INTRODUCTION
Gisela Konopka

I have never asked to introduce a speaker at the Konopka Lectureship, but this time I wanted very much to do it.

Patricia Wald is not only one of the great persons who will go down in history, but she is a friend. And if I wanted to tell you all about her I could take the full hour to do this but I had better not.

Pat and I met many years ago when we worked together to do something about the abominable treatment of young people in the Texas juvenile institutions. I was asked to fly to Dallas and meet the lawyer who would work with me. I got off the plane and looked around. A young woman with long braids came up to me and said, “I am Patricia Wald. Are you Gisela Konopka?” I loved her from the first moment. When I retired, Pat gave a paper and remembered the time when we, as she said, “stood banging on the doors of isolation cells demanding to be let in with or without a court order.

On many occasions we entered the courtroom of a dusty little town in Texas where everybody looked at us as though we were the last civil rights workers whom they thought had left several years before.”

In 1973-1977 we served on the American Bar Association Commission on Juvenile Justice Standards. She was already famous at that time but she was still the same Pat, very concerned with young people.

I can only give a few highlights about her professional life:

Judge Patricia Wald was appointed United States Circuit Judge for the District of Columbia in July 1979. She served as its Chief Judge from July 1986 to January 1991. She is a graduate of Yale Law School. Prior to her appointment to the bench, she served as Assistant Attorney General for Legislative Affairs in the Department of Justice. She was an attorney for the Mental Health Law Project and the Project’s Litigation Director, as well as an attorney with the Neighborhood Legal Services Program, and Center for Law and Social Policy in Washington, and co-chair of the Ford Foundation Drug Abuse Research Project. She is a Council Member and Second Vice President of the American Law Institute, and a Fellow of the American Academy of Arts and Sciences.

I cannot name all the numerous honors and the many publications which include such subjects as Law and Violence and Law and Poverty.

I started to count and found that she had 16 doctorates. During the last few years Judge Wald became involved in the international scene. She was an observer for the Bulgarian elections and a consultant to law practices in Russia, Romania, Czechoslovakia, Albania and Lithuania. She conducted a teleconference with the Women’s Advisory Council for Western Australia and served last year as delegate to the Symposium on Administrative Law for Chinese officials in Beijing, China.

Beyond all this she continues to be a loving, concerned person with a wonderful husband, five children whom she has raised to significant and beautiful adulthood, and grandchildren whose drawings fill their apartment.

I give you with awe and love, Judge Patricia Wald.

PATRICIA M. WALD, J.D.
Circuit Judge
U.S. Court of Appeals
Washington, D.C.

I. THE PROBLEM

Americans—from the President to Bill Cosby—relentlessly insist that they will do anything—sacrifice anything—for the sake of our children. Yet, it is remarkable how inept we are in churning out public policy to benefit children, be it reducing the budget deficits they must pay for someday, health care they need now, or in the case I plan to discuss tonight, protection from overexposure to televised violence and to violence in films, and lately, video games.

Almost everyone agrees there is a problem in the flood of violence that has enveloped television and other entertainment media. According to a recent poll, four out of five Americans believe television violence contributes directly to escalating violent behavior; 54 percent would support direct governmental regulation of violence on television.1 A Citizen’s Task Force on Television Violence, whose membership includes the American Medical Association, the American Psychiatric Association, and the National Association of Elementary and Secondary School Principals, wants a daily 16-hour ban on violent programming: “We’ve had the studies, we’ve had the discussion, we’ve had the debate,” they say. “Enough is enough. There is simply … too much violence and it needs to be reduced.”2 President Clinton, during a Hollywood appearance, implored industry leaders to curb murder and mayhem in the movies and on television.3 Attorney General Reno warned at congressional hearings last fall that if the television producers didn’t take “immediate” steps to police themselves, she would support governmental regulation to do it for them.4 There are at least nine bills in Congress to back the threat.5 The new FCC Chairman says he will aggressively enforce and defend such laws.6 Why isn’t somebody doing something to follow through?
Harken back for a moment to 30 years ago. It’s 1961 and Senator Thomas Dodd—father of Senator Chris Dodd of Connecticut—is conducting headline-grabbing hearings of the Subcommittee on Juvenile Delinquency on the explosive subject of violence on television. At that time, next to no research had been done on its effect on children, a point made much of by the television industry who blamed family breakdown, inner city decay, the drug epidemic and the ready availability of guns for what was perceived then (1961, that is) as a precipitous increase in violent youth crime. Sound familiar? Reels of gory excerpts from television programs were shown in the hearing room. The three television networks which then controlled 90 percent of the airwaves had a formal code in place restricting television violence, but as one committee witness testified, it was administered by middle-level executives who either were overruled by higher-ups or themselves merely rubberstamped the executive suite decisions about the kind of programming that was needed to sell the goods that supported TV. There was even a smoking gun in those 1961 hearings: an alleged order, vehemently denied, by the President of NBC to a writer demanding “more sex and violence” to up the audience ratings of a particular series. But, after all the sound and fury, the hearings signified very little; no legislation emerged. In the intervening years, there have been 27 congressional hearings on the subject of television violence but not much has changed.1 We seem incapable of coming to closure on curbing what so many national leaders and citizens perceive to be a clear and present danger to our children’s welfare.

