an inherent part of global culture and has occurred between nations long before television was established.¹ Researchers acknowledge that violence portrayed on television is a potential danger.² Conflicting views exist as to whether violence on television and in the media leads its viewers down a road of violence. An age-old question is whether life imitates art or vice versa.³ For example, a group of teenage boys rent and watch a film, graphically depicting the brutal sexual assault of a young girl with a broom handle.⁴ The boys then discuss the rape scene, select their victim days later, and assault her with a broom handle.⁵

Since television's early days, Congress has held a series of hearings to investigate the impact of television programs on juvenile crime.⁶ William Belson conducted a study of 1,565 boys aged thirteen to seventeen years in London, England finding that boys who had a higher exposure of televised violence were more involved in serious violent behavior than boys who had lower exposure.⁷ Furthermore, the National Institute of Mental Health ("NIMH") report concluded that violence on television does lead to aggressive behavior by children and teenagers who watch the programs.⁸ The NIMH's conclusion is based on laboratory experiments and field studies.⁹ Brad Bushman, a psychology professor at Iowa State University at Ames wrote a commentary on a 17-

¹ *Television, Violence and Censorship*, at <http://www.123helpme.com/view.asp?id=10384> (last visited Jan. 16, 2005).

² *Id.*

³ Bob Waliszewski & Bob Smithouser, *Media Influence: When Life Imitates Art*, at http://www.troubledwith.com/stellent/groups/public/%5C@fotf_troubledwith/documents/articles/twi_pf_013859.cfm?channel=Parenting%20Children&topic=Media%20Influence (last visited Apr. 6, 2005).

⁴ Jane M. Whicher, Feature, *Constitutional and Policy Implications of 'Pornography Victim' Compensation Schemes: A Look at the Potential Impact of Statutorily-Created Third Party Liability Schemes*, 40 FED. B. NEWS & J. 360 (1993).

⁵ *Id.*

⁶ John P. Murray, *Television and Violence: A Symposium: The Impact of Televised Violence*, 22 HOFSTRA L. REV. 809, 809 (1994).

⁷ *Id.* at 818-19.

⁸ *Id.* at 821.

⁹ *Id.* at 821.

year study of 700 young people on the impact of violent television, and found that television causes increased aggression.¹⁰ Bushman stated:

The correlation between violent media and aggression is larger than the effect that wearing a condom has on decreasing the risk of HIV. It's larger than the correlation between exposure to lead and decreased IQ levels in kids. It's larger than the effects of exposure to asbestos. It's larger than the effect of secondhand smoke on cancer.¹¹

According to the American Academy of Pediatrics, by the age of 18, the average young person will have viewed an estimated 200,000 acts of violence on television alone.¹²

Not everyone, however, believes that there is a correlation between violence on television and increased violence in youth. For example, Jonathan Freedman, a psychologist at the University of Toronto, argues that the study above failed to prove that television watching was the cause of the aggressiveness.¹³ Freedman said "it has nothing to do with TV -- it has to do with lifestyle," and those "who watch more than three hours of TV are different than those who watch less than an hour."¹⁴ The people and groups who do not want media censorship argue that the First Amendment of the United States Constitution ("First Amendment) grants United States citizens the right to freedom of speech, which includes showing violence on television.

This article will address violence on television and various cases and regulations that have taken effect, as well as the problems associated with these regulations. Specifically, Part I will discuss television violence and the legislative response. Part II will explain the FCC regulatory history related to television. Part III will focus on censorship violence and the First Amendment. Finally, Part IV will propose some solutions to violence on television.

¹⁰ Shankar Vedantam, *Study Ties Television Viewing to Aggression: Adults Affected as Well as Children*, WASH. POST, Mar. 29, 2002, at A01, available at http://www.fradical.com/March_2002_tv_violence_study.htm.

¹¹ *Id.*

¹² American Academy of Pediatrics, *Media Violence*, PEDIATRICS Vol. 108, No. 5, at 1222 (Nov. 2001) at <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;108/5/1222.pdf>.

¹³ Vedantam, *supra* note 10, at http://www.fradical.com/March_2002_tv_violence_study.htm.

¹⁴ *Id.*

II. TELEVISION VIOLENCE AND THE LEGISLATIVE RESPONSE

Since 1954, the United States Senate Subcommittee on Juvenile Delinquency of the Committee on the Judiciary has conducted investigations on the impact that violence on television has on its viewers.¹⁵ Researchers found the television content extremely violent and half of the television hours monitored included violent programming.¹⁶ These programs included crime, gunfire, fighting, and murder. The study concluded that under certain conditions some violent television could affect some children.¹⁷ That is, most researchers came to the conclusion that by watching a violent program or scene on television, some children will become more aggressive and more violent within their own behavior.¹⁸

In 1972, the Surgeon General issued a report concluding that violence in television had an adverse effect on certain members of society.¹⁹ Initially, President Reagan and Congress ignored the report.²⁰ Eventually, however, both the House and Senate Committees on Appropriations directed the Federal Communications Commission ("FCC") to submit a report to the congressional committees on action the FCC planned to take in order to protect children from programming with excessive violence and obscenity.²¹ Ten years later, the Surgeon General issued an updated report, stating that the majority of observational or field surveys indicated that there is a positive correlation between television viewing and a variety of behavioral influences, including aggressive behavior.²²

Also in 1972, researchers Robert Liebert and Robert Baron conducted and published a major study on television's impact on children called the "Short-Term Effects of Televised Aggression on

¹⁵ Julia W. Schlegel, Note, *The Television Violence Act of 1990: A New Program For Government Censorship?*, 46 FED. COMM. L.J. 187, 188 (1993).

