Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Violent Television Programming	)	MB Docket No. 04-261
And Its Impact on Children	)	
	)	

COMMENTS OF THE MEDIA ASSOCIATIONS

American Advertising Federation
American Association of Advertising Agencies
Association of National Advertisers, Inc.
Motion Picture Association of America
National Association of Broadcasters
Satellite Broadcasting and Communications Association

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EXECUTIVE SUMMARY

In response to a congressional request, the Commission launched this *Notice of Inquiry* to explore policy issues arising from depictions of violence on television. Among other things, the *Notice* seeks comment on such issues as the amount of violent programming, the effects of viewing such shows, the role of parental guidelines and the V-chip, and possible new regulatory solutions in this arena. It also asks whether potential regulations are authorized by the Communications Act or if they would be barred by the First Amendment. These comments, submitted on behalf of the Media Associations, including the American Advertising Federation, the American Association of Advertising Agencies, the Association of National Advertisers, Inc., the Motion Picture Association of America, the National Association of Broadcasters, and the Satellite Broadcasting and Communications Association, explain that the justifications for regulation are greatly exaggerated, and that the First Amendment and statutory barriers to new content regulations are insurmountable.

The Definition is the Key

The Commission acknowledges in its Notice of Inquiry that "it is not necessarily the case" that there is a well-established definition of "violent programming." Social science researchers, policymakers, and members of the public all profess to have a unique understanding of what ought to be regulated as "violent programming," but every definition is different. What exactly is meant by the term "violent programming" bears on every aspect of the present inquiry, from the amount of such programming that exists to questions of its purported impact, as well as whether the Commission can adopt any regulations that are consistent with the law and the First Amendment.

Reports of Media Effects Are Greatly Exaggerated

The Commission's review of the literature is badly needed, for there is no shortage of extravagant and wildly inaccurate claims about the overall effect on children of viewing violent television shows. Advocacy groups have claimed that there are 3,500 studies that demonstrate adverse effects of media violence, and it is commonplace for organizations and policymakers to casually (and falsely) assert that there are thousands of such studies that point to a "causal connection." In reality, however, fewer than 250 studies have been done, and the vast majority of those fail to support the hypothesis that there is a connection between violent programming and violent actions.

Professor Jonathan Freedman of the University of Toronto published an exhaustive review of all of the research on this topic available in 2002, and concluded that "evidence does not support the hypothesis that exposure to film or television violence causes children or adults to be aggressive." For purposes of these comments, Professor Freedman analyzed the available research (and summaries of research) published more recently and found nothing to alter his earlier conclusions. His report is appended to these comments. Nor is there evidence that exposure to violent imagery leads to "desensitization." Although the evidence in support of a link is often described as "overwhelming," the evidence is, in fact, weak and inconsistent. Research findings often are mischaracterized, and in some cases reach conclusions that are the opposite of what has been reported.

Actual experience with real-world aggression and violent crime provides an important reality check against claims that pictures of violence produce aggressive acts. If the causal hypothesis is correct, then increasing levels of violence in the media must result in higher levels of violence in society. Some media critics claim that depictions of violence in prime time have increased dramatically in recent years, and they assert that this violent programming causes

violent behavior. But actual experience shows just the opposite. By almost any measure, we are living in a less violent society. Violent crime rates declined about 55 percent between 1994 and 2003, and a September 2004 Justice Department report found that the crime rate is at its lowest level since it began conducting the survey in 1973.

The Importance of Viewer Control

The current state of technology provides individuals with the capacity to select which programs they wish to receive or exclude. Where the audience is a willing one, governmental regulation is inappropriate, as the First Amendment does not permit the government to prohibit speech as intrusive unless the audience is "captive" and cannot avoid the objectionable speech. In 1978, the Supreme Court upheld a narrow exception to this rule in the area of broadcast indecency, because it concluded the radio audience was powerless to exclude unwanted communications. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978). That finding, however, has never been applied to depictions of violence, and there is no justification for expanding its scope to entirely different subject matter. As the Commission itself recently concluded, the modern media marketplace has greatly evolved, and "new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history." *2002 Biennial Regulatory Review*, 18 FCC Rcd. 13620, ¶¶ 86-87 (2003). Such changes in the technology undermine any argument for expanding government control over content.

In addition to solutions that evolved on their own, such as parental control devices and digital video recorders, other self-regulatory options were stimulated by the Telecommunications Act of 1996. The Act requires that all televisions with a screen size of 13 inches or greater be equipped with V-chip technology. To implement the system, the industry in 1997 devised TV Parental Guidelines to rate programs both on the basis of age and on the basis of content. This combination of marketplace developments, self-regulatory efforts, and minimal

regulations suggests that the Commission must thoroughly evaluate the technological landscape before proposing any new content regulations.

First Amendment Problems Are Insurmountable

Quite apart from whether there is a need for regulation of violent programming, any attempt by the Commission to regulate such programming would face high First Amendment hurdles. Every court that has addressed the degree to which "violent" expression is constitutionally protected has concluded that such material receives the utmost protection. The United States Court of Appeals for the Seventh Circuit has observed that "violence on television … is protected speech" and that "[a]ny other answer leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us." *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986). In striking down restrictions on renting to minors videotapes that depict violence, the Eighth Circuit confirmed that violent video programming is entitled to "the highest degree of First Amendment protection." *Video Software Dealer's Ass'n v. Webster*, 968 F.2d 684, 689 (1992).

Any regulation of violent television programming obviously would be content-based and presumptively unconstitutional. Such strict scrutiny cannot be diluted by attempting to classify violent material as "obscene" or "indecent." In any event, a change in classification would not affect the level of scrutiny. Under well-established law, the government must prove that regulation of violent programming is necessary to serve a compelling interest and that the resulting rules are the least restrictive means of control. *ISDA v. St. Louis*, 329 F.3d 954, 958 (8th Cir. 2003); *Webster*, 968 F.2d at 689. Regulation of violent programming cannot survive this test.

Regulation of televised violence would impose either wholesale censorship or an incomprehensible standard. As one study reported, if all violence were eliminated, viewers

would be unable to watch historical dramas like *Roots*, theatrical films like *Schindler's List*, or a documentary on World War II. If, on the other hand, the Commission attempted to distinguish "good" depictions of violence from "bad" depictions, the resulting vague standard would impermissibly chill speech and would give the Commission too much discretion to curb disfavored expression. Any such regulation would necessarily discriminate based on viewpoint, thus exacerbating its constitutional infirmities. Finally, regulation of violent programming would violate the First Amendment because less restrictive means exist to empower individual choice, including parental controls and the V-chip.

FCC Lacks Statutory Authority

In addition to First Amendment problems, the Commission lacks statutory authority to regulate violent programming. The Communications Act specifically precludes censorship or interference with free speech in radio communication as well as the imposition of content regulations on cable service. No specific provisions of the Act authorize the Commission to adopt rules regulating violent television programming, and the general grant of power to "regulate the broadcast medium as the public interest requires" does not fill the void. *Motion Picture Ass'n of America v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

The adoption of V-chip mandates in the Telecommunications Act of 1996 clearly undermines any claim that the Commission can promulgate direct content regulations. Congress specifically considered – and rejected – FCC rulemaking authority for violent programming in its deliberations prior to the passage of the 1996 Act. Because Congress adopted the provisions regarding the V-chip instead, the Commission cannot now claim authority to do that which Congress withheld. Accordingly, the Commission must decline to take any action to regulate violent programming on television.

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The Media Associations, comprised of the American Advertising Federation ("AAF"), the American Association of Advertising Agencies ("AAAA"), the Association of National Advertisers, Inc. ("ANA"), the Motion Picture Association of America ("MPAA"), the National Association of Broadcasters ("NAB"), and the Satellite Broadcasting and Communications Association ("SBCA") (together, the "Media Associations"), hereby submit comments on the *Notice* of Inquiry in the captioned proceeding. [1] The *Notice* seeks comment on such issues as the "incidence of violent programming," *Notice* ¶¶ 3-4, the "effects of viewing violent programming," *id*. ¶¶ 5-7, the role of "parental guidelines and [the] V-chip," *id*. ¶¶ 16-19, and "possible new regulatory solution[s]" for violent programming, *id*. ¶¶ 20-22. It also asks whether potential regulations are authorized by the Communications Act or would be consistent with the First Amendment. *Id*. ¶¶ 23-28.

I. INTRODUCTION

This inquiry is as much a national Rorschach Test as it is a public policy proceeding. Revealing a gift for understatement, the Commission acknowledges it "is not necessarily the case" that there is "a well established definition of violence" or "violent programming." *Id*. ¶ 8.

[1] *Violent Television Programming and Its Impact on Children*, 19 FCC Rcd. 14394 (2004) ("*Notice*"). Descriptions of the Media Associations reflecting their interests in this proceeding are provided in the Attachment to these Comments.

As it turns out, "[a]lmost everyone has his or her own definition of violence," [2] a fact that applies equally to social science researchers, policymakers, and – last but not least – members of the public, each professing his or her unique understanding of what ought be regulated under the "violence" rubric. [3] What is meant by the term "violent programming" bears on every aspect of the present inquiry, from the amount of such programming that exists to questions of its purported impact, as well as whether the Commission can adopt any regulations that are consistent with the law and the First Amendment.

While much of the public policy debate on the subject of televised violence is animated by social science research on the subject, those conducting the studies have used a "wide variety of definitions and measures" such that "the definition of violence or aggression becomes extremely murky." [4] This includes great diversity in what is classified as the violent stimulus as well as a wide array of responses that the researchers consider aggressive. Among the examples of programs put forth as violent include sports films (including presentations of

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[2] UCLA Center for Communication Policy, THE UCLA TELEVISION VIOLENCE REPORT 1997 (rel. January 1998) ("UCLA TELEVISION VIOLENCE REPORT"), at 26.

[3] *See, e.g.*, Comment of Michael Skora ("You can't watch nightly news hyping all the world violence every night and feel balanced and safe."); Comment of Judy Jensvold ("horrific and violent images" include "network program [that] showed the Zapruder film of the moment JFK was hit in the head and an autopsy photo"); Comment of K Mitchell ("Violence [includes] actual killing to the depiction of dead bodies in their homicidal positions on shows like CSI, NCIS, etc."); Comment of Gaylynn Griffin ("Cartoons and Disney movies are full of adult innu-endos."); Comment of Peter Rauschenbach ("Only PaxTV is offering family friendly TV."); Comment of Douglas K. Ulrey (violence on TV includes fictionalized WWE program of "man being assaulted by a sledge hammer" and "sadistic melodrama[s] during prime time"); Comment of John McElwain ("soft core pornography [and] programming that continually allows more and more sensuality … is directly related to the breading [*sic*] of violent criminals"). *Cf.* Comment of Noelle Stout ("I don't think there's too much violence on tv … I did however watch Kill Bill recently and the violence … made me physically ill" but "[w]here to draw the line in-between Kill Bill and Seventh Heaven is hard to say" and "each individual [should] make choices based on their sensitivity").

[4] Professor Jonathan L. Freedman, *FCC Inquiry on the Effects of Televised Violence: What does the Scientific Research Show?*, attached as Appendix hereto ("Freedman Report").

boxing and hockey), Batman and Superman cartoons, and *The Untouchables* television show. Measures of aggressiveness included punching Bobo dolls, showing a willingness to administer loud noises, and thinking of aggressive words in free association, among other things. In many cases it is "especially difficult to relate real aggression to the research, since so often the research has involved at best metaphors for aggression rather than the real thing and at worst, measures that have little relationship to real aggression or violence." [5]

Policymakers similarly have used a wide range of definitions in this area, suggesting that some depictions of violence are "good" while others are "bad." Former Surgeon General Jocelyn Elders testified that presentations of violence should not be sanitized and should realistically portray the consequences – "that you really do bleed." [6] Congressman Carlos Moorhead, on the other hand, objected to programs in which "people are shot and get hurt and are writhing in pain," and concluded, "cowboy movies were better." Senator John Kerry has objected to reality-based shows like *Cops*, while other lawmakers have declined to differentiate between the various types of programs. Former Senator John Danforth reportedly said, "Shakespeare, *Beavis and Butthead*, Schwarzenegger, its all the same." [7] Former Senator Paul Simon explained to a group of broadcasters that cartoons such as *Tom and Jerry* are too violent, but that a film such as *Schindler's List* would be permissible so long as it is not aired "at eight o'clock when a lot of kids are watching." [8] Senator Ernest Hollings once complained about the violence

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[5] *Id*. at 40.

[6] Hanna Rosin, *The Producers: Congress Fights TV Violence*, THE NEW REPUBLIC, December 13, 1993, at 12.

[7] *Id*.

[8] Kim McAvoy, *Washington Watch*, BROADCASTING & CABLE, March 7, 1994, at 58.

level in the network sitcom *Love and War*, and showed a clip at one hearing in which the characters threw popcorn at each other as part of a spoof on televised violence. [9]

As the Commission acknowledged in the *Notice*, quoting the UCLA TELEVISION VIOLENCE REPORT, "not all violence is created equal," and some uses may be deemed acceptable while others may express "inappropriate or improper uses of violence." *Notice* ¶¶ 8, 12. Raising this question shows the Commission's appreciation of context but also highlights the inherent complexity of this inquiry. From a public policy perspective, it is *not* sufficient for the Commission to define only "gratuitous or excessive violence," *id*. ¶ 8, when it starts from a position of uncertainty regarding what is even meant by "violence" and which depictions of violence are "bad." These are only the threshold questions that define what the FCC purports to measure. It must also determine whether its measurement tools, largely in the form of social science studies, are adequate to the task, what the studies purport to find, and whether the results are relevant to the legal standards that will be used to scrutinize any resulting regulation.

Answering these questions presents a host of practical and legal problems if the Commission seeks to fashion regulations based on its understanding of social science theories. Will any rules be confined to televised images of fictional violence or will they also include real-life violence shown on the news and ritual violence in full-contact sports programs? Similarly, will the regulations address "food chain" violence in nature programs or "autopsy violence" in medical programs? Each of the policy alternatives begins with the Commission's definition of violence, and the choices made will have significant ramifications, not only on the scope of the regulation, but also any resulting legal analysis, which cabins the Commission's power to effectuate public policy initiatives.

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[9] Robert Corn-Revere, *Television Violence and the Limits of Voluntarism*, 12 YALE J. ON REG. 187, 193 (1995).

II. REPORTS OF THE EFFECT OF VIEWING VIOLENT PROGRAMMING ARE GROSSLY OVERSTATED

The *Notice* seeks comment on the impact of violent programming, focusing primarily on the social science studies that have been at the heart of the debate over media effects. *Notice* ¶¶ 5-7. The Commission's review of the literature in this area is most needed, for there is no shortage of extravagant claims about the overall effect on children of viewing television shows with depictions of violence. Groups such as the American Academy of Pediatrics claim that there are 3,500 studies that demonstrate adverse effects of media violence, [10] and it has become commonplace for such organizations and policymakers to casually (and falsely) assert that there are thousands of such studies that point to a "causal connection." [11] Certain proponents of the causal hypothesis have even made the astonishing statements that television shows are behind half the homicides in the United States, [12] and the cause of 10 percent of violent crimes. [13] Many of these advocates state boldly that "the debate is over" [14] and that to dispute a causal link between TV and aggression is to "argue against gravity." [15]

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[10] *See id*. ¶ 7 n.18 (citing American Academy of Pediatrics, *Media Violence*, 108 Pediatrics 1222, 1223 (Nov. 2001)).

[11] A June 2000 joint public statement of the American Medical Association, the American Academy of Pediatrics, and the American Psychological Association, among others, stated that "[w]ell over 1,000 studies … point overwhelmingly to a causal connection between media violence and aggressive behavior in some children." *Id*. ¶ 6 n.17.

[12] *See* Brandon S. Centerwall, *Television and Violence: the Scale of the Problem and Where to Go From Here*, 267 JAMA 3059 (1992).

[13] *See* L. Rowell Huesmann *et al.*, *The stability of aggression over time and generations*, 20 Developmental Psychology 1120 (1984).

[14] American Psychiatric Ass'n, *Psychiatric Effects of Media Violence, available at* http://www.psych.org/public_info/media_violence.cfm.

[15] *See* Lawrie Mifflin, *Many Researchers Say Link is Already Clear on Media and Youth Violence*, NEW YORK TIMES, May 9, 1999 (quoting Jeffrey McIntyre of the American Psychological Association).

Such statements are wildly inaccurate, and the *Notice* prudently seeks additional information on these issues, citing more balanced reviews of the research. It notes, for example, that the FTC found "[m]ost researchers and investigators agree that exposure to media violence alone does not cause a child to commit a violent act, and it is not the sole, or even necessarily the most important, factor contributing to youth aggression, anti-social attitudes, and violence." [16] It also quotes a 2001 Surgeon General's report stating that "many questions remain regarding the short- and long-term effects of media violence, especially on violent behavior." [17] Additionally, it asks commenters to address the discrepancy in claims about the number of studies, noting the gulf between the "thousands" trumpeted by some advocates versus the couple of hundred described by researchers in the field. [18]

It therefore is appropriate in this proceeding to explore the chasm between the "debate-is-over/more-certain-than-gravity" line of argument, and the conclusions of the FTC and Surgeon General. The question here is not how many studies exist; it is why the number is so grossly overstated by some. Answering that question also provides a valuable touchstone for evaluating what the studies really mean, and whether they provide an adequate basis for policymaking.

