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## Banning Speech Does Not Cure Social Ills

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## BANNING SPEECH DOES NOT CURE SOCIAL ILLS

*Kathleen Peratis\**

I am not sure that I can add very much to Mr. Eisenberg's comments.<sup>1</sup> I think that his First Amendment analysis is the kernel and the core of the problem with the approach the Hollings Bill advocates.<sup>2</sup> However, I do have a couple of observations I would like to

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\* Partner, Frank & Peratis. Editor's note: This article was originally presented at a live Symposium on Television and Violence held at Hofstra University School of Law on April 8, 1994.

1. Arthur Eisenberg, *The Hollings Bill: Unconstitutional Under the First Amendment*, 22 HOFSTRA L. REV. 793 (1994).

2. The text of the Hollings Bill is as follows:

### SECTION 1 SHORT TITLE

This act may be cited as the "Children's Protection from Violent Programming Act of 1993."

### SECTION 2 FINDINGS

The Congress Makes the following findings:

(1) Television influences children's perception of the values and behavior that are common and acceptable in society.

(2) Television station operators, cable television system operators, and video programmers should follow practices in connection with video programming that take into consideration that television broadcast and cable programming—

(A) has established a uniquely pervasive presence in the lives of all Americans; and

(B) is readily accessible to children.

(3) Violent video programming influences children, as does indecent programming.

(4) There is empirical evidence that children exposed to violent video programming at a young age have a higher tendency for violent and aggressive behavior later in life than those children not so exposed. Children exposed to violent video programming are prone to assume that acts of violence are acceptable behavior and therefore to imitate such behavior.

(5) There is a compelling governmental interest in limiting the negative influences of violent video programming on children.

(6) There is a compelling governmental interest in channeling programming with violent content to periods of the day when children are not likely to comprise a substantial portion of the television audience.

(7) Restricting the hours when violent video programming is shown is the least restrictive and most narrowly tailored means to achieve that compelling governmental interest.

(8) Warning labels about the violent content of video programming will not in themselves prevent children from watching violent video programming.

add.

The first is an aphorism from Will Rogers which occurred to me when John Windhausen was speaking.<sup>3</sup> He said, "[w]hen Congress is in session, no one is safe."<sup>4</sup> Mr. Windhausen's comments are a very graphic illustration of how Congress looks for quick solutions that

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SECTION 3 UNLAWFUL DISTRIBUTION OF VIOLENT PROGRAMMING

Title VII of the Communications Act of 1934 (47 U.S.C. § 601 et seq.) is amended by adding at the end the following new section:

SEC. 714 UNLAWFUL DISTRIBUTION OF VIOLENT PROGRAMMING

(a) UNLAWFUL DISTRIBUTION—It shall be unlawful for any person to—

(1) distribute to the public any violent video programming during hours when children are reasonably likely to comprise a substantial portion of the audience; or

(2) knowingly produce or provide material for such distribution.

(b) RULEMAKING PROCEEDING—The Commission shall conduct a rulemaking proceeding to implement the provisions of this section and shall promulgate final regulations pursuant to that proceeding not later than nine months after the date of enactment of this section. As part of that proceeding, the Commission—

(1) may exempt from the prohibition under subsection (a) programming (including news programs, documentaries, educational programs, and sporting events) whose distribution does not conflict with objective of protecting children from the negative influences of violent video programming, as that objective is reflected in section 2 of the Children's Protection from Violent Programming Act of 1993;

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

(c) REPEAT VIOLATIONS—If a person repeatedly violates this section or any regulation promulgated under this section, the Commission shall, after notice and opportunity for hearing, immediately repeal any license issued to that person under this Act.

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

(e) DEFINITION—As used in this section, the term "distribute" means to send, transmit, retransmit, telecast, broadcast or cablecast, including by wire, microwave or satellite.

SECTION 4 EFFECTIVE DATE

The prohibition contained in § 714 of the Communications Act of 1934 (as added by section 3 of this Act) and the regulations promulgated thereunder shall be effective on the date that is one year after the date of enactment of this Act.

S. 1383, 103d Cong., 1st Sess. (1993).

3. John Windhausen, *Congressional Interest in the Problem of Television and Violence*, 22 HOFSTRA L. REV. 783 (1994).

4. WILL ROGERS REFLECTIONS AND OBSERVATIONS (Bryan B. Sterling & Frances N. Sterling eds., 1982).

can actually pass without consideration of whether they make sense. Real solutions are very complicated and not only slow, but, more specifically, not likely to produce any results before the next election. That is the problem with Congress trying to cure social ills. Real cures are unlikely to take effect before the next election.