¹⁶ *Id.*

¹⁷ *Television, Violence and Censorship*, at <http://www.123helpme.com/view.asp?id=10384> (last visited Jan. 16, 2005).

¹⁸ *Id.*

¹⁹ Schlegel, *supra* note 15, at 190.

²⁰ *Id.* at 192.

²¹ *Id.* at 190.

²² *Id.* at 192.

Children's Aggressive Behavior."²³ Liebert and Baron's study concluded that watching a violent program or scene made children more willing to be aggressors in a laboratory setting.²⁴ Furthermore, Liebert and Baron found that children who watch media violence that gets rewarded and not punished are more prone to act more violently themselves.²⁵

Liebert summarized the research from his own and other studies within the Surgeon General's Report, as well as 54 earlier experimental studies.²⁶ For example, when television characters use aggressive means to reach benevolent ends, young children misinterpret the show's befuddled message(s) than when the characters behave consistently good or bad.²⁷ Children also behave more aggressively after seeing a mixed pro-social/anti-social character (one who acts acceptable in a social context and then unacceptably) than when the character has behaved consistently in a totally pro-social way.²⁸ Justifying the rational for aggressive actions does not appear to eliminate the influence exposure to aggressive acts has on very young children.²⁹ Soon after this study, the National Association of Broadcasters ("NAB") required that broadcasters show sex or violence only as it relates to the plot and without unneeded emphasis.³⁰

A. *The Television Program Improvement Act of 1990, 47 U.S.C. §303c*

Congress responded to the high rate of violence on television with the Television Program Improvement Act of 1990, 47 U.S.C. §303c ("Improvement Act"). Former President George H.W.

²³ Jane E. Ledingham, C. Anne Ledingham & John E. Richardson, *The Effects of Media Violence on Children*, (1993), at http://www.phac-aspc.gc.ca/ncfv-cnivf/familyviolence/html/nfntsviomeia_e.html (last visited Apr. 7, 2005).

²⁴ *Television, Violence and Censorship*, at <http://www.123helpme.com/view.asp?id=10384> (last visited Jan. 16, 2005).

²⁵ *Id.*

²⁶ University of Southern California Annenberg School Center for the Digital Future, *1997 TV Violence Report* (1997), at <http://www.digitalcenter.org/webreport96/historic.htm> (last visited Apr. 9, 2005).

²⁷ Ledingham, *supra* note 23, at http://www.phac-aspc.gc.ca/ncfv-cnivf/familyviolence/html/nfntsviomeia_e.html (last visited Apr. 7, 2005).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Schlegel, *supra* note 15, at 190.

Bush signed the Improvement Act into law on December 1, 1990, which was “designed to encourage the networks, the cable industry, and independent stations to reduce the amount of violence currently shown on television.”³¹ The main thrust of the Improvement Act was for the television industry to voluntarily establish standards on violence for a limited purpose and time.³² Former Illinois Senator Paul Simon originally introduced the Improvement Act, which gave the networks an exemption from antitrust laws in exchange for reducing television violence.³³ In order to facilitate the reduction of violence in programming, a provision of the Improvement Act allowed the broadcasters and cable industry the opportunity to meet regularly during a three year period and focus on violence standards.³⁴

After persuasion from Senator Simon, the industry members met after two years in December of 1992.³⁵ As a result of the meeting, the networks (ABC, NBC, and CBS) in a joint statement, created standards intended to “prohibit depicting violence as glamorous or using it to shock or stimulate the audience.”³⁶ The standards prohibit scenes showing “excessive gore, pain or physical suffering”, and limit scenes that contain “gratuitous” or “excessive” violence, force inappropriate for home viewing, images that encourage imitation by or frighten children, and anything that abuses or encourages animal injury.³⁷

The Improvement Act has some problems regarding the control over television content. First, only the networks apply and interpret the guidelines of the Improvement Act, not Congress, which results in the networks deciding on what content is explicitly violent or inappropriate for children.³⁸ Secondly, the purported standards have not reduced the amount of violence on television because

³¹ *Id.* at 188.

³² *Id.* at 189.

³³ *Id.* at 193.

³⁴ *See id.* at 193-4.

³⁵ *Id.* at 194.

³⁶ *Id.*

³⁷ *Id.* at 194-5.

³⁸ *See id.* at 195.

violent programs attract a larger audience and are more profitable to the stations.³⁹ The networks merely put a caption at the beginning of a program giving various ratings and warnings to parents for shows that may be sexually or violently inappropriate for youth.

B. The Children's Television Act of 1990, 47 U.S.C. §303a-303b

On October 18, 1990, Congress enacted the Children's Television Act of 1990, 47 U.S.C. § 303a-b ("Children's Act"). Similar to the Improvement Act, the Children's Act seeks to improve children's television through FCC regulation.⁴⁰ The Children's Act serves the following three functions: (1) time restrictions on advertising; (2) airing programming beneficial for children and; (3) informing broadcasters at license renewal time that compliance with the above two factors is considered part of their duty to program in the public interest.⁴¹

The Children's Act restricts advertising on children's television to twelve minutes per hour during the week and ten and one half minutes per hour on weekends.⁴² Furthermore, the Children's Act educational programming requirement forces broadcasters to broadcast programs specifically designed to "meet the educational and informational needs of the child audience" and established the National Endowment for Children's Educational Television.⁴³ Children's television includes programs originally produced and broadcast primarily for children ages twelve and under.⁴⁴ The Children's Act does not apply to programs made for general audiences that may be viewed by children.⁴⁵

³⁹ See *id.* at 198.

⁴⁰ *Id.* at 196.

⁴¹ 47 U.S.C. §§ 303a(b), 303b(a).