A. Social Science Research and Public Policy in Perspective

One factor making it difficult to dispassionately interpret research findings in the area of televised violence is the extent to which the issue has been politicized. In the policy arena, research often is used less as a path to understanding the issue and more as currency to be

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[16] *Notice* ¶ 6 (quoting *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* (September 2000) at Appendix A: A Review of Research on the Impact of Violence in Entertainment Media at 8).

[17] *Id*. ¶ 6 (quoting *Youth Violence: Report of the Surgeon General* (2001), App. 4-B).

[18] *Id*. ¶ 7 n. 18 (noting some 200 to 250 studies on televised violence).

exchanged for political leverage. As a result, studies of televised violence rarely are reported or discussed in terms of what actually was found (or not) by the researchers, and this creates a tendency to misstate or exaggerate their impact. The policy debate is a mélange of social science mixed with politics and advocacy, and there is not always a clear dividing line between the researchers and the advocates. [19]

One indication of this is the extent to which prominent organizations have weighed in on the issue by "endorsing" research findings in the aggregate rather than by reviewing the research and reporting on particular studies. The June 2000 announcement by a number of noted public health organizations provides a good case in point. [20] That well-publicized announcement was characterized by its misstatement of the actual extent of the research ("well over 1,000 studies") and its careless use of the concept "causality." Professor Freedman observes that such errors "are always in the direction that would tend to make the statements of harm more impressive." In all instances "the errors have been to overstate the total number of studies and to understate or not to mention the failures." The important point is not that there are fewer studies on televised violence than advertised, but that such statements "indicate that the organization involved does not know the status of the research and is not taking a position based on a rigorous examination of the scientific research." [21]

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[19] Professor Freedman provides details on researchers in the field who have moved beyond studying the phenomenon of televised violence and have become policy advocates. Freedman Report at 27, 41.

[20] *See Notice* ¶ 6 n.17.

[21] Freedman Report at 5-6 ("it is obvious that these organizations have issued their potentially very important statements without knowing the scientific literature"). *See also* Jonathan Freedman, MEDIA VIOLENCE AND ITS EFFECT ON AGGRESSION 9 (Univ. of Toronto Press 2002) ("MEDIA VIOLENCE AND ITS EFFECT ON AGGRESSION") ("That the [American Academy of Pediatrics] gave such an inflated figure [for the number of studies] is only one indication that they do not know the research. Imagine the response if an organization of economists asserted that there were serious economic problems in over 150 American states. No one would bother

Why would such well-respected professional organizations take a position in the TV violence debate if not based on sound research findings? Perhaps the answer is that in the world of public policy, it is not all about the facts. Dr. Edward Hill, a member of the Board of Trustees of the American Medical Association ("AMA"), provided some insight into this issue at a May 2001 panel discussion hosted by the Freedom Forum. In describing the AMA's motivations for signing the June 2000 joint statement on televised violence, he said:

> [T]here were political reasons for signing on. We're looking for a champion in Congress that will be willing in the long run to back our desire for funding of comprehensive school health in this country. And we haven't found that champion yet but we are looking for him. There are five federal agencies who have large health education budgets. Some of them don't use it for much health education: the Department of Defense, Agriculture, Education and one other have large budgets for health education. What our dream of seven years ago was to have those funds put into a single pot and have them utilized by states and school districts who are willing to follow a certain criteria for developing or using curriculum for school health. Much as we have done with highway funds in this country and successfully build highways. We haven't found that champion yet, so some of our reason was political and some of it was true belief that our science department signed off on what was good science. I question that, of course, and I have. But I still believe that all the science is not in.[22]

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asking for their statistics, since if they were so sloppy as to think that there were that many states, who could possibly trust the rest of their statement?").

[22] *Violence in the Media – Connection or Cause*, Freedom Forum First Amendment Center, May 1, 2001 (Transcription from webcast) ("Freedom Forum Panel"), attached as Exhibit 1 at 14-15. Dr. Hill added:

> Up until the time I read [Marjorie Heins'] paper, I was fairly comfortable with the research that we were presented with at the American Medical Association. I have become less comfortable. I still don't believe that I am necessarily wrong. I just believe none of the research has been done yet or the right kind of research and maybe we cannot do the right kind of research in the right context. I suspect that's true because of social issues. But we are still very concerned about – not causality as much as we are concerned about context and volume of violence and sexuality in the entertainment industry and the media. But the solution is – you would have to be a simpleton not to know what the solution to the problem is. It's what I call prenatal through 12 comprehensive health education in this country – funding it and financing it.

Id. at 8-9.

Such statements are far removed from the rhetoric that "the debate is over" that so often dominates policy discussion on this issue. At the same Freedom Forum event, Jeff McIntyre of the American Psychological Association was asked directly if he is "convinced there is a causal link between media violence and actual violence." His answer is revealing:

> Not to sound too Clintonesque, but how do you define causal? [laughter] I think one of the difficult things in this debate has been a problem in just that term – causal – unfortunately, that when we use the term causal, a lot of folks think that that is something that can be used in a predictive sort of way. When we use it in social science context, generally what we see is that in the roots of violence, and we have to kind of get away from your traditional cause-and-effect model when we talk about violence, because there is nothing in the roots of violence prevention that aims at one thing. [23]

Those more moderate descriptions of the research findings cannot be reconciled with the claims made in the policy arena that "the evidence is overwhelming" and that "[t]o argue against it is like arguing against gravity." [24] Such statements make wonderful sound bites, but they should not be confused with science.

Quasi-scientific pronouncements have a long history in the world of public policy, most especially in matters related to the protection of children. In 1954, psychiatrist Dr. Fredric Wertham published the book SEDUCTION OF THE INNOCENT, which claimed that reading comic books caused juvenile delinquency. It described instances of violence, sex, drug use, and other adult behavior in comic books and concluded, largely based on undocumented anecdotes, that

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[23] *Id*. at 9.

[24] Mifflin, *supra* note 15 (quoting Jeffrey McIntyre of the American Psychological Association). Jeffrey McIntryre also stated in a recent congressional hearing that the joint consensus statement issued in 2000 was "what we absolutely know to be true in the public health community regarding children's exposure to violence in the media." *The Effect of Television Violence on Children: What Policymakers Need to Know*, Subcom. on Telecomms. and the Internet, Sept. 13, 2004 (statement of J. McIntyre), *available at* http://energycommerce.house.gov/108/Hearings/09132004hearing1355/McIntyre2197.htm.

reading this material caused similar behavior in children. Wertham warned parents of a "blond, curlyheaded boy of six" who had "started his career as a burglar" after reading comic books. [25]

The example is relevant because comic books were as pervasive in 1954 as television is in 2004, reaching over 90 percent of children aged 6 to 11 and over 80 percent of children aged 12 to 17. [26] The Senate reported that juvenile delinquency rose more than forty percent between 1948 and 1953. [27] Citing this rise in juvenile crime, Dr. Wertham reasoned that the comic books must have caused children to become delinquents. The Senate Judiciary Committee convened a special Subcommittee to Investigate Juvenile Delinquency in the United States and held hearings on the topic of Comic Books and Juvenile Delinquency in 1954. Dr. Wertham testified extensively before the Subcommittee, restating arguments from his book and pointing to comic books as the major cause of juvenile crime. As support for his cause, Dr. Wertham testified that "A boy of 6 wrapped himself in an old sheet and jumped from a rafter. He said he saw that in a comic book." [28] However, twenty years after his sensational testimony, and outside the glare of the media spotlight, Dr. Wertham later backed off his assertions and became "a comic book fan," [29] corresponded with other fans [30] and even published a book about fanzines, which are self-published books by comics fans. [31]

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[25] *See* Frederic Wertham, *What Parents Don't Know About Comic Books*, LADIES HOME JOURNAL, November 1953 (excerpting SEDUCTION OF THE INNOCENT). The anecdotes also described a teenager found driving a stolen car and twelve-year-old boys caught stealing, both of whom supposedly "learned" their behavior from comic books – although no evidence suggested that the boys in question actually had seen the comics Wertham concluded had "obviously inspired" them. *Id.*

[26] *See* Note, *Regulation of Comic Books*, 68 HARV. L. REV. 489, 489 n.3 (January 1955).

[27] *Id.* at n.9 (citing Sen. Rep. No. 1064, 83rd Cong., 2d Sess. 7 (1954)).

[28] *See Are Comics Horrible?*, NEWSWEEK, May 4, 1954, at 60.

[29] *Id.*

It is not at all unusual for anecdotes to masquerade as fact in the debate over televised violence, particularly when bolstered by the patina of credibility provided by scientific references. In one widely-reported incident in 2000, an activist group claimed that children were committing violent acts after watching the wrestling program "WWF Smackdown!" on television. On the basis of this assertion, the group orchestrated a campaign to persuade advertisers not to sponsor World Wrestling Entertainment ("WWE") (formerly the WWF), blaming the deaths of four children on the "Smackdown!" show.[32] WWE sued the group for libel in November 2000, and ultimately agreed to settle the case for $3.5 million.[33] The activist group acknowledged that it had made false statements about the deaths and stated in a public apology: "Please disregard what others and we have said in the past about the Florida 'wrestling' death. Neither 'wrestling' in general, nor WWE specifically, had anything to do with it. Of that I am certain."[34] Other high-profile examples that claim adverse effects of television viewing similarly turned out to be false upon closer inspection.[35] Retractions, however, are not usually

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[30] Dwight Decker describes his correspondence with Dr. Wertham in "Fredric Wertham - Anti-Comics Crusader Who Turned Advocate," Amazing Heroes (1987). A version of article is available at http://art-bin.com/art/awertham.html (visited October 6, 2004).

[31] Frederic Wertham, The World of Fanzines: A Special Form of Communication, Southern Illinois University Press (1973).

[32] *See* Paul Farhi, *TV Watchdog Apologizes for False Claims on Wrestling*, WASH. POST, July 9, 2002, at C1.

[33] *See* John M. Higgins, *Bozell's $3.5M apology*; BROADCASTING & CABLE, July 15, 2002, at 36; *Flash: Wrestling 1, Parent Group, 0*, NEWSDAY, July 9, 2002, at A12.

[34] L. Brent Bozell, Parents Television Council Retraction to WWE and to the Public, issued July 9, 2002, attached as Exhibit 2.

[35] In another case that received extensive media coverage, a five-year-old boy set fire to his family's trailer home in Ohio in 1993, killing his two-year-old sister. Joe Chidley, *Toxic TV: Is TV Violence Contributing to Aggression in Kids?*, MACLEAN'S, June 17, 1996 (*available at* www.mediaawareness.ca/english/resources/ articles/violence/toxic_tv.cfm). The mother said the boy set the fire after watching the show "Beavis and Butthead," but subsequent investigation

as highly publicized as the sensational accusations, and they combine with inflated descriptions of social science research to color the policy debate.

B. Research Findings Are Exaggerated and Do Not Provide a Sound Basis for Making Policy

The *Notice* quite properly asks what the policy implications should be, if any, arising from findings in the social science literature regarding the effects of television violence. *Notice* ¶¶ 5-7. As an initial matter, however, it identifies the significant differences in the way the results have been characterized and seeks comment on the overall nature of the research findings, as well as an update on more recent research efforts. It describes the various types of studies that have been conducted and cites the literature reviews of the FTC in 2000 and the Surgeon General in 2001. *Id*. ¶¶ 5-6. In response, we set forth an analysis below of the research findings.

As a threshold matter, it is important to explain the importance of the public policy context in which this analysis occurs. First, as a matter of scientific method, there is an obligation on the part of the researcher to show that results provide strong support for the proposed effect (if, in fact, that is what the study concludes). Second, by moving into the regulatory realm, there is an obligation on the part of policymakers to demonstrate that any research findings they cite are relevant to, and support, some supposed regulation. This second burden of proof is far more complex, for a couple of reasons. As an initial matter, it is generally not sufficient to create a regulation in response to a particular study's findings. Just as it is possible to criticize any study, it would be foolhardy to base national policy on a particular result. Moreover, the First

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(which was far less widely reported) revealed "the mobile home in which Jessica Matthews died did not even have cable." *Id.* *See also* MEDIA VIOLENCE AND ITS EFFECT ON AGGRESSION at 6 ("*Tommy's family did not have cable television*. In fact, no one at the trailer park had it, and no one he knew had it. *So there was no way he could have seen the show*. The tragic incident had nothing whatsoever to do with the television program that had been shown the day before. Rather than being a case of television causing the tragedy, it was simply one more instance of children playing with fire and someone getting hurt.") (emphasis in original).

Amendment places a substantial burden of proof on the government to support any content-based regulations, so that policymakers must identify a substantial body of findings that would specifically support the proposed regulations.

A detailed examination of the 200 to 250 existing studies shows that the literature does not support the claim of a causal relationship between depictions of violence in the media and aggression. Nor is there evidence that exposure to violent imagery leads to desensitization. Although the evidence in support of a link is often described as "overwhelming" in the policy debates, in fact the evidence is weak and inconsistent. Unfortunately, research findings often are mischaracterized, and in some cases reach conclusions that are the opposite of what has been reported. [36] In 2002, Professor Jonathan Freedman of the University of Toronto conducted an exhaustive review of all of the research on this topic available, and concluded that "evidence does not support the hypothesis that exposure to film or television violence causes children or adults to be aggressive," a finding that "has never been seriously challenged." [37] In particular, he reviewed each study and classified it as (1) supporting the causal hypothesis, (2) failing to support the causal hypothesis, or (3) yielding mixed results. His results are summarized for each type of study:

Laboratory Experiments. Freedman reviewed eighty-seven laboratory experiments and found that 37 percent of the studies supported the causal hypothesis, 22 percent gave mixed results, and 41 percent did not support the hypothesis. [38] He noted that laboratory experiments have serious limitations. The experiments are short-term, involve only brief exposures to pro-

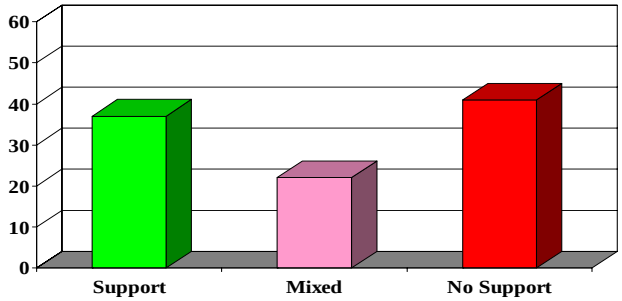
[36] *See generally* Freedman Report; MEDIA VIOLENCE AND ITS EFFECT ON AGGRESSION.

[37] Freedman Report at 6.

[38] The typical laboratory experiment brings subjects into the laboratory, shows them violent or nonviolent films, and then measures aggression levels, also in the laboratory setting. *See* MEDIA VIOLENCE AND ITS EFFECT ON AGGRESSION at 46-84.

grams, use measures of aggression that are often questionable, and are conducted in an artificial environment, therefore increasing the effect of experimentor demand. Freedman concluded that the laboratory experiments do not provide much support for the causal hypothesis, both because of their inherent limitations and, more importantly, because of the weakness of the results.

Results of Laboratory Experiments

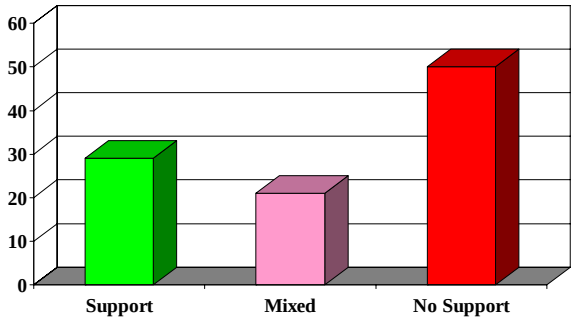


Percentage of Studies Getting Each Result

The above chart simply reports the findings of laboratory studies based on the researchers' conclusions as to whether the results supported or failed to support the causal hypothesis. Even by this measure, most studies are not supportive. But Professor Freedman observed further that when unrealistic measures of aggression are removed from the analysis (*e.g.*, thinking "aggressive thoughts," hitting a Bobo doll, or administering a loud noise), the percentage of supporting studies drops even further, to 28 percent, while 55 percent of the studies show no support for the causal hypothesis. [39]

[39] *Id.* at 62-63. Freedman has noted that "many of the experiments with children defined aggression in terms of behaviours that are so remote from actual aggression that they are highly questionable or even laughable as measures of aggression" (*e.g.*, asking the subject if he would pop a balloon if he had one). Since Bobo dolls are made for the purpose of being hit, Freedman has pointed out that "[c]alling punching a Bobo doll aggressive is like calling kicking a football aggressive …. No harm is intended and none is done." *Id.* at 61. *See id.* at 39.

Results of Laboratory Experiments
no Bobo dolls, no thoughts

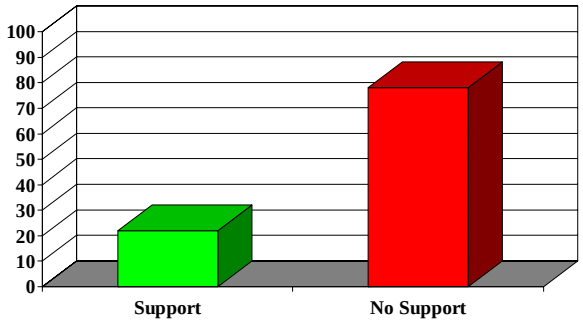


Percentage of Studies Getting Each Result

Field Experiments. Freedman reviewed a total of 23 field experiments, [40] and concluded that three experiments found some support for the causal hypothesis, while twenty did not. Further, the three experiments that obtained supportive results all had small samples. Freedman concluded that the field experiments provided little or no support for the causal hypothesis, and therefore constitute evidence *against* the causal hypothesis. The field experiments should be the best test of the hypothesis, since they are done in natural settings and therefore avoid many of the problems of the laboratory research. That the field experiments produced such negative results for the causal hypothesis is a strong indication that the laboratory results, described above, were not due to the direct effect of the violent media.