And we now have empirical data to support that view. The 1961 hearings sparked serious scholarly research on the relationship between watching violence on television and acting it out in the real world. In 1969, the National Commission on the Causes and Prevention of Violence concluded that “a constant diet of symbolic violence is an environmental hazard ... a risk factor threatening the health and welfare of American children and youth.”10 By 1993, a noted professor of human development and family studies could confidently affirm that:

Hundreds of studies done since the early 1960s—experimental studies of small numbers of children and large field studies in different cultures using a variety of techniques—broadly agree that children of both sexes who are heavy viewers of TV are more aggressive than are children who are light viewers.12

And Ted Turner, probably television’s most visible mogul, was quoted as saying that television is the “single most significant factor contributing to violence in America.”13

Exposure to television violence has grown exponentially in 30 years. Newton Minow, the former Federal Communications Commission Chairman and author of the “vast wasteland” critique of television in the 1960s, said recently: “I think the most troubling change over the past 30 years is the rise in the quantity and quality of violence on television. I worry that my grandchildren will actually be harmed by it.”14 In 1961, there were 47 million sets tuned on in America; in 1992, there were over 200 million; cable reached 1 million homes then, now it reaches 56 million. Americans watched television for two hours a day in 1961; now they watch almost 7-1/2 hours; in 1961, the networks dominated 90 percent of viewing; now they account for only 60 percent, as cable television’s reach steadily stretches. We have VCRs in 58 million American homes, and sales of video games are soaring. The information super-highway will—we are told—bring 400-500 channels into our homes within the foreseeable future.15

But, while choice and diversity has exploded, quality has not. The President of CBS admitted recently: “We see a vast media jaded audience that wanders restlessly from one channel to another in search of that endangered species—originality ... more choices may not necessarily mean better choices.”16 Indeed, greater choice has meant a greater likelihood that our children will encounter proliferating violence with every click of the dial.

The current figures on television exposure, while familiar, are arresting. By the end of sixth grade, a child will have watched 100,000 violent acts on television. By the time he is 18, he will likely have seen 25,000 television murders and, since age six, spent 15,000 hours in front of the tube compared to 11,000 in school.17

A child’s playthings today are remote controls, cable television, and the VCR. Until the last half of this century, children spent most of their time observing adults at work and play and learning from them the skills and attitudes needed to take their place in an intimate and familiar society. Now they spend four waking hours watching television to every three hours interacting with family members and peers.18 Indeed, many experts think it is not simply the violent content of the programs but the nature of the medium itself that threatens the healthy development of children. They ask, “what happens when television, movies, video and video games provide more of children’s experiences than actual relationships with other people?”19 Television watching distracts children from more active engagement in the world about them. Bellah, Madsen, et al., the authors of the Good Society, tell us:

We are not happy when we are watching television ... because we feel we are “on hold” rather than really living during that time. We are happiest when we are successfully meeting challenges at work, in our private lives, and in our communities.20

Television’s effect on children is strong because it is filling a vacuum left by the default of other institutions in their lives—family, schools, church, community—that are supposed to teach them how to behave and react to the world around them.

Television can, of course, and in wide-ranging ways, do educate as well as entertain. But commercial television is also ruled by the market and, to keep viewers’ attention, it must startle, constantly move, resolve dilemmas quickly. For the most part, it does not have the time or the capacity to relate present problems to the past, to raise issues it cannot solve, to inspire curiosity or encourage further inquiry on the viewer’s own time. It only haphazardly
or superficially involves the viewer. An extreme expression of this theory is that the television itself allows the child, by a hand-held device (analogous to a handgun), to control what he sees without any effort; the set reacts, does not answer back; the child gets what he wants, shuts out what he doesn’t; he can’t get hurt; tigers are little and don’t bite; fires are cold and don’t burn. He never need deal with the consequences of his experience.

Beginning with cartoons, to which—we are told—90 percent of children are addicted by age six, children’s waver- ing attention is seduced by action-oriented events. The message is might makes right, eventually anyhow; might is identified with the good guys as well as the bad; superior violence is correlated with superior morality. An especially alarming insight came from a 1992 study showing that between 6:00 a.m. and midnight, 1,800 violent scenes were shown on television and the aggressors were overwhelmingly white males while their victims were predominantly female, nonwhite, foreign-born, or aged.

Ideally, children should watch television with their parents or elders, talk about the programs, separate illusion from reality. But the studies show very little co-viewing except in limited evening hours. The research, despite skeptics who wryly remind us Socrates warned that teaching children to write things down would destroy their memories and Plato that storytellers would corrupt their sense of reality, is persuasive that relentless exposure to episodic violence for 30-40 hours a week with no opportunity to discuss its implications or context will alter a child’s or adolescent’s perspective on life. Newspapers in the last year bombarded us with some horrific examples: In Austin, Texas, a five-year-old boy burned down his house, with his two-year-old sister in it, after watching Beavis and Butt-Head play with cigarette lighters. A movie called Program featured college football players straddling the middle of a highway and letting cars drive over them as a test of nerve; several teenagers, in imitation, were killed or maimed. (And, of course, reporting the tragedy, television re-broadcast the ugly movie scene many more times.) An eight-year-old boy swung a 12-week-old infant around by his feet, smashed his head against the floor and killed him, protesting later that he was playing Robocop—a popular television movie—with the baby. Though the connection is less direct, we know violence in the schools has risen to epidemic proportions, one of five high school students regularly carries a firearm, knife, club or other weapon; 60 percent of 6th-12th graders say they can get access to a handgun if they need one. In a survey of 729 urban, suburban and rural schools, 82 percent reported dramatic increases in violence in the past five years. Next to family dysfunction or disruption, television and gangster rap lyrics were the most frequently cited causes by teachers, parents and principals.

