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In reflecting upon the sixtieth anniversary of the Communications Act of 1934, I am reminded of one of the first public policy issues I encountered in the practice of communications law. That issue was television violence, a subject that has continued to confound policymakers ever since.

My first brush with the issue came against the backdrop of the Vietnam War. It was in a senate hearing room and the fiery Senator from Rhode Island, John O. Pastore, was castigating the television networks (then only ABC, CBS, and NBC) for allowing the portrayal of violence to permeate so much of their programming.

This was not the first time Congress, exercising its constitutional role under the Communications Act, had cajoled television broadcasters on this topic. The issue, in fact, is almost as old as the medium itself. In 1952, a House subcommittee held hearings on television violence prompted, in part, by the fear of copycat behavior by children arising from the original TV *Superman* series. In 1954, a Senate subcommittee on juvenile delinquency chaired by Senator Estes Kefauver began exploring possible links between juvenile crime and violence shown on television. And a decade later in 1964, the same issue was revisited by the same subcommittee, then chaired by Senator Thomas Dodd.

But the hearings before Senator Pastore in 1969 seemed to intensify the issue as never before. This was an especially urgent time in American history. The Vietnam War had been America's first military engagement where the violence of war was so vividly displayed on daily television newscasts. Also, as chronicled that year by a National Commission on the Causes and Prevention of Violence, it was a time when many other violent strains in our society had bubbled to the surface. The assassinations of Dr.

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Martin Luther King, Jr. and Robert Kennedy, and the anti-war and civil rights disturbances that filled the streets and America's television screens—including rioting at the 1968 Democratic National Convention in Chicago—set an ugly tone. The country and its elected officials were upset and looking to find causes and ready to place blame. Television was a natural, almost inevitable, target.

Television had become a compelling, continuous presence in the lives of most Americans, and as a licensed medium, it was expected to be responsive to social changes and public criticism. Congress, on the other hand, provided the perfect bully pulpit for the ventilation of these volatile issues. Then, as now, few could resist or would deny the political dynamic fueled by the headline potential of being opposed to violence, a champion of children, and tough on a regulated industry.

Ultimately, however, it was the regulatory framework established by the Communications Act of 1934 and a belief and trust in the strong private broadcasting system that has been allowed to evolve within that framework that proved most crucial. Section 326 of the Communications Act provides the abiding standard. In matters of content, "[n]othing in this chapter shall be understood or construed to give the [Federal Communications] Commission the power of censorship over the radio communications or signals transmitted by any radio [or television] station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."[1]

The series of hearings initiated by Senator Pastore and duplicated in the House in the late 1960s and early 1970s represented a stern, practical test of this standard. Societal events and escalating political pressure put the established communications system on the defensive. But when the debate subsided, the public interest was served by the kind of accommodation and responsiveness that is unique to our governmental system. Yes, threats were made—some of them fairly ominous—but certain lines, ultimately, were not crossed. A study by the U.S. Surgeon General to further explore the causes of violence was initiated and, in the ensuing years, the television industry undertook a number of significant self-regulatory measures. While important questions remained, the public was heard and the medium responded—all without any fundamental changes in the governing law.

The tension over potential content regulation that filled the air in the late 1960s and early 1970s, however, remains with us in the 1990s as we celebrate the sixtieth anniversary of the Communications Act. While more hearings and reports littered the landscape throughout the 1970s and into

1. 47 U.S.C. § 326 (1988).

the 1980s, Congress assiduously avoided any acts that smacked of direct content regulation.[2] In 1990, however, this began to change as Congress took two significant steps that threaten to alter drastically the delicate balance previously maintained in this area. First, Congress passed the Children's Television Act of 1990, which not only sets advertising limits in children's programming but requires the FCC, for the first time, to consider the extent to which a TV licensee has served the educational and informational needs of children when reviewing that station's application for renewal of license.[3] While not directed toward violence or intended to restrict any form of children's programming, this important recent addition to our communications laws clearly is intended to influence a certain kind of program content directed towards children.

Second, Congress passed the Television Program Improvement Act of 1990 which granted a specific temporary exemption from the antitrust laws relative to "any joint discussion, consideration, review, action, or agreement by or among persons in the television industry for the purpose of, and limited to, developing and disseminating voluntary guidelines designed to alleviate the negative impact of violence in telecast material."[4] Thus, after many years of a relatively healthy interplay between industry and government that always stopped short of legislation, Congress enacted a measure effectively demanding action on the violent content of television programs. While this first legislative step only targeted voluntary self-regulation, it still poses a new, more menacing threat to the no-censorship standard of the Communications Act.