[40] *Id.* at 85-107. Field experiments are experiments done in natural settings, as opposed to a laboratory. These experiments show the subjects programs in the subjects' homes or classrooms, and observe behavior in the school playground or equivalent setting.

Results of Field Experiments

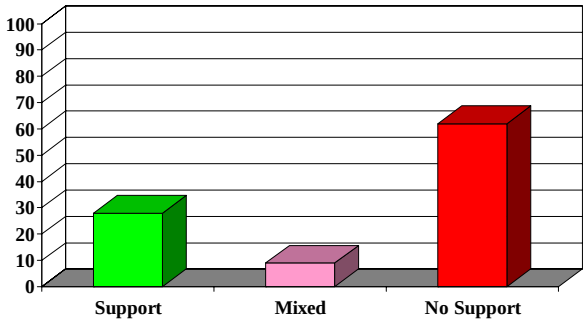


Percentage of Studies Getting Each Result

Longitudinal Studies. Freedman reviewed the eight longitudinal studies that have been conducted on the issue of media violence and aggression.[41] He found that only three studies provided any results that were clear support for the causal hypothesis. However, even in those three studies, the results were neither strong nor consistent (and the other five provide no support whatsoever). The same three studies that found the only supportive results also produced many more non-supportive results. Freedman concluded that the evidence from longitudinal studies provides little support for the causal hypothesis, and could be interpreted as evidence against that hypothesis.

[41] Id. at 108-134. Longitudinal research on media violence starts with the results of surveys on the correlation between viewing violent programming and aggressive behavior. However, since correlation alone does not provide information about a causal link between media violence and aggression, longitudinal studies gather data on viewing habits and aggressiveness in an attempt to provide evidence that will establish whether there is a causal effect.

Results of Longitudinal Studies



Percentage of Studies Getting Each Result

These findings are entirely consistent with the work of other scholars. Thirty-three scholars in the fields of media, psychology, and culture concluded in 2002 that the research on media violence has not demonstrated that violent entertainment causes real-world harm. *See* Brief of Amici Curiae Thirty-Three Media Scholars at 6-12, *Interactive Digital Software Ass'n v. St. Louis Cty*., 329 F.3d 954 (8th Cir. 2003) (No. 02-310), attached to ACLU Comments, MB Docket No. 04-261, filed September 15, 2004. In addition, various researchers have debunked a widely-quoted study by Brandon Centerwall which claimed that television influences the homicide rate. Centerwall studied the homicide rates in South Africa, Canada, and the United States in relation to the introduction of television in those countries (while Canada and the United States began receiving television broadcasts in 1945, television was banned in South Africa until 1975). In all three countries, Centerwall found that the homicide rate doubled ten to fifteen years after the introduction of television. Centerwall therefore concluded that watching television as a child is a causal factor behind approximately one-half of the homicides committed in the United States. [42] These sensational claims were reported uncritically in a 1999 Senate

[42] *See* Brandon S. Centerwall, *Television and Violence: the Scale of the Problem and Where to Go From Here*, 267 JAMA 3059 (1992). He concluded that "[i]f, hypothetically, television technology had never been developed, there would be 10,000 fewer homicides each year in the

Judiciary Committee Report, [43] and have been described as "a mainstay of the American Medical Association and Congressional claims that television violence is destroying American youth." [44]

Such superficial analysis has been widely criticized, as the Federal Trade Commission noted in its September 2000 report. [45] For example, Franklin Zimring and Gordon Hawkings of the Earl Warren Legal Institute at the University of California at Berkeley refuted Centerwall's findings in 1997. Zimring and Hawkins tested Centerwall's theory by studying homicide rates in the three countries Centerwall studied, as well as four other countries: France, Germany, Italy, and Japan. They found the homicide rates in those countries either remained the same or declined with increased television exposure, "*disconfirm*[ing] the causal linkage between television set ownership and lethal violence for the period 1945-1975." [46]

Professor Freedman likewise describes Centerwall's conclusions as "nonsense," and notes that "careful analysis of the crime statistics indicates that the pattern of increases in crime rates is inconsistent with the suggestion that the increases were caused by exposure to television." Moreover, other changes in the US and Canada that occurred during the period Center-

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United States, 70,000 fewer rapes and 700,000 fewer injurious assaults. Violent crime would be half what it is."

[43] *Children, Violence and the Media: A Report for Parents and Policy Makers*, Sen. Jud. Committee, September 14, 1999.

[44] Richard Rhodes, *The Media Violence Myth*, attached as Exhibit 3 ("*Media Violence Myth*").

[45] The FTC Report cited critics who noted that Centerwall did not take into account the social changes taking place in South Africa during the time period of the study, and that Centerwall's focus on television in general makes it difficult to isolate the impact of violence in entertainment media versus violence in television news. *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* (September 2000) at Appendix A: A Review of Research on the Impact of Violence in Entertainment Media at 8.

[46] *Media Violence Myth* at 3 (citing Franklin Zimring & Gordon Hawkings, *Crime Is Not the Problem: Lethal Violence in America* (1997), at 243) (emphasis in original).

wall studied (*e.g.*, massive social change – the sexual revolution, more unwanted children to young mothers, more broken homes, etc.) could well explain increases in violent crime. In any event, the cultural difference between the U.S. and Canada as compared to South Africa during the period in question (*e.g.*, "the former were democratic, had free press, allowed public dissent, were not police states, and were not apartheid") make Centerwall's extrapolation fanciful. [47]

Another study that is widely quoted by policymakers is a longitudinal study conducted by Leonard D. Eron and L. Rowell Huesmann that purported to find that viewing television had a long-term effect on aggression. [48] It is on the basis of this data that the researchers have asserted televised violence is responsible for 10 percent of violent crime. [49] However, closer examination of this data reveals one extraordinary fact: as Huesmann has admitted, the correlation between televised violence and arrests for violent crime in their study was based on the activities of only three boys. [50] For the other 142 boys in the study, there was no relationship between viewing televised violence and later arrests for violent crime. [51]

Finally, in response to the request in the *Notice* that commenters address more recent research, *Notice* ¶ 6, the Media Associations engaged Professor Freedman to review the newer studies of media violence. He examined recent studies by Huesmann and Johnson, as well as recent research on brain activity. The resulting report, attached in an Appendix to these Com-

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[47] Freedman Report at 30-31; MEDIA VIOLENCE AND ITS EFFECT ON AGGRESSION at 140.

[48] *See* L. Rowell Huesmann *et al.*, *The Stability of Aggression Over Time and Generations*, 20 Developmental Psychology 1120 (1984). The study has been described as a "key study leading to the Surgeon General's committee conclusions," and was influential in the legislative debates that led to adoption of the V-chip provisions of the 1996 Telecommunications Act. *Media Violence Myth* at 5.

[49] *Media Violence Myth* at 6.

[50] *Id.* at 7.

[51] *Id.*

ments, describes the nature of recent research and concludes that "the few studies done since" 2002 do not change his conclusion that "scientific evidence does not support the hypothesis that exposure to media violence causes people to be aggressive." [52] In addition, Professor Freedman specifically addresses the review that was published by a group of psychologists who are advocates for the causal hypothesis. [53] A version of this review was submitted to the Surgeon General (who largely rejected it) and has been submitted to the Commission. Although the review was supposed to be definitive, Freedman concludes that the review "presents a highly selective and one-sided description" of media violence studies. [54] "It is not the state-of-the-art review it is meant to be nor a balanced presentation of the scientific literature." [55]

In sum, studies that claim to have found "causality" between media violence and effects are grossly overstated. In fact, the causes of violent behavior are far more complex, and the experimental studies of reactions to violent programs are too simplistic. As Professor Freedman notes, "[t]he simplest explanation, the one that must be disproved, is that some children have more aggressive personalities or dispositions than others and that these children like more violent media, play more violent sports, and engage in more aggressive behavior. To demonstrate that violent media *cause* aggressiveness, it is necessary to rule out this simple, intuitive explanation …." [56]

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[52] Freedman Report at 2.

[53] *Id*. at 21-37.

[54] *Id.* at 27.

[55] *Id.* at 37.

[56] *Id*. at 8 (emphasis in original).

C. Reality Check for Research Findings

Actual experience with real-world aggression and violent crime provides an important reality check against claims that pictures of violence produce aggressive acts. If the theories are correct, then increasing levels of violence in the media *must* result in higher levels of violence in society. Some commenters in this proceeding undoubtedly will submit evidence purporting to show that the number and intensity of violent images in the media is continuing to rise. For example, some media critics have claimed that between 1998 and 2002, depictions of violence in prime time increased by 41 percent during the "family hour" and 134.4 percent during the hour beginning at 9 p.m., [57] and they argue that this violent programming causes violent behavior. But the actual statistics show just the opposite effect. By virtually any measure, we are living in a less violent society.

1. Violent Crime Rates Have Plummeted

The rate of violent crime in the United States began to drop in 1994, and the reduction has continued through 2003 to the lowest level ever recorded. Between 1994 and 2003, violent crime rates declined about 55 percent. [58] A September 2004 Justice Department report found the crime rate is at its lowest level since it began conducting the survey in 1973. [59] The following Justice Department chart illustrates the fall in the rate of violent crime [60] since 1973:

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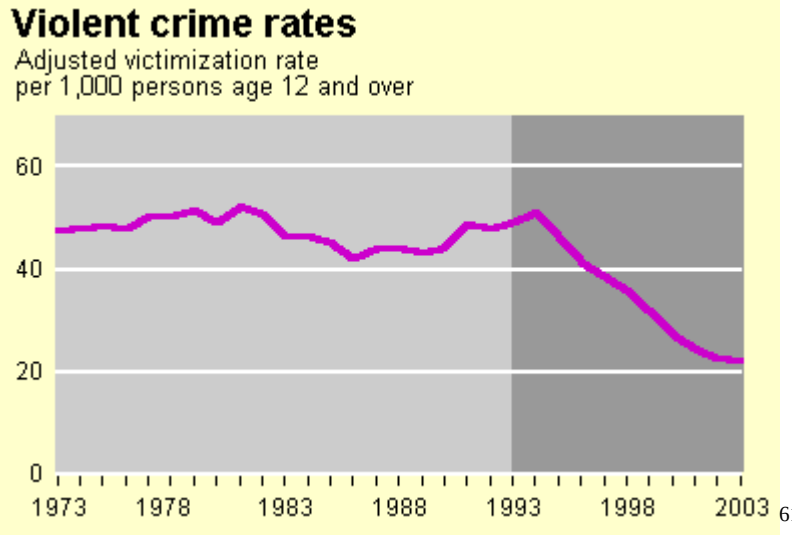
[57] Parents Television Council, *TV Bloodbath: Violence on Prime Time Broadcast TV: A PTC State of the Television Industry Report* (2003), *available at* http://www.parentstv.org/ptc/publications/reports/stateindustryviolence/main.asp.

[58] *See* U.S. Department of Justice, Office of Justice Programs Bureau of Justice Statistics at http://www.ojp.usdoj.gov/bjs/glance/viort.htm.

[59] *Id*.

[60] In this study, violent crime encompasses rape, sexual assault, robbery, aggravated assault, and simple assault. *Id.*



[61]

Another study showed that in major metropolitan areas where violent television programs have the largest audiences, the rate of violent crime (including homicide, rape, robbery, and aggravated assault) is low. Steven Messner studied statistics to determine whether "population aggregates with high levels of exposure to violent television content also exhibit high rates of criminal violence." [62] Messner compared FBI violent crime rates in metropolitan areas to the popularity of "violent" programs in those areas. [63] He found that the "data consistently indicate that high levels of exposure to violent television content are accompanied by relatively low rates of violent crime." [64] In fact, Messner found that areas "in which large audiences are attracted to

[61] Rape (excluding sexual assault), robbery, and assault data are from the National Crime Victimization Survey. Ongoing since 1972, this survey of households interviews about 75,000 persons age 12 and older in 42,000 households twice each year about their victimizations from crime. The homicide data are collected by the FBI's Uniform Crime Reports from reports from law enforcement agencies. *See* http://www.ojp.usdoj.gov/bjs/glance/viort.htm.

[62] Steven Messner, "Television Violence and Violent Crime: An Aggregate Analysis," 33(3) *Social Problems* 218 (1986).

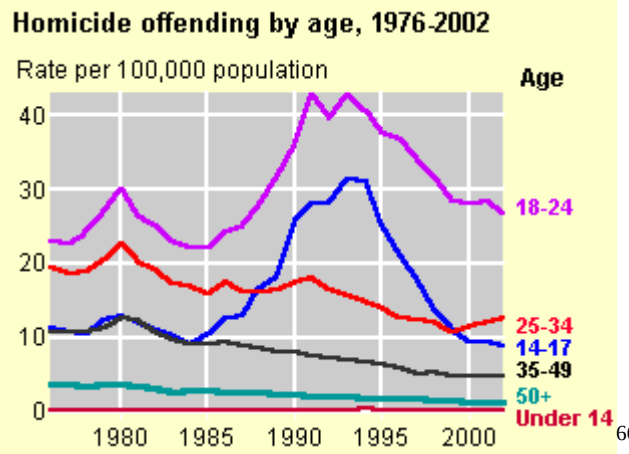
[63] Messner used a list of "violent" TV shows as identified by an antiviolence advocacy group.

[64] *Id*. at 228.

violent television programming tend to exhibit *low* rates of violent crime." [65] As illustrated by these studies, the claim that violent crime is increasing due to increased television viewing is incorrect.

2. Youth Violence Also Declined

Not only have overall violent crimes rates decreased, but youth violence in general, and school violence in particular, has declined markedly since the early 1990s. The juvenile crime rate has been falling since 1994, as illustrated by this Department of Justice chart:



[66]

Further, Bureau of Justice statistics show the rate of violent crime in schools declined by more than 50 percent between 1994 and 2001. [67] Between 1995 and 2001, the percentage of students who reported being victims of crime at school decreased from ten percent to six percent. [68] Other studies also report that violence among youth is decreasing. National Center for Education Statistics show the number of homicides in U.S. schools in 2001-02 was only half

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[65] *Id.* at 223-24.

[66] The source of the statistics for this chart is the FBI's Supplementary Homicide Reports, 1976-2002. *See* http://www.ojp.usdoj.gov/bjs/homicide/teens.htm#oage.

[67] *See* http://www.ojp.usdoj.gov/bjs/abstract/iscs03.htm.

[68] *Id.*

the number it was five years earlier.[69] From 1993 to 2001, the percentage of students who reported having been in a physical fight decreased, as did the percentage of students who reported carrying a weapon to school at least one day.[70] The Centers for Disease Control and Prevention reported that the percentage of high school students who had been in a physical fight dropped to 33 percent in 2003 from 43 percent in 1991.[71] Also, the percentage of students who carried a weapon to school decreased from 26.1 percent in 1991 to 17.1 percent in 2003.[72]

Despite the continuing efforts of media critics to link television programming to increased violent behavior, the facts do not support this assertion. If violent programming is responsible for crime, then violent crime rates should have increased in recent years. The fact that it has not, and in fact has moved in the opposite direction, should lead proponents of the causal hypothesis to check their premises.

III. CONSUMERS HAVE AMPLE MEANS TO CONTROL PROGRAMMING IN THEIR HOMES

No review of the issue of televised violence would be complete without a thorough analysis of the current state of technology. As a general proposition, content restrictions have been permitted in the United States only when individuals lack the capacity to select which programs they wish to receive (or exclude). While policymakers may debate the relative merits of certain types of programs, the law requires the government to remain neutral when people have a choice. As Justice Kennedy explained:

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[69] There were 28 homicides in schools in 1996-97, and fourteen homicides in 2001-02. *See* National Center for Education Statistics, *Indicators of School Crime and Safety, 2003*, Fig. 1.2, *available at* http://nces.ed.gov/pubs2004/crime03/1.asp.

[70] *Id.* at Fig. 5.2 and 11.2.

[71] 2003 Youth Risk Behavior Surveillance System, *available at* www.cdc.gov/yrbss.

[72] *Id.*

> The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.

United States v. Playboy Entmt. Group, Inc., 529 U.S. 803, 818 (2000). *See Ashcroft v. ACLU*, 124 S.Ct. 2783, 2794-95 (2004) (evaluating constitutionality of speech restrictions requires court to update record to assess changes in technology). With a willing audience, government regulation is inappropriate, as the First Amendment "'does not permit the government to prohibit speech as intrusive unless the "captive" audience cannot avoid objectionable speech.'" [73]

In 1978, the Supreme Court upheld a narrow exception to this rule in the area of broadcast indecency because it concluded the radio audience largely was powerless to exclude unwanted communications. [74] That finding, however, must be updated even with respect to the subject of indecency (and it never applied to other subjects like violence). As the Commission recently concluded, "the modern media marketplace is far different than just a decade ago." It found that traditional media "have greatly evolved," and "new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history." *2002 Biennial Regulatory Review*, 18 FCC Rcd. 13620, ¶¶ 86-87 (2003).

