

**Calendar No. 953**

106th Congress }  
2d Session }

SENATE

{ REPORT  
{ 106-509

**CHILDREN'S PROTECTION FROM VIOLENT  
PROGRAMMING ACT**

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R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND  
TRANSPORTATION

ON

S. 876



OCTOBER 26 (legislative day, SEPTEMBER 22), 2000.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

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(II)

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### CHILDREN'S PROTECTION FROM VIOLENT PROGRAMMING ACT

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Mr. MCCAIN, from the Committee on Commerce, Science, and  
Transportation, submitted the following

#### REPORT

together with

#### ADDITIONAL VIEWS

[To accompany S. 876]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 876) "A bill to amend the Communications Act of 1934 to require that the broadcast of violent video programming be limited to hours when children are not reasonably likely to comprise a substantial portion of the audience", having considered the same, reports favorably thereon and recommends that the bill (as amended) do pass.

#### PURPOSE OF THE BILL

The purpose of the bill is to protect American children from the harm caused by viewing violence on television.

#### BACKGROUND AND NEEDS

##### I. SUMMARY

Each year, more than 16,500 people are murdered in the United States. One person is killed every 31 minutes. While France has a murder rate of 1.1 homicides per 100,000 people, the United States has a rate of 6.3. The United States murder rate is four times the rate of Europe and 11 times higher than that of Japan. Violence is the second leading cause of death for Americans between the ages of 15 and 24, and is the leading cause of death for African-Americans of that age group.

The growth of violence in our society has prompted Congress to look for various solutions to reduce the extent of this problem. Congress first began to examine the link between television and violence with hearings in the 1950s. Hearings continued throughout the 1960s and early 1970s. The Senate Judiciary Committee studied this issue in 1954 and held several hearings from 1961 to 1964. Their conclusion was that they had “conclusively established a relationship between televised crime and violence and antisocial attitudes and behavior among juvenile viewers.” Since the early 1960s, the Senate Commerce Committee has held 23 hearings on the subject of media violence. In 1972, the Surgeon General released a study demonstrating a correlation between television violence and violent behavior and called for Congressional action.

Each time the issue was raised in Congress, however, the industry responded with promises to regulate itself while at the same time urging against Congressional action. In 1975, Richard Wiley, then Chairman of the Federal Communications Commission (FCC), announced that he had reached an agreement with the broadcasters that made Congressional action unnecessary. This agreement provided that the television industry would voluntarily restrict the showing of violent shows during the family hour. This practice fell out of use in the 1980s.

During the 1980s, the amount of violence on television increased substantially. One study found up to 32 acts of violence on television on children’s programming. The increase in violence coincided with an increase in the amount of time children spend watching television. Children spend, on average, 28 hours per week watching television, which is more time than they spend in school.

In 1990, Congress passed legislation allowing television industry representatives, without violating antitrust laws, to meet, consider, and jointly agree upon voluntary ratings standards. However, in 1993, the Department of Justice concluded that meetings by industry representatives to discuss and develop a voluntary ratings standard did not require a waiver of the antitrust laws. Therefore, it was not necessary to extend the waiver granted to industry in 1990.

In 1996, Congress passed legislation requiring television sets to be equipped with an electronic device, the V-chip, that would allow parents to block certain programming. The legislation also encouraged the video programming and distribution industry to establish rules for rating video programming containing sexual, violent, or other indecent materials and to broadcast signals containing these ratings. In January of 1997, the industry developed an age-based ratings proposal. These proposed age-based ratings came under intense and immediate criticism because they failed to identify specific content that was violent, was sexual in nature, or contained mature dialogue. Thus, the ratings denied parents the ability to block individual programs based on objections to the specific content of the programs. In response to these criticisms, the industry revised its proposed television ratings to include content specific information. The National Association of Broadcasters, the National Cable Television Association, and the Motion Picture Association of America were the principal groups behind these revisions. As revised, the new ratings retained the original age-based categories, and added four content categories to help viewers identify violence

(V), sexual situations (S), coarse or crude indecent language (L), and suggestive dialogue (D).

On July 8, 1997, eight Senators wrote a Dear Colleague letter urging the FCC to approve the revised ratings and ensure that those ratings be used in a fashion compatible with the V-chip. That letter also urged the Senate to allow “a substantial period of governmental forbearance during which further legislation or regulation concerning television ratings, content or scheduling should be set aside.” The signatories to this letter were Republicans John McCain, Trent Lott, Conrad Burns, Orrin Hatch, and Dan Coats, and Democrats Tom Daschle, Patrick Leahy, Carol Moseley-Braun, and Barbara Boxer.

The FCC adopted an order finding the voluntary ratings system to be acceptable on March 12, 1998. The FCC deemed the industry to be sufficiently self-regulating despite the resistance to the ratings by NBC and Black Entertainment Television (BET). NBC refused to use content-specific ratings and relied instead on the age-based ratings only; and BET refused to use any ratings whatsoever. That remains their practice today.

In that same order, the FCC required manufacturers to include V-chip technology to block objectionable programming in at least half of televisions 13 inches or larger by July 1, 1999, and in the remaining half by January 1, 2000. The FCC required that the technology work specifically with the voluntary programming ratings agreed to by industry.

Subsequent to the FCC’s approval of the ratings, a 1998 study by the Kaiser Family Foundation found that 79 percent of shows with moderate levels of violence are not rated for violence. The study further found that while NBC and BET do not rate their programs for content, most of the unrated violent programming is not on those channels. With respect to programming supposedly designed for children, the Kaiser study found that no programs rated TV-G receive a V rating for violence. Moreover, 81 percent of children’s programming containing violence did not even receive the FV rating for fantasy violence. According to the Kaiser study: “The bottom line \* \* \* is clear. Parents cannot rely on the content descriptors, as currently employed, to block all shows containing \* \* \* violence. \* \* \* There is still a significant amount of ‘moderate’ to ‘high’ level \* \* \* violence in shows without content descriptors.” And, with respect to children’s programming, the failure to use the ‘V’ descriptor and the rare use of the FV descriptor leads to the conclusion that “there is no effective way for parents to block out all children’s shows containing violence.”

In April 2000, the Kaiser Family Foundation released a study on the actual effectiveness of the V-chip in American homes. The study concluded that only 9 percent of parents with children aged 2–17 actually owned televisions with V-chips and only one third of those families (three percent of all families with children) were using the V-chip to block objectionable programming. Moreover, the survey indicated that 39 percent of parents had never heard of the V-chip.

Over 200 independent research studies have now been conducted that demonstrate a causal link between viewing violent programming and aggressive behavior. Several national organizations, including the National Institutes for Mental Health, the American

Psychological Association, and the National Parent-Teacher Association have supported a safe harbor approach in addressing television violence.

S. 876, as reported, the Children's Protection from Violent Programming Act, requires the FCC to implement a safe harbor to prohibit violent video programming during hours when children are reasonably likely to comprise a substantial portion of the audience, unless video programming is blockable by electronic means based on its content. In addition, S. 876, as reported, requires the FCC to institute a safe harbor for all programming, blockable or not, if it determines that the V-chip and the content specific ratings are not effectively shielding children from violence on television. S. 876 adopts a similar approach to television violence as that which has been upheld for broadcast and cable indecency. The provisions in S. 876 apply to broadcast television, and cable and satellite television (except for premium channels or pay-per-view programs).

If the FCC determines that a safe harbor is to be instituted, then restricting the hours when violent video programming is shown will be the least restrictive and most narrowly and tailored means to achieve the compelling government interest and to protect children from violence on television. The bill thus meets the "strict scrutiny" test set down by the Supreme Court for "content-based" regulation.

## II. HISTORY OF CONGRESSIONAL CONCERN

Congress has expressed concern about the amount of violence on television for over forty years. Studies conducted in the 1950s showed that violent crime increased significantly early in that decade, and some researchers believed that the spread of television was partly to blame. In response, Congress held hearings concerning violence in radio and television and its impact on children and youth in 1952 and 1954. In 1956, one of the first studies of television violence reported that 4-year-olds who watched the "Woody Woodpecker" cartoon were more likely to display aggressive behavior than children who watched the "Little Red Hen." After the broadcast industry pledged to regulate itself, and after the FCC testified against censorship, no action was taken.

The urban riots of the 1960s again raised concern about the link between television violence and violent behavior. In response to public concern, President Lyndon B. Johnson established the National Commission on the Causes and Prevention of Violence. The Commission's Mass Media Task Force looked at the impact of violence contained in entertainment programs aired on television and concluded that (1) television violence does have a negative impact on behavior; (2) television violence encourages subsequent violent behavior; and (3) "fosters moral and social values about violence in daily life which are unacceptable in a civilized society."<sup>1</sup>

In 1969, Senator John Pastore, Chairman of the Senate Subcommittee on Communications of the Committee on Commerce, petitioned the Surgeon General to investigate the effects of TV violence. In 1972, Surgeon General Jessie Steinfeld released a study<sup>2</sup>

<sup>1</sup>U.S. National Commission on the Causes and Prevention of Violence. To Establish Justice, To Insure Domestic Tranquility. Final Report of the National Commission on the Causes and Prevention of Violence. Washington, U.S. Govt. Print. Off., December 1969, p. 199.

<sup>2</sup>U.S. Dept. of Health, Education, and Welfare. The Surgeon General's Scientific Advisory Committee on Television and Social Behavior. Television and Growing Up: The Impact of Tele-

demonstrating a correlation between television violence and violent behavior and called for Congressional action. The five-volume report concluded that there was a causal effect from TV violence, but primarily on children presupposed to be aggressive. The then FCC Chairman, Dean Burch, declined to regulate violence, saying that the FCC should not make fundamental programming judgments.

Several more hearings were held after the release of the Surgeon General's report in the 1970's. Despite studies showing an increase in violent programming, little regulatory or Congressional action was taken. Discussions continued regarding the relationship between violence in society and what was shown on television. The continued concerns prompted Congress to request the FCC study possible solutions to the problems of television violence and sexually-oriented materials.