Before going further, we need to tackle one fundamental question: Why can’t parents handle this crisis by controlling what their children watch? To paraphrase the old television public service announcement: Where are your parents tonight? It’s not an altogether foolish question; columnist, Anna Quindlen, asks: “Kids and violent TV, violent TV and violence, violence and kids. The only people missing from this discussion are the parents. Where are we? Gone. Abandoned.” Why, she comments, as in the case of poisonous cleaners stored under the sink, don’t parents themselves take responsibility for their kids’ television watching? A representative of the Annenberg School of Communications, on the other hand, calls the notion of parental control “an upper middle class conceit. Passing the buck to parents is the greatest cop-out of this industry.”

The two views are not necessarily inconsistent. No matter what corrective action industry and/or government takes—short of an impossible blanket ban on violence—the parental role should still be critical. The autonomy of the family to set its own child-rearing standards, barring neglect or abuse, is a constitutional freedom recognized by the Supreme Court. Parents are as varied as our society, and differ radically in what they want their kids to watch, including how much violence and what kind, by whom and against whom. Some parents are actually quite sanguine. A cover story a few months ago in the Washington Post entitled “TV Without Guilt” told of an upper middle class family in Gaithersburg, Maryland, with two young kids and six television sets that were on up to 17 hours a day. The obviously devoted parents didn’t worry about television sex or violence; there were no forbidden shows; the children were well-adjusted and doing fine in school. “If the kids have a question, [the stay-at-home mother stated], they’ll ask it, and if they don’t, they’ll probably get bored and change the channel.” Unfortunately, all kids don’t have a resident mother to run to with questions; a large percent of inner-city children are indiscriminate latchkey consumers of television fare.

And even otherwise attentive and caring parents complain that they don’t have the time to act as full-time “gatekeepers” on television. While some, like the family in Gaithersburg, do not worry at all, most parents—and certainly children without parental supervision—need some outside help to control the amount and type of violence available at the flick of a switch.

In sum, we have a problem with what television is doing to our children that parents alone can’t solve. Americans feel strongly about it, the academic research tends to support their fears. The subject has been discussed and debated ad infinitum. Why can’t we now agree on a public policy that will benefit our children?

What I’ve said so far provides some critical clues. It has always been—and probably always will be—conceptually and practically difficult to disentangle children’s problems from the broader social problems affecting society as a whole. The problem of television violence inevitably incites ideological, legal, and economic disputes. As the next part of my talk will illustrate, the best we seem able to do is to lurch towards partial solutions likely to inspire as much dissatisfaction as satisfaction. In the end, I will tell you now, I too can offer only some tentative and uneasy suggestions for improving this daunting policymaking process.
II. THE SEARCH FOR SOLUTIONS

Any approach to reducing television violence must take account of several key truisms of American life:

(1) the freedom of expression for all but obscene material guaranteed by the First Amendment,
(2) the profit-making nature of American television, cable, and video,
(3) the constantly advancing state of the art technology simplifying viewer control of program choice, and
(4) the sacrosanct view that government must not unduly interfere with parental choice.

Over it all, hangs the invisible shadow of politics.

(1) The First Amendment: The First Amendment, which guarantees freedom of speech, expression and the press, has been interpreted by the courts to apply to television and cable. But these same courts also give more leeway to regulation of the broadcast media than of the print media because, at least until recently, the broadcast spectrum was considered a limited commodity under government’s stewardship to be parceled out and supervised in the public interest. Thus, since 1927, the Federal Radio and Communications Acts have specifically permitted the FCC to regulate “indecency”—defined originally by the FCC as the exposure of children to material that describes sexual or excretory activities in a patently offensive manner. (Indecent programming is to be carefully distinguished from obscene material that appeals to the prurient interest and lacks serious artistic, political or scientific value; obscene matter, unlike indecent material, is not protected by the First Amendment.) But the Congress has never enacted specific legislative authority for regulating violence on television, and there is even a section in the Communications Acts forbidding FCC censorship. The history of the FCC’s efforts to regulate indecency, though, provides a valuable lens for viewing the potential problems of government regulation of violence in the interests of children.

“Indecent” material was originally defined by the FCC principally in terms of material that described or depicted sexual or excretory organs in a way that was offensive under community standards for children; adult viewing of the same material at some reasonable time was recognized by the FCC as protected by the First Amendment. And, until 1987, the FCC implemented this restricted definition of “indecency” simply by enforcing a ban against “filthy words” akin to those used in the famous monologue by George Carlin, which the Supreme Court, in its Pacifica decision in 1978, said could be kept off the airwaves at least when children were likely to be listening. The FCC ban forfaded use of the so-called “dirty seven” words before 10:00 p.m. In 1987, however, the FCC extended the indecency ban to midnight, no longer regulating indecency in terms of the hours during which children would most likely be listening.