It is interesting to note that free speech is in more trouble today than it has been in decades. Perhaps the sociologists who are going to be speaking in later panels can help us to figure out why the ideological turn to the right has caused us to focus on banning speech as a solution to a whole range of social ills.<sup>5</sup> Yes, we do have racial hatred. So let us ban racial speech. Yes, we do have gender abuse. So let us ban sexual material. Yes, we do have a violent society. So let us ban those depictions on television. It does not take a rocket scientist to realize that this approach does not focus on causes. Causes are complicated.

The approach taken by the Hollings Bill focuses simply on the depictions of the results of social ills. It is the classic example of shooting the messenger. Mr. Windhausen has referred to a number of social ills, such as single parent homes and lack of parental supervision. We can add poverty, racism and hopelessness to the list. What are we going to do about these daunting, terrifying problems? We are going to ban television violence. I did not hear Mr. Windhausen say we should ban guns. As a matter of fact, Senator Hollings is very strongly opposed to any kind of gun regulations. I did not hear him say that we must work on better education or better health care or better enforcement of civil rights laws. Mr. Hollings is not a champion of these efforts, either. No, he proposes legislation which shoots the messenger.

The alliance of some liberals or progressives with the right on this issue is very interesting. In addition to the liberals who are on the side of banning television violence, there are also feminists, some of whom really are and some who simply call themselves feminists, who are in favor of banning sexually explicit material. I believe these people are being used by the right. Their short-term agendas may be similar, but I believe the long-term agenda of the right is not merely to limit violence, but to control and suppress a very wide range of

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5. See generally Edward Donnerstein, *Mass Media Violence: Thoughts on the Debate*, 22 HOFSTRA L. REV. 827 (1994); Jonathan L. Freedman, *Viewing Television Violence Does Not Make People More Aggressive*, 22 HOFSTRA L. REV. 833 (1994); John P. Murray, *The Impact of Televised Violence*, 22 HOFSTRA L. REV. 809 (1994).

so-called objectionable material.

Mr. Windhausen spoke of the public interest and the desire not to let marketplace incentives override the public interest.<sup>6</sup> Those are strange words out of the mouths of conservatives like Mr. Hollings and others. The marketplace and marketplace incentives are usually sacred to them. On that ground, they typically oppose regulation of environmental pollution, gun control, comparable pay for comparable work, single patient health care and workplace safety, unless the cost benefit analysis supports it. Because opposition to marketplace incentives is not normally expected from Senator Hollings and his typical allies, we may question his motives when he does oppose these incentives.

The problem with allowing the government to ban expression, as Mr. Eisenberg indicated,<sup>7</sup> is that we do not know where it is going to go. However, we do know that ultimately the unpopular, the marginal and the out of favor are going to have their speech banned. That is the nature of censorship. It is a hungry monster which needs constant feeding.

Censors look for good reasons to justify control, and good reasons are never hard to find. Although the motives may be good to begin with, they often do not end up that way. Even at the definitional level, it is obvious that vast quantities of materials may be swept within the most careful definition. We have seen this in attempts to ban degrading depictions of women and we see it here. For example, one very conscientious and hard-working group of experts came up with this definition of the kind of violence that should be banned from the television: "Any deliberate act involving physical force or use of a weapon in an attempt to achieve the goal, further the cause, stop the action of another, act out an angry impulse, defend oneself from attacks, secure material rewards or intimidate others." Apparently doing it for laughs is okay.

During the 1930s there was a serial killer who murdered dozens of children. When he was finally apprehended, he explained that the reason he was brutally murdering these children was that he had been inspired by the story of Abraham and Isaac in the Bible. This illustrates that, ultimately, there is no way to insure that a violent depiction will not inspire someone to replicate the act. If this were the standard, we would have to ban all images, all speech, all books that

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6. See Windhausen, *supra* note 3, at 787.

7. Eisenberg, *supra* note 1, at 795-96.

touched on violence, and probably even that would not accomplish the desired end.

If banning depictions of violence is so unlikely to produce the desired result, why is the movement behind it so strong? One of the today's panelists wrote a piece which contained a wonderful analogy which might explain some of the zeal behind these attempts. He said that banning television violence is a little bit like looking for your watch under a lamppost. Even though you lost your watch in the dark alley around the corner, you look for it under the lamppost because that is where the light is.<sup>8</sup>

Although there seems to be a lot of light in Congress focusing on these bills, as described by Mr. Windhausen, it seems clear that the light is not the light of enlightenment. If we are going to find real solutions to real problems, we are going to have to muck around in the dark alleys because that is where the problems are. They are not under the lamppost and the easy solution is not going to work.

As a civil libertarian, I must quickly make one last point. Not only will banning speech do nothing to solve the problem, it will make our society much poorer. Violence, gender abuse and racial hatred have real causes. Depictions of them are not among them.

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8. See Todd Gitlin, *The Real Problem is Violence, Not Violence and Television*, 22 HOFSTRA L. REV. 913 (1994); *Panel IV: Discussion*, 22 HOFSTRA L. REV. 925, 927 (1994).