On February 20, 1975, under the direction of then Chairman Wiley, the FCC issued its Report on the Broadcast of Violent and Obscene Material. The report recommended statutory clarification regarding the Commission's authority to prohibit certain broadcasts of obscene and indecent materials. However, with regard to the issue of television violence, the FCC did not recommend any congressional action because the industry had recently adopted a voluntary family viewing period as part of a pro-family television code.<sup>3</sup> The Television Code, however, fell out of use in the 1980's.

During the 1980s, no further measures were taken either by Congress or by the FCC to restrict television violence. However, during this period, over 200 studies were conducted demonstrating a causal link between viewing violent scenes and engaging in aggressive behavior. In addition, the growth of media outlets, especially cable television, also led to an increase in the amount of violence on television.

During the 101st Congress, then Senator Paul Simon (D-IL) introduced the Television Program Improvement Act. That legislation granted an antitrust exemption to permit television industry representatives to meet, consider, and jointly agree upon implementing voluntary standards that would lead to a reduction in television violence. Subsequent to the bill's enactment, industry discussions led to the release, in December 1992, of joint standards regarding the broadcasting of excessive television violence. For example, the standards stated that "gratuitous or excessive depictions of violence \* \* \* are not acceptable," and that "all depictions of violence should be relevant and necessary to the development of character, or to the advancement of theme or plot." Six months later, in June 1993, the networks adopted a policy to warn viewers about programs that might contain excessive violence. That policy required the following statement to be transmitted before and during the broadcasting of violent programs: "Due to some violent content, parental discretion is advised." The Independent Television Association, the trade group representing many of the television stations not affiliated with one of the networks, adopted a similar voluntary code.

vised Violence. Report to the Surgeon General. U.S. Public Health Service. Washington, U.S. Govt. Print. Off., 1972, p. 279.

<sup>3</sup>On February 4, 1975, the National Association of Broadcasters (NAB) Television Code Review Board adopted a code implementing a family viewing period between 7 to 9 p.m., viewer advisories, and warnings to publishers of the advisories.

Despite these efforts by the industry, there were many in Congress that believed that the voluntary code did not adequately address the concerns of parents over television violence. In October 1993, the Senate Commerce Committee held a hearing on television violence to consider a variety of legislative proposals. Attorney General Janet Reno testified that all the legislation currently pending before the Committee, including S. 1383, the Children's Protection From Violent Programming Act of 1993 (Hollings-Inouye), S. 973, the Television Report Card Act of 1993 (Dorgan), and S. 943, the Children's Television Violence Protection Act of 1993 (Durenberger), would be constitutional. The major broadcast networks and other industry representatives argued that the amount of violent programming had declined. The industry representatives also requested more time to implement proposed warning labels before the Congress considered legislation. No further action was taken on the bills in the 103rd Congress.

Senator Simon's Television Improvement Act provided an antitrust exemption for three years until 1993. In 1993, he requested the views of the Department of Justice on the antitrust implications of the collective efforts of the television industry to address the effects of violence on television. In a response, Sheila Anthony of the Department of Justice stated that the Department did not believe that the continuance of industry meetings to develop a ratings standard presented a substantial antitrust risk.<sup>4</sup> Accordingly, the Department of Justice believed that industry members were free to meet and develop a ratings standard.

During floor consideration of S. 652, the Telecommunications Competition and Deregulation Act of 1995, the Senate adopted an amendment based on S. 332, the Children's Media Protection Act of 1995, offered by Senators Conrad and Lieberman. The amendment required all new television sets to be equipped with a programmable chip that would allow parents to block out specific programs. In addition, the amendment required the establishment of a ratings commission if the industry fails to set up a voluntary ratings system within one year. The Senate adopted the amendment by voice vote, but after a motion to table, the amendment was defeated by a vote of 73-26.

On July 11, 1995, the Commerce Committee held its second hearing on television violence to consider pending measures, including S. 470, the Hollings safe harbor legislation. S. 470 (104th Congress) was identical to S. 1383 (103rd Congress). The Committee subsequently reported S. 470 without amendment on August 10, 1995 by a recorded vote of 16 yeas and 1 nay, with two Senators not voting. Senator Hollings wrote to then Majority Leader Dole, and subsequently to Majority Leader Lott, requesting floor time for S. 470. However, due to several holds placed on the legislation, the full Senate did not consider S. 470 during the 104th Congress.

As part of the 1996 Telecommunications Act, the 104th Congress adopted legislation concerning the V-chip and ratings system. Based upon those provisions, manufacturers of television sets with a 13-inch or larger screen must install an electronic device in each set manufactured after 1998. This device, dubbed the V-chip for vi-

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<sup>4</sup>Letter to Paul Simon, Senator, from Sheila Anthony, Assistant Attorney General, DOJ, (November 29, 1993).

olence, could be programmed to block programming with certain ratings. To make the V-chip work, the 1996 Act encouraged the video programming industry to “establish voluntary rules for rating video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children,” and to broadcast voluntarily signals containing these ratings.

On February 29, 1996, all segments of the television industry created the “TV Ratings Implementation Group” (ratings group),<sup>5</sup> headed by Motion Picture Association of America (MPAA) President Jack Valenti. The group submitted its voluntary age-based ratings proposal to the FCC on January 17, 1997. After industry updated the ratings to include content specific indicators, the FCC approved the ratings system on March 12, 1998. In that order, the FCC also required manufacturers to install V-chips in half of all televisions 13 inches or larger by July 1, 1999, and in all televisions by January 1, 2000.

### III. RESEARCH ON TV VIOLENCE

Research has consistently shown a link between viewing violence on television and violent behavior. Following the Surgeon General’s 1972 report, significant research was conducted detailing the correlation between viewing violent television and later aggressive behavior. Several of the leading medical associations published similar conclusions, including the American Medical Association, the American Psychological Association, the American Pediatric Association, and the American Academy of Pediatrics.<sup>6</sup>

For instance, a study by Tanis Williams supports the conclusion that there is a direct correlation between television violence and aggressive behavior in children. Williams, a researcher at the University of British Columbia studied the impact of television on a small rural community in Canada that received television signals for the first time in 1973. The researchers observed 45 first and second graders for signs of inappropriate aggressive behavior. Two years later, the same group was observed and it was found that the aggressive behavior in the children increased by 160 percent as compared to a control group that saw no noticeable increase in aggressive behavior.<sup>7</sup>

In 1982, the National Institute of Mental Health (NIMH) produced a new report entitled *Television and Behavior: Ten Years of Scientific Progress and Implications for the Eighties*. In contrast to the Surgeon General’s 1972 report, the NIMH concluded that TV violence affects all children, not just those predisposed to aggression. The 1982 report reaffirmed the conclusions of the earlier studies stating: “After 10 more years of research, the consensus among most of the research community is that violence on television does lead to aggressive behavior by children and teenagers who watch the programs. This conclusion is based on laboratory experiments

<sup>5</sup> The Implementation Group included: members from the broadcast networks; affiliated, independent and public television stations; cable programmers; producers and distributors of cable programming; entertainment companies; movie studios; and members of the guilds representing writers, directors, producers, and actors.

<sup>6</sup> Centerwall, Brandon S., *Television and Violence: The Scale of the Problem and Where to Go From Here*. JAMA, v. 267, no. 22, June 10, 1992, p.3059.

<sup>7</sup> Centerwall, Brandon. *Television and Violent Crime*, Public Interest, No.111, Spring 1993. p.56.

and on field studies. Not all children become aggressive, of course, but the correlations between violence and aggression are positive. In magnitude, television violence is as strongly correlated with aggressive behavior as any other behavioral variable that has been measured. The research question has moved from asking whether or not there is an effect to seeking explanations for the effect.”<sup>8</sup>

Not all research, though, supported this conclusion. In 1982, NBC sponsored a study of the issue and reported there was no correlation. In addition, a 1984 analysis of all the available studies by Jonathan L. Freedman, of the Department of Psychology at the University of Toronto, concluded that the published studies did not support the hypothesis that viewing habits of children resulted in subsequent changes in behavior in children. The Congressional Research Service (CRS) reports that both the NBC study and the Freedman studies have been discounted by additional research. In fact, a re-analysis of the NBC study revealed a direct correlation between viewing violence and harmful behavioral changes in children.

More recent research adds credibility to the findings of the National Institute of Mental Health. Two of the most widely publicized empirical studies adopt two different methodologies, but arrive at the same result. In one of the studies, Dr. Leonard Eron followed a group of children in upstate New York State and examined them at ages eight, 19, and 30. The study found that the more the participants watched TV at age eight, the more serious were the crimes of which they were convicted by age 30, the more aggressive was their behavior when drinking, and the harsher was the punishment which they inflicted on their own children. Similar experiments were conducted in Australia, Finland, Israel, and Poland, and the outcome was the same in each experiment.

Another study was conducted by Dr. Brandon Centerwall, a Professor of Epidemiology at the University of Washington. He studied the homicide rates in South Africa, Canada and the United States in relation to the introduction of television. In all three countries, Dr. Centerwall found that the homicide rate doubled about 10 or 15 years after the introduction of television. According to Dr. Centerwall, the lag time in each country reflects the fact that television exerts its behavior-modifying effects primarily on children, whereas violent activity is primarily an adult activity. Dr. Centerwall concludes that “long-term childhood exposure to television is a causal factor behind approximately one-half of the homicides committed in the United States.” This report<sup>9</sup> concerning the harmful impact of viewing television violence on preadolescent children found that extensive exposure to television violence could lead to chronic effects extending into later adolescence and adulthood.

These studies explore the link between violent television and violent behavior. However, violent behavior may not be the only harm caused by television violence. The APA believes that the harm caused by violent television is broader and includes fearfulness and callousness:

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<sup>8</sup>The NIMH Report, p.6.

<sup>9</sup>Centerwall, p. 3059-3063.

(1) Viewing violence increases fear of becoming a victim of violence, with a resultant increase in self-protective behaviors and increased mistrust of others.

(2) Viewing violence increases desensitization to violence, resulting in calloused attitudes toward violence directed at others and a decreased likelihood to take action on behalf of the victim when violence occurs (behavioral apathy).