⁴² *Id.*

⁴³ Michael J. Palumbo, Note, *Broadcast Regulation, Has the Marketplace Failed the Children: The Children's Television Act of 1990*, 15 SETON HALL LEGIS. J. 345, 346 (1991).

⁴⁴ See *id.* at 347.

⁴⁵ *Id.*

The FCC assumes compliance with the educational requirement, unless a formal complaint is filed with the FCC challenging a station's compliance.⁴⁶ Section 102(a) of the Children's Act requires the FCC to initiate a rule making proceeding to "prescribe standards applicable to commercial broadcast licensees with respect to time devoted to commercial matter in conjunction with children's television..."⁴⁷ The FCC has conducted unsystematic reviews of ads being broadcast to check up on its licensees.⁴⁸ For instance, a January 1992 audit found ten violations from more than the 160 television stations and cable systems that were inspected.⁴⁹ Three stations cited as violators were levied fines of a maximum of \$20,000, and three other stations received admonishments from the FCC.⁵⁰

The Children's Act, like the Improvement Act, is not without problems. One issue is that broadcasters remain unclear as to what constitutes compliance.⁵¹ For instance, Atlanta's Superstation WTBS ("WTBS") challenged the FCC's finding that it went over the weekday advertising time limits.⁵² WTBS believed the ads promoting programming on other Ted Turner Broadcasting owned stations should not be considered "commercial matter."⁵³ WTBS argued that the ads did not have to meet the FCC's standards because they were not sold for money to the broadcaster.⁵⁴ The FCC, however, defined "sold" as any situation where the broadcaster receives valuable consideration from the advertiser, directly or indirectly, and WTBS received this type of consideration.⁵⁵ WTBS

⁴⁶ Schlegel, *supra* note 15 at 196.

⁴⁷ Palumbo, *supra* note 43 at 346-347.

⁴⁸ Diane Aden Hayes, Note & Comment, *The Children's Hour Revisited: The Children's Television Act of 1990*, 46 FED. COMM. L.J. 293, 301 (1994).

⁴⁹ *See id.*

⁵⁰ *Id.* at 302.

⁵¹ *Id.*

⁵² *Id.* *See also* Letter from Edythe Wise, Chief, Complaints and Investigations Branch Enforcement Div., MM, to Licensee, TV Station WTBS (Atlanta), 8 FCC Rcd. 490 (1993), at 1993 WL 755659.

⁵³ *Id.* at 302-03

⁵⁴ *Id.* at 303.

⁵⁵ *Id.*

received an admonishment only, not a fine, because it agreed to monitor this practice more carefully in the future.⁵⁶

Some broadcasters also argue that compliance with the Children's Act requires too much time and money.⁵⁷ While some fear that broadcasters may give up on children's programming, the FCC's apparent leniency on network violators and the affirmative duty to broadcast for children, make it unlikely that stations will completely abandon children's television.⁵⁸

III. FCC REGULATIONS AND COMPLIANCE

A. Historical Look at the FCC's Action

Initially, the FCC appeared indecisive about regulating television, particularly children's television.⁵⁹ Unlike the Children's Act, the Improvement Act did not grant Congress or the FCC authority to enforce any guidelines that the networks create.⁶⁰ In 1974, the FCC published the "Children's Television Report and Policy Statement" ("Report"), which set forth the voluntary guidelines limiting advertising during children's programs.⁶¹ The Report also described three advised practices.⁶² First, the Report urged the television industry to increase the broadcasting of children's programming during weekdays, not just on weekend mornings.⁶³ Second, it advocated eliminating "host-selling" and "tie-ins," where performers, including cartoon characters, advertise products or brand names during the program or during commercials aired during or immediately after

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Niki Frangos Tuttle, *Children's Television Act of 1990: Impact on Broadcasters and Cable Operators*, 21 COLO. LAW 683, 683 (1992).

⁶⁰ Schlegel, *supra* note 15, at 194.

⁶¹ Tuttle, *supra* note 59.

⁶² *Id.*

⁶³ *Id.*

programming.⁶⁴ Finally, the FCC asked the industry to create clearer separations between programs and commercials during children's programming.⁶⁵ The FCC held that children are more trusting of and vulnerable to commercials than are adults.⁶⁶

In 1984, the FCC published the "Children's Television Programming and Advertising Practices" report ("Practices").⁶⁷ The Practices suggested that current data indicated a marked increase in quality programming.⁶⁸ The FCC also stated "mandatory programming obligations are undesirable and should not be adopted."⁶⁹ In the Practices, the FCC repealed a number of the advertising policies it had advised television broadcasters to practice in the 1974 Report, believing market forces were better indicators of reasonable commercial levels than the FCC.⁷⁰ The Action for Children's Television and Black Citizens for a Fair Media brought a suit against the FCC alleging that the Commission failed to engage in "reasoned decision-making" in withdrawing its long-standing children's television commercialization guidelines.⁷¹ The United States Court of Appeals for the District of Columbia held that the FCC failed to sufficiently justify its action deregulating children's television and remanded case for further explanation of its elimination of the children's television commercialization guidelines.⁷² In response, the FCC initiated a Notice of Inquiry regarding commercialization in children's programming.⁷³

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Robert E. Fitzpatrick, Note, *Three Hour Mandate of Children's Television Programming: Is the FCC Teaching Your Children Well?*, 32 SUFFOLK U. L. REV. 767, 776-77 (1999).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Tuttle, *supra* note 59.

⁷¹ *Action for Children's Television v. FCC*, 821 F.2d 741, 743 (D.C. Cir. 1987).

⁷² *Id.*

⁷³ Tuttle, *supra* note 59.

