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## WHITE PAPERS

### VIOLENCE IN PROGRAMMING: IS IT PROTECTED SPEECH?

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Hyperlinks are supplied to many of the cases reviewed in this study.

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##### ABSTRACT

New proposals to censor or label "violent programming" which have been introduced in the Congress raise questions about the constitutionality of such legislation. This study contextualizes the issue in terms of recent court rulings and situates it within debate over broadcast and newspaper parity. First, it argues that televised programming should enjoy the same First Amendment protection as newspapers. Second, it examines the arbitrary and capricious nature of terms such as "violence." Third, it analyzes the hypothesis that prevention of violence falls under the rubric of a "substantial government interest" and examines prominent studies that argue that television contributes to violence in society. This section demonstrates that most studies either do not call for censorship or are seriously flawed with regard to methodology or the failure to take relevant variables into account. Fourth, it tests labeling against constitutional standards now in place. The study concludes that by almost any measure, restrictions on violent programming are unconstitutional and counterproductive.

#### VIOLENCE IN PROGRAMMING: IS IT PROTECTED SPEECH?

At the end of the Fifteenth Century, a puritanical monk named Savonarola riled up the citizens of Florence against the ruling Medici family. He claimed their love of art was nothing more than vanity and that the vanities of Florence had to be destroyed. Savonarola was such a powerful orator that he soon ruled Florence and ordered a bon fire of the vanities in the city square. A great many beautiful works of art and scholarly books were lost. A few years later, Savonarola fell from grace and was burned in the very same square. Unfortunately, his spirit lives on.

In the last two years, a host of national policy makers have brought new pressure on producers and broadcasters of violent programming to curtail "gratuitous violence." In 1994, for example, Congressman Edward Markey (D-Mass.) told the television networks to figure out a way to label violence in programming or he would do it for them. In 1995 he attached legislation to the communications bill that would require the installation of a so-called V-chip in all new television sets. The chip, while not yet developed, would, Markey speculated, detect ratings of programs that would be applied by producers.

In 1994 Senator Paul Simon (D-Ill.) told the National Association of Broadcasters that while cartoons such as *Tom and Jerry* were too violent for television, he wouldn't mind seeing *Schindler's List* on television.<sup>[1]</sup> Reed Hundt, Chairman of the Federal Communications Commission, warned that networks may be legally responsible for the effects of their programs and that the Federal Communications Commission has the power to regulate the content of programs. Speaking before the Executive Committee of the National Association of Broadcasters in February of 1994, Hundt called for "new family programming" to "educate and instruct" children. Appearing before Markey's committee later that year, the Surgeon General Joycelyn Elders attacked the networks for not doing enough to reduce violence on television. With the resignation of Elders, Attorney General Janet Reno emerged as the point person on this issue. She has told Congress that regulating the content of programming does not damage the rights of broadcasters because they are second-class citizens under the First Amendment.<sup>[2]</sup>

In February, 1995, Senator Kent Conrad (D-North Dakota) introduced a bill to ban "gratuitous violence" from television between 8AM and 10PM.<sup>[3]</sup> Senator Bob Graham (D-Fla.) coerced the Defense Department, the Postal Service and Amtrack to agree not to place advertisements in "excessively violent" programming. Senator Fritz Hollings (D-S.C.) introduced legislation to ban violent television programs when children are "reasonably likely" to compose a "substantial part of the audience." Since that time Senators Joseph Lieberman (D-Conn.) and John McCain (R-Ariz.) have held hearings and warned producers that regulation is just a bill away. Finally, Clinton's last Surgeon General in his last week issued a report linking violence with the media. It came under immediate attack by numerous scholars. Professor Karen Sternheimer, a sociologist at the University of Southern California and a researcher at the Center for Media Literacy, wrote that "One of the studies the surgeon general cites equates programs as diverse as cartoon and police dramas with video games and action movies."<sup>[4]</sup> Such comparisons are misleading and dangerous because they ignore the more like causes of violence such as "alcohol abuse, the deterioration of public education and the lack of economic opportunity in impoverished areas."<sup>[5]</sup>

This wave of censorship is nothing new. Politicians have been unable to resist the urge to blame television for the ills of society since its inception. In 1954 Senator Kefauver (D-Tenn.) investigated the relationship between juvenile delinquency and television programs. This issue was revived in the early 60s by Senator Dodd (D-Conn.) who eventually got President Johnson to establish the Eisenhower Commission on the Causes and Prevention of Violence in 1968. Since its conclusions were not in accord with his impressions, in 1969 Senator John Pastore (D-R.I.) requested that the Surgeon General issue another report on the problem. Three years later under the watchful eye of

the Congress, a report was published that hinted at a weak correlation between the viewing of violence and violent activity: "The effect is small compared with many other possible causes, such as parental attitudes or knowledge of and experience with the real violence in society. [The evidence does not] warrant the conclusion that televised violence has a uniformly adverse effect ... [or] an adverse effect on the majority of children."<sup>[6]</sup> Nonetheless, the Surgeon General appeared before Pastore's committee and claimed a causal link had been documented though "carefully phrased and qualified in language acceptable to social scientists."<sup>[7]</sup> By the fall of 1974, the Chairman of the Federal Communications Commission, Richard Wiley, was urging the three networks to voluntarily curtail "sex and violence" on television. Unfortunately, this call of conscience intertwined the issue of indecency with violence. In reaction, the networks and the National Association of Broadcasters Television Review Board adopted the "family viewing" policy, which shoved violent and sexual programming into the 9 to 11PM time slots. Nonetheless the Commission made clear that "industry self regulation" was preferable to governmental regulation, that such standards were highly subjective and raised "serious constitutional questions."<sup>[8]</sup> Sure enough in November of 1976, the courts found the "family viewing" hour unenforceable and unconstitutional.<sup>[9]</sup> But more recently the Court has ruled that the FCC can put in place a restriction on "indecent" material limiting it to broadcast in the 10 PM to 6 AM time period. In its ACT III decision the Court did not deal with defining or determining what is indecent speech; that will be the subject of subsequent rulings.<sup>[10]</sup>

In *Winters v. New York* (1948), Justice Stanley Reed, writing for the majority, protected entertainment from infringement by ruling that "[t]he line between ... informing and ... entertaining is too elusive .... Everyone is familiar with instances of propaganda as fiction. What is one man's amusement, teaches another's doctrine;"<sup>[11]</sup> see also *Cohen v. California* (1971). That was an important finding, because *Winters* is one of the few Supreme Court cases that deals with the question of the effect of violence in the media. The state of New York had arrested Winters under a statute that prohibited the sale of stories of bloodshed. After three arguments before the Supreme Court, the law was deemed unconstitutional on the ground that it was too vague. The Court has repeatedly held to this position. In *NAACP v. Alabama*, for example, the Court ruled that terminology is unacceptable if it is "so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application."<sup>[12]</sup>

The vagueness of the term "violence" is one of the most persistent problems for those who seek to regulate it because it encourages arbitrary regulation that violates free, let alone creative speech. The Supreme Court has consistently ruled that inhibiting speech is unconstitutional, especially when the inhibition is caused by the application of an "arbitrary and capricious" standard. Television programs from reruns of *The Three Stooges* to *Will & Grace* achieve comic effects using what some have called violent activity. Because conflict makes drama, it is hard to find a serious program, whether it is *Macbeth* or *Lonesome Dove*, that is not violent in some way. Furthermore, philosophically, it is not difficult to demonstrate that violence can be used to reinforce in the mind of audience members what is moral and what is immoral. Other studies show that violence in programming in cathartic and might actually prevent further violence. The latest study in this regard has been written by Professor Jib Fowles in his book *The Case for Television Violence* (Sage Publications, 2000).

That is why this study addresses a key question: Does the guarantee of freedom of expression extend to broadcasting in such a way as to preclude Congress from making laws affecting the broadcasting of violence? There are several important sub-questions which situate this debate inside the context of the struggle over the past decade to give broadcasters parity with newspapers when it comes to content controls. They include the following:

1. Under what circumstances is the government allowed to impose content controls on broadcast programs?
2. Can "violence" and such related terms as "gratuitous" be defined in such a way as to preclude their arbitrary and capricious use?
3. Does violence in programming constitute a clear and present danger, and does regulation of it by the government advance a significant and legitimate government interest?

This study proceeds by answering the sub-questions and then addressing the major question in its conclusion.

## I. CONTENT CONTROLS OVER BROADCASTING

Because they played an integral part in fomenting the American revolution and in staging the debate over the Constitution and the Bill of Rights, newspapers were protected by the free press clause of the First Amendment. In case after case the Supreme Court has re-asserted that guarantee. Perhaps the clearest case was *Miami Herald Publishing Co. v. Tornillo*<sup>[13]</sup> in 1974 in which the Court struck down a 1913 Florida statute that required newspapers to give response space to candidate's they had attacked. The decision was unanimous but contradicted an earlier ruling of the Court in *Red Lion Broadcasting v. FCC*.<sup>[14]</sup> And therein lies the rub.

In that 1969 case, the Court ruled unanimously that broadcast licensees could be subjected to the "fairness doctrine" of the Federal Communications Commission because they were a scarce resource that Congress required to operate in the public interest. But not long after that decision, the "fairness doctrine" came under attack, first by one of its chief sponsors, Senator William Proxmire (D.-Wisc.), who had codified it into federal law in 1959,<sup>[15]</sup> and then by a host of others in the 1980s. Proxmire, like those who followed him, argued that the high minded doctrine—it was conceived to relieve restrictions on editorializing by broadcasters—was actually counter-productive. It was used by Presidents Kennedy, Johnson and Nixon to intimidate broadcasters who opposed their views.<sup>[16]</sup> Challenges by public interest groups of the left and right had the effect, whether intended or not, of chilling the speech of broadcasters by requesting response time to editorials, programs, and news reporting.<sup>[17]</sup> Worse yet, the FCC took up "fairness" complaints on a case-by-case basis instead of examining them at license renewal time. This practice led to inordinate legal costs for stations who began to avoid controversial editorializing as much as possible. Though well-intentioned, the "fairness doctrine" was having a chilling effect on the speech of broadcasters.