(3) Viewing violence increases viewers' appetites for becoming involved with violence or exposing themselves to violence.

#### IV. THE GROWTH OF TV VIOLENCE

According to several studies, television violence increased during the 1980s both during prime-time and during children's television hours. Children between the ages of two and 11 watch television an average of 28 hours per week. According to a University of Pennsylvania study, in 1992 a record 32 violent acts per hour were recorded during children's shows. The American Psychological Association (APA) estimates that a typical child will watch 8,000 murders and 100,000 acts of violence before finishing elementary school.

A similar story exists for prime-time programming. The National Coalition on Television Violence (NCTV), a monitoring and advocacy group, found that 25 percent of the prime-time shows in the 1992 fall season contained very violent material.

In August 1994, the Center for Media and Public Affairs released the results of a new survey showing an increase in the amount of violence on a single day of television in Washington, D.C. As it did in 1992, the Center monitored 10 channels of programming (six broadcast channels and 4 cable programs) on a single day in April. The Center found a 41 percent increase in television violence over the findings of its 1992 study. The Center counted 2,605 violent scenes in that day, an average of almost 15 scenes of violence per channel per hour. Life-threatening violence increased by 67 percent and incidents involving gun play rose 45 percent. The Center found that the greatest sources of violence on television came from "promos" for upcoming shows and movies, which were up 69 percent from 1992. Only toy commercials saw a reduction in violence; violence in toy commercials dropped 85 percent.

Sponsors of these studies believe that there are several reasons for this increased TV violence. One cause is the increase in reality shows, such as *Cops* and *Real TV*. These shows describe or provide tape footage from actual police activity, including efforts to subdue suspects resisting arrest. Another reason is the increase in violence shown on the nightly news programs, which may in part result from the increase in violent acts in society. A very significant factor is the increase in cable programming that seeks smaller, niche audiences. According to one study, three of the top four most violent channels were cable channels, while the three major network affiliates and the public broadcasting affiliate were at the bottom of the list, the 144 music videos on MTV included almost as much violence as the three network affiliates combined.

Some believe that the most violent programs are cartoons. The inclusion of fantasy or animated characters in the compilation of violent programming is controversial. Some observers believe that cartoon violence should be distinguished from real-life violence that

may glamorize violence. Many child psychologists, however, believe that young children are especially vulnerable to violent programs because they are unable to distinguish between fantasy and reality.

Violence continues to be prevalent on television. In March of 1997, the Center for Communications and Social Policy released a new study on television violence. The study concluded that there has been no meaningful change in the presentation of violence on television during the last two years. Researchers identified over 18,000 violent incidents in a sample of 2,000 hours drawn from 23 cable and broadcast channels during the 1995–96 television season. Over half of all violent incidents still fail to show the victim suffering any pain. Long-term negative consequences from violence are portrayed in only 16 percent of programs this year, compared to 13 percent last year. Programs that employ a strong anti-violence theme remained extremely rare, holding constant at 4 percent of all violent shows last year. More recently, a \$3.5 million study commissioned by the National Cable Television Association (NCTA) indicated that, from 1996 to 1998, the level of television violence was relatively constant. That same study, however, found that violence is increasing during prime time programming (up 14 percent on the Big Four networks, up 7 percent on independent broadcast stations, and up 10 percent on basic cable). Almost every study agrees, moreover, that there is a significant amount of violence on television today during time periods when children are watching. Moreover, the manner in which violence is portrayed on television may be a cause for concern. For example, the NCTA study reports that: “Much of TV violence is still glamorized \* \* \* Most violence on television continues to be sanitized \* \* \* Less than 20 percent of violent programs portray the long-term damage of violence to the victim’s family, friends, and community \* \* \* Much of the serious physical aggression on television is still trivialized \* \* \* Very few programs emphasize an anti-violence theme.”

In addition, as discussed earlier, a 1998 study by the Kaiser Family Foundation indicates that 79 percent of shows with moderate levels of violence are not rated for violence. The study further found that while NBC and BET do not rate their programs for content, most of the unrated violent programming is not on those channels. With respect to programming supposedly designed for children, the Kaiser study found that no programs rated TV–G receive a V rating for violence. Moreover, 81 percent of children’s programming containing violence did not even receive the FV rating for fantasy violence.

#### V. ANECDOTAL EVIDENCE OF THE EFFECT OF TV VIOLENCE

In addition to the research, there are several compelling examples of the effects of television on children. In May 1979, Johnny Carson used a professional stuntman to hang Carson on stage. After a noose was placed around Carson’s neck, he was dropped through a trap door and emerged unharmed. The next day, a young boy, Nicholas DeFilippo, was found dead with a rope around his neck in front of a TV set tuned to NBC. The parents of the child sued NBC for negligence, but lost their suit. Twenty-six people died from self-inflicted gunshot wounds to the head after watching the

Russian Roulette scene in the movie "The Deer Hunter" when it was shown on national TV.

"Beavis and Butt-head," a cartoon which at one time aired every day at 7:00 p.m. on MTV, is a parody of two young teenagers and their view of daily life. The two characters engage in what some observers view as irresponsible activity, including cruelty to animals. In particular, the show occasionally has the two characters suggesting that setting objects on fire is "cool." It has been alleged that the cartoon's depiction of unsafe fireplay led one five-year-old in Ohio to set his family's mobile home on fire, causing the death of his two-year-old sister in 1993. Although MTV denies any connection, it subsequently removed all references to fire in future episodes, and has rescheduled the program to 10:00 p.m.

#### VI. RESPONSE BY THE TELEVISION COMMUNITY

Although the broadcast community now admits that there is some link between violent television and violent behavior, the broadcasters join with the other sectors of the industry in believing that these findings exaggerate the importance of television violence. They argue, for instance, that the Eron and Centerwall studies contain methodological problems because they fail to take into account other factors that may contribute to the violent behavior. They argue that income level, socioeconomic status, and especially the amount of supervision by parents have a greater impact on violent behavior than television. One study noted that an increase in violent behavior by children also was found after children watched Sesame Street, perhaps the most successful educational television show. They note that the homicide rate for white males in the United States and Canada stabilized 15 years after the introduction of television and did not increase in the 1980s despite the increase in the amount of television violence. They argue further that in some countries the introduction of television did not result in increased homicide rates.

#### A. PUBLIC SERVICE ANNOUNCEMENTS

Efforts undertaken by industry include public service announcements (PSAs). For example, in November 1993, NBC launched a campaign called "The More You Know" focusing on teenage violence and conflict resolution. However, the amount of time spent on PSAs has decreased during the last few years.

In speeches before the Cellular Telecommunications Industry Association and the National Association of Broadcasters, Reed Hundt, then Chairman of the FCC expressed concern about the diminishing time being spent on PSAs. In 1993, the Big Four Networks averaged 12 seconds of PSAs per prime-time hour, but by November of 1996 that number was down to 6.2 seconds.<sup>10</sup> Time spent on PSAs is being eroded, in part because broadcasters are spending more time on commercials and promotions. In 1995 and 1996, for example, promotional time at the broadcast networks has increased more than 25 percent, and in 1996, both CBS and NBC hit all time highs in the amount of promotional time spent per prime-time hour.<sup>11</sup>

<sup>10</sup> Richard Katz, Television: Networks Hit on PSA Loads (Mediaweek, April 14, 1997).

<sup>11</sup> Kyle Pope, Networks' Self-promotion Ads Irk FCC (The Arizona Republic, April 11, 1997).

## B. COMMON TELEVISION CODE

In December 1992, as previously referenced in this report, three networks (ABC, NBC, and CBS) adopted a common set of "Standards for the Depiction of Violence in Television Programs." Some observers have criticized these efforts because the standards adopted by the networks appear weaker than the networks' own standards.

## C. WARNING LABELS

In June, 1993, the networks also decided voluntarily to place "warning labels" before any show which the networks believed to contain violent material. The three networks committed that, before and during the broadcasting of various series, movies, made-for-TV movies, mini-series and specials that might contain excessive violence, the following announcement would be made: "Due to some violent content, parental discretion is advised." The warning is also included in advertising and promotional material for certain programs and is offered to newspapers and magazines that print television viewing schedules.

A similar advisory program was adopted by the Independent Television Association (INTV—the trade group representing many of the 350 television stations not affiliated with one of the three networks). All the station members of INTV have adopted this voluntary code.

Despite the institution of warning labels or perhaps in light of them, studies demonstrated a significant rise in the level of violence on television. As stated above, there was a 41 percent increase in the level of television violence between 1992 and 1994. In 1994, there were 2,605 violent scenes in a day, an average of almost 15 scenes of violence per channel per hour.

## D. INDUSTRY'S PROPOSED RATINGS SYSTEM

Pursuant to the Telecommunications Act of 1996, the industry proposed a ratings system in December of 1996. The voluntary ratings system, called the TV Parental Guidelines, consisted of six age-based ratings categories, which resemble the Motion Picture Ratings System. TV-Y, TV-Y7, TV-G, TV-PG, TV-14, and TV-M. The industry responded to the immediate and harsh criticism of these ratings by developing additional, specific ratings for content.

The industry ratings system, called the TV Parental Guidelines, consists of the following age-based and content specific ratings categories. This system was approved by the FCC in 1998. The following categories apply to programs designed for the children:

**TV-Y ALL CHILDREN.**—This program is designed to be appropriate for all children. Whether animated or live-action, the themes and elements in this program are specifically designed for a very young audience, including children from ages two to six. This program is not expected to frighten younger children.

**TV-Y7 DIRECTED TO OLDER CHILDREN.**—This program is designed for children age seven and above. It may be more appropriate for children who have acquired the developmental skills needed to distinguish between make-believe and reality. Themes and elements in this program may include mild physical or comedic violence, or may frighten children under the

age of seven. Therefore, parents may wish to consider the suitability of this program for their very young children. Note: For those programs where fantasy violence may be more intense or more combative than other programs in this category, such programs will be designated TV-Y7-FV.