B. *The Center for Media Education Report*

In 1991, one year after the Children's Act became law, the Center for Media Education ("CME"), a Washington-based consumer watchdog group released a study analyzing broadcasters' compliance with the Children's Act's programming requirements.⁷⁴ The CME also studied whether the Children's Act achieved Congress and the FCC's goals.⁷⁵ The CME, along with the Institute for Public Representation at Georgetown University Law Center, reviewed the license renewal applications of stations in fifteen markets—five large, five midsize, and five small markets.⁷⁶ The studies found that few shows were created to meet the Children's Act's goals, and those that did were broadcast at off-peak hours, such as midnight.⁷⁷

C. *The FCC Takes Action: Recent History*

The FCC looked into children's television issues after the CME report was published.⁷⁸ The FCC first informed broadcasters that cartoons, such as the Jetsons and G.I. Joe, would not count towards the educational programming requirement.⁷⁹ The FCC, however, did not elaborate on what "educational" meant, only saying "educational means educational."⁸⁰ The FCC also delayed renewing seven stations' licenses, demanding the stations provide better evidence that they are meeting the educational requirement in children's broadcasting.⁸¹ Congress strongly supports greater FCC enforcement and involvement into television programming, especially where children are concerned.

⁷⁴ Hayes, *supra* note 48, at 304.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 308.

⁷⁹ *Id.* at 309. See also Schlegal, *supra* note 15, at 196.

⁸⁰ *Id.* at 308.

⁸¹ Schlegal, *supra* note 15, at 196-197.

For example, Congressman Edward J. Markey (D-MA) said, "Broadcasters, beware. The new era has begun."⁸²

IV. CENSORSHIP, VIOLENCE, AND THE FIRST AMENDMENT

While Congress, the FCC and television networks have valid reasons to censor children's programming, what rights do adults have in the media? The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."⁸³

Incidents of youth and school violence have created an opportunity for government involvement into First Amendment rights. For instance, in December 1965, a group of adults and students in Des Moines, Iowa met at 16-year-old student Christopher Eckhardt's home and decided to wear black armbands and fast between December 16 and New Year's Eve to protest the Vietnam War and support a truce.⁸⁴ On December 16, three students, including Eckhardt, wore the armbands to school even though the Des Moines principals' policy banned the armbands two days prior.⁸⁵ Citing the student's First Amendment rights, the United States Supreme Court held in 1969 that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁸⁶

Another example occurred in 1999 when an Allen High School (north of Dallas, Texas) 17-year-old honor student, Jennifer Boccia, wore a black armband to school to mourn the students killed

⁸² Hayes, *supra* note 48, at 310.

⁸³ U.S. CONST. amend. I.

⁸⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

⁸⁵ *Id.*

⁸⁶ See *id.* at 506. See also Clay Calvert, Article, *Free Speech and Public Schools In a Post-Columbine World: Check Your Speech Rights at the Schoolhouse Metal Detector*, 77 DENV. U. L. REV. 739 (2000).

in April 1999 at Columbine High School (Littleton, Colorado) and to protest against newly implemented school security policies.⁸⁷ The school gave Boccia a three-day suspension and an order preventing her from speaking with members of the news media.⁸⁸ The ACLU brought a lawsuit against Allen High School and its officials in order to protect Boccia's free speech rights, but an agreement was eventually reached and Boccia's transcripts were expunged of the incident.⁸⁹

A. The Columbine High School Massacre: Violence and the Desire for Legislative Censorship

On April 20, 1999, Columbine High School ("Columbine") students, 18-year-old Eric Harris and 17-year-old Dylan Klebold entered their high school cafeteria in fatigues, with pipe bombs strapped to their chests and shotguns and high-powered pistols under long black coats.⁹⁰ Harris and Klebold shot their classmates and teachers at point-blank range while hurling explosives.⁹¹ It was the deadliest school shooting in United States history.⁹² Fifteen people, including the two gunmen, were killed, and numerous others injured.⁹³

In April 2004, the Columbine victims' families filed a class-action lawsuit against 25 entertainment companies, including Nintendo of America, Sega of America, Sony Computer Entertainment, Time Warner Inc. (now AOL Time Warner), ID Software Inc., and GT Interactive Software Corp.⁹⁴ The families seek \$5 billion in punitive damages. The suit alleges that if Harris and

⁸⁷ Calvert, *supra* note 94.

⁸⁸ *Id.*

⁸⁹ *Id.* See also *Is School Safety Infringing on Student Rights?*, APB NEWS, October 1999, available at http://www.spannj.org/BridgeArchives/is_school_safety_infringing_on_s.htm.

⁹⁰ Mike Anton, *Death Goes to School with Cold Evil Laughter*, ROCKY MOUNTAIN NEWS, (April 21, 1999), available at <http://denver.rockymountainnews.com/shooting/0421top00.shtml>. See also http://en.wikipedia.org/wiki/Columbine_High_School_massacre#April_20.2C_1999:_Shooting_at_Columbine_High (last visited Dec. 20, 2005).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Dennis Neal, *Columbine victims' lawsuit poses threat to free speech*, THE NEWS LEADER, (May 13, 2001), available at <http://www.freedomforum.org/templates/document.asp?documentID=14049>.