The Supreme Court noticed this phenomenon in 1984 when they invited a review of the "doctrine" in *FCC v. League of Women Voters*:

*In light of the substantial increase in the number and types of information sources, we believe that the*

*artificial mechanism of interjecting the government into the affirmative role of overseeing the content of speech is unnecessary to vindicate the interest of the public in obtaining access to the marketplace of ideas.*<sup>[18]</sup>

At almost the same time, Senator Bob Packwood (R-Ore.), chairman of the Senate Commerce Committee, held two influential hearings on the issue of content controls. In 1984, the hearings concluded that the doctrine was counter-productive and unconstitutional.<sup>[19]</sup> Of particular interest was the transcript from the debate over the "public interest" clause of the Radio Act of 1927 provided by the Freedom of Expression Foundation:

**Congressman White:** *The pending bill gives the Secretary [of Commerce] no power of interfering with freedom of speech in any degree.*

**Congressman LaGuardia:** *Is it the belief of the gentleman and the intent of Congress in passing this bill not to give the Secretary any power whatever in that respect in considering a license or the revocation of a license?*

**Congressman White:** *No power at all!*<sup>[20]</sup>

The purpose of the public interest standard in the 1927 Radio Act and the Communication Act of 1934 was to require broadcasters to establish a clear signal that did not interfere with the broadcasts of others including the armed forces. The Freedom of Expression Foundation along with the Radio and Television News Directors Association took the findings from the hearings to the FCC and asked for a re-assessment of the doctrine. After its own hearing in 1985, the FCC also concluded that the doctrine was counter-productive and constitutionally suspect.<sup>[21]</sup>

The FCC was then given the opportunity to suspend the doctrine when the D.C. Court of Appeals ruled that the FCC had "primary" jurisdiction over the doctrine and the scarcity rationale used by the Supreme Court in 1969 was no longer valid. This was true for several reasons chief among them being that there were so many media outlets and so many broadcast stations available, that they could hardly be termed scarce. In writing the majority opinion of the court, Justice Bork went even further, arguing that almost anything could in some sense be deemed scarce, and therefore, subject to regulation under this rationale: "All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism."<sup>[22]</sup> Given Bork's green light, the FCC suspended the "fairness doctrine" in August of 1987. The decision was immediately appealed to the D.C. Court of Appeals, which upheld the FCC. When the Supreme Court denied certiorari, the issue was settled for the moment though the constitutionality of the doctrine was held in abeyance.

Further clarification was provided in *Turner Broadcasting System, Inc. v. FCC*, a further injunction against content based controls.<sup>[23]</sup> The plain terms of the regulation must be examined to see whether, on its face, the regulation confers benefits or imposes burdens based on the content of the speech regulated. Second, it must be determined, even if the regulations plain language does not mandate a finding of content discrimination, whether there are nevertheless indications that the rules manifest purpose is to regulate speech based on the message it conveys.<sup>[24]</sup> Clearly, the "fairness doctrine" or a regulation concerning violence would not meet this standard, and therefore be declared unconstitutional.

Given that newspapers are more scarce than broadcast outlets, that content based controls are impermissible under *Turner*, and that Congress did not intend the "public interest" clause to be used to create content controls, we conclude that broadcasters should enjoy the same freedoms as newspapers and be subject to the same limitations of libel and slander when it comes to entertainment programming.<sup>[25]</sup> This conclusion is supported by a number of constitutional scholars, the most prominent of which wrote in 1995:

*[I]t is not necessary to retain a separate First Amendment jurisprudence for broadcasters.... We believe that the growing telecommunications convergence should lead the Court to embrace these principles explicitly while discarding the false notion that "broadcasting" (whatever that is) requires or deserves a separate First Amendment jurisprudence.... [T]he general principles of law and regulation underlying all nonbroadcast mass media would be just as workable, and should be fully applied, to broadcast media.*<sup>[26]</sup>

Thus, violence in programming should be subject to the same standards that would apply to violence in newspapers or literature for that matter.

## II. ARBITRARY AND CAPRICIOUS USE OF TERMS

It is a long standing matter of constitutional law and administrative review that the arbitrary and capricious use of laws or regulations is prohibited. In *Cox v. New Hampshire* (1941), the Supreme Court struck down a law giving a licensing board arbitrary power and unfettered discretion over parades.<sup>[27]</sup> A whole line of cases from *Roth* to *Jenkins v. Georgia* has held that for a literary work to be considered obscene and therefore censurable, it must meet very specific standards, not some vague arbitrary formula such as "I know obscenity when I see it."<sup>[28]</sup>

Earlier we referred to Senator Paul Simon's definition of "gratuitous violence" which he sees in *Tom and Jerry* cartoons but not in *Schindler's List*, which in the opinion of others is full of unnecessary cruelty. Clearly, "gratuitous violence" is an arbitrary phrase that can be used in a capricious manner. Thus, defining what is or is not gratuitous violence may be better left to critics than to government censors.

The problem with defining violence also exists in the social scientific world. Sometimes violence is described as aggressive behavior; sometimes it is described as verbal abuse and teasing. Constitutional scholars Thomas Krattenmaker and Scott Powe put the problem this way in their landmark two hundred page review of social scientific research:

*Finally, and most damaging to proponents of the violence hypothesis, no one yet has been able to suggest an acceptable operational definition of the very kind of behavior sought to be measured: "violence." To be useful as a basis for policy making, studies of the causes of violence must rest upon a definition incorporating normative, social connotations. To illustrate, if violence is defined simply as a willingness*

*to stand one's ground when physically attacked, it is extremely unlikely that violence caused by television would produce an outcry for increased regulation. What then can the researcher take as an objective observable conception of violence capable of measuring behavior that produces social concern?*<sup>[29]</sup>

The most recent case in this regard concerns an ordinance written by the city of Indianapolis attempting to limit access to violent video games by minors in arcades. The ordinance defined "graphic violence" in two ways. First, it bracketed "graphic violence" with obscenity arguing that it caters to a "morbid interest" and is "patently offensive to prevailing standards in the adult community as a whole ... lacks serious literary, artistic, political or scientific value." Secondly, the ordinance defines "graphic violence" as "amputation, decapitation, dismemberment, bloodshed, mutilation, maiming, or disfigurement." The local judge approved implementation of the ordinance on the grounds that psychological studies of other games provided enough data to convince him that such games induced minors to aggressive acts of violence. The case was appealed to the Seventh Circuit Court in 2001. Judge Posner issued the ruling in *American Amusement Machine Association v. Kendrick*. Citing *Winters*, which makes clear that "depiction of torture and deformation are not inherently sexual," he rejected the bracketing of violence with obscenity and the use of court sanctioned obscenity prohibitions to apply to violence. Furthermore, Posner argued that "no showing has been made that games of the sort found in the record of this case" induce violence. "The grounds" for such an ordinance "must be compelling" not merely plausible because "[c]hildren have First Amendment rights."<sup>[30]</sup> Posner compared the video games to literature containing graphic violence and concluded that video games, despite their interactive nature, were still stories that taught lesson.

In the wrong hands, and perhaps in any hands, using a phrase like "graphic" or "gratuitous violence" to write policy creates a "broad sweep" that would include many instances of creativity or even innocuous speech and/or programming. It is, therefore, unconstitutional and dangerous to allow the government to censor "gratuitous violence" and/or other such undefinable phrases.

### III. CLEAR AND PRESENT DANGER; COMPELLING GOVERNMENT INTEREST

So under what circumstances is the government allowed to infringe on the First Amendment? The Supreme Court stated the issue this way: "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that issue."<sup>[31]</sup> In *Edenfield v. Fane* (1992) the Supreme Court ruled that proof of a real harm must be demonstrated before speech can be restricted. In other words, policy makers must be able to define violence in operational policy terms and then prove that there is causal link between violence on television and serious crime on the streets in order to restrict the content of broadcasts.

That leads to the O'Brien test: Does the proposed law advance a "compelling interest"?<sup>[32]</sup> Is there a problem here that can be solved by banning violence on television and no other medium? In the case of violence, those seeking to ban it, must show that it does significant harm and that the banning of specific acts of violence in *televised* programming will alleviate the situation. To pass the lesser levels of scrutiny applicable to content-neutral regulations, such regulation must also be "narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of information" because it was influenced by a bias against television.<sup>[33]</sup>

There has been much literature on the effect of broadcast violence on its audience. As Majorie Heins of the ACLU has made clear much of it is a summary of other studies.<sup>[34]</sup> Most of those studies are seriously flawed or based on responses from hormonally challenged freshmen and sophomores subjected to who knows what kinds of video violence.<sup>[35]</sup> The laboratory tests are not scientific, not representative of the population, nor do they use an operational definition of violence. No wonder the Department of Education concluded that "a disturbing amount of scholarship has been slipshod..."<sup>[36]</sup>

Unfortunately, some studies have gained rhetorical force because they have been cited by the courts. It is to the leading one of those that this study now turns its attention.

#### 1. THE CENTERWALL STUDY

Brandon Centerwall's study was cited by a federal judge on the D.C. Court of appeals as one of the most compelling in terms of presenting a case for censorship of violent programming.<sup>[37]</sup> Thus, the validity of his study becomes an important question. To test that validity, this study begins with an examination of the methodology used.

The nature of society is both complex and dynamic. As such, isolating and measuring the influence of one variable on the behavior of societal members is very difficult. Proper research methods are required. Unfortunately, Centerwall ignores these.<sup>[38]</sup> While he attempts to account for factors such as alcohol consumption and availability of fire arms in his study of violence, he inevitably ignores several others that shape not only a child's behavior, but the behavior of society as a whole. His study of South Africa as a virginal society corrupted by television is particularly troubling. Heins argues that the introduction of computers or Hondas in the same time period could be just as much to blame for the rise in violence. More seriously, Centerwall ignores at least three crucial variables: 1) the rise of militant resistance to apartheid as a contributing factor to the rise in the homicide rate among whites, 2) law enforcement officials in South Africa in the period exaggerated white homicide rates (Centerwall's index of violence) in order to whip up prejudice; and 3) evolving changes in the traditional family unit. Increases in divorce rates and in single parent families have an impact on a child's behavior. Since Centerwall also uses Canada as his other test tube, it is important to note that *The Canada Year Book* documents the escalation of the number of divorces granted in Canada due in part to a 1968 change in the divorce law.<sup>[39]</sup> The *Statistical Abstract of the United States* also reports an increase in divorce rates and illegitimate births over the same time period.<sup>[40]</sup> Centerwall's failure to account for these significant variables undermines the credibility of his case. That is why it is difficult to replicate his study. Schramm actually found that aggressive behavior among sixth graders in a Canadian community with television was lower than among sixth graders in a community that was "television virgin."<sup>[41]</sup>

Other significant questions emerge. First, can't other media be held accountable for the same effects Centerwall alleges from television? Cinema, newspapers, and books were also popular during the time television was introduced but he

doesn't credit them with the same effects. The increase in violent episodes in these alternative media could have increased just when television was introduced to a broad audience in Canada and/or South Africa. One of the most violent movies of the time, "Bonnie and Clyde," launched a whole new genre of graphic violence. Its existential themes endorsed risk taking to achieve selfhood and some have argued that its immense popularity on college campuses encouraged demonstrations and other acts of violence.<sup>[42]</sup>

Second, could historic events account for the increase in violence? During the time period of the Centerwall study, the Vietnam War escalated and many seeking to avoid the draft emigrated to Canada. In 1968 Martin Luther King and Robert Kennedy were assassinated and riots broke out throughout America with sympathetic demonstrations around the world. In May of 1970 students were killed at Kent State University and more disruptions followed.