The following categories apply to programs designed for the entire audience:

TV-G GENERAL AUDIENCE.—Most parents would find this program suitable for all ages. Although this rating does not signify a program designed specifically for children, most parents may let younger children watch this program unattended. It contains little or no violence, no strong language and little or no sexual dialogue or situations.

TV-PG PARENTAL GUIDANCE SUGGESTED.—This program contains material that parents may find unsuitable for younger children. Many parents may want to watch it with their younger children. The theme itself may call for parental guidance and/or the program contains one or more of the following: moderate violence (V), some sexual situations (S), infrequent coarse language (L), or some suggestive dialogue (D).

TV-14 PARENTS STRONGLY CAUTIONED.—This program contains some material that many parents would find unsuitable for children under 14 years of age. Parents are strongly urged to exercise greater care in monitoring this program and are cautioned against letting children under the age of 14 watch unattended. This program contains one or more of the following: intense violence (V), intense sexual situations (S), strong coarse language (L), or intensely suggestive dialogue (D).

TV-MA MATURE AUDIENCE ONLY.—This program is specially designed to be viewed by adults and therefore may be unsuitable for children under 17. This program contains one or more of the following: graphic violence (V), explicit sexual activity (S), or crude indecent language (L).

All television programming except for news and sports are supposed to be rated according to these guidelines. The ratings are assigned in most cases by broadcast and cable networks and producers. The ratings are supposed to appear before each program, with the ratings icons appearing for 15 seconds at the beginning of each program in the upper left-hand corner of the television screen. Ninety percent of all programming now contains some encoded ratings which are capable of interacting with the V-chip.

While the ratings group supplies the guidelines and explanations to newspapers and other program listings, including TV Guide and cable's Preview Channel, many outlets do not depict the ratings.

#### VII. ACTIONS IN OTHER COUNTRIES

In 1994, the Canadian broadcasters, under pressure from the Canadian Government, instituted a new voluntary Code Against Violence for television that took effect in 1997. The code bans shows with gratuitous violence and limits those shows that include scenes of violence suitable for adults only to the hours after 9 p.m. The code places limits on children's shows by requiring that violence not be a central theme. Also, it stipulates that, in children's pro-

grams, violence not be shown as a preferred way of solving problems and that the consequences of violence be demonstrated.

Other countries that have adopted rules restricting violence to certain hours of the day include Australia, France, Italy and New Zealand.

#### VIII. CONSTITUTIONAL ANALYSIS

Some have questioned whether limiting the distribution of violent programming to certain hours of the day would be consistent with the First Amendment of the Constitution. Attorney General Janet Reno responded to some of these questions when she testified in October, 1993, that the safe harbor approach in S. 1383 and the other bills before the Committee at that time were constitutional.<sup>12</sup>

There are several exceptions to the First Amendment that permit government regulation of content. According to a study by the Congressional Research Service (CRS),<sup>13</sup> the Supreme Court has allowed Government regulation of obscenity, indecency, child pornography, and speech that creates a clear and present danger. In addition, CRS notes that the courts provide only limited First Amendment protection to commercial speech, to defamation, and to speech that can be harmful to children. CRS further notes that “even speech that enjoys the most extensive First Amendment protection may be restricted on the basis of its content if the restriction passes ‘strict scrutiny.’”<sup>14</sup> Finally, CRS notes that the courts will allow certain time, place and manner restrictions.

While no court has ruled specifically on the constitutionality of the approach taken by S. 876, there appear to be many lines of decisions that would support the constitutionality of the safe harbor approach to television violence. S. 876 could fall within the ambit of the clear and present danger exception, the limitations on commercial speech and speech harmful to children, the strict scrutiny test, and a regulation of time, place and manner. The following discussion focuses on the recent opinions concerning broadcast indecency and the strict scrutiny test as examples of the lines of analysis that appear to support the constitutionality of the safe harbor approach. This discussion is not exhaustive, and there may well be arguments to justify the legislation which do not appear below.

##### A. SAFE HARBOR UNDER AN ACT IV CASE ANALYSIS

A Court of Appeals decision in *ACT IV*<sup>15</sup> to uphold the safe harbor for broadcast indecency provides, perhaps, the best indication that the courts would uphold the safe harbor approach for television violence.

In 1992, Congress enacted legislation sponsored by Senator Robert Byrd to prohibit the broadcast of indecent programming during certain hours of the day. The Byrd amendment allowed indecent

<sup>12</sup>Testimony of Attorney General Janet Reno, Hearing on S. 1383, the Children’s Protection from Violent Programming Act of 1993, et al., before the Senate Committee on Commerce, Science, and Transportation, October 20, 1993, pp. 30, 42.

<sup>13</sup>“Freedom of Speech and Press: Exceptions to the First Amendment”, Henry Cohen, American Law Division, Congressional Research Service, April 7, 1992, Revised July 6, 1993.

<sup>14</sup>“Strict scrutiny” requires the government to show that the restriction serves to promote a compelling Governmental interest and is the least restrictive means to further the articulated interest. See, *Sable Communications of California v. Federal Communications Commission*, 492 U.S. 115, 126 (1989) (Sable).

<sup>15</sup>*Action for Children’s Television, et al. v. FCC, et al.*, 58 F.3d 654 (D.C. Cir. 1995) cert. denied 116 S.Ct. 701 (1996).

broadcasts between the hours of midnight and 6 a.m., except that public broadcast stations that go off the air at midnight or before were permitted to air indecent broadcasts as early as 10 p.m.<sup>16</sup>

On June 30, 1995, the United States Court of Appeals for the District of Columbia, sitting en banc, upheld the constitutionality of the Byrd amendment in *ACT IV*. The court found, in a seven to four opinion, that the safe harbor approach, also called “channeling,” satisfied the two-part “strict scrutiny” test.<sup>17</sup>

The court found that the Government met the first prong of the test by establishing that the Government had a “compelling governmental interest” in protecting children from the harm caused by indecency. The court found two compelling governmental interests, and left open the possibility of a third.<sup>18</sup> First, the court found that “the Government has a compelling interest in supporting parental supervision of what children see and hear on the public airwaves.”<sup>19</sup> The court cited *Ginsberg v. New York*, 390 U.S. 629, 638, for the proposition that Government has a “fundamental interest in helping parents exercise their ‘primary responsibility for [their] children’s well-being’ with laws designed to aid [in the] discharge of that responsibility.”<sup>20</sup> Second, the court found that “the Government’s own interest in the well-being of minors provides an independent justification for the regulation of broadcast indecency.” It quoted the Supreme Court again in *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) for the proposition that “\* \* \* a State’s interest in safeguarding the physical and psychological well-being of a minor is compelling. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.”<sup>21</sup>

The court found that the legislation met the second prong of the test because it uses the “least restrictive means” to accomplish that governmental interest. Here, the court noted that, in choosing the hours during which indecency would be banned, the Government must balance the interests of protecting children with the interests of adults. “The question, then, is what period will serve the compelling governmental interests without unduly infringing on the adult population’s right to see and hear indecent material.”<sup>22</sup>

After reviewing the evidence compiled by the FCC, the court upheld the determination that a ban on indecent programming during the hours of 6:00 a.m. to 10:00 p.m. satisfied the balance and was the least restrictive means. The court noted that, to the extent

<sup>16</sup> Congress had already prohibited obscene and indecent broadcasts many years earlier. Section 1464 of title 18 of the United States Code prohibits the broadcast of any obscene, indecent, or profane language by means of radio communication. This section was enacted as part of section 326 of the Communications Act of 1934 and was moved into title 18 in 1948.

<sup>17</sup> While the court upheld the safe harbor approach implemented by the Byrd amendment, it found that the different treatment of certain public broadcast stations and other stations was unjustified. The court thus directed the FCC to modify its rules to apply a consistent safe harbor of 6 a.m. to 10 p.m. for all broadcast stations.

<sup>18</sup> The court found it unnecessary to address the FCC’s contention that there is also a compelling Governmental interest in protecting the home against intrusion by offensive broadcasts. *ACT IV*, at 13.

<sup>19</sup> *ACT IV*, at 661.

<sup>20</sup> *ACT IV*, at 661.

<sup>21</sup> *ACT IV*, at 661.

<sup>22</sup> *ACT IV*, at 665.

that such a ban affected the rights of adults to hear such programming, “adults have alternative means of satisfying their interest in indecent material at other hours in ways that pose no risk to minors [such as renting videotapes, computer services, audio tapes, etc.]”<sup>23</sup> The court stated further that, “[a]lthough the restrictions burden the rights of many adults, it seems entirely appropriate that the marginal convenience of some adults be made to yield to the imperative needs of the young.”<sup>24</sup>

The reasoning of the court in *ACT IV* appears to apply equally to S. 876. As with indecency, the Government has a compelling interest in protecting the moral and psychological well-being of children against the harm of viewing television violence. Also as with indecency, restricting television violence to certain hours of the day balances the rights of adults to watch violent programming with the interests of protecting children. Adults have other ways of obtaining access to violent programming just as they have other ways of obtaining indecent materials. Thus, the decision upholding the safe harbor for indecency appears to provide strong support for finding a safe harbor for violence to be constitutional.

#### B. THE STRICT SCRUTINY TEST

The strict scrutiny test is the most stringent test used to analyze the constitutionality of a First Amendment challenge. The *ACT IV* court as discussed above, used a strict scrutiny analysis in determining constitutionality. The following discussion further assesses the safe harbor approach under strict scrutiny, not because of the certainty that this is the test that will be applied, but because, if the safe harbor approach can pass the strict scrutiny test, it could certainly pass any lesser standard of review. Regulation will pass the strict scrutiny test if the regulation is narrowly tailored to meet a compelling government interest.

There is good reason to believe that S. 876 would pass the strict scrutiny test, and not just because of the results of the strict scrutiny analysis under the *ACT IV* case. In some respects, the constitutionality of a safe harbor approach for violence could be easier to sustain than for indecency. As opposed to the indecency issue, Congress has developed a long and detailed record to justify the legislation. Congress has held hearings to explore various approaches to television violence in every decade since the 1950's. This Committee alone has held 23 hearings over the past three decades on this topic, including at least three hearings specifically on the safe harbor approach. The Committee has laid extensive groundwork for considering the least restrictive means of protecting children from violence on television. By contrast, the Byrd amendment, the legislation at issue in the *ACT IV* case, was adopted on the Senate floor without any Committee hearings. Furthermore, as Chief Judge Edwards of the D.C. Circuit has acknowledged twice, there is much stronger evidence that viewing violence on television causes harm to children than any proposed harm caused by indecency.<sup>25</sup>

<sup>23</sup>*ACT IV*, at 666.

