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## WHAT IS THE CONSTITUTIONAL SOLUTION?

*William Abbott\**

I write today as the President of the National Foundation To Improve Television, a research and policy organization founded in 1969 with an exclusive focus on the public health threat posed by televised violence. The Foundation's Board of Directors includes prominent psychologists, child development experts, and others with a background in media and children's issues.

Initially, in the 1970s, we worked to harness all the research which was available concerning the impact of television violence on viewers, particularly children. At that time, the available research was limited. As of today, however, my comments are supported by the findings of three thousand reports, surveys, and studies which conclusively link exposure to television violence to increased levels of fear, desensitization, aggression, violence and crime in our society. A steady string of Surgeons General, beginning in 1972, have reached this conclusion.<sup>1</sup> Every leading medical association in this country has reached this conclusion, including the American Medical Association, the American Academy of Pediatrics, the American Psychological Association, the American Psychiatric Association, and many others.<sup>2</sup> The question is simply no longer whether television violence has a harmful effect, but rather what can be done about it.

It is clear that the level of violence on television is still dangerous and unacceptable. The so-called "Gerbner Index" compiled every few years by researchers at the University of Pennsylvania has shown the level of violence over the past twenty five years to have remained constant, with a few peaks and troughs.<sup>3</sup> Other periodic reports confirm this trend. My own observations during the recently completed

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1. Maureen Gaffney, *Connecticut Q&A: What to do About Television Violence*, N.Y. TIMES, Aug. 28, 1994, at C13.

2. *Id.*

3. Elizabeth Kolbert, *TV Violence and Real Aggression: How Firm is the Link?*, INT'L HERALD TRIB., Dec. 15, 1994.

"February Sweeps" month (the ratings for which determine the next quarter's advertising rates) confirm this trend. During this February's prime-time, network television alone aired *Lethal Weapon II*, *Marked for Death*, *Out for Justice*, *Sudden Impact*, *Hard to Kill*, and on and on. For the week of March seventh to twelfth, the USA cable network won the distinction of being the week's top cable network largely as a result of its telecast of the *Rambo* trilogy, *First Blood*, *Rambo*, and *Rambo II* twice during the week. The first showing was early Thursday evening, Friday evening, and Saturday. And in case you missed those, USA ran the whole series again on Sunday afternoon. If you look in the back of *TV Guide* any week you will see that they are one of the very few publications that rates movies for violent content. You will also see that over half of all the movies shown on television carry *TV Guide's* violence warning. This figure has been remarkably constant for the past few years. New syndicated material also contributes to the current mix of highly violent programs. *Robocop*, *Thunder in Paradise*, *Kung Fu*, *Cybertron* and the like are forming an increasingly sizable chunk of independent stations' daily schedules.

The question today, then, is not whether television violence is a threat to our children and to public health; it is not whether there are too many harmful images of violence on television—the relevant question today from a public policy standpoint is what can be done, consistent with the First Amendment, to remedy this problem.

Can the television industry be trusted to clean up its own act? What has been the history? In 1975, the Federal Communications Commission declared in a report, "[r]egulatory action to limit violent . . . programming . . . is less desirable than effective self-regulation . . ."<sup>4</sup> Note that this argument assumes that self regulation can be effective. In this same report, twenty years ago, the FCC said that industry guidelines, promulgated in the face of growing public and Congressional pressure, "go a long way toward establishing appropriate protections for children from violent [programming]."<sup>5</sup>

For twenty years we have followed the levels and variety of violence on television. There is little doubt that television has become bloodier and more murderous in that period. All the available research confirms that self regulation has failed. The history of this issue is replete with broken promises by the television industry. Self regula-

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4. 51 F.C.C.2d 418 (1975).

5. *Id.*

tion by television on the violence problem is about as likely as self regulation by the tobacco industry on the cigarette problem.

Then where can we turn to reduce the tide of glamorized, sanitized television violence? Legal developments since the early 1970s indicate that the FCC has the ability, one might even say the duty, to act on television violence. It will not take an act of Congress. The FCC has broad authority to issue regulations under the Communications Act of 1934.<sup>6</sup> The FCC has the duty to ensure that the public interest, convenience and necessity are served by the exercise of its licensing and regulatory authority.<sup>7</sup>

In determining whether FCC action on television violence would be constitutional, we must start by acknowledging that television, like the radio, is uniquely accessible to children. More Americans have televisions than have indoor plumbing. In today's world, millions of kids watch television unsupervised. This is a reality unlikely to go away. One quarter of our children live in homes with a single parent who often works long hours outside the home just to make ends meet.<sup>8</sup>

Additionally, varieties of television violence which have been medically determined to be hazardous to viewers' health would clearly be classified as "low value speech" under First Amendment case law.<sup>9</sup> As a result, television violence would probably not be granted the same high degree of protection as political and other highly-valued speech.