Third, could it be that television's profound effect stems not from its content but from availability, time watched, the introduction of color, and/or location? Because television is in our homes, it is more accessible and misuse may be more likely to result than from such more remote media as motion pictures. If that were the case, banning certain programming would not solve the problem because those who watch television excessively would simply tune to other programs. By some accounts, children who do not receive proper exercise and play time become more aggressive. This phenomenon is not difficult to understand. Outdoor competitive physical games provide an outlet for aggression. If that outlet is blocked because the child is watching too much television, the child will be more violent in interpersonal behavior. Thus, the variable may not be the content of television programming, but rather the amount of time spent watching television.

Mary Winn, author of *The Plug in Drug: Television, Children and the Family*, supports this hypothesis. In the *New York Times*, she responded to Centerwall's study by explaining that violent content is not the problem but that "the time-consuming act of watching replaces some crucial child experiences, notably play and socialization."<sup>[43]</sup> According to Winn, "even if the content is monitored, if all the child watches is *Sesame Street*, *National Geographic* specials, or *60 Minutes*, the effect is the same."<sup>[44]</sup> Understandably, the 24 hours the American child spends in front of the television each week replaces times that might better be spent interacting with family members, playing with the family pet, learning to read, or riding a bicycle.<sup>[45]</sup> The solution is to restrict access to television, which in fact some parental groups have advised.

Fourth, Centerwall's manipulation of variables is suspect. He operationalizes aggression in terms of white homicide rates in South Africa and Canada. This definition is quite a leap considering aggression is typically defined by social scientific scholars on Centerwall's side of the debate as "an act that injures or irritates another person."<sup>[46]</sup> Centerwall's use of white homicide rates allows him to run up the significance of his numbers in a way that leads to the suspicion that he selected this category precisely because it confirmed his hypothesis. But the white homicide rate measures the number of white victims. Consequently, whether or not the murderers were television viewers can not be determined. The rise in white homicide could be a result of racial, family, or political turmoil.

Fifth, Centerwall's results indicate a saturation point. "As of 1987, the Canadian homicide rate was 2.2 per 100,000, as compared with 2.5 per 100,000 in 1974. In 1987, the U.S. white homicide rate was 5.4 per 100,000, as compared with 5.8 per 100,000 in 1974."<sup>[47]</sup> He rationalized that "Since Canada and the U.S. became saturated with television by the early 1960's, it was expected that the rates of violence would likewise reach a saturation point 10 to 15 years later."<sup>[48]</sup> Centerwall, in an effort to explain the decline in rates, argues that the leveling off of homicide rates implies that a natural aggression level exists among individuals and society as a whole. But the possibility that Centerwall clearly ignores is the fact that reporting of such incidents by law enforcement officials became much more efficient during the same time period. Because of his campaign for law and order, President Nixon significantly increased funds for law enforcement in 1969; Canada and South Africa followed suit. At the time of Centerwall's study, then, reporting of crime increased because of new technologies and efficiencies in the detection of crime. It may have leveled off because the efficiency of reporting caught up with the level of crime. If that is the case, there may have been no real rise in the crime rate, only an increased ability to detect criminal activity that was always going on. Statistics on parricides, the killing of parents, support our conclusion here. Because parricide is such a horrific crime, law enforcement officials have kept detailed records of it for a long period of time. Because it involves children killing parents, it is certainly a better index of what Centerwall seeks to prove about the influence of violence on television than is the white homicide rate. And yet there has been no rise in the rate of parricide in the last 20 years.<sup>[49]</sup>

Worse yet, for Centerwall's hypothesis is the fact, as Marcia Pally makes clear, that the "national homicide rate peaked twice in the century, most recently between 1979-1981. The first and longer peak came in the early 1930s when no one had a TV set..."<sup>[50]</sup> Nor does Centerwall acknowledge the decline in the annual white homicide rates from 1946 to 1966, well into the television era. The historical factor with a much higher correlation to the white homicide rate is the escalation of the war in Vietnam.

Sixth, Centerwall does not take into account the variable of colonization. During the time period of the actual rise in homicide rates, that is, starting in 1966, many viewers traded in black and white televisions for color sets. The vivid reality of the new medium—a hotter medium according to McLuhan—may be more responsible for Centerwall's results than its content. The solution in such a case would not be to ban or censor programming, but to revert to black and white television broadcasts.<sup>[51]</sup>

Finally, Centerwall cites the results of a national opinion poll in which 47% of adult Americans believed that televised violence "plays a part in making America a violent society."<sup>[52]</sup> Since that group is not expert on this matter, the reporting of this data is gratuitous. Worse yet, it runs counter to what most experts have reported. Bybee, Robinson and Turow (1986) surveyed 486 mass media scholars on the perceived effects of television on children. They reported less concern about television's ability to promote aggression than that it contributed to reduced reading behavior and physical exercise. Moreover, results indicated a negative correlation between academic publication and perceived negative effects of television viewing.<sup>[53]</sup> The more scholars studied the problem, the more they found that other variables than television program content accounted for aggressive behavior.

We need to digress for one moment at this juncture to deal with another name that is sometimes cited by officials seeking to reinstate censorship. George Gerbner's studies have caught the attention of policy makers and the news

media, and have had the same kind of rhetorical impact as Centerwall. Thus, to conclude this section, this study considers Gerbner's approach different though it is from Centerwall's.

The analysis can begin with Gerbner's arbitrary definition of violence, which he has used over the years to compile his "profile" of violence in the media: "[T]he overt expression of physical force against self or other, compelling action against one's will on pain of being hurt or killed, or actually hurting or killing."<sup>[54]</sup> Note there is no accounting for motive or context; the event could be part of a comedy routine or part of the evening news. It could occur in self defense or in a rescue of another.

From these episodes Gerbner created his profile by adding five numbers together. Krattenmaker and Powe lay out the formula:

*1) percentage of programs containing violence, 2) double the rate of violent episodes per program, 3) double the rate of violent episodes per hour of programs, 4) the percentage of leading characters involved in violent acts, either as perpetrators or as victims, and 5) the percentage of leading characters involved in killing, either as perpetrators or victims.*<sup>[55]</sup>

Thus, Gerbner complicates the problem of his indiscriminate definition of violence with a formula that conflates percentages, hard numbers and arbitrary multipliers. It is small wonder that in one annual profile Gerbner's statistics led to the conclusion that "I Dream of Jeannie" was the most violent program on television.<sup>[56]</sup> And when his colleague, Nancy Signorielli described the results of research for 1993 before the House Telecommunications Subcommittee, she admitted:

*Interestingly, the most violent genre in this week-long sample was the variety shows, including specials on 'Television's Greatest Moments,' 'TV's Funniest Commercials,' and the 25th anniversary of Rowan and Martin's 'Laugh In.'*<sup>[57]</sup>

Even Gerbner has referred to the index as means to make "gross comparisons."<sup>[58]</sup> Turning on experimenters like Centerwall, he admits that correlational studies are irrelevant because they ignore the bigger picture he seeks to capture, the socializing nature of television. In short, his work is idiosyncratic, impressionistic and clearly outside the realm of social scientific quantifiable research. And in fact, after years of study, Gerbner wrote in 1994 that the level of violence in television programming had not escalated over the years. Commenting on these kinds of studies, Glenn G. Sparks wrote in 2005, "Although the content studies clearly show that there is a lot of violence on TV, the studies have nothing to say about how that violence may be affecting people."<sup>[59]</sup>

The latest in this series of studies was produced at the behest of the cable companies by four universities.<sup>[60]</sup> The National Television Violence Study counted incidents of violence and then tried to contextualize them. No causation or even correlation to violence in society was statistically demonstrated. One of the researchers on the project admitted:

*Most experts on this issue state that televised violence has approximately a 10% influence on future violent behavior, and many say that it has even less.... What they really should be concerning themselves with are the more serious contributors to violence, such as our dwindling education system, urban blight, the disappearance of family structure ... the availability of assault weapons, the strictness of our criminal laws, which too often treat violent criminals more leniently than drug offenders, and the recidivism rates of our prisons.*<sup>[61]</sup>

Perhaps that is why *Broadcasting & Cable* concluded that the "[s]tudy ... does not appear to break any new ground."<sup>[62]</sup>

The problem with the Gerbner counting method is that it does not account for difference in levels of violence in communities that watch the same programming. Detroit's crime rating is 30 times higher than Windsor, Canada's, yet residents of Windsor, just across the bridge from Detroit watch the same programming as do the citizens of Detroit. And this situation is not unique, compare various neighborhoods in San Francisco, New York City, and Los Angeles and you'll see the same results. They suggest that alternate causes are at work here. For example, a landmark 1990 study demonstrated that lead poisoning in childhood is the single most important predictor of criminality among adults. In January of 1996 the results of an extension of that study argued that exposure to lead in the environment may contribute significantly to criminal behavior, particularly in inner cities. This study was conducted by Dr. Herbert L. Needleman of the University of Pittsburgh's School of Medicine; it was a field study of 301 males from Pittsburgh's inner city. It found that boys with above-normal lead values were more aggressive and had higher delinquency rates when evaluated by teachers, parents, and, most important, themselves.

## 2. EVIDENCE CONTRARY TO CENTERWALL AND GERBNER

Professor Edward Donnerstein of the University of California is one of the leading experts on violence in the media. He recently gave a lecture in which he argued that "viewing violence per se does not cause people to become violent."<sup>[63]</sup> Donnerstein points out that countries with much more violence on broadcast media than America do not have high levels of violence in society. He cites Japan and Canada as his examples. What America has that Japan and Canada lack is a high level of poverty, excessive gun ownership, drug abuse, broken homes, illegitimacy, and gangs. Donnerstein points out that violence in America has declined for every age group except teenagers, where the increase skews the results for the rest of the population.

James Q. Wilson, the Collins Professor of Management and Public Policy at UCLA, reaches a similar conclusion in his book *The Moral Sense*.<sup>[64]</sup> Wilson points out that in Japan pornography is readily available and incredible violence pervades the media. And yet Japan has remarkably low rates of crime, especially violent crime, and is control of substance abuse.