<sup>24</sup>*ACT IV*, at 667.

<sup>25</sup>“There is significant evidence suggesting a causal connection between viewing violence on television and antisocial violent behavior. . . .” (emphasis in original) *ACT IV*, Edwards, C.J., dissenting, at 671.

1. THE COMPELLING GOVERNMENTAL INTEREST.—The Government has several compelling interests in protecting children from the harmful effects of viewing violence: an interest in protecting children from harm, an interest in protecting society in general, an interest in helping parents raise their children, and an interest in the privacy of the home. Each of these are discussed below.

A. HARM TO CHILDREN.—Government has a compelling interest in protecting children from the harm caused by television violence. As several witnesses testified, there is little doubt that children's viewing of violence on television encourages them to engage in violent and anti-social behavior, either as children or later as adults. More than 200 independent studies demonstrate a causal connection between viewing violence and violent behavior.<sup>26</sup> These studies have included field studies of the effect of television on persons in real life and laboratory studies. While the studies concluded in 1972 by the Surgeon General concluded that there was a causal relationship between viewing violence and behavior primarily among those children predisposed to violence, more recent research by NIMH and others demonstrates that violent television affects almost all children. Dr. Eron stated in his testimony before the Committee as follows:

One of the places violence is learned is on television. Over 35 years of laboratory and real-life studies provide evidence that televised violence is a cause of aggression among children, both contemporaneously, and over time. Television violence affects youngsters of all ages, both genders, at all socio-economic levels, and all levels of intelligence. The effect is not limited to children who are already disposed to being aggressive, and it is not restricted to the United States.<sup>27</sup>

While it is perhaps axiomatic that children who become violent because of television suffer harm, it is worth noting that such children suffer harm in many ways. For example, they can become anti-social, distant from others, and unproductive members of society, especially if their actions arouse fear in other people. They can suffer from imprisonment or other forms of criminal punishment if their violence leads to illegal behavior.

Violent behavior may not be the only harm caused by viewing violent television. According to the American Psychological Association, viewing violence can cause fearfulness, desensitization, or an increased appetite for more violence. In other words, as with "obscenity" and "indecentcy", the harm from television violence may result simply from viewing violent material, even if no violent behavior follows such viewing.

B. HARM TO SOCIETY.—A related compelling Governmental interest is the need to protect society as a whole from the harmful results of television-induced violent behavior. A child who views excessive amounts of television violence is not the only person who suffers harm. As Dr. Eron testified, children who watch excessive amounts of television when they are young are more "prone to be convicted for more serious crimes by age 30; more aggressive while

<sup>26</sup> Among these are studies conducted by the American Medical Association, the American Psychological Association, the National Institute of Mental Health, the Center for Disease Control, and numerous studies by individual researchers.

<sup>27</sup> Written Testimony of Dr. Leonard Eron, Professor of Psychology and Senior Research Scientist, Institute for Social Research, University of Michigan before the Senate Committee on Commerce, Science and Transportation, Communications Subcommittee, May 18, 1999.

under the influence of alcohol; and, harsher in the punishment they administered to their own children.”<sup>28</sup>

C. HELPING PARENTS SUPERVISE THEIR CHILDREN.—In addition to the Governmental interests in protecting children and society from harm, the courts have also recognized a compelling governmental interest in helping parents supervise what their children watch on television. In *Ginsberg*, the Supreme Court upheld a New York statute making it illegal to sell obscene materials to children. The Court noted that it was proper for legislation to help parents exercise their “primary responsibility for [their] children’s well-being with laws designed to aid [in the] discharge of that responsibility.”<sup>29</sup>

D. PRIVACY OF THE HOME.—“The Government’s interest in protecting the privacy of the home from intrusion by violent programming may provide a fourth compelling Governmental interest. The Supreme Court has recognized that “in the privacy of the home \* \* \* the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”<sup>30</sup> The right to privacy in one’s home was recently used to uphold legislation limiting persons from making automated telephone calls to residences and small businesses.<sup>31</sup> Just as subscribers to telephones do not give permission to telemarketers to place automated telephone calls, the ownership of a television does not give programmers permission to broadcast material that is an intrusion into the privacy of the home.

2. THE LEAST RESTRICTIVE MEANS.—Opponents of the legislation argue that the safe harbor approach to television violence is not the least restrictive means of accomplishing the goals of reducing the exposure of children to television violence. Some in the broadcast industry, for instance, argue that the industry should be trusted to regulate itself to reduce the amount of violence. Parents should bear the primary responsibility for protecting their children, according to some observers. Others say that the warnings and advisories that many programmers now add to certain shows are a lesser restrictive means of protecting children. In addition, opponents of legislation urge that the V-chip and the television ratings system provide a less restrictive means of protecting children.

The most recent case addressing this issue is *United States v. Playboy*, 120 S. Ct. 1878 (May 22, 2000). In *Playboy*, the Supreme Court invalidated a provision added in the Telecommunications Act of 1996 that required cable operators to either scramble sexually explicit channels in full, or limit programming on such channels to hours when children are not likely to be watching. The Court held that the provision was a content based restriction. The Court further held that the requirements of the provision were not the least restrictive means of achieving the government’s goal. The Court found that another provision in the Telecommunications Act, that

<sup>28</sup>Written Testimony of Dr. Eron before the Senate Committee on Commerce, Science, and Transportation Communications Subcommittee, July 12, 1995, p. 2. Dr. Eron further warns that “. . . like secondary smoke effects, . . . don’t think that just because you have protected your child from the effects of television violence that your child is not affected. You and your child might be the victims of violence perpetrated by someone who as a youngster, did learn the motivation for and the techniques of violence from television.” Written Testimony of Dr. Eron’s July 12, 1995.

<sup>29</sup>*Ginsberg v. New York*, 390 U.S. 629,639 (1968).

<sup>30</sup>*FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

<sup>31</sup>*Moser v. FCC*, (1995, CA9 Or), 46 F3d 970.

required cable operators to fully block any channel upon request by a subscriber—was a less restrictive alternative. The Court added that even if this option was not widely used by cable subscribers, the government bears the burden of proving that the available alternative is not effective.

The substitute amendment adapted to S. 876 by the Commerce Committee is crafted in part to respond to *Playboy*. The FCC is only directed to implement a safe harbor for violence after it determines that the V-chip and ratings system are ineffective alternative means of protecting children from television violence. Prior to reaching such a determination, the FCC is directed to prohibit violent programming that is not electronically blockable, i.e. that is not encoded specifically with a rating for violence.

While the Committee cannot predict the outcome of the FCC's analysis of the effectiveness of the V-chip and the ratings system, the Committee does note that parental supervision alone may not sufficiently protect children from violence on television. For example, the problem of children's exposure to violence on television is especially acute for residents of inner city neighborhoods. According to Gael Davis of the National Council of Negro Women, who herself was the victim of a random gunshot by an urban youth, "Violence is the No. 1 cause of death in the African-American community. \* \* \* [I]n south central [Los Angeles], \* \* \* [t]he environment is permeated with violence. It is unsafe for children to walk to and from school. We have 80 percent latchkey children, where there will be no parent in the home during the afterschool hours when they are viewing the television. The television has truly become our electronic babysitter."<sup>32</sup>

Many children do not have the benefit of parents willing and able to monitor the television programming they watch. According to William Abbott of the Foundation to Improve Television, "millions of children watch television unsupervised, one-fourth of our children have but a single parent (the latch-key kids)."<sup>33</sup>

Under the "strict scrutiny" test, a regulation that limits freedom of speech based on the content must use "the least restrictive means to further the articulated interest."<sup>34</sup> As the following discussion explains, in the absence of an effective V-chip and content based ratings system, the safe harbor approach is the only approach that has a significant chance of furthering the compelling governmental interest in protecting American children from the impact of television violence.

A. INDUSTRY SELF-REGULATION.—As discussed earlier, the television industry has been directed to improve its programming by Congress for over 40 years. The first Congressional hearings on television violence were held in 1952. Hearings were held in the Senate in 1954 and again in the 1960's, the 1970's, 1980's and 1990's, and again, this year in 2000. At each hearing, representatives of the television industry testified that they were committed to ensuring that their programming was safe and appropriate for children. In 1972, the Surgeon General called for Congressional action, but

<sup>32</sup>Testimony of Gael T. Davis, President, East Side Section, National Council of Negro Women, Hearing on S. 1383, the Children's Protection from Violent Programming Act of 1993, et al. before the Senate Committee on Commerce, Science and Transportation, October 20, 1993.

<sup>33</sup>Testimony of William Abbott, President, Foundation to Improve Television, before the Committee on Commerce, Science and Transportation, Hearing on Television Violence, July 12, 1995.

<sup>34</sup>*Sable*, at 126.

this call was ignored after the broadcast industry reached an agreement with the FCC to restrict violent programs and programs unsuitable for children during the family hour.

There is substantial evidence, however, that despite the promises of the television industry, the amount of violence on television is far greater than the amount of violence in society and continues to increase. According to one study, “[s]ince 1955, television characters have been murdered at a rate one thousand times higher than real-world victims. Indeed, television violence has far outstripped reality since the 1950s.”<sup>35</sup> As noted earlier, the American Academy of Pediatrics recorded a threefold increase in the amount of violence on television during the 1980’s.

The incentives of the television industry can be illustrated by a quote from a memo giving directions to the writers of the program “Man Against Crime” on CBS in 1953:

It has been found that we retain audience interest best when our stories are concerned with murder. Therefore, although other crimes may be introduced, somebody must be murdered, preferably early, with the threat of more violence to come.<sup>36</sup>

In December, 1992, the four broadcast networks released a common code of conduct that many criticized for being weaker than the networks’ own code of practices. In any case, the code appears to have had little effect on the amount of violence on television. In December of 1996, the industry proposed a ratings system which has been sharply criticized for being age and not content based.