Klebold had not been exposed to violent video games, they would not have committed these acts.⁹⁵ The lawsuit states, "Absent the combination of extremely violent video games and these boys' incredibly deep involvement, use of and addiction to these games and the boys' basic personalities, these murders and this massacre [at Columbine] would not have occurred."⁹⁶ The suit further asserts that Klebold and Harris visited web sites featuring sexually violent content.⁹⁷ Attorney John DeCamp says the lawsuit "seeks literally to change the marketing and distribution of these super-violent video games that take kids...to become addicted and turn them into monster killers."⁹⁸

Increased violent incidents, particularly, like the one at Columbine, have revived congressional interest in violence on television, movies, music and video games, and the potential negative effects caused by those media.⁹⁹ The Senate Commerce Committee on the marketing of violent entertainment to children held two hearings subsequent to the Columbine slayings.¹⁰⁰ A safe harbor proposal was reintroduced in the Senate, and the Senate Commerce Committee approved the bill in 2000 (although it was not presented to the full Senate).¹⁰¹ The bill requires that violent programming be limited to hours when children are not likely to comprise a substantial portion of the audience.¹⁰²

In 1999, two bills were introduced but no formal action has ever been taken.¹⁰³ The first bill would have created a national youth violence commission to discover the causes of youth violence and report to Congress and the President.¹⁰⁴ The second, the Children's Protection Act of 1999, would have exempted agreements "relating to voluntary guidelines governing telecast material,

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Gwendolyn Mariano, *Columbine Families Sue Gaming Companies*, (April 24, 2001) at <http://news.com.com/2100-1023-256374.html?legacy=cnet>.

⁹⁹ Joel Timmer, *Incrementalism and Policymaking on Television Violence*, 9 COMM. L. & POL'Y 351, 371 (2004).

¹⁰⁰ *Id.*

¹⁰¹ See *Children's Protection from Violent Programming Act*, S. 876, 106th Cong. (1999) and S. Rep. No. 106-509 (2000).

¹⁰² *Id.*

¹⁰³ Timmer, *supra* note 99.

¹⁰⁴ National Youth Violence Commission Act, S. 1001, 106th Cong. (1999).

movies, video games, Internet content, and music lyrics” from the antitrust laws.¹⁰⁵ Other attempts to enact legislation dealing with media violence also failed, and Congress adjourned the session without the enactment of any legislation on the issue.¹⁰⁶

At former President Clinton’s request, the Federal Trade Commission (“FTC”) prepared and released a report in 2000 on the marketing of “adult-oriented” violent content to children.¹⁰⁷ The FTC report found that the motion picture industry, the music industry and the computer gaming industry extensively advertised mature-rated content in media predominantly viewed by children.¹⁰⁸ The FTC found that these products’ marketing plans specifically targeted children, and they were promoted and advertised in broadcasting most likely to reach children.¹⁰⁹

After the report’s release, the Senate Commerce Committee and the Senate Judiciary Committee held hearings on the marketing of violence to children and the FCC announced plans to examine the effects of “sexually explicit and violent” television programming on children.¹¹⁰ In late 2000, the FCC held a hearing on the “public interest obligations of TV broadcast licensees” and issued a report to Congress.¹¹¹ The report included ways broadcasters could lower the violent programs negative impact, such as limiting the inappropriate violence, language, or sexual content from child programs, airing children programming (including ads) at appropriate times (not when a significant number of children are reasonably expected to be in the audience), and improving the existing program ratings system and airing public service announcements to educate parents about

¹⁰⁵ Children’s Protection Act of 1999, H.R. 1855, 106th Cong. (1999).

¹⁰⁶ Timmer, *supra* note 99, at 372. See also e.g., Faye Fiore, *Media Violence Gets No Action from Congress*, L.A. TIMES, Nov. 11, 1999, at A1.

¹⁰⁷ John Shaeffer & Pierce O’Donnell, *Watch Out – How You May Be Impacted by Renewed Government Efforts to Curb Advertising of Adult-Rated Products to Children*, at <http://www.legalelite.com/articles/a-jshaeffer-watchout.htm> (last visited Sept. 12, 2005).

¹⁰⁸ *Id.* (the FTC states that MTV advertises music that includes explicit lyric warnings during times when a significant portion of the audience is under the age of seventeen).

¹⁰⁹ Timmer, *supra* note 99, at 372.

¹¹⁰ See Christopher Stern, *FCC to Examine TV Sex, Violence*, WASH. POST, Sept. 13, 2000, at E3.

¹¹¹ See David Fiske, *FCC Initiates Proceeding on Interactive Television*, 2001 FCC LEXIS 487, Appendix at 98-102.

the ratings system and the V-chip.¹¹² “The FCC did not promulgate any regulations dealing with violent programming, however, nor did any legislative proposals on the issue clear Congress.”¹¹³

The Media Marketing Accountability Act of 2001 would have prohibited “the targeted advertising or other marketing to minors of an adult-rated motion picture, music recording, or electronic game” as an unfair or deceptive practice.¹¹⁴ No formal action, however, has been taken on this bill.¹¹⁵

B. Opposition to Media Censorship as a Violation of First Amendment Rights

While Congress and the FCC have taken some action to marginalize violence on television, others are not convinced of the correlation between violence in the media and increased violence in children. Todd Gitlin, a high-profile veteran of the 1960's peace movement and a leading United States commentator and author on media and culture issues, argues that television violence does not cause violence, and that “the profiteers of television in the United States – the networks, the program suppliers, and the advertisers - are essentially subsidized (e.g., via tax write-offs) to program this formulaic stuff.”¹¹⁶ Gitlin believes that “media violence isn't dangerous, it's just stupid.”¹¹⁷ Gitlin further argues that Japan shows a greater amount of media violence and sex than the United States, yet has a lower rate of violence.¹¹⁸

¹¹² *Id.*

¹¹³ Timmer, *supra* note 99, at 373.

¹¹⁴ Media Marketing Accountability Act of 2001, S. 792, 107th Cong. (2001).

¹¹⁵ Timmer, *supra* note 99, at 373.