Professor Karen Sternheimer of the USC Sociology Department writes that "People who live in violent neighborhoods and families are more likely to become violent (or the victims of violence) than anybody else. [Furthermore], [i]t is

likely that people with a propensity for violence are drawn toward violent media, thus creating a correlation" but not a causal relationship.<sup>[65]</sup>

A considerable amount of research indicates absolutely no correlation exists between televised violence and aggression in the real world. Hennigan, et al. (1982) conducted a study similar to that of Centerwall. Hennigan and her associates examined the impact of the introduction of television on levels of crime in the United States. The researchers took advantage of the Federal Communications Commission's (FCC) freeze on new broadcasting licenses which lasted from late 1949 to mid-1952. Those communities that gained access to TV prior to the freeze were compared to the communities that were temporarily isolated from television's influence. The researchers employed an interrupted time series design with switching replications to ensure internal and external validity, something Centerwall failed to do. Yearly FBI crime reports supplied the data detailing statistics for the following crimes: murder, aggravated assault, larceny, auto theft, and burglary. The researchers analyzed reports from 1936 through 1976 for cities, and from 1933 through 1974 for the states and found "no consistent evidence of an increase in...[murder, aggravated assault, burglary, or auto theft] due to the introduction of television in the years tested."<sup>[66]</sup> The researchers did, however, note an increase in larceny. They attribute this rise not to social learning properties of television, but to resentment and frustration from watching television characters rich in material wealth and advertisements of goods people could not afford. The only censorship this study might justify is the banning of "gratuitous wealth" from program content in order to reduce larceny levels in society.

Wiegman, et. al. (1992) also conducted a cross-cultural longitudinal study investigating the extent to which the viewing of violent content in dramatic television programs invited aggressive behavior in children. The study examined The Netherlands, Australia, Finland, Israel, Poland, and the U.S. over a period of three years. The researchers reported that, "On the basis of the data of all countries participating in this study, we may conclude that there is almost no evidence for the hypothesis that television violence viewing leads to aggressive behaviour..."<sup>[67]</sup> The statistical relationship between aggression and television that some social scientists have found disappears, according to Wiegman, et. al., when the data is corrected to reflect such other factors as a child's intelligence and preexisting level of aggression.

The most recent study in this line of counter-intuitive research comes from Marjorie Heins, a former ACLU attorney and now the Director of the Free Expression Policy Project. Her latest and most heavily researched book is *Not in Front of the Children: "Indecency," Censorship and the Innocence of Youth* (2002). The book begins with a history of censorship and then moves to scientific data which clearly demonstrates that social scientists have either very flawed research or are unable to establish a link between violence in televised programming and violence among the young.

### 3. OVERLOOKED FACTORS IN THE VIOLENCE-AGGRESSION EQUATION

Centerwall ignored such significant variables as divorce rates, effects of other media, impact of the Vietnam War, historic changes, crime reporting standards, viewing time, and colonization. These macrocosmic variables are only the beginning of the troubles faced by social scientists trying to establish a relationship between program violence and societal violence. Other researchers have found microcosmic factors that also need to be addressed.

For example, Singer, et. al. (1988) conducted a longitudinal study investigating the role of television in children's behavior. They reported that "From the present data we can conclude that the results are only weakly suggestive of a link between television viewing and aggression..."<sup>[68]</sup> Jonathan Freedman (1984) found "little convincing evidence that viewing violence on television in natural settings causes an increase in subsequent aggressiveness."<sup>[69]</sup> Andrea Martinez, a sociologist at the Canadian Radio-television and Telecommunications Commission, conducted an extensive review of a variety of television violence studies in 1993. She reported finding only a weak link between violence on television and violence in society.<sup>[70]</sup> Raymond G. Lande, M.D., reported inconclusive results of the scientific studies of both the Surgeon General and The National Institute of Mental Health (NIMH).<sup>[71]</sup> He demonstrated that the NIMH erroneously boasted a causal relationship when the studies actually yielded only a slight correlation.<sup>[72]</sup>

As illustrated by the NIMH survey, the incorrect inference of causality is a frequently overlooked error in every television violence study including that of Centerwall. Scientific method and logic since at least David Hume holds that the mere existence or appearance of two variables at the same time does not necessarily guarantee that one caused the other. And leading constitutional scholars who have examined the evidence claim it does not provide a link that would pass constitutional muster.<sup>[73]</sup> In fact, one can just as easily reverse the correlates and argue that violence on the television is the result of violence in the home, on the streets, and in the world. Television is reflecting not causing violence, and by holding up a mirror to society, may actually be reducing violence and providing a catharsis for violence prone individuals.

As Judy Foreman of the Harvard Medical School makes clear, "None of the new studies probes the most obvious feature of violence: that, across cultures, men are far more likely to commit violent crimes."<sup>[74]</sup> The FBI data from 1998 shows that men are eight times more likely than women to commit murder and nine times more likely to commit armed robbery. The probably cause is not environment, but higher levels of testosterone. As Foreman points out, "In animals, considerable data show that aggression is linked to high testosterone and that castration decreases aggression."<sup>[75]</sup>

Recently a new variable entered the picture that may make past studies obsolete. Researchers have consistently found in epidemiological studies that low levels of serotonin could be correlated with aggressive behavior. Studies completed at the University of Texas and Yale University verified this correlation by bringing about lower serotonin levels through dieting procedures. All volunteers in the studies were more aggressive when their serotonin levels were low. Dr. Frederick Moeller who conducted the study at Texas said, "There may be some individuals who are more prone to this effect, such as people with a history of early-onset aggressive behavior. If true, these people may benefit from medications increase serotonin."<sup>[76]</sup>

The serotonin studies correlate with several others that are very important to the present study. Richard Davidson, a psychologist at the University of Wisconsin, studied 500 people with strong violent activity and concluded that they had diminished brain activity in the prefrontal region, while activity in the amygdala was higher than normal. The

prefrontal area helps to control serotonin levels. The link between prefrontal damage and violence has been the subject of important recent research. In 2002 University of Southern California neuroscientist Adrian Raine for that damage or poor functioning of the prefrontal cortex was highly correlated to violent activity.<sup>[77]</sup> Raine went on to take PET scans of 41 convicted murderers and compared them to 41 normal counterparts. The murderers had lower levels of prefrontal activity. In fact, Raine demonstrated that impulsive murderers as compared with premeditated murderers, had the lowest levels of prefrontal activity. He also found that brains cells in the prefrontal area were small among people demonstrating anti-social behavior than among those who did not.

Raine's work confirmed prior studies conducted at the University of Iowa showing that damage to the prefrontal lobe area results in increased violent activity. Dr. Jonathan Pincus, head of neurology at the Veterans Center in Washington, D.C., also linked damage to prefrontal lobe areas with increased violent tendencies. Dr. Allan Siegel of the New Jersey Medical School has found that different parts of the hypothalamus cause different types of violence.

Yet another overlooked factor is that laboratory experimentation is tainted. For example, Freedman (1986) concluded that field, that is, real world research has not generated sufficient evidence to support a causal link between viewing violence and aggression in children.<sup>[78]</sup> In his article, he provided sound reasons why results obtained in the laboratory do not generalize to the outside world. For instance, laboratory studies overestimate the effect of television violence on aggression. Also, past research shows that it is much easier to produce attitude changes in the lab than in natural settings. The researchers might, for example, induce a halo effect that encourages respondents to provide the answers the researchers desire.<sup>[79]</sup> Attitudes may be temporarily changed but behavior is not. Freedman discovered that field experiments could just as easily be used to make a case for the lack of a causal relation rather than for its existence. His position was supported by Gadow & Sprafkin who found a three fold increase in aggression among pre-schoolers after watching "Sesame Street," the non-violent program in their field test.<sup>[80]</sup>

Lefkowitz, et. al. (1973), after returning to those subjects studied by Eron<sup>[81]</sup> in 1963 concluded that there was no significant correlation between violent television and aggressive behavior for the nineteen year-olds.<sup>[82]</sup> However, the Lefkowitz study is a prime example of the problems with social scientific research. The study does not closely correlate viewing of violence and aggressive activity. Eron's original study relied on reports of the subjects' mothers, while Lefkowitz's follow up relied on self-reporting of television viewing. As Krattenmaker and Powe make clear: "[B]y increasing the reliability of his second sample Lefkowitz may have skewed his comparative results because any increase in the accuracy of measurement can show up as an effect."<sup>[83]</sup> Finally, Lefkowitz's measures of aggression require reports from peers and include such questions as, Is he someone "who used to say mean things?" Aside from the arbitrary nature of the wording, note that the question is in the past tense.

In another famous study on this issue, Feshbach tried to establish a correlation between viewing violence and aggression. But found instead that violence had a therapeutic (cathartic affect). Feshbach's co-author later said that their work supported the null hypothesis and "shows no support for the theory that viewing of aggressive television increases real life aggression."<sup>[84]</sup> Subsequent major field studies supported this latter view. The most significant was by Milgram and Shotland in 1973 and Lynn, Hampson & Agahi in 1989.<sup>[85]</sup>

Without consistent demonstration of a direct causal link between violence viewing and aggression, content censorship is not only unconstitutional, it may be misguided and ineffective as well. Gene R. Nichol, Dean, University of Colorado School of Law, stated that "Direct government regulation would almost definitely be unconstitutional unless at least a substantial link can be established."<sup>[86]</sup> But establishing causality is an almost impossible task considering the complex nature of aggression and the infeasibility of isolating television's effect on it. Lande (1993) put it this way, "Aggressive behavior is clearly multi-determined, being influenced by genetic, biochemical, social, and interpersonal factors."<sup>[87]</sup> Eileen Saunders, professor of Journalism and Communications at Carleton University, agrees that television violence is only one factor among many which contributes to social violence: it is only "one string within a complex web of factors inducing social violence and we cannot say with any certainty where this particular string becomes important."<sup>[88]</sup> Loren H. Roth, MD, MPH 1987 also considered violence to be a behavior influenced by a variety of factors including the socioeconomic, psychological and cultural.<sup>[89]</sup>

To this point this study has demonstrated that because aggression is a complex behavior influenced by an array of social, biological, and cultural elements, it can not be attributed to a single factor and research making such attributions is highly suspect. But the indictment of such research doesn't end there. At least seven other micro-variables deserve serious attention: intelligence level, frequency of viewing, preference for violence, parental role, family stressors, predisposition and emotional quotients.

Intelligence level of children is one factor that has been inversely associated with aggression. Wiegman, et. al. (1992) concluded that boys with above average intelligence tend to behave less aggressively than boys of average intelligence. For girls the correlations point in the same direction, but did not achieve necessary levels of significance.<sup>[90]</sup> These findings are consistent with Albert Bandura's (1977), and Holland, Beckett, and Levi's (1981) assessment that because a child of lower intelligence is less able to evaluate behavioral consequences and has a limited range of conflict resolution strategies,<sup>[91]</sup> the child is more apt to rely on aggressive tactics to solve social problems.<sup>[92]</sup> Even Eron (1982), who is often cited with Centerwall, reported a correlation between low achievement and aggression.<sup>[93]</sup>

Ironically, Eron's work in 1982 and again in 1987 substantiates this study's earlier point that frequency of viewing is a much more vital determinant than content.<sup>[94]</sup> Even Gerbner and Gross (1980) imply that frequency is a determinant of aggressive behavior.<sup>[95]</sup> In other words, the problem may not be what's on television but that the television is on. Banning certain kinds of programs will not solve the problem; the problem can only be solved by reducing the frequency and time spent watching television.