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[73] *Bolger v. Youngs Drug Prods Corp.*, 463 U.S. 60, 72 (1983) (quoting *Consolidated Edison Co. v. Public Serv. Comm'n of New York*, 447 U.S. 530, 542 (1980)). *See also Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) ("Once a public forum for communication has been established, both free speech and equal protection principles prohibit discrimination based solely upon subject matter or content.").

[74] *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978). In dissent, however, Justice Brennan pointed out that individuals voluntarily open their homes to broadcast signals, and are not required to listen or watch anything they find offensive. He argued that "an individual's actions in switching on and listening to communications transmitted over the public airways … are more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse." *Id.* at 765 (Brennan, J., dissenting).

Consumers today are not limited to the media that existed in the past. Rather, they make conscious choices to participate in broadcast media or to select other services that bring media into their homes. In 2004, consumers not only have more programming options, but the available alternatives permit a far greater degree of control over programming than ever before. In addition to delivered video media (including broadcasting, cable and satellite), consumers may watch videotapes or DVDs of movies, technology that was only in its infancy two decades ago. Today, the vast majority of households have VCRs, and over half of American households have DVD players to view the more than 300,000 titles available on DVD. [75] Further, with the advent of digital video recorders, or DVRs, viewers have an increased ability to "time-shift," or watch programming at a later time than it is broadcast. Consumers can purchase a stand-alone DVR or rent one through their cable or satellite provider. [76] DVR penetration is projected to reach 24.7 million homes by 2007. [77] With a DVR, viewers can pause, rewind, or fast-forward programs as they are being transmitted, changing the definition of "live TV."

These marketplace developments empower individuals and parents to accept or reject programming of their choice. [78] In fact, some children's media advocates see the devices as an

[75] *DVD Disc Purchases in 2003 Exceeded $12 Billion*, January 26, 2004, MEDIA LINE NEWS, *available at* http://www.medialinenews.com/articles/publish/article_455.shtml.

[76] *See* Ken Belson, *TiVo, Cable or Satellite? Choose That Smart TV Wisely*, N.Y. TIMES, September 4, 2004.

[77] Tenth Annual Report at 44. A Kagan Research study found that DVRs were in 2.9 million households at the end of 2003, and expected to be in 6.6 million households by the end of 2004. Kagan predicts that by 2014, DVR penetration will close in on cable's reach, at 62 million homes. Ann M. Mack, *Untitled*, ADWEEK, September 20, 2004.

[78] *See, e.g.*, http://customersupport.tivo.com/knowbase/root/public/tv1529.htm (guide to TiVo parental controls); http://www.timewarnercable.com/corporate/products/digitalcable/dvr.html (guide to cable box DVR parental controls).

improvement over existing parental-control technology.[79] Some types of parental controls are provided along with video service. For example, satellite customers have access to parental control technology,[80] and analog cable subscribers can use their set-top boxes, or can lease or purchase a "lockbox" to lock specific channels so that the programming cannot be viewed.[81] Digital cable subscribers can use their digital cable box to restrict viewing by rating, by program title, by time or date, or completely lock out certain channels or programs.[82] Such blocking options allow parents to control programming in their homes without infringing others' rights.[83]

In addition to solutions that evolved on their own, other self-regulatory options were stimulated by the Telecommunications Act of 1996. The Act requires that all televisions with a

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[79] Daniel McGinn, *Tending Tots with TiVo*, NEWSWEEK, December 16, 2002, at 9. "All the V- chip does is block what you don't want," says David Kleeman of the American Center for Children and the Media. "With [a DVR], you can pick the best programs for your children's age group from all the different channels." *Id.* One parent praised DVRs because "[y]ou're making a conscious choice on what to watch, and when you're done with what you've chosen, the default is not to sit there and watch what comes on next." *Id.*

[80] For example, the Locks & Limits feature on DIRECTV service allows customers to restrict access to movies based on the rating system, pay-per-view spending limits, and block viewing of entire channels. *See* http://www.directv.com/DTVAPP/learn/FAQ_DTVBasics_System.dsp#4. Similarly, Dish Network has an Adult Guard security feature for all models of its receivers that offers subscribers the ability to remove or restrict access on a per-channel basis. The VOOM set-top box supports personal identification number or "PIN" based parental controls that allow subscribers to block the video and audio of entire channels and/or individual programs based on both MPAA or TV Parental Guidelines ratings.

[81] CGB, *How to Prevent Viewing Objectionable Television Programs*, *available at* http://www.fcc.gov/cgb/consumerfacts/objectionabletv.html.

[82] *TV Channel Blocking: V-Chip, the Cable "Lockbox," and Set-top boxes*, *available at* http://www.fcc.gov/parents/channelblocking.html (last reviewed/updated on 2/11/04).

[83] Though parents should have options to control their children's viewing, it is important to ensure filtering technology does not violate the rights of others, including intellectual property rights. While most parental-control technology simply blocks children from watching content their parents do not want them to see, some companies have created products that "edit" content without authorization from copyright holders. *E.g.*, Mike Snyder, *Hollywood Riled up over ClearPlay*, USA TODAY, May 5, 2004.

screen size of 13-inches or greater be equipped with V-chip technology, a device which allows parents to block "sexual, violent, and other indecent material about which parents should be informed before it is displayed to children." [84] To enable the system to work, MPAA, NAB and NCTA devised TV Parental Guidelines to rate programs both on the basis of age and on the basis of content. [85] Almost all broadcast and cable networks were utilizing the Parental Guidelines by October 1, 1997, thus giving parents an additional tool to help them decide which programming they wish their children to view. [86] This combination of marketplace developments, self-regulatory efforts, and minimal regulations suggests the Commission must thoroughly evaluate the technological landscape before proposing any new content regulations.

IV. REGULATION OF VIOLENT PROGRAMMING IS BARRED BY THE FIRST AMENDMENT

Any attempt to regulate televised violence would face insurmountable First Amendment barriers. [87] As the Tennessee Supreme Court has noted, "*every court* that has considered the issue has invalidated attempts to regulate materials solely based on violent content, regardless

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[84] 47 U.S.C. § 303(w)(1). The V-Chip reads information encoded in television programs and blocks the program based on (1) the overall age category; (2) the content rating assigned to the program; or (3) by a combination of the two. Parents also can use the V-Chip to block shows based on the MPAA rating system. The Parental Guidelines were devised by the industry and do not constitute a government-mandated classification system. *See Implementation of Section 551 of the Telecommunication Act of 1996, Video Program Ratings*, 13 FCC Rcd. 8232, 8241 (1998).

[85] *See* http://www.tvguidelines.org/ratings.asp. In addition, some networks also air their own, separate advisories as to program content to the extent appropriate when the programming airs.

[86] *See* Joel Federman, *Rating Sex and Violence in the Media: Media Ratings and Proposals for Reform, A Kaiser Family Foundation Report* (November 2002) at 8.

[87] The *Notice* indicated that members of the House Commerce Committee asked the Commission to evaluate whether constitutional considerations would limit the government's ability to define the phrase "excessively violent programming that is harmful to children" or its ability to create a "safe harbor" for violent programming. The *Notice* also solicited comment on whether the answer to these questions would be affected by exceptions for certain types of programs, such as news or other "unrated" programs, or whether any rules should exempt programs with "cultural, historical, or artistic merit." *Notice* ¶ 23.

of whether that material is called violence, excess violence, or included within the definition of obscenity." *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 531 (Tenn. 1993) (emphasis added). *See also Video Software Dealers Ass'n v. Maleng*, 325 F.Supp.2d 1180, 1182 (W.D. Wa. 2004) ("*VSDA v. Maleng*") ("no such regulation has passed constitutional muster").

A. Regulation of "Violent" Television Programming Would Be Subject to the Most Exacting First Amendment Scrutiny

A growing number of courts have addressed the degree to which "violent" expression is constitutionally protected in a variety of contexts, and every one has decided that such material receives full First Amendment protection. The Supreme Court initially set a high hurdle for regulation in this area, invalidating a state law that curbed the publication of magazines "devoted principally to criminal news and stories of bloodshed, lust or crime." *Winters v. New York*, 333 U.S. 507, 510-11 (1948). In doing so, the Court observed that "[w]hat is one man's amusement, teaches another's doctrine. 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 the best of literature." *Id*. at 501. Since then, a growing number of courts have struck down laws that attempted to restrict the rental to minors of videotapes depicting violence,[88] that regulated the sale of "violent" trading cards,[89] that sought to restrict pornography because of an alleged connection

[88] *Video Software Dealer's Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992).

[89] *Eclipse Enters. v. Gulotta*, 134 F.3d 63 (2d Cir. 1997).

with violence, [90] that sought to regulate access by minors to "violent" video games, [91] and that sought to impose various forms of tort liability for media that allegedly incited violent acts. [92]

The United States Court of Appeals for the Seventh Circuit has observed that "violence on television … is protected speech, however insidious. Any other answer leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us." *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986). Similarly, in striking down restrictions on renting to minors videotapes that depict violence, the Eighth Circuit confirmed that violent video programming is entitled to "the highest degree of First Amendment protection." *Webster*, 968 F.2d at 689. Any regulation of violent television programming obviously would be content-based and

[90] *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188 (9th Cir. 1989).

[91] *Interactive Digital Software Assn. v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) ("*ISDA v. St. Louis*"); *American Amusement Machine Ass'n. v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *VSDA v. Maleng*, 325 F.Supp.2d 1180.

[92] *See James v. Meow Media, Inc*., 300 F.3d 683 (6th Cir. 2002) (First Amendment precludes private tort action based on distribution of violent media products); *Sanders v. Acclaim Entmt., Inc*., 188 F.Supp.2d 1264 (D. Colo. 2002) (same); *Wilson v. Midway Games, Inc*., 198 F.Supp.2d 167 (D. Conn. 2002) (First Amendment bars tort claim based on alleged wrongful death caused by video game); *Watters v. TSR*, 904 F.2d 378 (6th Cir. 1990) (First Amendment precludes wrongful death claim against "Dungeons and Dragons" game); *Herceg v. Hustler*, 814 F.2d 1017 (5th Cir. 1987) (First Amendment precludes tort action over article plaintiff alleged advocated practice of autoerotic asphyxia); *Federation of Turkish-American Societies v. ABC*, 620 F.Supp. 56 (S.D.N.Y. 1985) (First Amendment protects telecast of film "Midnight Express" despite allegation it incited violence against Turkish-Americans); *Waller v. Osbourne*, 763 F.Supp. 1144 (M.D. Ga. 1991), *aff'd*, 958 F.2d 1084, *cert. denied*, 113 S. Ct. 325 (1992) (First Amendment precludes tort action alleging Ozzy Osbourne album incited teen suicide); *McCollum v. CBS*, 202 Cal.App.3d 989 (1988) (same); *Vance v. Judas Priest*, 1990 WL 130920 (Nev. Dist. Ct. 1990)) (First Amendment precludes tort action alleging Judas Priest album incited teen suicide); *Olivia N. v. NBC*, 126 Cal. App. 3d 488 (1981), *cert. denied*, 458 U.S. 1108 (1982) (First Amendment precludes tort action alleging television program incited copycat rape).

subject to First Amendment strict scrutiny.[93] Under the applicable standard, the government must demonstrate that any regulation of violent programming is necessary to serve a compelling interest and that it has adopted the least restrictive means of achieving its purpose. *ISDA v. St. Louis*, 329 F.3d at 958; *Webster*, 968 F.2d at 689.

B. There is No Justification for Reducing the Level of Scrutiny

The *Notice* asks whether violent programming may be classified as expression that qualifies for a lesser degree of constitutional protection, such as "obscene" or "indecent" speech.[94] Although it acknowledges that "an interpretation of indecency or obscenity as encompassing violence would be novel," *id*., the Commission nevertheless asks commenters to address whether violent speech could be relegated to a category of speech that it presumably could regulate more easily. Not only does this inquiry beg the question of whether such a classification would affect the level of scrutiny – which it would not – it also ignores the growing number of cases that already answer the question. As explained in more detail below, depictions of violence cannot constitutionally be lumped in with either obscene or indecent speech.

First, however, it is important for the Commission to understand the constitutional trend is away from recognizing categories of speech that receive less First Amendment protection. Early First Amendment cases described certain "well-defined and narrowly limited classes of speech" that were long considered to be outside the First Amendment's protection. These categories included "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words,'" *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942), and commercial speech, *Valentine v. Chrestensen*, 316 U.S. 52 (1942). Since those early pronouncements,

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[93] Various courts have held that strict scrutiny is the applicable standard for regulation of violent media and that such regulations are "presumptively invalid." *E.g., ISDA v. St. Louis*, 329 F.3d at 958. *See also Eclipse Enters.*, 134 F.3d at 67; *Webster*, 968 F.2d at 689.

[94] *Notice* ¶ 25.

however, the clear trend has been toward greater constitutional protection of speech to such an extent that some scholars suggest this categorical approach has "largely been discredited and abandoned." Rodney A. Smolla, 1 *Smolla & Nimmer on Freedom of Speech* 2-70 (1997).

Commercial speech now receives First Amendment protection, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), and the same is true of "lewd" speech, *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989), "insult[s]," *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), and even "fighting words." *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Substantial constitutional protections buttress the freedom of speech alleged to be obscene, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65 (1963), or defamatory, because freedom of expression must have substantial "breathing space" in order to survive. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-272 (1964) (citation omitted). This trend has narrowed the "variable obscenity" or "harm-to-minors" category of speech as well. Since the Supreme Court first articulated this standard in *Ginsberg v. New York* in 1968, it has limited regulation in this area to "borderline obscenity" or to material considered to be "virtually obscene." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 390 (1988). Similarly, in *Playboy*, 529 U.S. at 829, the Court stressed that "indecent" speech is fully protected by the First Amendment and is not subject to diminished scrutiny as supposedly "low value" speech. [95] Consistent with this movement toward greater protection, the United States Court of Appeals for the Second Circuit expressly "decline[d] any invitation to expand these narrow categories of speech to include depictions of violence." *Eclipse Enters.*, 134 F.3d at 66.

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[95] *See Playboy*, 529 U.S. at 826 (the government cannot assume that it has greater latitude to regulate because of its belief that "the speech is not very important"). Thus, even if violent speech legitimately could be classified as "indecent," the First Amendment nevertheless requires the government to use the "least restrictive means" of regulation. *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999, 8000-01 (2001). *See Action for Children's Television v. FCC*, 59 F.3d 1249, 1253 (D.C. Cir. 1995) ("*ACT IV*").

1. "Violent" Programming Cannot be Analogized to Broadcast Indecency

The First Amendment generally prohibits the government from regulating speech "by wrapping itself in the cloak of parental authority." *ISDA v. St. Louis*, 329 F.3d at 960. The Supreme Court has made clear that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when the government seeks to control the flow of information to minors." *Erznoznik v. Jacksonville*, 422 U.S. 205, 213-214 (1975). Here, there is no justification for imposing special limits on violent programming.

The suggestion that the Commission "could expand its definition of indecency to include violent programming" is based on a misunderstanding of the government's authority to regulate indecency. *Notice* ¶ 25. The Commission's observation that "the Supreme Court has concluded that the term indecent 'merely refers to nonconformance with accepted standards of morality' and that 'neither our prior decisions nor the language or history of § 1464 supports the conclusion that prurient appeal is an essential component of indecent language,'" *Id.* (quoting *Pacifica*, 438 U.S. at 740-41), is inapplicable to this inquiry on televised violence. The cited passage in *Pacifica* stands only for the proposition that indecency need not be limited to material that is "obscene."[96]

Review of the Commission's indecency policy makes clear that the First Amendment precludes extending it to include violence. Although restrictions against "indecency" and

[96] *Pacifica*, 438 U.S. at 739-740. The cited passage comes from the *Pacifica* Court's discussion as to why the FCC may be able to enforce its indecency rules (separately from the prohibition on obscenity) despite the fact that a similar provision applicable to printed matter could be applied constitutionally only to obscene communications. *Compare Hamling v. United States*, 418 U.S. 87, 113-114 (1974) (statutory prohibition on "indecent" or "obscene" mailings may be constitutionally enforced only against obscenity).