When the up-to-midnight ban was challenged in court, however, the FCC relied on protecting children as its justification. The ban was then struck down by the D.C. Circuit in 1988, as unsupported by any data showing how many children were in the audience of the offending stations at particular hours. Reacting to the court’s decision, the Congress in 1991 passed a 24-hour ban on indecent programming. The D.C. Circuit struck down that law as well, finding that some “safe harbor” for adults to view nonobscene material must exist under the First Amendment. Congress therefore promptly enacted new legislation setting the “safe harbor” hours of 12:00 p.m. to 6:00 a.m. in which indecent material could be broadcast. Last fall, a panel of our court on which I sat struck that law down too; that decision, I hasten to add, is currently awaiting in banc review by the full court. The FCC had defended the latest ban on indecent programming from 6:00 a.m. to midnight on several grounds—as a way to ensure that parents could supervise their children’s viewing; to protect the well-being of unsupervised minors during those hours; and to protect all members of the public—adults and children alike—from the invasion of indecent material into their homes during those hours. The court, however, citing the Supreme Court precedent, said that indecent speech is constitutionally protected, although the government could regulate it to further a compelling interest if it chose the least restrictive means. Here, we said, a ban that lasted during all but the hours when most people—children and adults—were asleep was too restrictive.

Neither the FCC nor the Congress, we found, had demonstrated due concern in fairly weighing the competing interests of children in being protected from indecency and the constitutionally-based rights of adults in viewing or stations in showing nonobscene matters when the safe harbor period of midnight to 6:00 a.m. was set; ergo, the ban could not withstand First Amendment scrutiny.

I stress again that this decision has been vacated by the court and the case set for in banc review.

First Amendment law is complex, even dense, and politicians are understandably wary of it. This is one reason why, in the area of television violence, congressional forays have been quite tentative. Since any legislation dealing with television violence would undoubtedly have to pass constitutional muster in the courts, I would not—even if I could—offer a scheme as to what it should or should not contain. On the basis of a decade of experience in the indecency area, however, I can say that it will be extremely difficult to construct a constitutional law defining and regulating violence. Most members of Congress recognize that problem and, like Senators Simon and Hollings who have sponsored television violence legislation, prefer to focus on labeling, rating and outside monitoring; others, like Representative Markey, have proposed technical devices allowing parents to block violent programs in advance; still others would set safe harbor time limits on violent programming; few legislators, however, talk about outright governmental bans. It may be that the law could recognize a category of violent material so outrageous and lacking in information or artistic merit as to fall outside the First Amendment altogether, in the manner of obscenity, but thus far no reformer has advanced such a concept.

So despite the comfort of more research on the effects of violence than of indecency on children, the job of defining what constitutes unjustified or unnecessary violence is more treacher-
ous than defining indecency which can at least focus on the tangible presence of sexual or excretory activities or language. Comparable violence regulations would have to design the contours of “inappropriate” or “unjustified” or “excessive” degrees of violence shown in vastly different contexts.  

Although in an industry spokesman’s words, “there aren’t any Congressmen losing any votes speaking out against TV violence—it’s a very popular issue,” there are many Congresspersons “caught in a web of confusion arising out of the clash between popular demands for reform and constitutional protection for speech and press.” The brooding omnipresence of the First Amendment causes legislators to move slowly and overshadow the bargaining process going on between the industry and Congress. One network official is quoted as saying, “I fully expect legislation to pass and that it will be struck down in the courts.”

Thus, in February, 50 top constitutional scholars signed a letter to Congress urging abandonment of all major television violence bills including safe harbors, warning labels, and FCC report cards on violence. They said the bills “involve a content and viewpoint bias that cannot be reconciled with the Constitution or prior precedent in the broadcasting field . . . They are vague and overbroad because they do not adequately define and encompass any expressive activities that may constitutionally be subject to regulation.” And that same week, in an intriguing turnabout, following a broadcaster-cable agreement for an outside monitor to view and report on television violence, Senator Simon, previously a hawk on the subject, said he would henceforth “resist” any legislation by his colleagues.

(2) The Industry: Almost every discussion of violence on television and what to do about it ends up with a plea that the entertainment industry exercise greater voluntary restraint, followed by cynical predictions that they will not. President Clinton was rousingly cheered last year when he admonished Hollywood leaders to curb murder and mayhem in films and movies made for television. Within hours, however, it was reported, several of those same Hollywood leaders were bidding $1 million for a movie script called “Overkill” in which 11 people are destroyed in the first seven pages.

The fact is “violence sells.” There are bitter cross-media accusations as to who does violence the most. The television networks make freewheeling use of violence. A recent NBC Dateline survey reported 129 violent acts in three nights of watching, their observation with little or no conflict” or remorse. There are bitter cross-media accusations as to who does violence the most. The television networks make freewheeling use of violence. They said the bills “involve a content and viewpoint bias that cannot be reconciled with the Constitution or prior precedent in the broadcasting field ... They are vague and overbroad because they do not adequately define and encompass any expressive activities that may constitutionally be subject to regulation.”

And that same week, in an intriguing turnabout, following a broadcaster-cable agreement for an outside monitor to view and report on television violence, Senator Simon, previously a hawk on the subject, said he would henceforth “resist” any legislation by his colleagues.