Preference for violence is another factor that may be a stronger predictor of aggression than actual viewing. *Walker & Morley* (1991) "demonstrated that the strongest predictor of aggression among adolescents was their attitude toward television violence. The more adolescents reported liking television violence, the more aggressive were their behavioral intentions."<sup>[96]</sup> Freedman (1984) also determined that "preference for violent programming on television is correlated with aggressive behavior".<sup>[97]</sup> In other words, if a child prefers violence before hand, the child will select violent programming. It is an effect, not a cause. Donnerstein, the most recent to complete research on this subject,



concur.<sup>[98]</sup> The violent prone watch violent programming, the programming does not make them violent.

According to Patterson, DeBaryshe, and Ramsey (1989) there are numerous empirical studies citing family variables as consistent co-variants in early antisocial behavior and later aggression in children.<sup>[99]</sup> Over the years, Patterson and his associates have done extensive research measuring the influence of parental figures on children's aggressive behavior. Their series of structural equation modeling studies provide support for the theory that "disrupted parent practices are causally related to child antisocial behavior."<sup>[100]</sup> The researchers also summarized past research which indicates that "family stressors" such as unemployment, domestic violence, divorce and marital problems are also related to delinquency and child adjustment problems.<sup>[101]</sup> An absent parent correlates to a more aggressive child, and coincidentally that child is more likely to be antisocial and turn to the television for company.

Other research supports Lande's (1993) thesis that "only a small group of vulnerable viewers"<sup>[102]</sup> exists, leaving a vast majority of Americans unharmed by televised violence. Lynn, Hampson, & Agahi's (1989) results suggested a genotype-environment correlation and interaction theory to explain an increase in aggression among children: "the viewing of TV violence only has an effect on aggression in genetically predisposed high psychoticism genotypes ..."<sup>[103]</sup>

Finally, research needs to take into account newly discovered evidence of individual emotional intelligent quotients. Psychologists Peter Salovey of Yale and John Mayer of the University of New Hampshire began research on this subject in 1990. Their findings will be part of another study by Harvard psychologist Daniel Goleman.<sup>[104]</sup> Goleman argues that as a society we have failed to develop "emotional intelligence" and the result is that crime is on the rise along with incivility. He claims that while children are still young, there is a "neurological window of opportunity" provided by prefrontal wiring of the brain, which regulations how act on what we feel. As children are more neglected and less disciplined, they lose vital instruction on emotional behavior and the window of opportunity closes. To put it another way, a proper understanding of emotions may be a missing link in those who become violent in our society.

Because there are so many other contributing factors to violent behavior, and because the best studies on the subject are inconclusive at best, it is irresponsible to assume that violent behavior in society is caused by the broadcasting of violence on television particularly when such an assumption implicates First Amendment rights. It has yet to be demonstrated that banning such programming advances a substantial government interest. Worse, since much of this programming conveys positive values, banning it might be counter productive and actually result in a more violent society. Those who believe television has an influence must also consider the negative impact of removing the positive values included in programming and terminating what may be for some a virtual cathartic experience that prevents real world violence.

#### 4. REQUIRING LABELING AND A V-CHIP

The fall back position of those who would impose bans on what they deem to be "gratuitous violence" is labeling or a rating system to which networks conform unless they want one imposed by Congress or the FCC.<sup>[105]</sup> Ostensibly, parents can then program a V-chip that would block programs rated at a level the parents did not want their children to see. However, the labeling system has been in trouble ever since the networks worked out a compromise scheme to please their congressional critics.

First, the V-chip is unworkable for a number of reasons, not the least of which is whether parents could learn how to program it. When a model was being set up for demonstration before a Senate Commerce Committee Hearing in July of 1995, the technician was unable to get the V-chip to work.

Even if it could be programmed with ease, it requires the simplest, least informative ratings of over a million hours of programming a year, according to the Motion Picture Association of America which rates about a 600 motion pictures a year. The first version of these ratings came under immediate criticism from congresspersons, social scientists and parents. Timothy Gray, a research assistant for the past two years on the National Television Violence Study, wrote this about the V-Chip legislation:

*[T]he V-chip legislation ... will not have the impact that President Clinton and its congressional proponents predict.... Because all televised violence does not have harmful effects, contextual information absolutely must be incorporated in a detailed fashion into any proposed ratings scheme. Unless contextual information is included, the result will be so indelicate that it puts "Shindler's List" and "Terminator II" in the same category.... Is the V-chip, which will take to years or more to meaningfully permeate the majority of the country's television sets, really the most efficient and expedient solution the problem of violence on television?<sup>[106]</sup>*

The confusion in the system is rampant. Some programs given the wholesome G rating contain words like "ass" and sexual jokes about breasts. To date, no show has been rated M, for adults only, because advertisers probably wouldn't sponsor it. The "Tonight Show" received a rating of TV-14, strong parental caution, while the "David Letterman Show" was given a PG rating. Disgust with the meaninglessness of the ratings soon led to calls for further restrictions. In early May of 1997, the Senate Commerce Committee voted 19-1 for a bill sponsored by Senator Hollings that would force the television industry to adopt a content based system or channel violent programming to when children were less likely to view it. Senators Joseph Lieberman and Sam Brownback asked their colleagues to sign a letter urging the networks to create a "safe haven for family viewing."

Critics believe that the ratings do not contain enough information to be useful or accurate. Five months after the ratings were in place, a survey taken by the Annenberg School East revealed that 70 percent of parents were familiar with it; however, only 35 percent used it to advise children's viewing. Only 6 percent could correctly identify what "TV-14" means and this was on a multiple choice answer with the correct choice staring them in the face.<sup>[107]</sup> Thus, the networks, with the exception of NBC, and producers reluctantly agreed supplement their age-based ratings with V for violence, S for sexual conduct, D for dialogue not suited for children, and FV for fantasy violence. TV-Y means this program is designed to be appropriate for all children; TV-Y7 means the program is directed to children age seven or older; a TV-Y7-FV rating means the same thing except that the program contains fantasy violence. TV-14 means this program contains some material that many parents would find unsuitable for children under 14 years of age. TV-MA means this program is specifically designed to be viewed by adults and therefore may be unsuitable for children under

Again, the opportunity for arbitrary and capricious categorization is ample. If the networks implement the system by October 1, 1997, the Congress has promised to leave them alone for three years. (The anti-trust violations are massive here. Furthermore, how can one Congress predict what the next one will do?)

Technical loopholes abound in the new system. For example, it is only required in newly purchased television sets larger than 13 inches, a small percentage of the market. And most new television sets are purchased as a second or third one for the home. A survey of 1,358 parents commissioned by the Henry J. Kaiser Family Foundation found that more than 45% of parents polled said they were "not at all likely" in the next two years to buy either a new television set or a set-top box equipped with a V-Chip.<sup>[108]</sup> Thus, the ingenious latch key child can find a small television set or a used television set or a second television set or VCR and circumvent the entire ratings program even if that child is not smart enough to figure out how to override his or her parent's V-chip program.

On top of that the V-chip technology is complex. Broadcasting & Cable described the technological problems this way:

*The challenge of programming the embedded chip to offer the parental access control will depend on the complexity of the ratings system that the broadcast and cable industries ... come up with. [I]f the ratings system requires too much information—five content categories and 20 levels of blockage, for example—the chip might not have the memory capacity to perform the V-chip function along with its closed-captioning and XDS tasks.... Like, line 21 of the VBI might not have the bandwidth to carry all the parental-access-control data.*<sup>[109]</sup>

The V-chip will probably block out programming in a very broad way because rating systems are of necessity general. Thus, while trying to block some Bruce Lee epic, a parent might also be blocking PBS' *Civil War* series. Furthermore, rating systems do not take into account the context of violence or whether a violent act is rewarded. The current law precludes news programming from the rating system, yet a study by Nickelodeon found news to be one of the most unsettling kinds of programming for young people.<sup>[110]</sup> Worse yet, after all the expense of installation and technological adjustment, one can bet once the technology is developed, it will be quickly circumvented by computer-wise children or by one who sticks the cable into a VCR and records what he wants.

The legislation called for an in-place rating system by February 8, 1997 to evaluate "sexual, violent or other indecent material." That's three indices with which producers were supposed to work. Cross that with the thousands of hours of weekly programming and you have a ratings system so complicated that it cannot be broadcast in the proper band. So it never happened that way. Instead the industry in consultation with Jack Valenti of the Motion Picture Association of America copied the film system which had been established in 1968.

But unworkability is not the worse flaw in the law. It blackmailed the industry into a system which requires a prior review of programming. A scheme for regulating speech "that places 'unbridled discretion in the hands of a government official or agency constitutes a prior restraint' which is prohibited under the constitution."<sup>[111]</sup> Networks and stations are now free to issue their own warnings and many are doing so; but the government currently has no right to require labeling, nor would such a requirement pass constitutional muster. In fact, evidence indicates that government labeling is actually counter-productive when it comes to influencing younger persons. In the February, 1992 issue of the *Journal of Applied Communication Research*, Professor Leslie Snyder looked at labeling in alcohol advertising and concluded, "Indeed, not only did the warnings fail to raise concerns over alcohol risks [among teenagers], but for drinkers they served to make alcohol even more attractive.... Contrary to the legislative intent of the warnings, the young drinkers in the experiment actually had higher ratings of the benefits of alcohol products when they saw the warnings." Imagine what would happen if a network issued this warning: "This program is one of the most violent we've put on the air. Parental discretion is advised." What a great way to run up your ratings. In fact, the cable commissioned study conducted at the University of California at Santa Barbara reached just such a conclusion. It found that for boys ten to fourteen parental discretion, PG-13, and R ratings made programs more attractive.<sup>[112]</sup>

There are other constitutional problems with government labeling. In the case of the California Public Utility Commission's desire to force messages into a company's newsletter, the Supreme Court sided with the utility company holding that speech does not lose its protection because of the corporate identity of the speaker. Forcing a company to provide space on its envelopes for the expression of particular views with which it disagreed was "antithetical to the free discussion that the First Amendment seeks to foster."<sup>[113]</sup> Those seeking to have their opinion printed in another's paid space were denied such access.

This ruling emerged from a line of decisions culminating with the four part test articulated in *Central Hudson Gas v. Public Service Commission*. First, to be entitled to protection, statements "must concern lawful activity and not be misleading." The next three parts articulate standards for determining the degree of regulation permissible: "whether the asserted governmental interest is substantial," "whether the regulation directly advances the governmental interest asserted," and "whether it is not more extensive than is necessary to serve that interest."<sup>[114]</sup> This four part test has prevented many local, state and federal governments from regulating the advertising of everything from beer to abortion clinics, from pharmaceuticals to law offices. What would happen if we applied the same test to "violence" on television?