"profanity" have existed in some form since the Radio Act of 1927, the Commission officially defined the term "indecent" for the first time in 1975 to clarify the concept in light of the Supreme Court's then-recent constitutional ruling regarding the obscenity standard in *Miller v. California*, 413 U.S. 15 (1973). *Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), New York, N.Y.*, 56 F.C.C.2d 94 (1975). Noting that "the term 'indecent' has never been authoritatively construed by the Courts in connection with Section 1464," it "reformulate[ed] the concept" of indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of day when there is a reasonable risk that children may be in the audience." *Id.* at 97-98. At that time, the Commission also made clear its understanding that statutory restrictions on indecency did not include violence, and that any attempt to expand the definition would raise "sensitive First Amendment problems."[97]

The scope of the "indecency" definition is constitutionally limited. As former Commissioner Glen O. Robinson explained, "[d]espite the fact that the statute (18 U.S.C. § 1464) on its face expresses no limit on our power to forbid 'indecent' language over the air, the First Amendment does not permit us to read the statute broadly." *Citizen's Complaint Against Pacifica*., 56 F.C.C.2d at 103-104 (Concurring statement of Comm'rs Robinson and Hooks). The Commission stated that in order to "avoid the error of overbreadth" it was necessary "to make explicit whom we are protecting and from what." *Id.* at 98. It reasoned that the indecency standard it articulated would not "force upon the general listening public debates and ideas which are 'only fit for children'" because "the number of words which fall within the definition of

[97] *Report on the Broadcast of Violent, Indecent, and Obscene Material*, 51 F.C.C.2d 418, 420 (1975). This report, issued at the same time the FCC developed its definition of indecency, concluded that regulating televised violence could result in "improper governmental interference in sensitive, subjective decisions about programming, could tend to freeze present standards and could also discourage creative developments in the medium." *Id.*

indecent is clearly limited." *Id*. at 99-100. The FCC also stressed that its definition of indecency was formulated "in a specific factual context" and emphasized that the government "must take no action which would inhibit broadcast journalism." *"Petition for Reconsideration" of a Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), New York, N.Y.*, 59 F.C.C.2d 892, 893 (1976). The Supreme Court has reinforced this fact, and in numerous cases emphasized the narrowness of the *Pacifica* holding.[98] To add violence to the types of content that could be more intensively regulated would be a significant – and unconstitutional – expansion of the government's ability to control speech.[99]

2. "Violent" Programming Cannot be Analogized to Obscenity

The same conclusion follows from any attempt to treat violence as if it were obscene. The *Notice* asks whether violence may be subject to regulation under an obscenity approach, and refers to a Seventh Circuit opinion that it acknowledges declined "to conflate obscenity and violence in the context of a particular ordinance regulating violent video games." *Notice* ¶ 25. At the same time, the *Notice* asserts – quite misleadingly – that the court suggested "a demonstrated link to such games and deleterious effects could possibly provide a basis for regulation of violent 'pictures.'" *Id*. This point in the *Notice* raises two separate points, which are addressed in turn: (1) there is no basis for analogizing violent programs to obscenity, and (2) courts have

[98] *Pacifica*, 438 U.S. at 742 ("our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast" in a "specific factual context"); *id*. at 750 ("[i]t is appropriate … to emphasize the narrowness of our holding"). *See also Sable Communications*, 492 U.S. at 127 (*Pacifica* was "an emphatically narrow holding"); *Bolger*, 463 U.S. at 74 (emphasizing narrowness of *Pacifica*).

[99] *See, e.g.*, *Winters*, 333 U.S. at 510, 519 (prohibiting stories of bloodshed and lust does not relate to "indecency or obscenity in any sense heretofore known to the law"); *Olivia N. v. NBC*, 178 Cal. Rptr. 888, 894 (Cal. App. 1st Dist. 1981) (rejecting relevance of *Pacifica* outside the context of "indecent" programming).

refused to approve regulation of violent imagery given the grave First Amendment problems that would result.

First, there is no judicial support whatsoever for the notion that violent speech could legitimately be regulated as if it were obscene. Suggestions to the contrary are the stuff of idle bureaucratic speculation and fringe academic musings, not serious legal analysis. For example, then-FCC Commissioner Gloria Tristani once called upon Congress and state governments to treat violent programs as obscene, and dismissed First Amendment concerns as nothing more than the "most popular sham objection to protecting children from harmful media influences."[100] The *Notice* cites one academic writer – and it would be difficult to find more than one – who has suggested that violence should be equated with obscenity because the ancient origins of the word "obscene" may include violence as well as sex.[101] Such arguments are entirely out of touch with the state of the law as it has been analyzed and applied in a growing number of cases.

Chief among the leading authorities is Judge Richard Posner's opinion in *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (2001), the Seventh Circuit opinion cited in the *Notice*. That opinion did far more than "decline to conflate obscenity and violence" as the

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[100] Commissioner Gloria Tristani, *On Children and Television*, Keynote Address, Annenberg Public Policy Center Conference on Children and Media, June 26, 2000.

[101] *Notice* ¶ 25 (citing Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 L. Rev. M.S.U.-D.C.L. 51 (2003)) ("*Regulating Youth Access to Violent Video Games*"). Professor Saunders draws on ancient history to bolster his argument that courts must include violent content, not just sexual content, in the definition of obscenity. He relies on the etymological derivation of the word "obscene" as well as common practices in ancient Greek and Roman theatrical productions to argue that the definition of "obscenity" includes violence as well as sex. *Id.* at 80-83. Professor Saunders notes with alarm that, in his view, the *Roth* Court mistakenly relied on an 1896 definition of obscenity instead of one from over a century earlier. *Id.* at 84. *See also* Kevin W. Saunders, VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION 113-118 (1996) ("VIOLENCE AS OBSCENITY") (suggesting that historical antecedents to modern obscenity law included very broad restrictions on profanity, blasphemy and depictions of violence, so that the concept of what can be obscene may be too limited by contemporary understandings).

Commission delicately characterized it. It unanimously reversed a lower court opinion and explained in detail why violent expression presents "a different concern from that which animates the obscenity laws." *Id*. at 575. A principal difference, according to the court, is that obscenity is regulated not because it is harmful, but because it is "to many people disgusting, embarrassing, degrading, disturbing, outrageous, and insulting." *Id*. ("Offensiveness is the offense."). Violent speech, on the other hand, may only be regulated if it can be *proven* to be harmful – just like any other protected speech that may be subjected to regulation. [102]

The Commission's characterization of the holding, however, that violent speech may be regulated if there is "a demonstrated link to … deleterious effects" misses the point of Judge Posner's opinion. While the court noted that proof of "harmful effects" historically has not been required in the case of obscenity, [103] it observed that the government faces a significant burden of proof when it seeks to regulate depictions of violence. The Commission's reference to the case entirely overlooks Judge Posner's skepticism about the government's ability to meet this standard of proof (as will be explained below).

All existing judicial authority on this subject confirms that violent speech cannot be equated with obscenity. "Simply put, depictions of violence cannot fall within the legal definition of obscenity for either minors or adults." *ISDA v. St. Louis*, 329 F.3d at 958. As numerous courts have explained, obscenity "encompasses only expression that 'depict[s] or describe[s]

[102] Among other things, regulations are subject to the basic rule that the "government may not [restrict] speech because it increases the chance an unlawful act will be committed at some indefinite future time." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (citation and internal quotation omitted).

[103] After *Kendrick* was decided, the Supreme Court raised the bar on the government's burden of proof, even in cases involving sexually-oriented speech. *See Free Speech Coalition*, 535 U.S. 234. The Court invalidated a federal law on First Amendment grounds where the "causal link [to the asserted harm was] contingent and indirect." The Court observed that "[t]he harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." *Id*. at 250.

sexual conduct.'" *Webster*, 968 F.2d at 688 (quoting *Miller v. California*, 413 U.S. at 24). As a consequence, "[m]aterial that contains violence but not depictions or descriptions of sexual conduct cannot be obscene." *Id.* *See Eclipse Enters.*, 134 F.3d at 67 ("standards that apply to obscenity are different from those that apply to violence"). As one court explained recently, "historical justifications for the obscenity exception simply do not apply to depictions of violence." *VSDA v. Maleng*, 325 F.Supp.2d at 1185. Images of violence "have been used in literature, art, and the media to convey important messages throughout our history, and there is no indication that such expressions have ever been excluded from the protections of the First Amendment or subject to government regulation." *Id*. *See Kendrick*, 244 F.3d at 577 ("Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Andersen, and Perrault is aware."). [104] Consequently, the Seventh Circuit in another case observed that empowering the government to delete "violence" from constitutional protection would give it "control of all the institutions of culture, [and make it] the great censor and director of which thoughts are good for us." *Hudnut*, 771 F.2d at 330.

The suggestion by some theorists that the judicially-accepted definition of obscenity is too limited, because historical antecedents to modern obscenity law included very broad restrictions on profanity, blasphemy and depictions of violence, ignores more than a century of

[104] The purposes and motivations underlying the regulation of sexual materials in the United States has far more to do with the "complex tapestry" of American history and culture than it does the presence (or absence) of social science research. *See generally* Richard A. Posner, *Sex and Reason* 60-66, 218-219 (1992). The regulation of "girlie magazines" upheld in *Ginsberg* was grounded in notions of morality and values, not actual harm. By comparison, violence is far more endemic to contemporary American culture, with elements woven into the fabric of literature, film, philosophy, religion, fairy tales, video games, children's toys, photojournalism, and sports. *See generally Why We Watch: The Attractions of Violent Entertainment* (Jeffrey H. Goldstein, ed., 1998).

constitutional jurisprudence. *E.g.*, Saunders, VIOLENCE AS OBSCENITY at 113-118. The fact that ancient understandings of the term obscenity, or even that some antiquated obscenity laws in the U.S., contained expansive restrictions on blasphemy or violence is hardly a persuasive rationale for expanding the concept of obscenity in the 21st century. Just because our history includes the unfortunate episode of Comstockery, [105] is not a reason to repeat the mistake, any more than it would support reinstating the death penalty for sodomy, as it existed in Colonial America. [106] With respect to restrictions on speech, it should be kept in mind that a principal purpose of the 1873 Comstock Act was to prohibit the dissemination of information about contraceptives. Posner, *Sex and Reason*, *supra*, at 78-79. Yet it scarcely could be argued that adding birth control information to a definition of obscenity would survive today. [107] Indeed, when an updated Comstock restriction on the dissemination of abortion-related information was included in the Communications Decency Act in 1996, the provision was so obviously unconstitutional that the U.S. Justice Department refused to even defend the provision in court. *Sanger v. Reno*, 966 F.Supp. 151 (E.D.N.Y. 1997). For the same reasons, any attempt to expand the concept of obscenity to include violence would violate the First Amendment.

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[105] The first federal obscenity statutes were passed following a lobbying onslaught by Anthony Comstock, who founded the New York Society for the Suppression of Vice. In addition to all things sexual, Comstock crusaded against "dime novels" which he described as "devil traps for the young." He claimed that the books' descriptions of crime and violence were "the inspiration for all of the antisocial behavior exhibited by the youth of the day." *See* Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society – From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary L. Rev. 741, 757 (1992).

[106] Posner, *Sex and Reason*, *supra*, at 61-62. As the Supreme Court made clear in *Lawrence v. Texas*, 539 U.S. 558 (2003), prohibitions on consensual sodomy between adults are unconstitutional despite history of laws prohibiting sodomy dating back to 1533.

[107] *Carey v. Population Servs. Int'l*, 431 U.S. 678, 697 n.22 (1977) (plurality op.) (rejecting argument that exposure to contraceptive information is "harmful to minors" under *Ginsberg*); *Bolger*, 463 U.S. at 72-73.

Notwithstanding this conclusion, the Commission's suggestion that at least one court might approve government regulation of "violent pictures" if there was a "demonstrated link [between violent images] and deleterious effects," *Notice* ¶ 25, badly misstates the relevant holding. In *Kendrick*, 244 F.3d at 575-576, the Seventh Circuit held that the concept of obscenity could not be expanded to include violence, and that any regulation of violent speech would require the government to prove the necessary harm, just as in any First Amendment case. This does not mean that the court would accept the proffer of social science research as sufficient evidence to satisfy First Amendment strict scrutiny, as more credulous observers are eager to do. [108] Rather, Judge Posner stressed that any grounds for regulating violent expression "must be compelling and not merely plausible." *Id*. at 576. In addition, he was deeply skeptical of the claim that exposing children to violent imagery is necessarily harmful:

> This is not merely a matter of pressing the First Amendment to a dryly logical extreme. The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing the government to control the access of children to information and opinion. Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise. And since an eighteen-year-old's right to vote is a right personal to him rather than a right exercised on his behalf by his parents, the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary either. People are unlikely to become well-functioning, indepen-

[108] For example, Professor Saunders discounts the numerous court rulings which have held that violent speech cannot be constitutionally regulated by citing some of the available research. To support his thesis, Professor Saunders relies on studies linking television to violence that have been thoroughly discredited, such as Centerwall's 1992 claim that television is responsible for a doubling of the homicide rate. While Saunders admits that the studies upon which he relies have "weaknesses," he nonetheless blithely insists that "[t]he view of the scientific community seems to be that the debate is over and that it is clear that there is a connection between media violence and aggression in the real world." *Regulating Youth Access to Violent Video Games*, *supra* note 10, at 67, 69. Those who have reviewed the studies more carefully, however, such as the FTC and the Surgeon General, have concluded that there is no such consensus. *See supra* at 6.

> dent-minded adults and responsible citizens if they are raised in an intellectual bubble.
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> * * *
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> To shield children right up to the age of eighteen from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.

Id. at 577 (emphasis in original). Although Judge Posner acknowledged the violent imagery of video games at issue in that case was limited to "the world of kid's popular culture," he wrote "it is not lightly to be suppressed" and rejected the social science studies in the record as insufficient to support the law, *id*. at 578-579, just as other courts have done.[109] This is hardly the opinion of a court that is likely to uphold regulation of violent programming.

C. Regulation of "Violent" Programming Cannot Be Reconciled With Basic First Amendment Principles

The constitutional problems arising from this inquiry are perhaps the most problematic of any potential content regulations the FCC might consider. Judge Harry Edwards of the United States Court of Appeals for the D.C. Circuit, in an influential law review article, identified many of the serious First Amendment questions that would have to be addressed with respect to any regulation of televised violence.[110] Writing with Professor Mitchell Berman, he concluded that there must be full First Amendment protection for violent speech, and he noted that the constitutional weakness of any scheme to regulate violence turns on the definition that the law uses.[111] They wrote that "[w]hen it comes to televised violence, we cannot imagine how

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[109] *ISDA v. St. Louis*, 329 F.3d at 958-959; *Eclipse Enters.*, 134 F.3d at 67; *VSDA v. Maleng*, 325 F.Supp.2d at 1188-89.

[110] *See* Harry T. Edwards and Mitchell N. Berman, *Regulating Violence on Television*, 89 NORTHWESTERN U. L. REV. 1487 (1995) ("*Regulating Violence on Television*"). *See also* Patricia M. Wald, *Doing Right by Our Kids: A Case Study in the Perils of Making Policy on Television Violence*, 23 U. BALT. L. REV. 397 (Spring 1994).

[111] *Regulating Violence on Television* at 1524.

regulators can distinguish between harmless and harmful violent speech, and we can find no proposal that overcomes the lack of supporting data." [112] As explained below, there is no satisfactory answer to Judge Edwards' concerns.

1. Regulation of Televised Violence Will Impose Either Wholesale Censorship or an Incomprehensible Standard

Virtually all observers agree that any attempt to regulate all televised violence would impose an unprecedented degree of censorship. As the Commission concluded in 1975 when it declined to equate "indecent" and "violent" programming, "no reform short of wholesale proscription" of all violent material would "provide absolute assurance that children or particularly sensitive adults will be insulated from objectionable material." *Report on the Broadcast of Violent, Indecent, and Obscene Material*, 51 F.C.C.2d at 423. The Commission quoted then-Chairman Richard E. Wiley for the proposition that, under such an absolute approach, "many traditional children's films should be banned because they include some element of violence – for example, episodes in *Peter Pan* when Captain Hook is eaten by an crocodile or in *Snow White* where the young heroine is poisoned by the witch." Chairman Wiley concluded that "[s]uch an extreme result simply does not make sense and would not be acceptable to the American people." *Id*. at 419 n.5.

This point has been acknowledged by those who have studied closely the phenomenon of television violence. For example, the 1997 UCLA TELEVISION VIOLENCE REPORT noted that if all violence were eliminated, "viewers might never see a historical drama like *Roots*, or such outstanding theatrical films as *Beauty and the Beast*, *The Lion King*, *Forrest Gump* and *Schindler's List*." [113] Violence is an important element in storytelling, and "violent

[112] *Id*. at 1565.

[113] UCLA TELEVISION VIOLENCE REPORT at 25.

themes have been found in the Bible, *The Iliad* and *The Odyssey*, fairy tales, theater, literature, film, and … television." The report added that in many instances, "the use of violence may be critical to a story that sends an anti-violence message" and it would be impossible to tell some stories without depictions of violence, including Shakespeare's *Hamlet*, the history of World War II (or, for that matter, any war), or the life of Abraham Lincoln. UCLA TELEVISION VIOLENCE REPORT at 25. The study pointed out that parents know "that violence can be instructive in teaching their children important lessons about life" and it sought to conduct a contextual analysis to determine when programs presented "inappropriate or improper uses of violence." *Id*. Similarly, the National Television Violence Study is premised on the understanding that "all acts of violence are not equivalent in their impact on the audience" and that "the larger meaning or message that is conveyed" must be examined program-by-program. [114]

The problem, then, is far more complex than determining whether televised violence may have some effect on the viewer that is measurable by social scientists. Even if such evidence could be characterized as sufficient to support content-based regulation – a highly dubious proposition – it would be necessary for the government to adopt regulations that precisely define which violent programs will be regulated (based on specific supporting evidence), and to articulate a rationale for doing so that survives strict scrutiny. But as Judge Edwards concluded, this task presents the government with insurmountable constitutional problems.

2. Regulation of "Violent" Programming is Unconstitutionally Vague

It is basic First Amendment doctrine that the government cannot use a vague standard for the sensitive task of regulating constitutionally-protected speech. *Reno v. ACLU*, 521 U.S. 844, 874 (1997). Imprecise speech restrictions are invalid for a number of reasons. First,

[114] Mediascope, Inc., THE NATIONAL TELEVISION VIOLENCE STUDY (1994-1995) at 8-9.

without clear guidelines, those subject to a restriction cannot understand what is forbidden and what is not. [115] Second, a vague standard impermissibly chills speech, causing speakers to "steer far wider of the unlawful zone" [116] and to restrict their expression "to that which is unquestionably safe." [117] Third, restrictions on speech that lack clear limits give government officials far too much discretion to curb disfavored expression. [118] These concerns are not lessened by the fact that the government may seek to regulate in the interest of protecting children. As the Supreme Court made clear in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689 (1968), "the permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children." *Id.* at 689. *See also Bantam Books*, 372 U.S. at 59 (condemning a commission that was charged with reviewing material "manifestly tending to the corruption of the youth").