The television and cable industries feel under the gun, but they have been there before. The National Association of Television Executives says, “we’re a scapegoat and we’re all a little afraid to talk back because we’re federally licensed.” The former Chairman of the National Coalition on TV Violence, in contrast, laments: “Are they taking this issue seriously? Of course not.” Governor Cuomo, who blames the American people as well as the industry (“We’re the ones with the blood lust, the taste for seeing people get blown away,” he says), scoffs at selfregulation, citing the broadcasters’ “overriding obligation to produce dividends for shareholders—no matter what.” The track record for voluntary abstinence from violence, at least until recently, has not been very impressive.

A congressional staff veteran of the sixties TV hearings warns that the economics of network television will always work against internal reforms. “Violence not only breeds violence,” he says, “it also breeds large profits for the networks and the television industry at large.” The business of television and its cable competitors is to sell audiences to advertisers and, historically, violence increases audiences. Still, the threat of some kind of government regulation and the rising level of popular discontent may be great enough this time to make the industry forge meaningful internal controls. The old rationalization that television is merely a whipping boy for the more fundamental causes of violence among the young, an “easy way,” as one critic has said, “of avoiding the core issues of crime, poverty and gun control,” weakens in the face of new empirical data. Television may not be the cause but it is a cause.

Last year, four major networks and fifteen cable channels began carrying parental advisories on the screen to warn parents of forthcoming scenes of heavy violence (cartoons, news and sports events not included). But channel “grazing” with remote controls severely dilutes the effectiveness of on-screen warnings. There is also much skepticism over the utility of a general warning that reads: “Due to some violent content, parental discretion advised.” Colman McCarthy, the columnist, writes that the warning might more accurately read: “Warning: The advisory that’s about to appear on your screen is an exercise in fake reform.” An honest warning for the typical cop show, he says, would read: “The following program depicts six murders with handguns, three stabbings, four beatings of women, two rapes, seven fistfights, four people thrown out of punkhouse windows, two high-speed chases ending in head-on collisions, three dynamitings of office buildings, one assassination, and three rifle butts to the jaw. Parental discretion advised.” Even the simple advisory, placed in effect last July, has had little effect. CBS immediately announced none of its fall schedule programs would
require it; and the Fox network said the same for most of its programming. In September, Surgeon General Joycelyn Elders pointed out that only one program (NYPD Blue) carried the advisory.

Sterner stuff by way of self-regulation, however, could be in the offing. Under the goal of Congressional and Administration warnings, the industry has moved ahead a few squares in the past few months. The four television networks (NBC, CBS, ABC and Fox) have agreed to use an independent monitor to review and report on the violent content of their programs. Who that independent monitor will be, how she will be chosen, or what rating criteria she will use, has not yet been settled. We are told that the assessments of violence will be “qualitative,” that is, made with context in mind, rather than indiscriminate rating of the number of violent scenes. The networks say they have their own ratings systems in place for advisories, and the outside monitor will act primarily as an independent check on their efficacy.

The major cable operators have gone a step further. (Their competitors, the television networks, say they should since cable carries much more violence.) Cable’s 11-point plan mandates the development of a violence rating system, also with an outside monitor. It also provides devices by which the consumer at home can automatically block-out programs rated as violent. (The networks resist a single rating system applicable to television and cable, and they do not want a consumer-controlled device for blocking violent programs fearing advertiser defections.) But the cable networks say no rating system will be effective unless it applies uniformly to all programmers, and Representative Markley of Massachusetts warns that he will press for compulsory rating and blocking systems in legislation unless the networks adopt them on their own.

Clearly, the games have just begun; legislation may or may not be successfully warded off; the networks and cable operators, veterans of much bitter internecine warfare, are still vying with one another over the necessary ingredients of self-regulation, though they must surely realize that, to satisfy parents and legislators, self-regulation will have to be reasonably uniform across media.

God, of course, is implementing the details, and the self-regulation could deteriorate into a sense of “you go firsts” between networks and cable. The nature of the rating system will be critical; the video game makers who are also at risk have put forth a rating system similar to the movie system that classified programs by age categories—all ages, 6-13, 13-17, and adults only. There is also talk of an electronic viewer’s guide that will enable parents well in advance to identify programs they don’t want their children to see. Skeptics ask: “What parent will take time to check each day’s listings and block out specific objectionable shows” even assuming accurate labels and effective technology? The drafters and monitors of the rating system will themselves be tasked harshly to decide how much violence, in what context, and at what age is undesirable for children, even if they read all of the hundreds of studies on the subject. Self-serving comments aside, the industry has a point in admonishing that overzealous excision of violence can turn television into a bland mix that appeals to and educates no one, including children. And it is still unsettled whether television news—a prime source of violent footage—and spontaneous sports violence will be covered. A spokesman for the Association for Responsible Television dismisses it all as “smoke and mirrors ... it’s a delaying tactic, so it will be business as usual for the next five years.”

Canada, our neighbor to the north, has just adopted a violence code, written by the television broadcasters but formally approved by the Canadian equivalent of our FCC, and intended to be used in licensing decisions. During hours exclusive of 9:00 p.m. to 6:00 a.m., the broadcasters will not show any program that “sanctions, promotes, or glamorizes” violence, or contains “gratuitous violence in any form,” and they are classifying programs according to their violence content. But the only casualty in its early days has been “Teenage Mutant Ninja Turtles,” which some said would have been dropped anyway because of low ratings. Congressional reaction to the Canadian Code has been that it is “very attractive” but could not be replicated here because of constitutional obstacles.