The first question is not difficult. As long as a broadcaster's signal is clear and not interfering with the signal of another, it is neither illegal nor misleading. What is at stake here is entertainment that has been cleared by censors to make sure it is not indecent, let alone obscene.<sup>[115]</sup> If it is indecent, obscene, treasonous, libelous or slanderous, legal action is now possible. No further regulation is necessary. If it is none of these things, then regulation is only permitted if it can be shown that the regulation advances a "substantial government interest" and that it is "narrowly tailored" to fit the problem. This is true because programming falls into the realm of protected speech.<sup>[116]</sup>

The second and third parts of the test address the "compelling interest" test. The research does not demonstrate that censorship of violent programming would advance the government's interest in lower the levels of violence in society. For example, in 1994, the broadcast networks chose the UCLA Center for Communication Policy to monitor

programming; cable networks selected MediaScope to conduct a parallel study coordinated through four different campuses.<sup>[117]</sup> Both studies were set for three years. The UCLA study quickly narrowed its purview to the hours that children were most likely to watch, that is, Saturday morning and prime time programming, and argued that context was the most important factor in deciding whether or not violence was appropriate. The 1994-95 report stated that television series raised relatively few concerns. Movies for television were more violent, but not as violent as versions shown in motion picture theaters. The report recommended that violent programming be moved to later in prime time, but not eliminated. It also recommended that the major networks re-examine their policy of importing films made for theaters on to television screens. The 1995-96 report reinforced the findings of the first year's report. While fourteen percent of programs raised some concerns regarding violent content in the first year study, only ten percent raised concerns in the second year.

The Center for Communication Policy at UC Santa Barbara took over the cable project. Its first-year report was based on an examination of 2,500 hours derived from 2,693 programs. It warned that the consequences of bad behavior needed to be emphasized and that the use of handguns in violent acts should be reduced. However, the study concluded that television violence is usually not explicit or graphic. Most violent acts portray a minimum of blood and gore; camera angles often protect the viewer from more graphic portrayals with the exception of news and reality-based programming. The Center's report also concluded that most violence was concentrated on premium cable channels that required extra payment for viewing. The report made very clear that it was merely describing the gathered data and not recommending government censorship of any kind.<sup>[118]</sup>

Much more to the point were studies and statements released in 2000 that analyzed these and other violence studies. Jonathan Freedman, a professor at the University of Toronto who has studied violence and the media for many years, concluded that none of the 200 or so recent violence studies support a causal relationship between violence in programming and violence in society. Richard Rhodes, a Pulitzer Prize winning scientist, told *ABC News*: "There is no good evidence that watching mock violence in the media either causes or even influences people to become violent."<sup>[119]</sup>

In fact, no court has granted monetary compensation for harm allegedly caused by a television program or music recording because the courts doubt the existence of a provable link between television and violence.<sup>[120]</sup> In *Zamora v. Columbia Broadcasting System*,<sup>[121]</sup> *Olivia N. v. NBC*,<sup>[122]</sup> *Walt Disney Prod. v. Shannon*,<sup>[123]</sup> *DeFilippo v. NBC*,<sup>[124]</sup> and *Waller v. Osbourne*,<sup>[125]</sup> the plaintiffs were denied damages when they alleged that they were victims of violence incited by television programming or in the last case, an Ozzy Osbourne recording. Instead, the courts sided with the defendants' claim to a First Amendment right to freedom of expression. Based on *Brandenburg v. Ohio* (1969), the scope of the advocacy of "imminent lawless action" doctrine has been limited;<sup>[126]</sup> the Supreme Court has specifically ruled that televised violence does not fall into that category, especially if it is entertainment. The same is true of the "clear and present danger" standard articulated in *Schenck v. United States* (1919). That test was strengthened in *Whitney v. California* (1927), where Justice Louis Brandeis in a concurring opinion joined by Justice Oliver Wendell Holmes wrote that "Fear of serious injury cannot alone justify suppression of free speech ... Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced."

Labeling also fails the fourth part of this test. Professor Snyder's study cited above indicates that it is counter productive. Worse yet, labeling is arbitrary and capricious. It is not the least restrictive means that can be used to achieve its end, nor has anyone demonstrated a "reasonable fit" between proposed legislative labels and a reduction in violence. The inventor of the V-chip in perhaps the most revealing comment to date recently said, "We don't have the First Amendment, thank God, in Canada."<sup>[127]</sup>

In America we do have a First Amendment and its protection was unanimously extended to the Internet in June of 1997 in *Reno v. ACLU*.<sup>[128]</sup> The Court struck down the provision of the law that prohibited the "display" of indecent materials on-line, and voted seven to two to void the provision that banned the transmission of indecent information to a minor. Justice Stephens argued that the government may not, in an effort to protect children, "justify an unnecessarily broad suppression of speech addressed to adults."

#### IV. THE SOCIAL VALUE OF TELEVISION

In a democratic society, television is one of the media that helps make us into a nation. It brings us the news. It informs us about the problems we face in the world. It provides a forum for political debate. And yes, it entertains and keeps us company. In 1993 Lande wrote, "For some people, television is a friend, relieving boredom and loneliness."<sup>[129]</sup> What happens if you change the nature of that friend or prohibit a person from visiting with that friend at all?

More important, the portrayal of violence is often essential if one wishes to convey a moral message. Dr. Baruch, president of the Institute of Mental Health Initiatives (IMHI), reminds us that violence is a natural part of life and may offer some pro-social benefits. Violence is an "element of our folk tales and our best literature-from *Hansel and Gretel* to *Hamlet* ... storytellers have traditionally used violence to teach youth about danger, safety, courage, injustice and honor."<sup>[130]</sup> She cautions that removing violence from the airwaves will not expel violence from society, but it may eliminate important values from television.<sup>[131]</sup> A father who beats a child may be shamed by a television movie with a plot line that condemns such activity; the child watching may learn that she/he is being mistreated. The vicious academic couple may end their abuse after viewing "Whos Afraid of Virginia Woolf" on the Monday night movie. The child who wants to play soldier may change his mind after watching a re-broadcast of CBS' "Charlie Company."

Gary Selnow's content-analytic study examining two weeks of typical prime-time programming indicated that television is laden with strong Judeo-Christian morals. The programs provide viewers with lessons about integrity, honesty, courage, compassion, and respect for others. Selnow and his colleagues found teachings on justice, duty, and good citizenship. "To put it succinctly, in mainstream programs, good triumphs over evil, honesty is the best policy, the righteous inherit the Earth."<sup>[132]</sup>

Jacques DeGuise, professor of Communications at Laval University in Canada, agreed that television may in fact help

in promoting the belief that violence is an evil not to be tolerated.<sup>[133]</sup> He explained to a Commons hearing that society's tolerance for violence is decreasing. For example, spousal abuse, child abuse, and animal cruelty are issues much less socially acceptable now than they used to be. In addition, television provides a forum to address such issues that have been historically closeted. The problem is that the medium is being held responsible for what it reports. Those who would place restrictions on television's content may be guilty of the "kill the messenger" syndrome.

Florian Sauvageau, director of Journalism Studies at Laval, agrees. Instead of blaming television for promoting violence, she asks a more important question, "Why is our society so violent?"<sup>[134]</sup> What is it about our society that makes it attracted and susceptible to violence? While it is easier to point the finger at television than at ourselves, we must make decisions that will be effective and preserve liberty. Censorship of television is not one of them.

Finally, programs such as America's Most Wanted have resulted in the capture of criminals; shows like *Rescue 911* have shown law enforcement in a positive light and educated the public about health hazards. And yet each has had to do that by putting some violent activity on the air. Should they be banned or labeled? And what would the label say? And do we really want the presidential appointees at the FCC to determine what we see? We need to be careful that we do not "reduce adults to hearing only what is fit for children" to turn a phrase back on Justice Stevens.<sup>[135]</sup>

Those in favor of new regulations often ignore the fact that television is the most market-sensitive industry in the country. Ratings are taken every week on all programs. Low ratings lead to cancellations. If the public wants a violent program taken off the air, all it has to do is not watch it. When the audience shrinks, the advertising revenue shrivels and the program disappears. Television is also the most reviewed and criticized industry in the country; every newspaper seems to have a television critic and almost every program is reviewed BEFORE BROADCAST. Finally, television is subject to parental censorship, guidance, and contextualization. Maybe that is why there was a decline in violent programming over the last few years.<sup>[136]</sup>

## V. CONCLUSION

This study has established several contentions that strongly mitigate against the censorship or labeling of television programs. It has demonstrated that the content of programming should be no more restricted than that of newspapers. It has demonstrated that the Constitution and the Bill of Rights prohibit the imposition of restrictions on programming based on its contents: "Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."<sup>[137]</sup> It has demonstrated that bans and labeling do not ameliorate the problem. It has shown that studies that have tried to link violence in society with broadcast violence are severely flawed and that other studies show that causation cannot be established. In light of these contentions, the presumption must rest with the First Amendment rights of broadcasters and views alike.

None of us like all of the things that are broadcast over the air waves, but few of us want the government arbitrating matters of taste. America has long been a beacon to the world when it comes to our first freedom, freedom of expression. While that freedom has been guaranteed to newspapers and to speech because of their role in our revolution, it has not always been granted to new technologies. Instead, whether it be radio, television, or movies, the United States has initially acted like old world principalities by imposing controls over content. It has taken time for each new medium to free itself of these shackles. Beginning with the infamous Creel Committee, movies were severely censored in this country from 1915 to 1952. The battle to end the "fairness doctrine" was not won until 1987. Imposing new content controls on violence on television would be a huge step backward in the march toward our rendezvous with freedom.

The First Amendment was not established to protect the easy cases. It was created to protect the "romantics," as Steve Shiffrin calls them, "those who would break out of classical forms: the dissenters, the unorthodox, the outcasts."<sup>[138]</sup> We need to remember that there were those in this country who arrested citizens who defended the French Revolution and made fun of President Adams. President Jackson forbade the distribution of abolitionist tracts in the South. President Lincoln incarcerated editors who criticized his administration. Union leaders were regularly jailed by federal judges at the end of the last century. And if you don't think it can happen in modern times, just revisit the McCarthy era which so cruelly punished screen writers, producers, and actors.

A first, virginal viewing of Shakespeare's *Hamlet* should shock the system while providing catharsis. Hamlet's father is poisoned through the ear, Ophelia commits suicide, Polonius is stabbed to death, Queen Gertrude and King Claudius are poisoned, Hamlet is stabbed with a poison rapier and kills Laertes. If violent entertainment is the cause of our ills, and if that cause is to be exterminated, then a great many works of art will be destroyed in the process. The destruction of entertainment that the regulators would visit on us would make Savonarola's bonfire of the vanities in Renaissance Florence look like a barbecue. Perhaps that is why Franklyn Haiman warned:

*If our problem is that we do not respect each other enough, that we exploit each others' gullibilities, that we resort to violence too easily, that we lust too much and love too little, I do not understand how improvement will be achieved by the censorship of communication, which is itself a coercive tool that treats us as objects to be manipulated by the censors rather than as human beings with the capacity to learn and choose for ourselves what is better and what is worse.*<sup>[139]</sup>

Censorship is the first step to mind control and the imposition of an ideology. Let us hope that those who are sworn to uphold the Constitution will do their duty and continue to protect our first freedom.