B. WARNING LABELS.—Some observers argue that a requirement to put warnings or parental advisories before certain violent programs would be a less restrictive means of satisfying the Government’s interest in protecting children. The Committee has received no evidence, however, that such warnings accomplish the purpose of protecting children.<sup>37</sup> In fact, recent reports indicate a continuing increase in the violence on television. Despite the industry’s efforts to air such advisories on their own initiative, the National Parent-Teachers Association and the Foundation to Improve Television has supported a safe harbor as a more effective approach. Indeed, there is some reason to believe that advisories may increase the amount of violence on television, if the television industry believes that it has provided notice to parents to protect itself from criticism. Some observers believe that programmers may want a warning label to be placed on a program in order to attract viewers.<sup>38</sup>

Without parental supervision, such warning labels may have the opposite effect of increasing the appetite of children for violent shows. Further, it is difficult to believe that such warnings would be effective in the age of channel surfing. Warnings that appear

<sup>35</sup> S. Robert Lichter, Linda S. Lichter and Stanley Rothman, *Prime Time: How TV portrays American Culture*, (Regnery Publishing, Inc., Washington, D.C., 1994), p. 275.

<sup>36</sup> Quoted in Eric Barnouw, *The Image Empire*, p. 23.

<sup>37</sup> The Committee notes that it has received no evidence indicating that the warning labels on music records and compact discs has reduced the exposure of children to inappropriate lyrics.

<sup>38</sup> For example, Ms. Lindsay Wagner, a television actress, testified in 1993 that film makers sometimes lobby to get an R rating. “We now have a couple of generations that have been reared on violence for fun and many flock to the films with warnings.” Testimony of Ms. Lindsay Wagner, Hearing on S. 1383, the Children’s Protection from Violent Programming Act of 1993, before the Committee on Commerce, Science, and Transportation.

once at the very beginning of a program may not be seen by a viewer who does not see the beginning of a program.

C. PARENTAL RESPONSIBILITY AND CONTROL TECHNOLOGIES.—Some observers believe that parents should bear the primary responsibility for protecting their children from violent programming, and a variety of technologies that are now available to television consumers can assist parents in controlling the programs that their children watch. For several reasons, it is not clear that either of these approaches will be effective.

Even when parents are available and concerned about the television programs that their children watch, they may not be able to monitor their children's television viewing habits at all times. According to one survey, 66 percent of homes have more than three or more television sets, and 54 percent of children have a TV set in their own bedrooms. Children often watch television unsupervised. In fact 55 percent of children usually watch television alone or with friends, but not with their families.

The implementation of the safe harbor approach is contingent upon the FCC finding that the content based ratings system, when used in conjunction with the V-chip, provides an ineffective means of protecting children from television violence. If the FCC makes such a determination, it is unlikely that other technology based solutions will more appropriately address the issue of children and television violence. In addition, technology based solutions require parents to be able to afford to spend money to purchase the new technologies. Development of such technologies are also uncertain. There are also questions about the ability of parents to program the technologies effectively. In many households, the children often are more comfortable with the technologies than the parents.

#### C. ADDITIONAL ISSUES

1. DEFINITION OF VIOLENCE.—Some have raised questions about the definition of violence in S. 876. Some have criticized the legislation for failing to include a definition; others state that it is inherently impossible to craft a definition that would not be overbroad or vague in violation of the constitutional requirements set down by the Supreme Court.

S. 876 adopts the same approach toward violent video programming as Congress has previously adopted for indecency. Section 1464 of title 18 prohibits the broadcast of indecency but does not contain a definition of the term. In 1975, the FCC adopted a definition of indecency that the courts have found to be proper. While it may be difficult to craft a definition that reflects the context of violence, that is not overbroad, that is not vague, and that is consistent with the research of harm caused to children, these are exactly the tasks that the FCC was created to perform. The FCC can hold its own hearings, seek comment from the industry and the public, and review the research in detail in order to come up with a definition.

Some observers cite the case of *Video Software Dealers Association v. Webster* to support the position that legislation to restrict violent video is unconstitutional.<sup>39</sup> That case, however, concerned a statute that neither contained a definition of violence nor dele-

<sup>39</sup>*Video Software Dealer's Association v. Webster*, 968 F.2d 684 (8th Cir. 1992).

gated the definition to a regulatory agency. S. 876, by contrast, does not take effect until the FCC issues a definition of violence. In *Davis-Kidd Books v. McWherter*, the court overturned a statute that contained a definition of violence that was overly vague.<sup>40</sup> While this case demonstrates the difficulty of defining violence, it does not stand for the proposition that violence is incapable of being defined. If the FCC fails to come up with a definition of violent video programming that satisfies constitutional scrutiny, the legislation authorizes the FCC to try again until it does.

2. APPLICABILITY TO CABLE TELEVISION AND OTHER BROADCAST TECHNOLOGIES.—Other observers question the constitutionality of restricting violence on cable television and other distribution media in addition to broadcasting. They note that *Red Lion*, *Pacifica*, and the line of *ACT* cases pertained only to broadcasting, not to cable or any other form of media.

There are several responses to this argument. First, the strict scrutiny test applies to any content regulation, not just those imposed on broadcast stations. Court cases indicate that a restriction on violent video programming could, potentially, be imposed on any media if it satisfies the strict scrutiny test.<sup>41</sup>

The court's rationale for subjecting broadcasting to a more restrictive treatment includes, the scarcity of broadcast frequencies, the pervasive presence of broadcast, and accessibility of broadcast to children. In recognizing the special status of broadcasting, the Supreme Court, in the *National Broadcasting Co.* and *Red Lion* cases, concluded that due to their scarcity, broadcast frequencies are not available to all who may wish to use them. Therefore, regulation is vital to the development of broadcasting.

The Supreme Court in *ACT IV*, addressed the pervasive presence of broadcast and its accessibility to children. The Court stated that:

First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, \* \* \*. Second, broadcasting is uniquely accessible to children \* \* \* The ease with which children may obtain access to broadcast material, \* \* \* amply justifies special treatment of indecent broadcasting.<sup>42</sup>

The *ACT IV* court further noted that “broadcast audiences have no choice but to ‘subscribe’ to the entire output of traditional broadcasters.”<sup>43</sup>

Just as with broadcast television, non-premium cable service has grown to have a uniquely pervasive presence in the lives of all Americans and is uniquely accessible to children. Over 60 percent of consumers now receive some form of cable service. Because of the must-carry rules, almost all of these subscribers now receive their broadcast signals through their cable systems. From the perspective of the viewer, and especially children, there is little if any distinction between the broadcast programs that come in over the cable system and the cable-only programs. Indeed, cable television

<sup>40</sup>*Davis-Kidd Books v. McWherter*, 866 S.W.2d 250 (1993).

<sup>41</sup>The court in *ACT IV* states, “[W]e apply strict scrutiny to regulations of this kind [concerning indecency] regardless of the medium affected by them \* \* \*”. *ACT IV*, at 12.

<sup>42</sup>*Pacifica*, at 748–750.

<sup>43</sup>*ACT IV*, at 12.

service has become so important a service to the average American that Congress has required the rates for cable television to be regulated.<sup>44</sup> It is the Committee's belief that satellite programming will approach cable's influence in the coming years, and is therefore regulable under S. 876.

Two more recent cases have indicated that it is permissible to regulate other technologies such as cable. The Supreme Court, in *Denver Area Educational Telecommunications Consortium*<sup>45</sup> addressed the constitutionality of section 10 of the Cable Television Consumer Protection and Competition Act of 1992. Although the Court struck certain provisions of section 10, it held that section 10(a), which permits cable operators to decide whether or not to broadcast indecent programs on leased access channels, is consistent with the First Amendment.

In *Playboy*, the Supreme Court addressed the constitutionality of section 505 of the Telecommunications Act of 1996. While the court struck down the provisions in question, it did so on the grounds that it was not the least restrictive alternative, not because Congress cannot regulate content on cable.

In fact, the District Court opinion in *Playboy* stated that: “\* \* \* cable television is a means of communication which is pervasive and \* \* \* [t]he Supreme Court has recognized that cable television is as accessible to children as over-the-air broadcasting, if not more so.” Moreover, the Supreme Court in its consideration of freedom of speech under the First Amendment has recognized the need to protect children from sexually explicit material, particularly in the context of a pervasive medium.<sup>46</sup>

S. 876, is not intended to apply to premium or pay-per-view channels in recognition of the fact that parents have the choice to subscribe to these channels on an individual basis. This distinction between premium channels and pay-per-view programs, on the one hand, and basic or expanded basic packages of cable or satellite programs, on the other, demonstrates the Committee's attempt to balance the rights of children and the legitimate rights of parents to watch the programs that they want to watch. In this way, the legislation avoids unnecessarily interfering with parents' First Amendment rights in order to meet the least restrictive means test.

#### LEGISLATIVE HISTORY

In October, 1993, the Senate Commerce Committee held a hearing on television violence to consider a variety of legislative proposals. Attorney General Janet Reno testified that the legislation currently pending before the Committee, including S.1383, the Hollings-Inouye legislation establishing a safe harbor for violent programming, would be constitutional. The broadcast networks and other industry representatives argued that the amount of violent programming was less than in previous years. The industry also testified that the industry should be given more time to implement its warning labels before legislation should be considered.

<sup>44</sup> See, the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (The 1992 Cable Act).

<sup>45</sup> *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S.Ct. 2374 (1996).

<sup>46</sup> *Playboy Entertainment Group*, 945 F. Supr. 722 (1996).

On July 11, 1995, the Committee held its second hearing on television violence to consider pending measures, including S. 470, the Hollings' safe harbor legislation. S. 470 (104th Congress) is identical to S. 1383 (103rd Congress). The Committee subsequently reported S. 470, as introduced, on August 10, 1995 by a recorded vote of 16 yeas and 1 nay, with two Senators not voting. No further action was taken during the 104th Congress.