¹¹⁶ George Gerbner & Todd Gitlin, *Is Media Violence Free Speech? A Debate between George Gerbner and Todd Gitlin* (June 1997), at http://www.media-awareness.ca/english/resources/articles/violence/violence_speech.cfm (last visited Apr. 10, 2005).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

“Restrictions on the First Amendment are permitted when the speech constitutes fighting words, incites imminent lawless activity, is defamatory or is legally obscene.”¹¹⁹ Individuals like Robert Peck, a lawyer and author, believe that “[a]s we continue to lose our First Amendment moorings as a people and think in terms of effects, we will see the bad tendency doctrine revived—even if under a new name. As a result, we will see increased authority to curb speech that supposedly leads people astray.”¹²⁰

Gitlin also gives his support of the V-chip, a device inside the television that parents can use to preclude their children from accessing certain television programming.¹²¹ Under the V-Chip system, television programs are rated similarly to the way movies are rated.¹²² Television ratings are sent electronically to the V-Chip, and parents can then set their televisions to block programs with certain ratings.¹²³

With or without the V-Chip, the television industry is often successful in using the First Amendment as a defense to their broadcasting of certain violent entertainment directed at children.¹²⁴ For example, in *Olivia N. v. Nat’l Broad. Co.*, a damages action was brought on behalf of a nine-year old girl who was artificially raped with a bottle after her assailants watched the movie *Born Innocent*.¹²⁵ The *Olivia N.* court found two problems with television censorship aimed at protecting children. First, regulating the television networks would “chill” speech and lead to self-censorship. In

¹¹⁹ Helen Gerothathos, *Media Violence and the First Amendment: The Conflict Between Freedom Of Speech and Protecting America’s Youth*, at <http://www.cfarfreedom.org/mediaviolence.shtml> (last visited Sept. 11, 2005). See also *Waller v. Osbourne*, 763 F. Supp. 1144, 1150 (M.D.Ga. 1991). See also *Miller v. California*, 413 U.S. 15, 20 (1973).

¹²⁰ Paul McMasters, *First Amendment: Still Under Siege at Age 209*, at <http://www.freedomforum.org/templates/document.asp?documentID=3176> (last visited Apr. 12, 2005).

¹²¹ Gerbner & Gitlin, *supra* note 116, at http://www.media-awareness.ca/english/resources/articles/violence/violence_speech.cfm. See also Lisa D. Cornacchia, Note, *The V-Chip: A Little Thing But a Big Deal*, 25 Seton Hall Legis. J. 385, 390 (2001).

¹²² Cornacchia, *supra* note 121. See also 142 Cong. Rec. E. 124, 124 (Feb. 1, 1996) (statement of Rep. Lee H. Hamilton of Ind.).

¹²³ *Id.*

¹²⁴ Gerothathos, *supra* note 119, at <http://www.cfarfreedom.org/mediaviolence.shtml>.

¹²⁵ 126 Cal. Rptr. 888, 890-91 (Cal. Ct. App. 1981). (*Born Innocent* was a television program that portrayed a rape scene in which the victim was sexually assaulted with the handle of a plunger).

other words, television networks would be subject to liability because of their broadcasting choices thus dampening the variety of public debate.¹²⁶ Secondly, the court was concerned that the adult population would have to watch only what is fit for children.¹²⁷

In *Zamora v. Columbia Broadcasting System*, a father sued three broadcasting companies after his son killed an 83-year-old woman.¹²⁸ The father alleged that television violence caused his son to become desensitized to violent behavior, thus leading to the murder.¹²⁹ The *Zamora* court, as did the *Olivia N.* court, held for the broadcasting companies and found that the imposition of civil responsibility for damages would act as a restraint on the broadcasters' exercise of their asserted first amendment rights.¹³⁰ The *Zamora* court also communicated the importance of giving viewers and the public access to social, political, esthetic or moral ideas.¹³¹

C. Support for Media Censorship

Unlike Gitlin, George Gerbner, the former dean of the Annenberg School of Communication at the University of Pennsylvania and founder of the Cultural Environment Movement, believes that media violence should be censored, and that violence in the media is not an absolute expression of free speech.¹³² Gerbner believes that "media violence is tantamount to censorship by media conglomerates who effectively shut out diverse points of view."¹³³ Gerbner further attacks Gitlin's "case of Japan" argument as the "knee-jerk retort of apologists," which "assumes that media violence

¹²⁶ *Id.* at 892.

¹²⁷ *Id.*

¹²⁸ *Zamora*, 480 F.Supp. 199, 200 (S.D. Fla. 1979).

¹²⁹ *Id.*

¹³⁰ *Id.* at 205. See also Gerosthathos, *supra* note 119, at <http://www.cfarfreedom.org/mediaviolence.shtml>.

¹³¹ *Zamora*, *supra* note 128 at 205.

¹³² Gerbner & Gitlin, *supra* note 116, at http://www.media-awareness.ca/english/resources/articles/violence/violence_speech.cfm.

¹³³ *Id.*

as the only, or major and always decisive, influence on human social behavior.”¹³⁴ Gerbner sees media violence as one of many factors contributing to real-world violence.¹³⁵ Gerbner further argues “heavy [television] viewers express a greater sense of insecurity and mistrust than comparable groups of light viewers. They are more likely to be dependent on authority and to support repression if it is presented as enhancing their security.”¹³⁶

Gerbner does not see the V-Chip as the solution and believes the technology protects the industry from the parents, and not the parents or children from the television industry.¹³⁷ Gerbner sees antitrust as a better government regulation because it could create a level playing field, that is, antitrust regulation would admit new entries and there would be a greater diversity of ownership, employment, and representation as a means to reduce violence.¹³⁸

In 1997, the Motion Picture Association of America (“MPAA”) president Jack Valenti submitted a system of voluntary parental guidelines to the FCC, called the TV Parental Guidelines (“Guidelines”).¹³⁹ Under the Guidelines, television shows fall into one of six categories, which are age-based: TV-Y, TV-Y7, TV-G, TV-PG, TV-14, or TV-M.¹⁴⁰ The Guidelines are applied to all television programs except for news and sports.¹⁴¹ While many advocates for censoring television violence agree with Gerbner, other than the acts discussed earlier and the Guidelines, little has been done legally to force censorship of media violence.