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## ENDNOTES

[1]. He was responsible for the Television Violence Act which was signed into law in 1990 and granted the three major networks a three-year exemption from the Sherman Antitrust Act so they could pursue a joint agreement on curbing and/or rating television violence. The networks did not meet until December of 1992 when the announced that existing standards "prohibit depicting violence as glamorous or using it to shock or stimulate an audience." These standards also "limit scenes depicting the use of force that are inappropriate for home viewing; unique or ingenious methods of inflicting pain or injury; portrayals of dangerous behavior or weapons

that invite imitation by children." First Amendment advocates were shocked that the networks would cave in to such pressure.

[2]. See G. Browning, "Push-Button Violence," *National Journal*, 26 (February, 1994): 458.

[3]. Conrad was responding to the pleas of at least twenty advocacy groups. Browning, 458.

[4]. Karen Sternheimer, "Blaming Television and Movies Is Easy and Wrong," *Los Angeles Times* (February 4, 2001), p.M5. This procedure, claims Sternheimer negates "the importance of context and meaning."

[5]. Sternheimer, p. M5.

[6]. *Television and Growing Up: The Impact of Televised Violence*, (U.S. Government Printing Office, 1972), pp. 4, 7.

[7]. *Surgeon General's Report by the Scientific Advisory Committee on Television and Social Behavior: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 2d Sess. 25, 26 (1972).

[8]. *Broadcast of Violent, Indecent, and Obscene Material*, 51 F.C.C. 2d 418 (1975), see particularly page 419.

[9]. See *Writers Guild of America W., Inc. v. FCC*, 423 F. Supp. 1064, 1161 (C.D. Cal. 1976).

[10]. It should be noted, however, that in *Reno v. ACLU*, decided in June of 1997, the Court, in the process of striking down the Communication Decency Act of 1996, warned about the "vagueness" of the term "indecentcy." One of the strongest points made in the unanimous decision was that the government's interest in protecting children from what might be harmful "does not justify an unnecessarily broad suppression of speech addressed to adults."

[11]. 333 U.S. 507, 510 (1948). See also *Cohen v. California*, 302 U.S. 15, 25 (1970).

[12]. *NAACP v. Alabama* 377 U.S. 288, 307 (1964).

[13]. 418 U.S. 241.

[14]. 395 U.S. 367 (1969).

[15]. As we shall see, Justice Bork would later argue that what Proxmire had codified was to give the FCC first jurisdiction over the doctrine; they could suspend it or implement it. But the doctrine itself, according to a strict reading of the statute, had not been codified. In filing before the FCC, the Freedom of Expression Foundation, which called for the repeal of the doctrine, nonetheless argued that Bork has misread the legislative history of the bill which clearly indicates that codification of the doctrine is what was intended.

[16]. In fact, Fred Cook, who brought the "fairness" complaint against Red Lion Broadcasting, was actually in the employ of the Democratic National Committee which was trying to stop the station from playing right-wing broadcasts by the Reverend Billy James Hargis. For a history of executive abuses in this regard see Fred Friendly, *The Good Guys, The Bad Guys and the First Amendment* (New York: Random House, 1976), pp. 32-35; David Kelly and Roger Donway, *Laissez Parler: Freedom in the Electronic Media* (Bowling Green, Ohio: Bowling Green University Center for Social Policy and Philosophy, 1983), p. 32.

[17]. When she appeared before the second day of hearings of the Senate Commerce Committee in 1984 on the fairness doctrine, Elaine Donnelly, special projects director for Phyllis Schlafly's Eagle Forum frankly admitted to using the doctrine to stop broadcasters from editorializing on behalf of the Equal Rights Amendment. See Hearings before the Committee on Commerce, Science and Transportation, United States Senate, 98th Congress, 2nd Session, January 30, February 1 and 8, 1984, p. 132. Patricia Aufderheide in the *Journal of Communication*, 40 (1990):47-72, examined the chilling incidences cited by the FCC in its 1987 report and found most of them wanting. However, the fact remains that the doctrine could be used to chill speech as Donnelly admits. Perhaps the most telling case was that Eugene Wilken, the general manager of KREM-TV in Spokane, Washington who was fired for getting the station into a fairness dispute which it eventually won after \$20,000 in legal fees and 480 hours of executive time spent. The fight was over airing one 60 editorial in favor of EXPO 74. See Craig R. Smith, *Freedom of Expression and Partisan Politics* (Columbia: University of South Carolina Press, 1989), p. 97-98.

[18]. 468 U.S. 364, 378 n.12.

[19]. *Freedom of Expression Act of 1983: Hearings Before the Sen. Comm. on Commerce, Science, and Transp.*, 98th Cng., 2d Sess. 182 (1984).

[20]. 67, *Congressional Record*, 5,480 (1926).

[21]. *Fairness Report*, 102 F.C.C. 2d 143, 191 (1985).

[22]. See *Telecommunications Research and Action Center v. FCC*, 801 F. 2d 501 (D.C. Cir 1986), cert. denied, 482 U.S. 919 (1987).

[23]. 114 S. Ct. at 2459.

[24]. 114 S. Ct. at 2459, 2460, 2461. See also *Arkansas Writers Project v. Ragland*, 481 U.S. 221, 231-232 (1987).

[25]. Senator Packwood introduced an amendment to the Communication Act in 1995 to this effect.

[26]. Thomas G. Krattenmaker and L. A. Powe, Jr., "Converging First Amendment Principles for Converging Media," *Yale Law Journal*, 104 (1995): 1720, 1740.

[27]. See also *Cantwell v. State of Connecticut*, 310 US 296 (1940); *Lovell v. City of Griffin*, 303 US 444 (1938).

- [28]. For a detailed discussion of this issue, see Joseph W. Slade, *Pornography: a Reference Guide* (Westport, CN: Greenwood Press, 1998). Slade is a professor of telecommunications at Ohio University.
- [29]. "Televised Violence: First Amendment Principles and Social Science Theory," *Virginia Law Review* 64 (1978): 1155.
- [30]. *Erznoznick v. City of Jacksonville*, 1975; *Tinker v. Des Moines*, 1969.
- [31]. *U.S. v. O'Brien*, 391 U.S. 367 (1968).
- [32]. See, for example, *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980).
- [33]. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).
- [34]. "Media Violence and Free Speech," paper presented to International Conference on Violence in the Media (October 4, 1994). See also Jonathan Freedman, "Television Violence and Aggression: A Rejoinder," *Psychological Bulletin*, 100 (1986): 372-78.
- [35]. See, for example, Victor Strassburger, "Television and Adolescents: Sex, Drugs, Rock 'n' Roll," *Adolescent Medicine*, 1 (1990): 161-94.
- [36]. In Marcia Pally, *Sex and Sensibility*, (1994), p. 93.
- [37]. The judge was writing a concurring opinion in which he said that indecency could not be banned from radio during a time period suggested by the FCC. However, he said that if the government could produce a study on indecency like Centerwall's on violence, then he might change his mind.
- [38]. Brandon S. Centerwall, "Television and Violence: The Scale of the Problem and Where to Go from Here," *Journal of the American Medical Association*, 269 (1992): 3059.
- [39]. *Canada Year Book 1970-1971* (Ottawa: Dominion Bureau of Statistics, 1971), p. 320.
- [40]. *Statistical Abstract of the United States*, (U.S. Department of Commerce: Bureau of Census, 1976), pp. 51, 58.
- [41]. As reported in Jack McLeod, Charles Atkin & Steven Chaffee, "Adolescents, Parents and Television Use," *Television and Adolescent Aggressiveness* (1992): 173-238.
- [42]. See Craig Smith, "The Coming of a Transcendent Rhetoric," *Journal of the Eastern States Speech Communication Association*, (Summer 1972):19-24.
- [43]. Mary Winn, "Does Television Itself Nurture Violence?" *New York Times* (August 9, 1992): A16.
- [44]. Winn, 16.
- [45]. James R. Petersen, "The Curse of The Boob Tube," *Playboy* (December, 1992): 49.
- [46]. Leonard D. Eron, "The Development of Aggressive Behavior from the Perspective of a Developing Behaviorism," *American Psychologist* (May 1987): 435.
- [47]. Centerwall, 3061.
- [48]. Centerwall, 3061.
- [49]. Dennis Romero, "Target: Parents," *Los Angeles Times* (March 21, 1995): E1.
- [50]. *Sex & Sensibility: Reflections on Forbidden Mirrors and the Will to Censor* (Hopwell, NJ: Ecco Press, 1994), p. 90.
- [51]. The color cones of the eye are sensitized by the glowing television screen. The most direct neural path to the brain is the eye. Furthermore, generally speaking the colors in the real world are not phosphorescent, however, those on a television set are not only phosphorescent but backlit. Thus, color television heightens intensity of colors and contrasts between them. When returning from the televised world to the real world, the eye may be unsatisfied, a frustration which may contribute to violence because the brain is being starved of the intense stimulation it receives from color television. The brain need not seek its newly required stimulation from the eye; it may transfer the desire to other senses or find efferent path such as more intense or violent movement. Furthermore, this phenomenon may raise the threshold of violence that will stimulate the subject. [Afferent neurons are those which feel; efferent neurons are those which move muscles. The afferent respond to change; the efferent make change.] Thus, color television, regardless of content, could be addictive because of the stimulation it provides. The working hypothesis in this study would be that color television is making society more violent by disposing society toward more intense perceptions and actions regardless of the content of the televised programming.
- [52]. Centerwall, 3060.
- [53]. Carl Bybee, James D. Robinson, and Joseph Turow, "The effects of television on children: What the experts believe," *Communication Research Reports*, 2 (1985): 153.
- [54]. G. Gerbner and L. Gross, "Living with Television: The Violence Profile," *Journal of Communication* (1976): 184.
- [55]. p. 1160.
- [56]. Coffin & Tuchman, "Rating Television Programs for Violence: A Comparison of Five Studies," 17 (1972) *Journal of Broadcasting*: 1, 13. Using Gerbner's approach in 1992, a one week survey by college students ranked programs according to the number of violent incidents; the highest rated included the following: "The