For purposes of this inquiry, there is no precise way to define "gratuitous" or "harmful" violence that could withstand constitutional scrutiny. [119] This is another factor that distinguishes proposed regulation in this area from the law of obscenity, which requires a specific definition of "sexual conduct" in the statute or through authoritative construction.

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[115] *See, e.g., Reno v. ACLU*, 521 U.S. at 871; *Kolender* v. *Lawson*, 461 U.S. 352, 357-358 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972); *Gentile v. State Bar*, 501 U.S. 1030, 1048 (1991) (regulation of speech is unconstitutional when those subject to it can do no more than "guess at its contours").

[116] *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958).

[117] *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

[118] *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 133 (1992); *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988); *City of Houston* v. *Hill*, 482 U.S. 451, 468-469 n.18 (1987); *Kolender*, 461 U.S. at 358, 360; *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940).

[119] By way of example, the Children's Protection from Violent Programming Act, S. 161, introduced by Senator Hollings, provided that the definition of "violent video programming" 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."

Miller, 413 U.S. at 24. No such specific definition is possible in the context of violence. [120] Former Chairman Wiley confirmed that "[s]hort of an absolute ban on all forms of 'violence' – including even slapstick comedy – the question of what is appropriate for family viewing is entirely subjective." *Broadcast of Violent, Indecent, and Obscene Material*, 51 F.C.C.2d at 419 n.5. Reviewing courts that have invalidated local regulations for vagueness have reached the same conclusion. *Davis-Kidd Booksellers, Inc.*, 866 S.W.2d at 532 (describing statutory restrictions as "entirely subjective"). *See Webster*, 968 F.2d at 689 ("every application of the statute create[s] an impermissible risk of suppression of ideas") (citation omitted); *VSDA v. Maleng*, 325 F.Supp.2d at 1190-91.

This problem is exacerbated by the many types of programs that can be characterized as "violent" in some way. In any proposed regulation, the government would be required to decide whether the definition of "violence" includes only fictional depictions of violence, or if it also would include reality-based violence. If both, would the rules cover news, sports and nature programs that include violent scenes, or would there be exceptions? Questions arise even within the various subcategories. For example, would it be acceptable for children to see professional football but not professional wrestling? Additionally, if some types of programs are not covered by the rules, how are the exemptions justified? Are they supported by the social science studies that policymakers have cited to justify the regulation of violent programming?

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[120] Any effort to distinguish only "harmful" or "gratuitous" violence by analogy to the "concepts of 'prurient interest,' 'patently offensive,' and 'serious value' used to define obscenity," would fail. *Regulating Violence on Television* at 1523. It is clear that to the extent "these concepts have proven difficult to apply in obscenity cases, … they would pose even more problems in cases seeking to distinguish between" regulable and non-regulable violence, particularly in that "violent material would have to be at least as graphic and beyond the mainstream as sexually explicit material is to be obscene," so programming falling within whatever regulation evolved likely would comprise an empty set. *Id.* at 1523-24. *See, e.g.*, NATIONAL TELEVISION VIOLENCE STUDY at 14 ("In general, very little of the violence on television is graphic or explicit.").

The subjectivity of such choices, along with a lack of any supporting science to support distinctions between "harmful" or "gratuitous" violence compared to other televised violence, led Judge Edwards and Professor Berman to posit that, because "existing social science data do not supply a basis upon which one may determine with adequate certainty which violent programs cause harmful behavior, … legislators face an insurmountable problem in finding a generic definition of violence that is coherent and not overbroad." [121] They concluded that "[w]hen 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." The inability to do so is constitutionally fatal since the appropriate level of First Amendment "scrutiny requires that any [such] regulation be precisely drawn to restrict only that programming that will likely induce antisocial aggression." *Id*.

As Judge Edwards and Professor Berman explained, "the many studies employ widely disparate definitions of 'violence,'" and this alone results in impermissible vagueness:

> While the diversity of operational definitions might be unfortunate, the task is not simply to agree upon any single one so long as it is not unconstitutionally vague. The heart of the problem is that available research does not supply a basis upon which one could determine with adequate certainty whether a particular "violent" program will cause harmful behavior.
>
> In fact, researchers have identified a large and varied assortment of aspects of the relationship between program and viewer that influence whether and to what extent the program might contribute to aggressive behavior. These include the extents to which the violence is presented as justified, effective, unpunished, socially acceptable, gratuitous, realistic (yet fictional), humorous, and

[121] *Regulating Violence on Television* at 1492. As Professor Freedman concludes, "if one is going to relate any conclusions to the research, the definition of violence or aggression becomes extremely murky." Freedman Report at 38. Because "aggression" also has been defined in many different ways in the different studies, it is virtually impossible to define what causes that aggression. "[I]t is especially difficult to relate real aggression to the research, since so often the research has involved at best metaphors for aggression rather than the real thing and at worst, measures that have little relationship to real aggression or violence." *Id.* at 40.

> motivated by a specific intent to harm. The effects of a particular presentation will also depend upon the extent to which actual viewers like and associate with the aggressor or the victims. Significantly, it is not the case that all violent programming is harmful, with the above factors relevant only for distinguishing the more harmful from the less. Some genres of violent programming might not, as a general matter, be harmful. More fundamentally, a program characteristic harmful in the abstract might be neutralized when combined with other features into a single whole.

Id. at 1553-54 (footnotes omitted). Recent decisions applied these precepts to invalidate violence regulations. [122]

Any effort to reconcile these competing definitions to arrive at a divining line for regulable "harmful" or "gratuitous" violence in television programming leaves the government with an impossible task from a First Amendment perspective. In view of the many variables that may factor into whether violence in programming is "harmful," the "government lacks the ability to actualize the requisite subtlety into legislation" because "[b]road and indiscriminate application of the operational characteristics already mentioned will sweep too broadly in practice." Even partial reliance upon "such qualitative and … fuzzy terms as 'gratuitous,' 'socially acceptable,' and 'effective' will almost surely prove unconstitutionally vague." *Id*. at 1554. Ultimately, "any regulation of television violence confronts an inherent tradeoff between precision and effectiveness" with the "risk … that any restriction in this area that is neither overbroad nor vague will leave unregulated so much violent programming that it will no longer accomplish a compelling interest." *Id*. at 1555. Not surprisingly, Judge Edwards described this exercise as "a jurisprudential quagmire." *Id*. at 1502-03.

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[122] *Kendrick*, 244 F.3d at 578 ("There is no indication that the games used in the studies are similar to those in the record of this case or to other games likely to be marketed in game arcades in Indianapolis."); *VSDA v. Maleng*, 325 F.Supp.2d at 1188 ("Most of the studies on which defendants rely have nothing to do with video games, and none of them is designed to test the effects of such games on the player's attitudes or behavior toward law enforcement officers.").

3. Regulation of "Violent" Programming Discriminates Based on Viewpoint

Researchers in this field have attempted to overcome the definitional problems by proposing what they describe as a "contextual" approach to determining what type of programs present the greatest risk and should be regulated. The UCLA TELEVISION VIOLENCE REPORT asserts, for example, that "all violence, in our view, is not created equal," and it employed a "contextual analysis" in order "to distinguish between uses of violence which raise concern and those acts which, because of their nature and the context in which they occur, do not raise such concerns." Report at 27. Similarly, the NATIONAL TELEVISION VIOLENCE STUDY stresses that "[i]t is important to consider the larger meaning or message that is conveyed by a program," including its "overall narrative purpose" in order to determine whether the "overall message … is an anti-violence one." Study at 9.

Not surprisingly, policymakers seeking to implement such findings as law also suggest certain exceptions for programming they consider to be meritorious. For example, S.161 would have empowered the FCC to exempt from its violence definition shows that it determines do "not conflict with the objective of protecting children from the negative influences of violent video programming," including "news programs and sporting events." *Children's Protection from Violent Programming Act*, S. 161, 108th Cong. § 4 (2003). Consistent with this view, the *Notice* asks whether there should be an exception for news or other types of unrated programs" including programs with "cultural, historical, or artistic merit." *Notice* ¶ 23. This approach has at least two major constitutional problems: (1) it fails to solve the vagueness problem and, in fact, exacerbates it; and (2) it seeks to define the scope of regulation in terms a program's message, which is even more troubling from a First Amendment perspective.

First, the attempt to examine programming contextually and based on presumed merit makes the definitional problem far more difficult. As the NATIONAL TELEVISION VIOLENCE

STUDY observed, "[a]t the base of any policy proposal in this realm is the need to define violence and, assuming that not all violence is to be treated equally, to differentiate types of violent depictions that pose the greatest cause for concern." Study at 28. This requires a "careful consideration of the contextual elements" of every program. *Id*. Consistent with this approach, the UCLA TELEVISION VIOLENCE REPORT observed that "[t]he scientific evidence, although valuable, gives the public little guidance in regard to specific television programs" and it attempted to "fill the void" by "using a detailed contextual analysis of every scene of violence in a program" and subjecting each one to "a whole panoply of contextual criteria." Report at 15. The result was a detailed examination of particular programs in selected television seasons, scene by scene, in an effort to define "inappropriate or improper uses of violence." *Id*. at 25. As should be obvious, any regulation that does more than simply define "violent" acts, but instead tries to base regulation on the purpose and meaning of the violence, would be staggeringly complex.

Second, the contextual factors used to determine whether violence is acceptable or inappropriate are the essence of viewpoint discrimination. As the NATIONAL TELEVISION VIOLENCE STUDY put it:

> When considering a particular program, think about whether violence is rewarded or punished, whether heroes or good characters engage in violence, whether violence appears to be justified or morally sanctioned, whether the serious negative consequences of violence are portrayed, and whether humor is used. All of these elements enhance the risks associated with children's exposure to violent depictions. [123]

The study notes that "the overall narrative purpose of an historical or educational program may be to condemn the evilness of violence, whereas an action-adventure show may seem to glorify violence." It cites as an example of "good" violence the theatrical film *Boyz 'n the Hood*

[123] Study at 29. Professor Freedman points out that there is no scientific evidence to support the suggestion that different types of portrayals of violence may or may not affect the audience. Freedman Report at 49-51.

because of its overall anti-violence message, despite the fact that the movie "ranks high in terms of frequency of violent interactions and scenes." *Id*. For the same reasons, the UCLA TELEVISION VIOLENCE REPORT indicated that "*Schindler's List* contains graphic violence but because of its historical importance and necessity to the plot, the violence does not raise concerns." Report at 33. In short, violence is deemed to be acceptable if it teaches the "correct" moral or historical lesson.

But the government cannot constitutionally regulate speech based on content or the message it conveys. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Government regulation may not favor one speaker over another, *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984), and discriminating against speech based on its message is presumed unconstitutional. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-643 (1994) ("*Turner I*"). However, when the government targets not the subject matter of speech, but particular views taken by speakers on a subject, the First Amendment violation is all the more blatant. *R.A.V*, 505 U.S. at 391. Indeed, "[v]iewpoint discrimination is … an egregious form of content discrimination," *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 828-29 (1995), and the government is barred from regulating speech when the specific motivating ideology, opinion, or perspective of the speaker is the rationale for the restriction. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983).

The "contextual" approach to defining violence harkens back to a First Amendment theory that permitted local governments to operate film censorship boards in the decades before the Supreme Court finally put an end to the practice. *See Freedman v. Maryland*, 380 U.S. 51 (1965); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). Former Chief Justice Earl Warren described the "astonishing" extent "to which censorship has recently been used in this country" during the period the film review boards were in operation. *Times Film Corp. v. City of*

Chicago, 365 U.S. 43, 69-78 (1961) (Warren, C.J., dissenting). He noted, for example, Atlanta banned *Lost Boundaries*, a film about a black physician and his family who "passed" for white, on grounds that exhibition of the film would "adversely affect the peace, morals and good order" of the community; Ohio's censors deleted scenes of orphans resorting to violence in the film *It Happened in Europe*; the Chicago licensing board banned newsreel films of Chicago policemen shooting at labor pickets and refused a license to exhibit the film *Anatomy of a Murder*; and the New York film licensing board censored over five percent of the movies it reviewed. *See, e.g.*, *id.* at 69-72 (Warren, C.J., dissenting). Such examples are just the tip of the iceberg. *See generally* Edward DeGrazia & Roger Newman, BANNED FILMS, at xviii, 177-381 (1982) (describing 122 representative examples of film censorship between 1908 and 1981).

Ultimately, however, First Amendment doctrine evolved and the Supreme Court ended the reign of the film review boards. *Freedman v Maryland*, 380 U.S. at 58-61; *id*. at 62 n.1 (Douglas, J. concurring) ("the Chicago censorship system, upheld by the narrowest of margins in *Times Film Corp*. … could not survive under today's standards"). As a consequence, contemporary understandings of the First Amendment preclude the FCC from declaring itself a national review board for televised violence. *Hudnut*, 771 F.2d at 330 ("Any other answer leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us.").

4. Such Viewpoint-Based Regulation Cannot Directly and Materially Further the Government's Interest

The "contextual" analysis described above also makes clear the government cannot demonstrate that its regulations will serve an important interest in a "direct and material way." *Turner I*, 512 U.S. at 644. Regulations that are predicated on "appropriate" messages and social values, and not to the demonstrable effects of programming on viewers, could not possibly

achieve the government's stated purpose. In this respect, the Commission faces a dilemma: By proposing to exempt programming categories with presumed "merit," it may well be permitting those very programs that have the most significant adverse effects on aggression. But if it proposes a blanket ban on violence regardless of a program's social value, its rules would be unconstitutional even if it could treat such programs as obscene. *See Miller*, 413 U.S. at 44-45.

A central problem with proposals to regulate televised violence is the inability to predict which programs will have the adverse effect the government is trying to prevent.[124] One reason for this was described by Professor Henry Jenkins, the Director of the Comparative Media Studies Program at MIT, in his testimony to the Commission in 2000. He observed that it is necessary not only to evaluate the program at issue, but also the viewers, since the effect of a given program will be determined ultimately by the attitudes and experiences of each audience member. He advocated treating violent programs as "one cultural influence among many," and acknowledged that "different consumers react to the same media content in fundamentally different ways."[125] This more nuanced approach suggests it would be impossible for the Commission to come up with lists of "suspect" programming or to predict what the effect would be of restricting them.

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[124] *See Regulating Violence on Television* at 1492 ("existing social science data do not supply a basis on which one may determine with adequate certainty which violent programs cause harmful behavior"). Professor Freedman concludes that the existing studies have provided no data about the effects of different types of portrayals of violence. *See* Freedman Report at 40. For example, there is no evidence that answers the question of whether violence which has consequences has less effect than violence with no consequences, or whether there is a different reaction to violence that is justified as opposed to unjustified violence. *Id.* at 41.

[125] *See* Transcript, In the Matter of En Banc Hearing on the Public Interest Obligations of TV Broadcast Licenses, Testimony of Henry Jenkins (October 16, 2000), available at http://ftp.fcc.gov/realaudio/tr101600.pdf. This point also has been made by the National Academy of Sciences. *See* National Research Council, Nat'l Academy of Sciences, *Understanding and Preventing Violence* (A. Reiss & J. Roth, eds.) (1993) at 101-102.

A good example to illustrate this point is the film *The Passion of the Christ*, reportedly one of the most violent films ever made. The *New York Times* described the film as "harrowingly violent; the final hour … consists of a man being beaten, tortured and killed in graphic and lingering detail" until he is "a mass of flayed and bloody flesh, barely able to stand, moaning and howling in pain." [126] Another reviewer, on the other hand, wrote that the film's director used "the extremely naturalistic depiction of violence" to "drive home the idea that Jesus … lived." [127] Given the film's theme, it may serve as a paradigmatic example of how the "merits" of a program may outweigh the impact of the depicted violence, yet its intensity may also cause some to question this premise. [128] In any event, since viewers bring their own experiences to the subject, it is not possible to predict what effect – if any – the film may have on them. [129]

The same is true of the other types of programs that policymakers suggest should be exempt from regulations of violent programming. Many observers have suggested, for example, that telecasts of sporting events may cause as much violent behavior by its viewers as does any other type of television programming. [130] The UCLA TELEVISION VIOLENCE REPORT, for

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[126] A.O. Scott, *Good and Evil Locked in a Violent Showdown*, NEW YORK TIMES, February 25, 2004. The level of violence led one reviewer to describe the film as a "two-hour-and-six-minute snuff movie" and to dub it "The Jesus Chainsaw Massacre." David Edelstein, *Jesus H. Christ*, Slate.com, February, 24, 2004 (http://slate.msn.com/id/2096025/).

[127] *E.g.*, Gary Thompson, *Using Gore With a "Passion,"* PHILADELPHIA DAILY NEWS, February 25, 2004.

[128] *Id.* ("Adults who want to see 'The Passion' should view it themselves before judging whether it's suitable for younger teens and older children.").

[129] *Georgia Couple Arrested After Debate Over "Passion of the Christ" Turns Violent*, USAToday.com, March 18, 2004 (http://www.usatoday.com/life/people/2004-03-18-couple-fight-passion_x.htm).