On February 26, 1997, Senator Hollings with Senators Inouye and Dorgan as co-sponsors, introduced S. 363. S. 363 was similar to S. 470 but allowed the Commission to implement a safe harbor if it does not implement a content-based ratings system. On February 27, 1997, the Committee held another hearing on television violence in which S. 363 was addressed. Groups such as the American Psychiatric Association expressed their disapproval of the current age based rating system proposed by the industry and noted their preference for a content-based ratings system. Kevin Saunders, Professor of Law at the University of Oklahoma, testified that violent programming could arguably be considered obscene or indecent and the safe harbor approach is constitutional.<sup>47</sup>

On May 1, 1997, the Committee reported S. 363 with one amendment to add findings by a recorded vote of 19 yeas and 1 nay.

On April 26, 1999, Senator Hollings introduced S. 876, safe harbor legislation that was substantially similar to S. 470 and S. 1383, in previous Congresses. The bill is co-sponsored by Senators Byrd, Durbin, and Inouye.

On May 13, 1999, the Committee held its third hearing on television violence and safe harbor legislation. Senator Hollings' bill, S. 876 was discussed at length, and testimony was offered as to the constitutionality of the measure as well as the adverse harm to children affected by exposure to violence on television.

On September 20, 2000 the Committee reported S. 876 as amended by a recorded vote of 17 yeas, 1 nay, and 1 present.

#### ESTIMATED COSTS

In accordance with paragraph 11(a)(3) of rule XXVI of the Standing Rules of the Senate, the Committee states that, in its opinion, it is necessary to dispense with the requirements of subsection (a)(1) of that paragraph in order to expedite the business of the Senate.

#### REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

#### SECTION-BY-SECTION ANALYSIS

##### *Section 1. Short title*

This Act is entitled the "Children's Protection from Violent Programming Act."

<sup>47</sup>Testimony of Kevin Saunders, J.D., PH.D before the Senate Committee on Commerce, Science and Transportation, February 27, 1997 at pp. 17 and 7.

*Sec. 2. Findings*

Expresses the findings made by the Committee in support of the legislation.

*Sec. 3. Assessment of effectiveness of current ratings system for violence and effectiveness of v-chip in blocking violent programming*

This section directs the Federal Communications Commission to assess the effectiveness of measures to require television broadcasters and multi channel video programming distributors to rate and encode programming that could be blocked by parents using the V-chip undertaken under section 715 of the Communications Act of 1934, and subsections (w) and (x) of section 303 of that Act.

The FCC is required to report its findings to the Committee on Commerce, Science, and Transportation of the United States Senate and the Committee on Commerce of the United States House of Representatives within 12 months of enactment, and annually thereafter.

If the FCC finds as a result of its ongoing assessment responsibilities described above, that the measures referred to are insufficiently effective, then the Commission shall complete a rulemaking, within 270 days after the date on which the Commission makes such a finding, to prohibit the distribution of violent video programming during the hours when children are reasonably likely to comprise a substantial portion of the audience.

Any term used in this section that is defined in section 715 of the Communications Act or the regulations issued thereunder, has the same meaning as when used in that section or in those regulations.

*Sec. 4. Unlawful distribution of violent video programming that is not specifically rated for violence and therefore is not blockable*

This section amends title VII of the Communications Act of 1934 (47 U.S.C. 701 et seq.) in the following manner:

This section creates a new section 715 under which it shall be unlawful for any person to distribute to the public any violent video programming not blockable by electronic means specifically on the basis of its violent content during hours when children are reasonably likely to comprise a substantial portion of the audience.

The FCC is directed to conduct a rulemaking and promulgate regulations to implement the provisions of this section within nine months of enactment.

In that proceeding, the Commission may exempt programming that does not conflict with the objective of protecting children from the negative influences of violent video programming, as that objective is reflected in the findings of section 551(a) of the Telecommunications Act of 1996. Such exempt programming could include news programs and sporting events.

The FCC is directed to exempt premium and pay-per-view cable and direct-to-home satellite programming.

The FCC is directed to define the term "hours when children are reasonably likely to comprise a substantial portion of the audience" and the term "violent video programming."

The Commission is directed to impose a forfeiture penalty of not more than \$25,000 on any person who violates this section or any

regulation promulgated thereunder for each such violation. Each day on which such violation occurs is a separate violation. If a person repeatedly violates this section or any regulation promulgated thereunder, the FCC shall after notice and opportunity for hearing, revoke any license issued under this Act. Compliance with this section and the regulations promulgated thereunder shall be an element for consideration by the Commission when it reviews an application for renewal of a license under this Act.

The term “blockable by electronic means” means blockable by the feature described in section 303(x).

The term “distribute” means to send, transmit, retransmit, telecast, broadcast, or cablecast, including by wire, microwave, or satellite, but it does not include the transmission, retransmission, or receipt of any voice, data, graphics, or video telecommunications accessed through an interactive computer service as defined in section 230(f)(2) of the Communications Act of 1934, which is not originated or transmitted in the ordinary course of business by a television broadcast station or multi channel video programming distributor as defined in section 602(13) of that Act.

The term “violent video programming” as defined by the Commission may include matter that is excessive or gratuitous violence within the meaning of the 1992 Broadcast Standards for the Depiction of Violence in Television Programs, December 1992.

*Sec. 5. Federal Trade Commission study of marketing strategy improvements*

This section requires the Federal Trade Commission to study the marketing of violent content by the motion picture, music recording, and computer and video game industries to children, including the marketing practices improvements described by industry representatives at the hearing held by the Senate Committee on Commerce, Science and Transportation on September 13, 2000. The FTC is required to report the results of the study, including findings and recommendations, if any, to the Senate Committee on Commerce, Science and Transportation, and the House Committee on Commerce, within 18 months after enactment.

*Sec. 6. Separability*

Under this section, if any provision of this Act or any provision of an amendment made by this Act, or the application thereof to particular persons or circumstances, is found to be unconstitutional, the remainder of this Act, or that amendment, or the application thereof to other persons or circumstances shall not be affected.

*Sec. 7. Effective date*

The prohibition contained in section 715 of the Communications Act of 1934 (as added by section 2 of this Act) and the regulations promulgated thereunder shall take effect one year after the regulations are adopted by the Commission.

ROLLCALL VOTES IN COMMITTEE

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following description of the record votes during its consideration of S. 303:

Senator Hollings offered an amendment in the nature of a substitute. By a rollcall vote of 17 yeas and 1 nay, with the chairman voting “present,” the amendment was adopted:

YEAS—17	NAYS—1
Mr. Stevens	Mr. Brownback
Mr. Burns	
Mr. Gorton	
Mr. Lott <sup>1</sup>	
Mrs. Hutchison	
Ms. Snowe	
Mr. Frist <sup>1</sup>	
Mr. Abraham <sup>1</sup>	
Mr. Hollings	
Mr. Inouye <sup>1</sup>	
Mr. Rockefeller	
Mr. Kerry	
Mr. Breaux <sup>1</sup>	
Mr. Bryan	
Mr. Dorgan <sup>1</sup>	
Mr. Wyden	
Mr. Cleland	

<sup>1</sup>By proxy

#### CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

#### COMMUNICATIONS ACT OF 1934

##### TITLE VII—MISCELLANEOUS PROVISIONS

\* \* \* \* \*

#### **SEC. 715. UNLAWFUL DISTRIBUTION OF VIOLENT VIDEO PROGRAMMING NOT SPECIFICALLY BLOCKABLE BY ELECTRONIC MEANS.**

(a) *UNLAWFUL DISTRIBUTION.*—It shall be unlawful for any person to distribute to the public any violent video programming not blockable by electronic means specifically on the basis of its violent content during hours when children are reasonably likely to comprise a substantial portion of the audience.

(b) *RULEMAKING PROCEEDING.*—The Commission shall conduct a rulemaking proceeding to implement the provisions of this section and shall promulgate final regulations pursuant to that proceeding not later than 9 months after the date of enactment of the Children’s Protection from Violent Programming Act. As part of that proceeding, the Commission—

(1) may exempt from the prohibition under subsection (a) programming (including news programs and sporting events) whose distribution does not conflict with the objective of protecting children from the negative influences of violent video programming, as that objective is reflected in the findings in section 551(a) of the Telecommunications Act of 1996;

(2) shall exempt premium and pay-per-view cable programming and premium and pay-per-view direct-to-home satellite programming; and

(3) shall define the term “hours when children are reasonably likely to comprise a substantial portion of the audience” and the term “violent video programming”.

(c) **ENFORCEMENT.**—

(1) **FORFEITURE PENALTY.**—The Commission shall impose a forfeiture penalty of not more than \$25,000 on any person who violates this section or any regulation promulgated under it for each such violation. For purposes of this paragraph, each day on which such a violation occurs is a separate violation.

(2) **LICENSE REVOCATION.**—If a person repeatedly violates this section or any regulation promulgated under this section, the Commission shall, after notice and opportunity for hearing, revoke any license issued to that person under this Act.

(3) **LICENSE RENEWALS.**—The Commission shall consider, among the elements in its review of an application for renewal of a license under this Act, whether the licensee has complied with this section and the regulations promulgated under this section.

(d) **DEFINITIONS.**—For purposes of this section—

(1) **BLOCKABLE BY ELECTRONIC MEANS.**—The term “blockable by electronic means” means blockable by the feature described in section 303(x).

(2) **DISTRIBUTE.**—The term “distribute” means to send, transmit, retransmit, telecast, broadcast, or cablecast, including by wire, microwave, or satellite, but it does not include the transmission, retransmission, or receipt of any voice, data, graphics, or video telecommunications accessed through an interactive computer service as defined in section 230(f)(2) of the Communications Act of 1934 (47 U.S.C. 230(f)(2)), which is not originated or transmitted in the ordinary course of business by a television broadcast station or multichannel video programming distributor as defined in section 602(13) of that Act (47 U.S.C. 522(13)).