- Miracle Worker," (PBS), "Civil War Journal," "Murder She Wrote," "Back to the Future," "Teenage Mutant Ninja Turtles," and "North by Northwest." As cited by Senator Brian Dorgan (D-N.D.) in December, 1993.
- [57]. "Testimony before the House Subcommittee on Telecommunications and Finance," May 12, 1993.
- [58]. "Living with Television," p. 185.
- [59]. *Media Effects Research*, p. 84.
- [60]. U. C. Santa Barbara, U. of Wisconsin, U. of Texas, and the U. of North Carolina.
- [61]. Timothy E. Gray, "V-chip: The Betamax of the 90s," *Broadcasting & Cable* (April 15, 1996), p. 30.
- [62]. February 12, 1996, p. 82.
- [63]. Marcia Meier, "Violence in Our Society: Who's to Blame and What's to be Done?" *Santa Barbara News-Press* (March 5, 1995): G5.
- [64]. (New York: Free Press, 1995).
- [65]. Sternheimer, p. M5.
- [66]. Karen M. Hennigan, Marlyn L. Del Rosario, Linda Heath, Thomas D. Cook, J. D. Warton, and Bobby J. Calder, "Impact of the Introduction of Television on Crime in the United States: Empirical Findings and Theoretical Implications," *Journal of Personality and Social Psychology*, 42 (1982): 473.
- [67]. O. Wiegman, M. Kuttchreuter, and B. Barda, "A longitudinal study of the effects of television viewing on aggressive and pro-social behaviours," *The British Journal of Social Psychology*, 31 (1992): 159.
- [68]. Jerome L. Singer, Dorothy G. Singer, Roger Desmond, Bennett Hirsch, and Anne Nicol, "Family Mediation and Children's Cognition, Aggression, and Comprehension of Television: A Longitudinal Study," *Journal of Applied Developmental Psychology*, 9 (1988): 345.
- [69]. Jonathan L. Freedman, "Effect of Television Violence on Aggressiveness," *Psychological Bulletin*, 96 (1984): 243.
- [70]. Paul Gessell, "Violence and TV: How Clear is the Link?" *The Gazette*, 20 (February 20, 1993): E7.
- [71]. *Surgeon General's Scientific Advisory Committee on Television and Social Behavior: Television and Growing Up: The Impact of Televised Violence*, (Washington, DC: US Public Health Service, 1972) cited in Raymond J. Lande, M.D., "The Video Violence Debate," *Hospital and Community Psychiatry*, 44 (1993): 349.
- [72]. D. Pearl, L. Bouthilet, and J. Lazar, "Television and Behavior: Ten Years of Scientific Progress and Implications for the Eighties," vol 1. *DHEW pub no (ADM) 82-1195*. (Washington, DC: Government Printing Office) cited in Lande, 349.
- [73]. See Thomas G. Krattenmaker and L. A. Powe, Jr. "Televised Violence: First Amendment Principles and Social Science Theory," *Virginia Law Review*, 64 (1978): 1123.
- [74]. Judy Foreman's "Violence May Lie in Damaged Brain Cells," *Los Angeles Times* (April 29, 2002): S1, 6. Ms. Foreman is on the faculty of the Harvard Medical School.
- [75]. Foreman, s. 6.
- [76]. Thomas H. Maugh, "Shortage of Chemical Causes Aggression, Studies Confirm," *Los Angeles Times* (November 13, 1995), pp. A1 & 18.
- [77]. For a review of these studies see Judy Foreman's "Violence May Lie in Damaged Brain Cells," *Los Angeles Times* (April 29, 2002): S1, 6. Ms. Foreman is on the faculty of the Harvard Medical School.
- [78]. Jonathan L. Freedman, "Television Violence ...": 377; Strassburger supports this view as do Kenneth Gadow & Joyce Sprafkin, "Field Experience of Television Violence with Children: Evidence for an Environmental Hazard?" *Pediatrics*, 83 (1989): 399-405; Robert Kaplan, "Television Violence and Viewer Aggression: A Reexamination of the Evidence," *Journal of Social Issues*, 32 (1976): 35-70.
- [79]. This phenomenon is also referred to as a "demand effect." Its impact on experimental studies is reviewed by R. Rosenthal, *Experimenter Effects in Behavior Research*, (1976 ed.), pp. 143-57.
- [80]. Kenneth Gadow & Joyce Sprafkin, "Field Experiments of Television Violence with Children: Evidence for an Environmental Hazard?" *Pediatrics*, 83 (1989): 339-405.
- [81]. Eron work has come under considerable criticism. See, for example, David Sohn, "On Eron on Television Violence and Aggression," *American Psychologist*, 37 (1982): 1292-93; Herbert Kay, "Weaknesses in the Television-Causes-Aggression Analysis by Eron, et al." *American Psychologist*, 27 (1972): 970-73.
- [82]. "Television Violence and Child Aggression: A Follow Up Study," *Television and Social Behavior*, 3 (1973): 48, see table 3. This is particularly disturbing since FCC Commissioner Reed Hundt recently cited Eron's work to bolster his claim that violent programming needed to be curtailed. Speech before Children's Defense Fund, Seattle, March 10, 1995. (Text distributed by FCC.)
- [83]. Krattenmaker and Powe, p. 1148.
- [84]. As cited in Krattenmaker and Powe, p. 1149.
- [85]. *Television and Antisocial Behavior* (1973); "Television Violence ..." (1989): 143-64.
- [86]. Hearings on H.R. 3848, supra note 31, at 67 cited in Julia W. Schlegel, "The Television Violence Act of 1990: A New Program for Government Censorship?" *UCLA School of Law, Federal Communications Law*

*Journal*, 46 (1993):188-97.

[87]. Lande, 347.

[88]. Gessell, E7.

[89]. L. Roth, *Clinical Treatment of the Violent Person* (New York: Guilford, 1987) cited in Lande, 350.

[90]. Wiegman, et. al., 159.

[91]. Wiegman, et. al., 162.

[92]. Cited in Wiegman, et. al., 162.

[93]. Leonard D. Eron, "Parent-Child Interaction, Television Violence, and Aggression in Children," *American Psychologist*, 37 (1982): 210. We are quick to point out that this study failed to report longitudinal findings which undermined its hypothesis. It was not the first time Eron refused to report data he had collected. See David Sohn, "On Eron on Television Violence and Aggression," *American Psychologist*, 37 (1982): 1292-93.

[94]. Eron, *Development*, 440.

[95]. G. Gerbner and L. Gross, "The violent face of television and its lessons," in *Children and the Faces of Television*, (New York: Academic Press, 1980) cited in Paul J. Fink, MD, "Video Violence," *Hospital and Community Psychiatry*, 44 (1993): 892.

[96]. Kim B. Walker and Donald D. Morley, "Attitudes and Parental Factors as Intervening Variables in the Television Violence-Aggression Relation," *Communication Research Reports*, 8 (1991): 44.

[97]. Freedman, *Effects*, 243.

[98]. Meier.

[99]. G. R. Patterson, Barbara D. DeBaryshe, and Elizabeth Ramsey, "Developmental Perspective on Antisocial Behavior," *American Psychologist* 44 (February 1989): 329.

[100]. Patterson, DeBaryshe, and Ramsey, 330.

[101]. Patterson, DeBaryshe, and Ramsey, 332.

[102]. R. Gregory Lande, D.O. "Video Violence," *Hospital and Community Psychiatry*, 44 (1993): 892.

[103]. R. Lynn, S. Hampson, and R. Agahi, "Television violence and aggression: Genotype environment, correlation and interactive theory," *Social Behaviour and Personality*, 17 (1989): 162.

[104]. *Emotional Intelligence* (New York: Bantam, 1995).

[105]. See the *Television Violence Reduction Through Parental Empowerment Act of 1993* authored by Congressman Markey (D-Mass.).

[106]. See "V-chip: The Betamax of the '90s," *Broadcast & Cable* (April 15, 1996), p. 30. *The National Television Violence Study: Year One* (1994-95), can be found at [www.mediascope.org/ntvs1.html](http://www.mediascope.org/ntvs1.html).

[107]. See "Parents Don't Understand, Study Concludes," *Broadcasting & Cable* (June 9, 1997), p. 7.

[108]. Jube Shiver, Jr., "Study Rates TV Ratings System" *Los Angeles Times* (May 28, 1998), p. A6.

[109]. February 12, 1996, p. 24. This conclusion was based on interviews with Joseph Peck and Thomas Mock, engineer, of the Electronic Industry Association.

[110]. See "Chip", *Los Angeles Times*, September 1, 1995, p. A 33.

[111]. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990) quoting *City of Lakewood v. Plan Dealer Publishing Co.*, 486 U.S. at 757.

[112]. *National Television Violence Study Year One* (1994-95). See below for further discussion of this study.

[113]. 106 S.Ct. 903 (1986).

[114]. 477 U. S. 562, 570-72, 577 (1980).

[115]. Neither the courts nor the FCC include violence under the indecency standard. For example, Section 223 (a) of the Communications Act makes it unlawful to "make any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy or indecent."

[116]. See, for example, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952).

[117]. See *UCLA Television Violence and Monitoring Report* (1994-95, 95-96, 96-97) Center for Communication Policy, UCLA; *National Television Violence Study* (1994-95, 95-96, 96-97) MediaScope.

[118]. See comments of Professor Donnerstein in Meier.

[119]. See *Broadcasting and Cable* (October 30, 2000), p. 82.

[120]. *Broadcasters Personal Injury Liability*, 20 ALR 4th 327 (1983) cited in Raymond G. Lande, M.D. "The Video Violence Debate," *Hospital and Community Psychiatry* 44 (1993): 349.

[121]. 480 F. Supp. 199 (S.D. Fla 1979).

[122]. 74 Cal. App. 3d 383, 141 Cal. Rpts. 511 (1977).

[123]. 247 Ga. 402, 276 S.E. 2d 580 (1981).



- [124]. 446 A. 2d 1036 (R.I. 1982).
- [125]. 763 F. Supp. 1144 (MD Ga. 1991).
- [126]. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).
- [127]. Statement of Professor Tim Collings, Simon Fraser University, as quoted in *Broadcasting & Cable* (February 12, 1996), p. 8.
- [128]. 117 S. Ct. 2329 (1997).
- [129]. Lande, "...Debate", 347.
- [130]. Rhoda Baruch, "Why the fuss about television violence?" *Broadcasting & Cable* (August 29, 1994): 40.
- [131]. Baruch, 40.
- [132]. Gary Selnow, "Prime-Time TV's Rich Lessons," *San Francisco Chronicle* (March 14, 1994): A21.
- [133]. Gessell, E7.
- [134]. Gessell, E7.
- [135]. See *FCC v. Pacifica Foundation*, 98 S. Ct. (1978) at 3040 n. 28.
- [136]. See E. Bark, "Roughing Up Hollywood: Do We Really Want Government to Step In?," *Dallas Morning News* (October 31, 1993), 1C.
- [137]. See, for example, *Police Department v. Mosley*, 408 U. S. 92 (1972), at 96.
- [138]. *The First Amendment, Democracy, and Romance* (Cambridge: Harvard University Press, 1990), p. 5.
- [139]. *Speech and Law in a Free Society* (Chicago: University of Chicago, 1981), p. 174.
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