Still, there is one hopeful omen. The annual TV “sweeps,” that is surveys of the ratings of all network shows compiled to attract advertisers, showed that, by comparison with last year, the top shows are much less violent—“light on serial killers and hit men and heavy on wholesome programming.” Moreover, the advertisers themselves are beginning to shy away from heavy violence, worried about audience antipathy and legislation directed at them. Of the ten highest rated made-for TV movies during the 1993-94 season, seven were completely nonviolent. Contrary to expectations, viewers did not desert the networks because the programs were less violent. The President of the ABC Entertainment Group was less optimistic, however, pointing out that if you went below the top ten, “you find a whole long list of families killing families—rape, murder, true crime. The bread and butter ratings, week in and week out, are these movies.... This season ABC’s best performance was with family crime.”

(3) Technology: Thirdly, communications technology has become increasingly prominent in the debate. There is little chance that salvation from television violence will emerge deus ex machina, but it is likely that emerging control technology over the black box will affect its resolution. For a decade, cable systems have been required by statute to offer subscribers a lockbox which they can use to block out in advance certain channels for certain periods of time; parents can even now theoretically prevent their children from viewing objectionable programs—that is, if they themselves know which ones to avoid and when they will be aired. Why then is this not enough, at least for cable, and why can’t there be an analogous device for regular television?

The problem is that lockboxes are presently underused. (Also, some bright children learn quickly how to unlock them.) The newly-invented V-Chip, a relatively cheap, mass-produced computer chip, which some proposed legislation would mandate but which cable has already voluntarily agreed to make available, will go beyond the lockbox in allowing parents to block out, or more accurately, blur out parts of any scene as well as whole scenes or programs that are too violent or sexually graphic. With the aid of a small decoder, the adult user can remove the obscuring blur when
using the set herself. The V-Chip would operate in conjunction with a rating system programmed into the set. There could potentially be four levels of restriction on sex and violence to accommodate different age groups.\(^8\) The price of the decoder is expected to come down to $5 as soon as usage reaches respectable levels. Some redesigning of smaller sets will be necessary to accommodate the circuitry, but satellite television is already using a device in conjunction with a rating system.\(^7\)

Broadcasters, it is reported, are cool to the V-Chip because it will result in some additional cost to viewers as well as enlarge viewer control capabilities and so potentially diminish the audience for advertisers. One broadcasting official laments sanctimoniously: “The very idea of the V-Chip scares me ... Have we as parents so abrogated our responsibilities ... to talk about things like violence on television with our children that we have to ask technology to stand in for us?”\(^2\) The answer may be “Yes.”

Parents would still have to trigger the system, however, no matter how sophisticated the control apparatus. Cynics point out that adoption of the V-Chip “presume[s] parents are more technically facile than their kids, and nothing could be further from the truth.”\(^5\) But, says Representative Markey, “Even if a small percentage of parents used the technology, the networks will see declining ratings for violent programs. The result will be less violence on TV.”\(^8\)

A few handouts press for segregating all violent programs on one channel, available to subscribers only by advance registration for a fee (and in conjunction with a decoder or lockbox), an approach that television broadcasters and cable operators predictably will oppose strongly.\(^4\) The FCC is, incidentally, pursuing this route in regulating indecent programming on the public access leased channels of cable.\(^6\) Its approach assumes that parents simply don’t use their lockboxes or cannot know in advance when indecent programming will be aired so as voluntarily to screen out those channels. The technology and onscreen guides might, however, overtake some of those arguments.

(4) Family Values: The fact that many parents feel inadequate to the task of controlling their children’s intake of television violence should not mean parental discretion is, in fact, impotent or irrelevant. To be politically acceptable in a bureaucratic society, a solution to television violence should not be allowed totally to supplant the role of parents in guiding their children. Until recently, the FCC has defended its regulations restricting indecency on grounds that its main interest is in helping parents make decisions, though of late it has muddied the waters by citing as an additional ground the government’s own compelling interest in protecting children and even adults from sinister influences.\(^8\) This latter claim, incidentally, provoked a spirited rebuke from my colleague, Judge Edwards, in the court’s recent opinion striking down the FCC’s 6:00-midnight ban on indecent programming. Judge Edwards found the two FCC justifications “irreconcilable” and admonished that, in setting itself up as a final arbiter on what children may see and hear, “the government tramples heedlessly on parents’ rights to rear their children as they see fit and to inculcate in them moral values of the parents’ choosing.”\(^8\) The question of whether FCC censors, or parents, should decide what kind and how much violence kids can see, is a fundamental one, worthy of a more intense focus than it is currently getting.

Assuming the government does move to regulate television violence, and assuming further that it decides to use the safe harbor technique for violent material (Senator Hollings has a bill in the hopper along these lines), the hours during which such fare could be shown would differ depending on whether the regulation was truly seeking to aid parental choice or simply to keep violent material away from kids altogether, regardless of their parents’ desires. Before you quickly retort, no rightminded parent wants her kid watching murder and mayhem, consider for a minute what that reaction could mean.

Do we really want our children protected from true depiction’s of our country’s violent history: lynchings, assassinations of Presidents, wars fought in the name of justice and freedom, the Rodney King tapes? One critic points out that “The ... movie’Gettysburg’ depicts more deaths than an entire season’s worth of TV shows. Should ‘Gettysburg’ be edited so that it depicts the event as a mere skirmish instead of the bloodbath it was?”\(^9\) he asks.