Courts often hold for defendants in First Amendment cases, making it difficult for plaintiffs to prevail.¹⁴² This is largely due to the *Brandenburg* test, which courts look to in analyzing media

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Cornacchia, *supra* note 121 at 401.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 402.

¹⁴² Gerothathos, *supra* note 119, at <http://www.cfarfreedom.org/mediaviolence.shtml>.

violence.¹⁴³ In *Brandenburg v. Ohio*, the defendant was a former Ku Klux Klan member convicted of violating the Ohio Syndicalism Statute, which made it a crime to teach the doctrines of criminal syndicalism.¹⁴⁴ The defendant challenged the constitutionality of this statute on Free Speech grounds, and the United States Supreme Court held that “the constitutional guarantees of free speech and free press do not permit a State to forbid . . . the use of force [or of law violation] except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁴⁵ Because the *Brandenburg* test requires plaintiffs to prove that listening to or watching violence caused or produced imminent lawless activity, the burden is often too high for plaintiffs to prevail and recover damages.¹⁴⁶

For example, in *Davidson v. Time Warner*, the widow of slain state trooper Bill Davidson brought a suit against Tupac Shakur and Time Warner, claiming that Shakur’s rap album *2Pacalypse Now* caused her husband’s death.¹⁴⁷ Ronald Howard was driving a stolen car, and Davidson pulled Howard over in an unrelated traffic stop.¹⁴⁸ Howard pulled out a handgun and fatally shot Officer Davidson during the traffic stop.¹⁴⁹ During the shooting, Howard was listening to *2Pacalypse Now*, which contains at least one song advocating violence against police officers.¹⁵⁰ Holding for the defendants, the United States District Court for the Southern District of Texas found that the *Brandenburg* test was not met because although the songs were insulting and outrageous, there was no proof that the artist intended to incite violence.

¹⁴³ *Brandenburg v. Ohio*, 395 U.S. 444 (1969); see also Gerothathos, *supra* note 119, at <http://www.cfarfreedom.org/mediaviolence.shtml>.

¹⁴⁴ *Brandenburg*, 395 U.S. at 446. (the Ohio Syndicalism Statute made it a crime for voluntarily assembling with any society formed to teach the doctrines of criminal syndicalism). See also Gerothathos, *supra* note 119, at <http://www.cfarfreedom.org/mediaviolence.shtml>.

¹⁴⁵ *Brandenburg*, 395 U.S. at 447.

¹⁴⁶ Gerothathos, *supra* note 119, at <http://www.cfarfreedom.org/mediaviolence.shtml>.

¹⁴⁷ *Davidson v. Time Warner, Inc.*, No. Civ. A.V.-94-006, 1997 WL405907 (S.D.Tex) (Mar. 31, 1997).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

V. PROPOSED SOLUTIONS TO VIOLENCE ON TELEVISION

Properly addressing how to curtail media violence's impact on children without infringing on First Amendment rights is a multifaceted issue.¹⁵¹ The courts, the legislature and the entertainment industry struggle to find solutions. Many Americans believe that censorship alone is not the answer.¹⁵² Todd Gitlin stated that "the problem of TV goes far beyond violence...The moneymaking machines that control as much of the culture as they can get their hands on will make just as many moral-sounding reforms as they think they need to keep Congress and the FCC off their backs."¹⁵³ His co-author George Gerbner agreed, saying, "the problem goes beyond violence, ratings, or any single factor, to the heart of the system...Citizens own the airways. We should demand that it be free and fair, and not just 'rated.'"¹⁵⁴ Thus far, the remedies have been reliance on the industries to self-regulate and provide parents with a means to help children pick suitable material for their age group.¹⁵⁵ There are, however, a few alternate solutions that may provide the answer to balancing television violence with First Amendment rights.

A. Solution One: Replacing the Brandenburg Test with the Miller Test for Media Violence

By utilizing the *Miller v. California* test, courts could establish an exception to the Free Speech Clause for media violence that is similar to the obscenity standard.¹⁵⁶ In *Miller*, the United States Supreme Court held that illegal obscenity could be determined by evaluating three factors.¹⁵⁷ First, whether "the average person, applying contemporary community standards would find that the work,

¹⁵¹ Gerothathos, *supra* note 119, at <http://www.cfarfreedom.org/mediaviolence.shtml>.

¹⁵² *See id.*

¹⁵³ Gerbner & Gitlin, *supra* note 116, at http://www.media-awareness.ca/english/resources/articles/violence/violence_speech.cfm.

¹⁵⁴ *Id.*

¹⁵⁵ Gerothathos, *supra* note 119, at <http://www.cfarfreedom.org/mediaviolence.shtml>.

¹⁵⁶ *Miller v. California*, 413 U.S. 15 (1973).