[130] *See Regulating Violence on Television* at 1546 n.264; John J. O'Connor, *Labeling Prime-Time Violence is Still a Band-Aid Solution*, N.Y. TIMES, July 11, 1993 at II.1.

example, observed that "[m]any feel that violent spectator sports such as football or hockey make violence an acceptable or even desirable part of American life." As a consequence, it included "sports violence" in its definition of televised violence. One difference with this category is that it does not depend on laboratory experiments to show tangible effects. The socially-sanctioned violence of televised sports could be a source of the most widespread social effects of all. [131]

Similarly, there is the question whether violent programming in the news should be exempt from regulations. Some researchers suggest that news programs can cause "elevated fears among children" and have advocated extending V-chip requirements to cover news broadcasts. [132] It is noteworthy in this regard that prominent social science researchers who assert a link between violent media and behavior do not necessarily differentiate between a work's merit and its alleged adverse effects on children. [133]

In at least one case, a reviewing court held that the merit or importance of political programming outweighed the potential adverse impact on children. In *Becker v. FCC*, 95 F.3d

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[131] More than 775,000 children and adolescents ages 14 and under are treated in hospital emergency rooms for sports-related injuries each year. In 2002, for example, more than 207,400 children aged 5-14 were treated in emergency rooms for basketball-related injuries and nearly 187,800 for football-related injuries. *See* National SAFE KIDS Campaign, Sports Injury Fact Sheet. In comparison, according to the National Center for Injury Prevention and Control, 268,004 children aged 5 to 14 were victims of violence-related nonfatal injuries in 2002 – about a third of the number of children injured playing sports. *See* the Center for Disease Prevention and Control's online database, available at http://www.cdc.gov/ncipc/wisqars/ (visited October 10, 2004). *Cf.* Dianna K. Fiore, *Parental Rage and Violence in Youth Sports: How Can We Prevent "Soccer Moms" and "Hockey Dads" From Interfering in Youth Sports and Causing Games to End in Fistfights Rather Than Handshakes?* 10 VILL. SPORTS & ENT. L.J. 103 (2003).

[132] *E.g.*, Nathanson, Ami I. and Joanne Cantor, *Children's Fright Reactions to Television News*, *JOURNAL OF COMMUNICATION*, Vol. 46 No. 4, (Fall 1996); James T. Hamilton, CHANNELING VIOLENCE 239-284 (1998).

[133] *See, e.g.*, *FCC En Banc Hearing* at 107 (Statement of Dr. Joanne Cantor) (discussing potential psychological impact of "Schindler's List" and "Saving Private Ryan"); *id*. at 136-137 ("even great programming can be harmful psychologically to kids who are too young to see it").

75 (D.C. Cir. 1996), the D.C. Circuit reversed an FCC ruling that had permitted broadcasters to channel political advertisements to late night that contained graphic anti-abortion imagery that, in the good faith judgment of the licensees, posed a risk to children. The Commission had found that the presentation of graphic abortion imagery in political advertisements could be psychologically damaging to children and ruled that broadcasters had discretion to transmit such materials at times when children were less likely to be in the audience.[134] Notwithstanding these findings, the Court of Appeals held that the imperative needs of the young did not outweigh the rights of political candidates. The court concluded that channeling political advertisements violated the "no censorship" provision of Section 315 of the Communications Act.

Such cases illustrate the problem of any regulation that is predicated on social science findings. If the government tries to emulate research results and restrict speech whenever it believes that programming may have adverse psychological effects or lead to heightened aggressiveness, then a great deal of constitutionally-protected speech will be suppressed. Moreover, where the social science findings are the touchstone for regulation, how should the government react to studies purporting to show that non-violent programming intended for children may lead to higher levels of aggression?[135] Faced with these conflicting values, regulations would either fail to achieve their stated purpose, or would lead to widespread restrictions on protected speech.

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[134] One United States District Court similarly had found that graphic anti-abortion images posed the risk of a negative psychological impact on children, and held that such political advertisements were indecent. *Gillett Communications of Atlanta, Inc. v. Becker*, 807 F.Supp. 757, 763 (N.D. Ga. 1992), *appeal dismissed*, 5 F.3d 1500 (11th Cir. 1995).

[135] *E.g.*, Testimony of Professor Joyce Sprafkin in *Eclipse Enterprises v. Gulotta*, No. CV-92-3416 (E.D.N.Y. Mar. 28, 1994), at 112-113 (describing research findings that viewing *Mister Rogers* and *Sesame Street* leads to more aggressive behavior in children).

D. Regulation of "Violent" Programming Cannot Survive Strict Scrutiny

1. The Asserted Interest is Too Abstract

To survive First Amendment scrutiny the government must demonstrate that the harms it seeks to address are "real, not merely conjectural." *Turner I*, 512 U.S. at 664. In doing so, it must "show a record that validates *the regulations*, not just the abstract … authority" to regulate. *Time Warner Entmt. Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) (emphasis in original). In this regard, simply naming the interest, without quantitatively and/or qualitatively describing its dimensions and showing how the regulation affects the stated interest, is insufficient. *See Playboy*, 529 U.S. at 819 ("First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as" either an outright ban or time-channeling that renders specific content unavailable most of the day). Here, it is not sufficient for the government to simply claim there are "deleterious effects … that may result from exposure" to violent programming, or suggest that "exposure to media violence can be associated with certain negative effects," or to claim that it is "protecting children from … violent programming." *Notice* ¶¶ 6, 28. Merely reciting an interest in protecting children is not enough. As Judge Edwards explained:

> To determine whether the interest the legislation accomplishes is compelling, we need to know how much societal violence the regulation would curb. Thus, for purposes of the compelling interest prong of exacting scrutiny, the issue most likely will not be whether television violence causes societal violence, but how much. Unfortunately, despite the vast number of studies investigating the violence hypothesis, there is scant data on the magnitude of the effect of television violence. [136]

The Supreme Court addressed a similar issue in *Playboy*, and it held that the government had failed in its burden of proof. The Court did not dispute that protecting the

[136] *Regulating Violence on Television* at 1549.

physical and psychological well-being of children is a compelling interest or that it is important to reduce children's exposure to indecent "signal bleed" (*i.e.*, imperfectly scrambled sexually-oriented networks that could be seen in the homes of non-subscribers). Rather, the Court explained that "[t]o say that millions of children are subject to a risk of viewing signal bleed is one thing; to avoid articulating the true nature and extent of the risk is quite another." *Id*. The Court refused to accept generalized "concern for the effect of the subject matter on young viewers" as the government's "overriding justification for the regulation." *Id*. at 811. Rather, it faulted the government for producing "little hard evidence of how widespread or how serious the problem of signal bleed is," and "no proof as to how likely any child is to view a discernible explicit image" or as to "duration of the bleed or the quality of the pictures or sound." *Id*. at 819.

Here, the asserted interest is even more amorphous than in *Playboy*, and the government's evidence is even less susceptible of validation, particularly where some violent depictions are characterized by the proponents of regulation as "good" and others as "bad." *E.g.*, UCLA TELEVISION VIOLENCE REPORT at 25. Additionally, there is no universal agreement that exposing children to "bad" depictions of violence is necessarily harmful. *See e.g.*, *Kendrick*, 244 F.3d at 577 ("To shield children right up to the age of eighteen from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it."). Moreover, in *Playboy* all the parties at least could identify what "signal bleed" was even if the government failed to adequately demonstrate (and the parties disagreed about) its impact. Here, the definitional issues about what qualifies as "violent" programming, even apart from the inability to gauge its impact, renders even more diffuse whatever state interest the government might claim it seeks to advance. In such circumstances, it is not enough simply to say "TV violence is bad for children." *See VSDA v. Maleng*, 325

F.Supp.2d at 1187-88 (simply identifying a compelling state interest in reducing aggressive feelings or behavior is insufficient).

2. Regulation Would Restrict Vast Amounts of Constitutionally-Protected Speech

The *Notice* describes "safe harbor" rules as a "possible new regulatory solution" and asks whether violent programming could be restricted during times when children are likely to be in the audience. *Notice* ¶¶ 20-22. Noting that such "time channeling" or "safe harbor" rules currently preclude the broadcast of indecent programs between the hours of 6 a.m. and 10 p.m., the *Notice* asks whether such rules might be extended to include violent programming on both broadcast and nonbroadcast media. Alternatively, the *Notice* asks whether a "safe harbor" approach could be combined with V-chip ratings in order to restrict programming that is "not blockable by electronic means specifically on the basis of its violent content." *Id*. at ¶ 22. However, all of these "possible new regulatory solutions" violate the First Amendment.

For reasons already described, any regulation of violent programming would pose insurmountable constitutional problems. A so-called "safe harbor" solution does not diminish the constitutional difficulties where, as here, the government lacks an appropriate justification for restricting programming content in the first place. *See*, *e.g*., *Erznoznik*, 422 U.S. at 213-214 ("[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them"). Nor does a "safe harbor" diminish the First Amendment problems of the regulation just because it does not impose a total ban. As the Supreme Court explained in *Playboy*, "it is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree." [137] In

[137] 529 U.S. at 812. Such "safe harbor" rules have been upheld only in the limited area of broadcast indecency rules. The Court in *Playboy* expressly rejected extending the regime to

the case of time channeling, such a rule "silences the protected speech for two-thirds of the day in every home … regardless of the presence or likely presence of children or the wishes of the viewers." 529 U.S. at 812. Such a restriction is grossly overbroad in light of the fact that nearly two-thirds of U.S. households have no children under 18. [138]

The fact that a "safe harbor" regime has been upheld (at least for the present) in the limited context of broadcast indecency rules does not affect this analysis, and not just because violent programming cannot be treated as if it were indecent. *See supra* at 33-35. Rather, the effect of regulating "violent" programming, especially as it is broadly defined by some critics, would be far more widespread than with indecency, as it would impose a wholesale reordering of programming available on television. The Supreme Court has noted that it upheld the indecency rules with respect to "a specific broadcast that represented a rather dramatic departure from traditional program content." *Reno*, 521 U.S. at 867. This finding was recently borne out in comments filed with the Commission in a recent rulemaking proceeding, demonstrating that only a minute fraction of programs ever receive an indecency complaint, and only a tiny fraction of the complaints are considered actionable. [139] In sharp contrast, the National Television Violence Study suggested that "[v]iolence predominates on television." Study at 9. As a result, a "safe harbor" requirement for violence could mean that much television programming would be relegated to what the D.C. Circuit has described as "broadcasting Siberia." *Becker v. FCC*, 95 F.3d at 84. And safe harbor rules would have an even greater impact for DBS due to the effect

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cable, and no court has ever suggested they could be applied to DBS transmissions. Indeed, such a regulatory approach is inapplicable to a medium that has a nationwide footprint. *See Carlin Communications, Inc. v. FCC*, 749 F.2d 113 (2d Cir. 1984) (setting aside time-channeling regulation of phone services as violative of First Amendment).

[138] U.S. Census Bureau, *Profiles of General Demographic Characteristics, 2000 Census of Population and Housing* (May 2001) (36.0% of U.S. households have children under age 18).

[139] Comments of the Broadcasters' Coalition, MB Docket No. 04-232, Aug. 27, 2004, at 5-9.

of time-zone differences on a national feed, which shrinks the permissible window for time-channeled content even further. *See also supra* note 137. Such widespread suppressions of constitutionally-protected speech is unprecedented.

Of course, the extent of the restriction would depend on the Commission's definition of "violent programming." It would be possible for the government to reduce somewhat the constitutional burden if it were to use a very narrow definition of the programming to be affected. Indeed, if the Commission attempted to use some definitional equivalent of obscenity it might avoid the most obvious First Amendment problems. But as Judge Edwards observed, such a narrow definition is likely to be an "empty set." *Regulating Violence on Television* at 1523-24 ("violent material would have to be at least as graphic and beyond the mainstream as sexually explicit material is to be obscene").

Regulations that tie a "safe harbor" requirement to V-chip ratings would not save the Commission's rules. Congress adopted the ratings as an expressly voluntary system, and mandating their use would change the constitutional dynamic of the rule. The V-chip ratings were created by industry agreement and were adopted voluntarily on the understanding that they were not to be considered regulatory categories.[140] To penalize programmers that fail to use the system would violate well-established constitutional principles. For example, various courts have held that the government may not use privately-developed ratings as means to restrict marketing of entertainment products.[141]

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[140] *See* Conf. Rpt. 104-458, 104th Cong., 2d Sess. 195 (Jan. 31, 1996) (V-chip ratings provisions are expressly voluntary).

[141] *E.g., Neiderhiser v. Borough of Berwick,* 840 F.2d 213, 218 (3d Cir. 1988) (zoning exemption based on film ratings invalidated); *Drive In Theatres, Inc. v. Huskey,* 435 F.2d 228, 230 (4th Cir. 1970) (film censorship cannot be based upon "ratings of the motion picture industry"); *Gascoe, Ltd. v. Newtown Township,* 699 F.Supp. 1092, 1096 (E.D. Pa. 1988) (zoning exemption based on film ratings invalidated); *Swope v. Lubbers,* 560 F.Supp. 1328, 1334 (W.D. Mich. 1983) ("standards by which the movie industry rates its films do not correspond to the … criteria

Such regulations would be unconstitutional regardless of the medium the government seeks to regulate. *See Notice* ¶ 21. While the discussion above primarily focuses on reasons proposed rules targeting broadcast channels would be unconstitutional, it is clear such regulations also are unconstitutional with respect to cable and similar subscription services like DBS and other satellite platforms.[142] The conclusion that regulation of violent programming is unconstitutional without respect to the medium regulated is consistent with courts' treatment of other media in striking down regulations against violent content. *See, e.g.*, *Winters*, 333 U.S. 507 (magazines); *Webster*, 968 F.2d 684 (videotapes); *Eclipse Enters.*, 134 F.3d 63 (trading cards); *ISDA v. St. Louis*, 329 F.3d 954 (video games).

Finally, the solution of "time channeling" ignores the inexorable trend of technology that renders regulatory solutions based on time of day pointless. As noted *supra*, a growing number of households have DVRs that allow residents to watch programming whenever they want. Such technology makes regulatory solutions such as the safe harbor unnecessary by giving individuals greater selection over their programming options. At the same time, a rule that alters

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for determining whether an item merits constitutional protection or not"); *Engdahl v. City of Kenosha*, 317 F.Supp. 1133, 1136 (E.D. Wis. 1970) (ordinance to prevent persons under 18 from viewing films rated for adults enjoined where the "determination as to what is proper for minors in Kenosha is made by a private agency, the Motion Picture Association of America").

[142] *See Turner I*, 512 U.S. at 637 (rejecting government contention in favor of must-carry rules that cable regulation should be analyzed under the same First Amendment standard as broadcast, on grounds that "rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation … does not apply in the context of cable regulation"); *SBCA v. FCC*, 275 F.3d 337, 353-55 (4th Cir. 2001) (applying same level of constitutional scrutiny to satellite carry-one, carry-all rules as to cable must-carry in *Turner*). Notably, though *Turner* and *SCBA* applied intermediate scrutiny to the carriage regulations at issue, both held that strict scrutiny applies where the government seeks to regulate based on content, as would be the case here with "violent" programming. *See Turner I*, 512 U.S. at 642 ("Our precedents … apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content"); *SBCA*, 275 F.3d at 353-54.

the scheduling of programs is superfluous when people can watch shows at any time, not just when they are aired. Quite simply, "safe harbor" is a regulatory solution whose time has passed.

3. Regulation of Programming Content is Not the Least Restrictive Means of Achieving the Government's Objective

Any regulation that bans, restricts, time-channels, or otherwise limits viewer control over the receipt of purportedly "violent" program content flunks constitutional scrutiny for the additional reason that it would not be the least restrictive means of advancing the government's interest (however defined) with respect to such programming. *E.g.*, *Playboy Entmt.*, 529 U.S. at 813. Unlike at earlier stages in broadcast history, where TV options were limited to over-the-air signals that purportedly entered viewers' homes "unbidden," *see*, *e.g.*, *Reno v. ACLU*, 521 U.S. at 844, those seeking televised entertainment have a broad range of options, over which they have total control. These include subscription service, videotape, DVD, video-on-demand, DVR, and similar options, not to mention many more broadcast channels than previously existed, and other non-TV platforms for audio-visual entertainment. *See supra* at 26-28. In addition, blocking technologies, program filters, programmable navigation devices, and other technical options have evolved to give viewers complete control over the TV programming that enters their homes, regardless whether it does so via broadcast, cable or satellite. *Id*.

It is obvious that these options are less restrictive than regulatory mandates. Determining what programming to watch, and when, is decided entirely by viewers and not the government. Indeed, as described in more detail below, it is clear that technological options are less restrictive alternatives, because *the government itself already has declared them as such*. *See infra* at 69-70. Congress specifically rejected bills that would have mandated audio warnings for programs that contain violence, required FCC publication of program violence ratings, and/or used FCC definitions for "violent video programming" and content-based

exemptions therefrom, in restricting children's access to such programs.[143] In rejecting these options and instead adopting what became Sections 303(w) and (x) of the Act, proponents advocated the V-chip approach as a "constructive solution that would avoid" the more restrictive alternative of "Government intervention" via direct content regulation. 141 Cong. Rec. S8225, S8232 (June 13, 1995) (statement of Sen. Lieberman). *Cf. Ashcroft v. ACLU*, 124 S.Ct. at 2793 ("not only has the Government failed to carry its burden of showing … that the proposed alternative is less effective, but also a Government Commission appointed to consider the question has concluded just the opposite").

In view of these "plausible, less restrictive alternative[s]," the government would not be able to demonstrate that these options "will be ineffective to achieve its goals." *Playboy Entmt.*, 529 U.S. at 816. *See Ashcroft v. ACLU*, 124 S.Ct. at 2791. Because the government must give less intrusive alternatives a chance to work, and explain why less burdensome alternatives would fail, content-based government restrictions on violent programming would be overly restrictive. *See Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 758-759 (1996).