(3) **VIOLENT VIDEO PROGRAMMING.**—The term “violent video programming” as defined by the Commission may include matter that is excessive or gratuitous violence within the meaning of the 1992 Broadcast Standards for the Depiction of Violence in Television Programs, December 1992.

## ADDITIONAL VIEWS

### VIEWS OF MR. MCCAIN

S. 876 requires the Federal Communications Commission to determine whether the V-chip and content-based rating systems protect children from television violence. If the Commission finds that the V-chip does not effectively shield children from violent programming—regardless of why—then the bill requires the Commission to prohibit the delivery of any violent programming when children comprise a “substantial portion” of the audience (i.e. a “safe harbor”).

If this safe harbor is activated, then the bill empowers the five non-elected Commissioners of the FCC to define both what constitutes “violent [video] programming” and when such content can be seen. The bill notes only that the definition of violent video programming may include matter that is “excessive” or “gratuitous” within the meaning of the 1992 Broadcast Standards for the Depiction of Violence in Television Programs.

This legislation deals with a topic of critical importance to America and her youth. Our children are exposed to violence through many forms of entertainment, including movies, television, music and video games. Increasingly, these entertainments are trying to attract public attention by ever more glorified and gratuitous displays of violence. The effect of this increasing exposure to violence is unclear at best and recent studies suggest that it may increase some children’s willingness to resort to violence.

In addition, other evidence suggests that the effects of violent entertainment upon youth may be exacerbated by the misconduct of the entertainment industries themselves. According to the Federal Trade Commission’s recent report on the Marketing of Violent Entertainment to Children, companies in the motion picture, music and video game industries routinely market to children products containing these industries’ own warnings and ratings of violent content.

Violence in the media is, therefore, a real and serious problem. Equally serious is the problematic behavior of entertainment industries that have worked to undercut the voluntary controls on violence upon which this country and this Congress have long relied.

Nevertheless, any Congressional action intended to combat this serious problem will be ineffective and counterproductive unless it can withstand legal scrutiny. Enacting unconstitutional legislation will only delay and impede the search for effective solutions to any problem, including this one.

Unfortunately, this “safe-harbor” legislation—no matter how well-intended it may be—raises serious and long-standing Constitutional concerns. In fact, Congress has repeatedly declined to

enact violence-based “safe harbor” legislation because of these Constitutional concerns.

And for good reason: it is impossible to prospectively define “violent” programming in a way that will not bar the transmission of Saving Private Ryan or Schindler’s List. For example, content featuring murder, suicide, gang violence and knife fighting is violent, but does anyone want the FCC to ban the broadcast of Romeo and Juliet? Similar difficulties arise in trying to define when children are not in the audience or how to address Internet “web-casting” or streaming video links. For these and other reasons, Congress has long concluded that laws like this will inevitably violate the First Amendment.

These conclusions are shared by the Administration, and indeed, the majority itself. For example, the FTC recognized in its report that “self-regulation of these industries is especially important considering the First Amendment protections that prohibit government regulation of content in most instances.”<sup>1</sup>

Similarly, the majority recognizes that “it may be difficult to craft a definition that reflects the context of violence, that is not overbroad, that is not vague, and is consistent with the research of harm caused to children.” The majority dismisses these difficulties, however, by concluding that “these are exactly the tasks that the FCC was created to perform.”

With due respect, I cannot agree. The Federal Communications Commission was created to perform tasks that facilitate communication among private citizens. But under this bill, the FCC would ban communications, regulate the content of speech and decree what speech can or cannot be communicated. These are not “exactly the tasks that the FCC was created to perform.” These are the tasks of a Federal Bureau of Censorship, an agency that does not, and probably cannot, exist under our present Constitution.

The majority cites no legal authorities that would suggest a different conclusion. The majority relies heavily on a Court of Appeals decision in *Act IV*<sup>2</sup> upholding a safe harbor for broadcast indecency, as an indication that this bill’s safe harbor for violence would be held constitutional. For two reasons, its analysis is unpersuasive.

First, the decision in *Act IV* involved indecency, not violence. “Safe harbor” requirements have not been extended outside the indecency area, and there is no indication that courts would be inclined to do so.<sup>3</sup> To the contrary, the Supreme Court has stressed the “narrowness” of its approach to indecency.<sup>4</sup> As the Seventh Circuit said in *American Booksellers Ass’n v. Hudnut*, “violence on television is protected speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor of which thoughts are good for us”.<sup>5</sup>

<sup>1</sup>Report of the Federal Trade Commission: Marketing Violent Entertainment to Children, (Sept. 2000)

<sup>2</sup>*Action for Children’s Television, v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) cert. denied 116 S. Ct. 701 (1996).

<sup>3</sup>*Video Software Dealer’s Association v. Webster*, 968 F.2d 684 (8th Cir. 1992).

<sup>4</sup>*Bolger v. Youngs Drug Products Corp.*, 463 U.S. 63,74 (1983).

<sup>5</sup>*American Booksellers Ass’n Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985) aff’d mem., 475 U.S. 1001 (1986); See also, *Winters v. New York*, 333 U.S. at 510–11 invalidating a state law designed to restrict the publication of criminal news magazines focused on stories of “blood-

Second, even making the unprecedented assumption that the “safe harbor” analysis of *Act IV* could be extended from indecency to violence, the bill would still be unconstitutional given the United States Supreme Court’s more recent analysis in *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878 (2000). In *Playboy Enterprises*, the Supreme Court held unconstitutional the indecency-based “safe harbor” provision in Section 505 of the Telecommunications Act of 1996. The Court held that a “safe harbor” provision serving a compelling government interest cannot be upheld unless the government shows that no other less restrictive means of control exists. *Id.* at 1886–87.

The majority reasons that this bill could survive scrutiny under *Playboy* because the bill only directs the FCC to implement a safe harbor for television violence if it determines that the V-chip is ineffective. But this is the very reasoning that *Playboy* rejected. In *Playboy*, the government tried to justify a safe harbor by arguing that signal bleed precluded “RF” or baseband scrambling from being effective alternative means of controlling the broadcast of indecent material. The Court rejected this argument, holding that the government cannot justify content-based regulation of indecent speech unless it proves that all other less restrictive methods of regulation would be ineffective—not just one method.

Moreover, *Playboy* is also likely to preclude the FCC from finding that the V-chip is an ineffective method of regulation. In *Playboy*, the government claimed that it could restrict indecent speech during non-safe harbor hours because some parents might choose not to use potentially effective tools that are available to them. But the *Playboy* majority emphatically rejected this argument: “Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech.” *Id.* At 1892.

And these are, of course, only the beginning of the bill’s constitutional problems. For example, the majority itself concedes that this legislation raises concerns that it is so impermissibly vague and/or overbroad as to be constitutionally infirm. After all, this bill would direct a government agency to first define, and then prohibit, the delivery of “violent programming” for everyone, if it for any reason finds that V-chip technology is not adequately protecting children.

The majority argues that this bill is not vague or overbroad simply because a federal agency has been charged with defining violence and the bill would allow that agency to “try again” until its definition passes constitutional muster. (Conference Report p.22). I see, however, no reason to conclude that the FCC has either the technical expertise or even the institutional competence to craft a constitutional definition of “violent programming.” In fact, the majority itself appears to have no clear idea what such a definition might include. Under such circumstances, I respectfully submit that it would be inappropriate for this Congress to delegate to non-elected officials such fundamental questions about the limits of our legislative power.

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shed, lust or crime.” “Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as any literature.”

Moreover, there is no indication that the courts would be patient with an FCC attempt to adopt a “try and try again” approach to content-based regulation of speech. Time and again, the courts have invalidated attempts to define attempts to prohibit violent content—even where the prohibition is aimed at the laudable goal of protecting children. For example, in *Interstate Circuit, Inc. v. City of Dallas*, the Supreme Court explicitly recognized that “the permissible extent of vagueness is not directly proportionate to, or a function of the extent of the power to regulate or control expression with respect to children.”<sup>6</sup> Moreover, the majority’s instruction to the FCC that its definition of violence may include “excessive” or “gratuitous” violence within the meaning of the 1992 Broadcast Standards for the Depiction of Violent Television Programs, provides little shield to a constitutional challenge. Courts have traditionally held laws designed to incorporate industry-based ratings systems to be unconstitutional—even where the laws did not attempt to ban the rated program, but rather, simply sought to provide special licenses or restrict children’s access.<sup>7</sup> Similarly, laws attempting to restrict material for “excessive violence” have also been consistently found to be unconstitutionally vague.<sup>8</sup>

Indeed, even those who the majority cites to in support of their assertion that “the constitutionality of a safe harbor approach for violence could be easier to sustain than for indecency” recognize the constitutional problems this type of legislation is likely to face. For example, the minority cites to a dissenting opinion of Judge Edwards of the D.C. Circuit, “acknowledging that there is much stronger evidence that viewing violence on television causes harm to children than any proposed harm caused by indecency” (Committee report p. 17) in support of its position. Yet Judge Edwards has written:

“When it comes to televised violence, we cannot imagine how regulators can distinguish between harmless and harmful violent speech, and we can find no proposal that overcomes the lack of supporting data \* \* \*”<sup>9</sup> “We cannot imagine how a regulator might fix rules designed to ferret out gratuitous violence without running the risk of wholesale censorship of television programming.”<sup>10</sup>

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<sup>6</sup>*Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 (1968); see also *Rushia v. Town of Ashburnham*, 582 F. Supp 900,905 (D. Mass 1983) “The fact that a regulation is adopted for the purpose of protecting children does not cure vagueness”.

<sup>7</sup>*Endahl v. City of Kenosha*, 317 F. Supp 1133,1135 (E.D. Wisc. 1970); *MPAA v. Specter*, 315 F. Supp 824 (E.D.Pa 1970) and *Gasgoe, LTD v. Newton Township*, 699 F. Supp 1092, 1096 (E.D.Pa 1988).

<sup>8</sup>See Harry T. Edwards and Mitchell N. Berman, *Regulating Violence on Television*, 89 North-western U.L. Rev: 1487 (1995).

<sup>9</sup>*Ibid.*, p. 1565.

<sup>10</sup>*Ibid.*, p. 1502.