Is there a cultural difference between Shakespeare’s violent works, like Titus Andronicus, in which “out of the 15 personages, six are stabbed, two beheaded, two have their throats cut, one is hacked to pieces and burned, one buried alive and left to perish of hunger,” and the notorious video game, Mortal Kombat, where the winning fighter rips out his victim’s heart and lets his head splash for 15 seconds on the pavement while the background voice shouts, “FINISH HIM, FINISH HER?” And if so, should it be the government or the parent who decides which can be viewed? Will news and sports programs be covered? As the New York Times points out:

*The spectacle of a Michael Jordan slugging players on a basketball court, for example, probably sends a more immediate and damaging message to the youth of this country than all the violence on network entertainment programs.*\(^9\)

Is it that the concerned families want when they call for government controls on violent programming Their pleas are broadly phrased—“less violence” or maybe “no violence.” “When” and “how much” should control the inquiry. Do the incessantly-cited studies help in the refinement; if so, nobody has shown how. Even during her impassioned plea for industry-or-else-government controls, Attorney General Reno admitted there would be a problem in defining what kind of violence to legislate against.

Parent and family organizations have been quite active in the crusade against television violence. They have collected signatures, mobilized, and lobbied for both industry and government restrictions. Some monitor television and cable themselves for unnecessary violence, and then organize citizen boycotts of the product advertised on the programs. The American Family Association boasts 1,700,000 families who support their anti-violence boycotts and is soliciting 3,300,000 more to insure maximum effect. They have already issued one call to arms in a full-page New York Times ad for parents to write the listed sponsors of NYPD Blue objecting to its...
violent and sex content. Attorney General Reno and columnist William Safire have encouraged this kind of grassroots activity. But what kind of solution do they want—one that relies upon parental involvement or rather one that delegates sensitive choices to the industry or the government? It’s not always clear.

This is not to say there is no consensus among parents, educators and regulators that certain kinds of violent programming serve no narrative or educational purpose at all, and should be severely curtailed during most viewing hours. But the vast array of programs containing some violence also contain history, literature, documentary, sports, news or even good storytelling. The censor—be she parent or FCC bureaucrat—carries a heavy burden of discretion in deciding when violence is excessive or gratuitous. If a major solution to the television violence problem allows for significant parental choice, rather than government fiat, it will be more in keeping with our democratic tradition of letting families do their own thing.

CONCLUSION

Americans love to talk about how much they care about children. But public policymaking for children’s welfare inevitably becomes entangled in the ideological and material conflicts that seem to beset all important issues of public policy in a democratic society. In the case of violence on television, we have a clearly aroused public—with the politicians close behind—calling for action of some kind. Substantial majorities of Americans polled want government intervention if necessary. Indeed, for a change, there is even a body of recognized research to support the ill effects of indiscriminate viewing on developing youngsters.

On the other hand, in our market economy, violence sells products. For decades, the entertainment industry has piously eschewed “gratuitous violence”; it has adopted and intermittently enforced voluntary codes of good behavior; very recently, under intense political pressure, it has signaled an intent to update such codes; the networks and cable systems have agreed to put parental enforcement voluntary codes of good behavior, we should look at our schedule and just try to do good programming. We’ll see.

The thorniest problem in any control system—by whomever administered—is deciding what violence should be screened out. There is a genuine risk of overreaction; so many aspects of our life and society do involve violence that it must inevitably be reflected in our art forms and entertainment if they are to make any valid comment on our life and times. The government’s flawed record in regulating indecency provides little promise that it can regulate violence more sensitively. If, for example, violence bans are to be defined in terms of inappropriateness for children’s viewing, surely there must be gradations between ages 6 and 17. Yet, in its indecency regulations, the government has so far rejected any such steps.

What has been conspicuously missing from the debate are explicit models of examples of programming the involved groups think should be restricted or banned. Shakespeare’s plays and Mortal Kombat do not define the terrain. Canada’s new television Code has detailed standards but so far only Teenage Mutant Ninja Turtles has reportedly felt its impact.

There is also the First Amendment to contend with, even when children’s welfare is at stake. No violence cases have yet come to court. But in the indecency field, some government-imposed safe harbor viewing hours have been found too restrictive, when no attempt was made to explain failure to differentiate between the ages of children in the viewing audience. While there certainly are some extreme forms of violence on the airwaves which titillated adults can reasonably be permitted to view only at selected hours away from children, that kind of regime, if imposed by law, would seem to require a far more precise kind of research and explicit balancing than government has heretofore engaged. If an effective scheme can be devised, industry self-regulation, by avoiding constitutional line-drawing, promises more certainty and less delay.

In the end, the role of parents cannot be ignored or passed on to some other authority. Conscientious parents differ all over the lot as to what they want their children to see. (The problem of the violence-prone child without any supervision at all cannot be settled within the framework of this debate.) Even on-the-job parents need help in controlling the use of home media. But they should not expect or want to escape responsibility altogether by delegating program control to the government, either through formal or de facto 24-hour bans or segregated channels to which all violent programming will be relegated. Advancing technology, like the V-Chip, and on-screen viewer guides would lend a helping hand to parents, allowing them to scan a day’s television fare rated for differing degrees of violence, and to lock out undesirable programs or parts of programs for their children’s viewing. Surely the industry should be able to work out the vulnerability in present technology to assure that smart kids—at least in the lower age ranges—cannot circumvent circuitry. Making it next to impossible for adults or older adolescents to see anything not fit for a six-year-old does not seem a legally or socially tolerable alternative.