Critics may assert that the V-chip is not an adequate alternative because most parents do not yet use it. A recent survey by the Kaiser Family Foundation indicated that 15 percent of parents use the V-chip.[144] However, this finding, by itself, does not show that the V-chip has failed. Quite to the contrary, the survey found that most who use it agree that it helps control

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[143] *See infra* at 69-70 (citing *Children's Television Violence Protection Act of 1993*, S. 943, 103rd Cong., 1st Sess. (1993); *Television Violence Report Card Act of 1993*, S.973, 103rd Cong., 1st Sess. (1993); *Children's Protection from Violent Programming Act of 1993*, S.1383, 103rd Cong., 1st Sess. (1993); *Parents Television Empowerment Act of 1993*, H.R.2756, 103rd Cong., 1st Sess. (1993); *Television and Radio Program Violence Reduction Act of 1993*, H.R.2837, 103rd Cong. 1st Sess. 1993).

[144] *Parents, Media and Public Policy: A Kaiser Family Foundation Survey* (Fall 2004) at 7.

programming in their homes.[145] Moreover, parents also use the Parental Guidelines to help choose appropriate programming. The Kaiser survey found that half of all parents have used the Parental Guidelines to guide their families' viewing choices, and the vast majority of parents who have used the Parental Guidelines find them either "very" or "somewhat" useful.[146]

The fact that not all parents actually use the V-chip does not diminish its importance as an alternative to regulation. All parents have the option to use it, and those who do so report that it works. Others rely on the ratings to choose what programs are suitable for their households. As the Supreme Court very recently held in *Ashcroft v. ACLU*, the government is barred from "presum[ing] that parents lack the ability, not the will, to monitor what their children see," but rather must "enact[ ] programs to promote use of filtering" or similar options "to give parents the ability [to control what their children see] without subjecting protected speech to severe" restrictions. 124 S.Ct. at 2793.

The Supreme Court confirmed in this regard that the government must satisfy a substantial burden of proof in order to demonstrate that less restrictive measures are ineffective. It held that the government cannot discharge its constitutional obligation by showing that a proposed alternative "has some flaws." Rather, the government must demonstrate the alternative measures are "less effective" than the law or regulation in question. *Id*. at 2793. The Court specifically rejected the government's complaint that a certain percentage of parents might not use a voluntary blocking solution, pointing out that "[t]he need for parental cooperation does not automatically disqualify a proposed less restrictive alternative." *Id*.

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[145] Of those parents who have used the V-Chip, 61% find it "very useful," while 28% find it "somewhat useful." *Id.* at 7.

[146] Fifty percent of parents say they have used the television ratings. Of the parents who have used the guidelines, 38 percent found them "very useful" and 50 percent found them "somewhat useful." *Id*. at 4-5.

In *Playboy*, 529 U.S. at 816, the Supreme Court similarly invalidated a regulation intended to shield children from unsolicited sexually-oriented sounds and images from signal bleed. The Court held that the government had failed to meet its obligation to show that content regulation was the least restrictive means of addressing the problem, because the law in question provided a voluntary (*i.e.*, "opt-in") blocking option that parents could use in addition to the mandatory restrictions. *Id*. at 826. It reached this conclusion despite the fact that "fewer than 0.5 percent of cable subscribers requested full blocking" during the time the more restrictive prohibition was enjoined and only the voluntary option was available. *Id*. at 816. In doing so, the *Playboy* Court noted the "uncomfortable fact" that "the public greeted [voluntary blocking] with a collective yawn" during the time it was the sole blocking alternative, but reasoned the less than enthusiastic reaction could be explained by the possibility that the problem it sought to address was less of a concern to parents than the government supposed, or that the voluntary option was insufficiently publicized. The same considerations apply here.

V. THE FCC LACKS STATUTORY AUTHORITY TO REGULATE TELEVISED VIOLENCE

Another "legal constraint on … the Commission" that does not allow it to regulate violent programming is a lack of statutory authority for such rules. *Notice* ¶ 2. As shown above, any regulation of violent programming necessarily involves program content, *see supra* Section IV, and the *Notice* effectively concedes as much in its discussion of studies that require "content analyses" to offer any conclusions. *Notice* ¶ 9. The Act specifically precludes censorship or interference with free speech rights with respect to radio communication and the imposition of content regulations on cable service. 47 U.S.C. §§ 326, 544(f)(1). These prohibitions, and the absence of authority delegated to the FCC in the Act for anything other than technical rules (together with First Amendment limits discussed above), provide a resounding "no" in answer to

the question of "whether the Commission currently has the authority to adopt" rules regulating violent television programming. *Notice* ¶ 23.

Sections 326 and 544(f)(1) preclude the Commission from imposing direct content regulations such as restrictions on violent television programming. Section 326 prohibits censorship and expressly withholds from government the power to "interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326. This denies to the FCC "the power of censorship" as well as the ability to promulgate any "regulation or condition" that interferes with speech. *Id*. Similarly, Section 544(f)(1) states that no "Federal agency," defined to include the Commission, *id*. § 522(8), "may … impose requirements regarding the … content of cable services, except as expressly provided" in the Act. *Id*. § 544(f)(1). Accordingly, the FCC may not regulate televised violence unless it can cite provisions in the Act expressly authorizing such action, and it may take action only as far as permitted by the provisions on which it relies.

It is clear, however, that no provision in the Act grants the Commission *any* authority to address violent programming beyond the technological rules that already exist. *See* 47 C.F.R. § 15.120(b) (effectuating V-chip provisions in §§ 303(w)-(x) of Act). *See also id*. §§ 544(d)(2); 560 (imposing cable operator blocking and scrambling obligations upon subscriber request). As a threshold matter, the D.C. Circuit recently confirmed that, "[t]o regulate in the area of programming, the FCC must find its authority in provisions other than" general grants of power. *Motion Picture Ass'n of America v. FCC*, 309 F.3d 796, 804 (D.C. Cir. 2002) ("*MPAA*"). Consequently, it is not as simple as asking whether *MPAA* "suggests that the Commission's public interest authority does not extend to regulation of violent program content." *Notice* ¶ 24. The decision in *MPAA* stands for the broader proposition that, without an affirmative grant of statutory authority, the FCC may not rely on its public interest authority, *or any other general grant of authority*, to regulate content. In addition, though the court analyzed only whether there

was statutory authority for the video description rules at issue, it described the need to interpret the Commission's powers narrowly because any regulation of program content "invariably raise[s] First Amendment issues." *MPAA*, 309 F.3d. at 805. While the court expressed no opinion on the constitutional issues, the thrust of its holding was that the Commission's general public interest authority over programming is far less expansive than previously assumed. [147]

The D.C. Circuit held in *MPAA* that regardless of the asserted "salutary" nature of any rules or objectives the FCC might seek to pursue, "47 U.S.C. § 151, does not give the FCC unlimited authority to act as it sees fit with respect to all aspects of television transmission." *MPAA*, 309 F.3d at 798, 807. Rather, "where [as here] the FCC promulgates regulations that significantly implicate program content, § 1 is not a source of authority." *Id*. at 799. The court noted that the fact that Section 151 authorizes the Commission "'to make such regulations … that are consistent with the public interest' … is a very frail argument" with respect to "regulations [that] significantly implicate program content" as would rules regulating violent programming. *Id*. at 803 (quoting 47 U.S.C. § 151). The court thus required that the Commission look elsewhere when it seeks to regulate program content. [148]

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[147] The same conclusion follows from the D.C. Circuit's decision in *Radio-Television News Directors Assn. v. FCC*, 229 F.3d 269, 270 (D.C. Cir. 2000) (per curium), where the court ordered the Commission to repeal the personal attack and political editorial rules, holding that the FCC had the burden – and had failed – to justify rules that "interfere with editorial judgment of professional journalists and entangle the government in day-to-day operations of the media."

[148] While there is no doubt violent programming regulations are content-based, *see supra* at 48-51, even if the Commission adopted rules it claimed were content-neutral, it could not avoid reversal on statutory authority grounds. *See MPAA*, 309 F.3d at 804 (whether "regulations are 'content-neutral' … is irrelevant" where "[t]he question is whether § 1 provides … authority to promulgate regulations that significantly regulate program content," because "content-neutrality is irrelevant to the inquiry of … delegated authority"). Indeed, "[o]ne of the reasons why § 1 has not been construed to allow the FCC to regulate programming content is because such regulations invariably raise First Amendment issues" such as those described in Section IV. *Id*. at 805 (citing *Turner I*, 512 U.S. at 651; *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 126 (1973)).

The general grants of power cited in the *Notice* to "regulate the broadcast medium as the public interest requires" and to grant licenses in the public interest, *Notice* ¶ 24 (citing 47 U.S.C. §§ 303(r); 309(a)), do not provide such authority. As the D.C. Circuit held, such "necessary and proper" public interest provisions, including that found in Section 303(r), "simply cannot carry the weight" of authorizing regulations of program content "if the agency does not otherwise have the authority to promulgate the regulations in issue." *MPAA*, 309 F.3d at 806. "The FCC must act pursuant to *delegated authority* before any 'public interest' inquiry is made," *id*. (emphasis original), such that where there is no provision in the Act authorizing rules, as is the case with violent television programming, the Commission cannot cite provisions like Section 303(r) and 309(a) as bases for its regulation. [149]

The Commission's limited authority in this area is confirmed by Sections 303(w)-(x), which set forth the FCC's authority to adopt V-chip rules. The fact that these provisions require technical standards but otherwise do not authorize the FCC to regulate violent programming, "when coupled with the lack of authority under § 1 … clearly supports the conclusion that the FCC is barred" from regulating violent programming. *MPAA*, 309 F.3d at 802. Just as with Section 713, which authorized the Commission to study closed captioning and video description, and to adopt closed captioning rules while remaining silent on video description rules, the adoption of V-chip mandates in the 1996 Telecommunications Act, without authorizing more,

[149] Similarly, though the *Notice* does not cite it, there is no authority to act with respect to violent programming under Section 4(i) of the Act, which allows the FCC to adopt regulations "reasonably ancillary" to exercise the powers the Act does grant. *See MPAA*, 309 F.3d at 806 (discussing 47 U.S.C. § 154(i)). Given the absence of any statutory authority to regulate violent programming, the extent to which the Commission believes the "statutory prohibition against 'obscene, indecent, or profane language' … does not implicate Section 326" is beside the point, *Notice* ¶ 25, since regulation in that area is authorized (to whatever extent it can be consistent with the First Amendment) by 14 U.S.C. § 1464. There is no similar statutory authority as to televised violence, and there is no constitutional or logically principled way for the Commission to "expand its definition of indecency to include violent programming." *Id*.

undermines any claim that the Commission can adopt direct regulations to restrict violent programming. *See id*. at 801-02. Consequently, the answer to the question "[h]ow does Title V of the 1996 Act … affect the Commission's general authority in this area," *Notice* ¶ 26, can only be that it fatally undermines any claim of authority to adopt regulations beyond technical V-chip requirements. [150]

It is a "cardinal canon" of statutory construction "that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). Here, Congress specifically considered – and rejected – FCC rulemaking authority for violent programming. Before congressional efforts ripened into the legislation that would form the Telecommunications Act's V-chip provisions, Congress had before it several bills that would have conferred a variety of powers on the Commission other than simply establishing technical regulations to enable V-chip use. One such bill would have required the Commission to mandate that television broadcast licensees and cable operators air video and audio warnings before any program that may contain violence, to the effect that the programming could adversely affect children's mental or physical health. *Children's Television Violence Protection Act of 1993*, S. 943, 103rd Cong., 1st Sess. (1993). Another, the *Television Violence Report Card Act of 1993*, S. 973, 103rd Cong., 1st Sess. (1993), would have required FCC to evaluate and rate television programs with respect to the extent of violence they contain and to publish the ratings for public consumption. Yet another bill proposed to make it unlawful to distribute any violent video programming during hours when children are reasonably likely to comprise a substantial portion of the audience, and to have the FCC define "violent video

[150] The "extent of the Commission's current authority over cable television in this area" is similarly limited in view of the technical provisions in Sections 544(d)(2) and 560 of the Act.

programming" and the hours when children likely are watching, and to consider a number of specified content-based exemptions from the prohibition. [151] None of these bills were enacted.

Congress instead adopted what would become Sections 303(w) and (x) of the Act, and otherwise was silent on the role the FCC should play with respect to violent programming. Accordingly, there can be no claim of statutory authorization now given that "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987). *See also Railway Labor Executives' Ass'n.*, 29 F.3d 655, 670 (D.C. Cir. 1994) (categorically rejecting argument that an agency "possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area") (emphases in original). As the D.C. Circuit held, "[t]he … position … that the adoption of rules is permissible because Congress did not expressly foreclose the possibility" is "entirely untenable." *MPAA*, 309 F.3d at 805-06.

In this regard, it is notable that even if reference to legislative history were necessary, it confirms that direct FCC regulation of violent television programming never was intended. When the bill that would become Sections 303(w) and (x) was introduced, it was held out as a "constructive solution that would avoid … Government intervention" such as direct content regulation. 141 Cong. Rec. S8225, S8232 (June 13, 1995) (statement of Sen. Lieberman). Congress made clear that it sought to "empower parents to exclude programming that comes into their homes, programming they find objectionable – not a Member of Congress, *not the FCC*, not anybody else, but what parents find objectionable[.]" *Id.* at S8227 (statement of Sen. Conrad)

[151] *Children's Protection from Violent Programming Act of 1993*, S.1383, 103rd Cong., 1st Sess. (1993). *See also Parents Television Empowerment Act of 1993*, H.R.2756, 103rd Cong., 1st Sess. (1993); *Television and Radio Program Violence Reduction Act of 1993*, H.R.2837, 103rd Cong. 1st Sess. 1993).

(emphasis added). *See also id.* at S9228 ("we have gone to great lengths to make sure what we are offering … is a voluntary system"). Similarly, debate before the House stressed that: "There is no mandate. There is no enforcement mechanism. There is absolutely no connective tissue between this bill and any first amendment violation. The only objective we have is to give power to parents in their own living rooms." 141 Cong. Rec. H8481, 8486 (Aug. 4, 1995). Such clear statements of intent to limit any government authority to directly regulate program content, even to address violence issues, preclude a Commission claim of authority to do so here.

VI. CONCLUSION

The Media Associations caution the Commission that any attempt to regulate televised violence will run afoul of the Constitution and the Commission's own statutory authority. The lack of an intelligible definition of "violence," among other things, makes it impossible for the FCC to craft a standard that would satisfy strict constitutional scrutiny. Even if no legal barriers existed, however, content regulation should be the last resort – not the first – since individuals can use available technology to select or reject television programming tailored to their own needs and preferences. In any event, the Commission should take a hard look at the evidence typically put forward in support of such rules. The degree to which the available research has been hyped, distorted, and used to make extravagant claims should raise warning flags for an agency that must "walk a 'tightrope'" to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act." *CBS v. Democratic Nat'l Comm.*, 412 U.S. at 117. While there may be "a correlation in Germany between the decline of the stork population and the falling human birth rate, … [t]his does not prove that storks bring babies." *Videodrome*, THE ECONOMIST, August 13, 1994 at 73. And so it is with the many claims about televised violence. There is no basis for the Commission to consider adopting rules in this area.

Respectfully submitted,

American Advertising Federation
American Association of Advertising Agencies
Association of National Advertisers, Inc.
Motion Picture Association of America
National Association of Broadcasters
Satellite Broadcasting and Communications Association

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ATTACHMENT

The American Advertising Federation, headquartered in Washington, D.C., is the trade association that represents 50,000 professionals in the advertising industry. AAF's 130 corporate members are advertisers, agencies and media companies that comprise the nation's leading brands and corporations. AAF has a national network of 200 ad clubs and connects the industry with an academic base through its 215 college chapters.

The American Association of Advertising Agencies, founded in 1917, is the national trade association representing the advertising business in the United States. Its nearly 450 members represent virtually all the large, multi-national advertising agencies, as well as hundreds of small and mid-sized agencies, which together maintain 13,000 offices throughout the country. Its membership produces approximately 75 percent of the total advertising volume placed by agencies nationwide.

The Association of National Advertisers, Inc. is the advertising industry's oldest trade association, representing companies offering more than 8,000 brands of goods and services, and is the only organization dedicated to companies that advertise on a national and regional basis. Its membership is a cross-section of American industry, consisting of manufacturers, retailers and service providers across the country. ANA serves the needs of its members by providing marketing and advertising industry leadership, serving as an information resource, and facilitating industry-wide networking.

The Motion Picture Association of America is a trade association representing major producers and distributors of theatrical motion pictures, television programs, and home video material.

The National Association of Broadcasters is the full-service trade association representing the interests of free, over-the-air radio and television broadcasters, serving as the industry's voice before the Federal Communications Commission other federal agencies,

Congress, and the courts. Organized in 1923, NAB currently represents approximately 6800 radio stations and over 1100 television stations. NAB seeks to preserve and enhance its members' ability to freely disseminate programming and information of all types.

The Satellite Broadcasting and Communications Association is the national trade organization representing all segments of the satellite industry. It is committed to expanding the utilization of satellite technology for the broadcast delivery of video, audio, data, music, voice, interactive and broadband services. SBCA is composed of the DBS, C-band, broadband, satellite radio, and other satellite service providers, content providers, equipment manufacturers, distributors, retailers, encryption vendors, and national and regional distribution companies that make up the satellite services industry.