Further, the interest which would be served by carefully considered, narrowly tailored FCC action on television violence would be that of preserving and promoting the health and welfare of children. Congress and the Courts have long written that it is difficult to conceive of an interest more substantial.

In 1978, the Supreme Court ruled in *FCC v. Pacifica Foundation*<sup>10</sup> that FCC action to institute a "time, place and manner" restriction on indecent radio programming was Constitutional due to the "low value" nature of "indecent" speech, the pervasiveness of radio,

6. 47 U.S.C. § 151 (1989).

7. *Id.*

8. Deborah Ramirez, *1 of 4 Families Led by Struggling Parent; Census: Single Parent Households Worse Off Than Those With Both*, SUN-SENTINEL, Jan. 10, 1995, at 1B.

9. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67-70 (1976); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

10. *Pacifica*, 438 U.S. 726.

the inability of parents to adequately protect children from exposure to radio programming, and the fact that such programming comes into the home, where the rights of the speaker must give way to the rights of the audience.<sup>11</sup> I submit that if these things are true of radio and indecency, they are certainly true with respect to television and violence.

Indeed, in the recent case, *Action for Children's Television v. Federal Communication Commission*,<sup>12</sup> the concurring judge of a D.C. Circuit's three-judge panel (who was probably the most liberal judge on the panel) wrote that he had problems with the indecency thrust of the FCC's content regulations: "[t]he apparent lack of specific evidence of harms from indecent programming stands in direct contrast, for example, to the evidence of harm caused by violent programming—a genre that, as yet, has gone virtually unregulated."<sup>13</sup>

Narrowly tailored, carefully drafted "time, place and manner" restriction on television violence should qualify as permissible restrictions on speech. Again, the combination of the medically-proven harms associated with television violence, the unique availability of television, and the failure of industry self regulation, suggest that careful FCC action on this issue would be found Constitutional. Suffice it to say that we believe, and I think that the Attorney General and the Chairman of the FCC believe that there is a clear line of cases which support the approach of balancing the rights of broadcasters with the rights of children. And to paraphrase Potter Stewart, arguing that a parent can protect their child from the harms associated with television violence simply by turning off violent programs is similar to suggesting that one's remedy for an assault is to run away after receiving the first blow.

With all that said, where do we go from here?

First, effective action requires us to treat the problem as a public health threat and not simply a matter of taste. Our efforts must continue to be guided by good science. We must not let our focus become diffused by getting sidetracked into issues of indecency, political bias, and the like. Our attention must be focused like a laser beam on violence.

Second, no single solution, including FCC action, is likely to succeed if implemented in isolation. We have to keep the media's

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11. *Id.* at 748-50.

12. 11 F.3d 170 (D.C. Cir. 1993).

13. *Id.* at 185 (Edwards, J., concurring).

attention on this problem, including media violence whenever we discuss solutions to the epidemic of violence which continues to plague the land. We have to raise public awareness on all aspects of the issue: how the television industry operates, what parents can do, etc. We must work with local programmers and stations to make their stations more "viewer friendly." We must expand media literacy programs into the schools to equip kids with the cognitive tools they need to protect themselves from exposure to violent images. And, of course, we must work creatively with television advertisers to reduce the sponsorship of violent programs, for in the last analysis, it is the hand that writes the check that cradles the gun.

Ultimately, if the industry remains intransigent, we must consider FCC action, in the form of requiring a ratings system, mandatory warnings on-screen and in print television listings, "time zoning" of violent shows, implementing the so-called "V-Chip," etc. Such action in a democracy is not unprecedented. Other freedom-loving countries have taken impressive steps to deal with television violence. Canada recently adopted a very tough code, for example. The Scandinavian countries, France, Belgium, and others are way ahead of us in terms of devising and implementing creative and effective solutions to this problem.

In conclusion, I do not agree with those who maintain that this society cannot work on more than one problem at a time. I think we can look at all the contributing factors to violence in our society and work on them across the board. The fact that we are working on television violence does not mean we cannot work on guns and drugs, poverty and broken families. It is ludicrous to me to suggest that we are somehow being sidetracked by the debate on television violence. Congress is not absolutely inert because they are talking about television violence. The work of the nation has not stopped.

With our children being gunned down in record numbers, should we not muster the will and energy to address all causes of violence, wherever we find them? Let us get our heads out of the sand on this problem and do something meaningful to end the constant barrage of medial bloodshed. Our children are worth it.