The lessons of this exercise in public policy formulation for children seem reasonably clear but daunting. There has been a
massive public debate over the past few years on this issue, but it has not yet focused convincingly on what can be done, what is at stake, or even what kind of programs we are talking about. The rhetoric of all sides is too strident—children’s welfare is pitted against freedom of expression—the debate is full of accusation and condemnation. It is as if fixing the blame will solve the problem. It will not. Yet, with all the differences, it seems as though we are about to see some changes made under political pressure driven by unhappy parents, by schools and churches, by our law enforcement establishment; perhaps even by our society’s better nature. The solutions are complex. They will fail if they reduce television fare to pap or deny adults any freedom of choice, or simply produce a kind of television totalitarianism by giving too much power to government to determine what we can see or hear. We must use our window of opportunity with wisdom and restraint.

There is no assurance that we will be successful, we can only try.

REFERENCES


7. This account of the 1961 Hearings is taken from Paul Laskin, Still Doing Violence (1993) (unpublished manuscript on file with author). Laskin was the Chief Counsel to the Senate Subcommittee to Investigate Juvenile Delinquency in 1961-62. “We Are Outraged” (adv. by American Family Association).


11. Laskin, supra note 7.


16. Quoted in id., at 21.


19. Martha Minow, supra note 17, at 5-6.


23. Condry, supra note 12, at 262.


33. Rosenfeld, supra note 17.

34. Minow & Weissbourd, supra note 17, at 10-14.

35. See generally Schlegel, supra note 9, at 204 et seq., discussing inter alia, Television Violence Act of 1990 permitting industry to establish voluntary standards to limit violence, free of antitrust restraints and Children's Television Act of 1990 restricting advertising children's programs to 12 minutes per hour and mandating programs to meet educational and information needs of children.


40. See Helen Dewar, "Free Speech Free-for-All," Wash. Post, Oct. 2, 1993, at Al. ("Congress is caught up in a web of controversies arising out of the clash between popular demands for reform and constitutional protections for freedom of speech and press.")

41. The debate on what kind of violence is gratuitous or excessive is furious. See, e.g., Carol J. Greenhouse, Reading Violence, in Law's Vocabularies that distinguish between good and bad violence.

42. Steve Coe, "Network chiefs thrust and parry," Broadcasting & Cable, Feb. 14, 1994, at 30 (Center for Media and Public Affairs identifies first-run syndicated hours as most violent series on prime-time; networks are credited with significant decrease in number of violent acts in their programming); Ellen Edwards, "TV Violence, After the Showdown," Wash. Post, Sept. 30, 1993, at B1 (CBS President angry that broadcast TV is target when cable, syndicated shows and movies have greater sins); John J. O'Connor, "Labeling Prime-Time Violence Is Still a Band-Aid Solution," N.Y. Times, July 1, 1993, section 2, at 1 (Congress' powder-puff debate limited to prime-time networks; "why should the commercial networks stand on the embattled front lines when pay-cable channels can show all the Terminators and Lethal Weapons they want, uncut?").

43. Dewar, supra note 40.

44. Price, supra note 2.


49. Id.; but see Mike Freeman, "Violence study targets first-run," Broadcasting & Cable, Feb. 14, 1994, at 30 (Center for Media and Public Affairs identifies first-run syndicated hours as most violent series on prime-time; networks are credited with significant decrease in number of violent acts in their programming); Ellen Edwards, "TV Violence, After the Showdown," Wash. Post, Sept. 30, 1993, at B1 (CBS President angry that broadcast TV is target when cable, syndicated shows and movies have greater sins); John J. O'Connor, "Labeling Prime-Time Violence Is Still a Band-Aid Solution," N.Y. Times, July 1, 1993, section 2, at 1 (Congress' powder-puff debate limited to prime-time networks; "why should the commercial networks stand on the embattled front lines when pay-cable channels can show all the Terminators and Lethal Weapons they want, uncut?").


51. Weinraub, "Despite Clinton," supra note 3.

52. Id. (citing Hollywood Reporter article "Killer Dies.")

53. Id.

54. Schlegel, supra note 9, at 198.

55. Dateline, supra note 50.

56. Weinraub, "Despite Clinton," supra note 3.

57. Eggerton, supra note 6 (quoting Fox Broadcasting Chairman Lucie Salhany).

58. Weinraub, "Despite Clinton," supra note 3.


60. Laskin, supra note 7.


62. As a result of the studies, most voices in the debate admit a correlation between viewing violence and acting it out, but the industry and its supporters do not all admit that one is the cause of the other. See, e.g., John J. O'Connor, "Another Round on TV Violence," N.Y. Times, Dec. 9, 1993, at C22 (major conclusions of studies are inconclusive); Sokkind, supra note 26 (chicken and egg problem whether violent movies and shows cause violence or attract viewers disposed toward violence).


93. See Stanley Greenspan & Amy Cunningham, “The Kids Who Will Be Killers,” Wash. Post, July 26, 1993, at Cl (”without loving contact in infancy and early childhood, a sense of human connectedness may never materialize and other people can soon become viewed as things to be kicked or destroyed when they stand in the way”).