¹⁵⁷ *Id.* at 24.

taken as a whole, appeals to the prurient interest.”¹⁵⁸ Second, whether the work “depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.”¹⁵⁹ The final factor is whether the work, “taken as a whole, lacks serious literary, artistic, political, or scientific value.”¹⁶⁰ Using the modified *Miller* test by substituting “violence” for “obscene sexual content” could satisfy the concern over freedom of expression versus harm to children.¹⁶¹

Advocates for the modified *Miller* test argue “that certain violent content, like pornography is obscene, and therefore entertainment companies should be held liable if they are producing and marketing obscene material.”¹⁶² Furthermore, by holding that excessive media violence is obscene, courts and legislatures would have more autonomy to limit unwarranted violence on television.¹⁶³ Broadcasters could still show violence, but violence that is classified as obscene would undergo stricter regulation.¹⁶⁴

Opponents of the modified *Miller* test believe a chilling effect on the entertainment industry and the prevention of free speech would occur if the test were implemented.¹⁶⁵ Opponents also assert that courts would have difficulty distinguishing good violence from bad violence.¹⁶⁶ Advocates respond that the entertainment industry could adapt to strict standards for violent programming, just as they did with pornography.¹⁶⁷

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Gerothathos, *supra* note 119, at <http://www.cfarfreedom.org/mediaviolence.shtml>.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* See also Sissela Bok, Book Note, 95 Mich. L. Rev. 2160 (1997) (reviewing Kevin W. Saunders, *Violence as Obscenity: Limiting the Media's First Amendment Protection*. (1996)).

¹⁶⁵ Gerothathos, *supra* note 119, at <http://www.cfarfreedom.org/mediaviolence.shtml>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

B. Solution Two: Media Awareness Programs

Another proposed solution to deal with excessive violence on television is through education by creating media literacy awareness programs.¹⁶⁸ The American Academy of Pediatricians suggests that parents become “media-literate” by “watching television with their children and teenagers, discussing the content with them, and initiating the process of selective viewing at an early age.”¹⁶⁹ Similarly, the Recording Industry Association of America (“RIAA”) encourages parents to watch television with their children and discuss the content with them.¹⁷⁰

The RIAA works with recording artists to develop public service materials in its “Talking with Kids about Tough Issues Campaign (“Talking Campaign”).”¹⁷¹ The Talking Campaign helps parents to better communicate with their children about difficult issues facing their lives.¹⁷² For example, school media literacy programs can help children interpret and analyze what they see and hear in the media.¹⁷³ If parents and children became more educated and aware of violence in the media, neither Congress nor the FCC would get the level of pressure they do to impose regulations that prevent minors from accessing the explicit material in the media.¹⁷⁴

C. Solution Three: Creating Universal Standards as a Means to Self-Regulate

A third proposed solution is for politicians and advocacy groups to work with the current system, allowing the media industry to regulate itself, and pushing those working in the industry to be

¹⁶⁸ *Id.*

¹⁶⁹ American Academy of Pediatrics, *Impact of Music Lyrics and Music Video on Children and Youth*, PEDIATRICS, Vol 98, No. 6, at 1220 (Dec.1996) at <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;98/6/1219.pdf> (last visited Apr. 13, 2005).

¹⁷⁰ Gerothathos, *supra* note 119, at <http://www.cfarfreedom.org/mediaviolence.shtml>.

¹⁷¹ *Id.* See also Recording Industry Association of America, *Issues: Parent's View and Tips*, at <http://www.riaa.com/issues/parents/viewandtips.asp> (last visited Sept. 13, 2005).

¹⁷² Gerothathos, *supra* note 119, at <http://www.cfarfreedom.org/mediaviolence.shtml>.

¹⁷³ *Id.* See also Clay Calvert, *Media Bashing at the Turn of the Century: The Threat to Free Speech After Columbine High and Jenny Jones*, 2000 L. REV. M.S.U.-D.C.L. 151, 160 (2000).

¹⁷⁴ Gerothathos, *supra* note 119, at <http://www.cfarfreedom.org/mediaviolence.shtml>.

more accountable for the material they produce.¹⁷⁵ For example, Connecticut Senator Joseph Lieberman urged Hollywood to market its violent content to children more responsibly.¹⁷⁶ Similarly, the FTC made three suggestions to the media industry in a report.¹⁷⁷ First, the FTC suggested that the industry expand or establish codes that prohibit target marketing and impose sanctions for violations.¹⁷⁸ Secondly, the FTC suggested improving self-regulatory system compliance at the retail level.¹⁷⁹ Finally, the FTC suggested increasing parental awareness of ratings and labels.¹⁸⁰ Likewise, the American Academy of Pediatrics urged producers and artists to exercise sensitivity and self-restraint in what they depict given the impact it has on children.¹⁸¹

Although some of the above attempts, like the FTC reports, have succeeded in bringing scrutiny to excessive media violence, each media industry (e.g. television, movies, and radio) has its own system of regulating violence.¹⁸² The various systems make it difficult for parents to choose appropriate materials for their children.¹⁸³ Therefore, creating universal standards applicable to all the major media and entertainment industries could furnish parents and children with proper information so they can make educated decisions about a program's content.¹⁸⁴

VI. CONCLUSION

The balance between preserving First Amendment rights while protecting the safety of America's youth is a slippery slope. It is important to ensure that children are not unduly influenced

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See Federal Trade Commission, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* (Sept. 2000), at <http://www.ftc.gov/reports/violence/vioreport.pdf> (last visited Sept. 19, 2005).

¹⁷⁸ *Id.* at 54

¹⁷⁹ *Id.* at 55.

¹⁸⁰ *Id.* at 55-6.

¹⁸¹ Gerothathos, *supra* note 119, at <http://www.cfarfreedom.org/mediaviolence.shtml>.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

by violence in a manner that causes them to become violent. However, First Amendment rights are essential to the freedoms guaranteed by the United States Constitution, and the government cannot violate constitutional rights simply to protect children. While violence will always be a part of society, the government, parents, children, educators and the media must all work for the greater good. The broadcasting networks need to make a conscious effort not to air impressionable and inappropriate programming at hours when children will be watching. The government should work with parents and the media industry, instead of attempting to create legislation (often unconstitutionally) each time an issue with the media arises. Finally, parents must stop passing the torch of parental responsibility to the media for what it airs, and start taking responsibility in overseeing what programs and media outlets their children are viewing.