Predictably, enactment of the Television Program Improvement Act of 1990 led almost immediately to increased public pressure on the television industry to institute voluntary measures, followed by a series of hearings in both the House and Senate designed to assess the industry's progress and performance.[5] Moreover, unlike past deliberations, these most

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2. *See, e.g.*, SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 1ST SESS., REPORT ON VIOLENCE AND TELEVISION 1 (Comm. Print 1977).

3. Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303a-303b, 393a, 394 (Supp. IV 1992)).

4. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 501(c), 104 Stat. 5089, 5127 (codified at 47 U.S.C. § 303c (Supp. IV 1992)).

5. *See Implementation of the Television Program Improvement Act of 1990: Joint Hearings Before the Subcomm. on the Constitution and the Subcomm. on Juvenile Justice of the Comm. on the Judiciary*, 103d Cong., 1st Sess. (1993); *Violence on Television: Hearings Before the Subcomm. on Telecommunications and Finance of the Comm. on Energy and Commerce*, 103d Cong., 1st Sess. (1993); *Hearings on Bills to Regulate TV Violence Before the Comm. on Commerce, Science, and Transportation*, 103d Cong., 1st Sess. (1993).

recent hearings were peppered with a number of specific legislative proposals. Included were measures that would, among other things, make it unlawful to distribute any "violent video programming during hours when children are reasonably likely to comprise a substantial portion of the audience,"[6] require the FCC to issue quarterly "violence television report cards" ranking both programs and sponsors according to violence,[7] require all television programming deemed violent to carry video and audio "warning labels,"[8] and require all new television sets sold in the United States to be equipped with a so-called "V-chip" that would enable viewers to block the display of channels, programs, and time slots containing material previously rated or labeled by the television industry as to violent content.[9]

As the 1993 Senate hearings drew to a close, an illuminating exchange took place. The committee chairman, Senator Earnest Hollings (D-S.C.), after hearing witnesses from the major television networks, sought to discredit their position by playing a video tape, in the hearing room, of a short clip from the half-hour situation comedy *Love and War*. The clip was from an episode in which the cast of male and female actors, departing from their usual comedic repartee in a restaurant that serves as the show's regular set, engaged in a short slapstick "barroom brawl" scene. Senator Hollings seemed appalled, strongly suggesting that this type of prime-time "violence" was indefensible. Senator Conrad Burns (R-Mont.), sitting on the same panel, expressed a different view—he thought the scene was funny.

Thus, although the debate has waged for more than forty years, the most troublesome aspect of any form of government regulation of violence remains the overwhelming problem of definition. Social scientists, the creative community, broadcasters, and, as illustrated above, members of Congress, have never been able to agree on what constitutes violence—of any sort. The problem is compounded by the fact that virtually everyone concedes that some violence is "good" or "acceptable" simply because it is essential to a story line, necessary to depicting human conflict, or vital to reporting history and showing reality. No one would seriously regulate

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6. S. 1383, 103d Cong., 1st Sess. § 3 (1993) (introduced by Sens. Earnest F. Hollings (D-S.C.) and Daniel K. Inouye (D-Haw.)).

7. S. 973, 103d Cong., 1st. Sess. (1993) (introduced by Sens. Byron L. Dorgan (D-N.D.) and Kent Conrad (D-N.D.)); H.R. 2159, 103d Cong., 1st Sess. (1993) (introduced by Rep. Richard J. Durbin (D-Ill.)).

8. S. 943, 103d Cong., 1st Sess. (1993) (introduced by Sen. David Durenberger (R-Minn.)).

9. H.R. 2888, 103d Cong., 1st Sess. (1993) (introduced by Rep. Edward J. Markey (D-Mass.)).

violence on news or sporting events or movies centered on the Holocaust or the Civil War. Even so-called "objective" criteria would not help. How many punches or bullets are too many? Does it matter whether the specific program is a serious drama, a situation comedy, or an action/adventure? Or should the "criteria" be applied indiscriminately to all programs as long as they are likely to be viewed by significant numbers of children comprising a certain age group? Many of the legislative proposals that began to surface in 1993 have been justified on the ground that since Congress can regulate "indecency," it should also be able to regulate violence. But the depiction of violence, some of which is found in many of our finest creative works, is clearly not the equivalent of indecent material. Any governmental effort to sanitize, channel, or otherwise direct the depiction of violence on television would undoubtedly be so overbroad as to have a severe chilling effect on all entertainment programming.

The continuing controversy over violence on television has largely been spurred and shaped by members of Congress and not the expert agency on communications. The FCC, in fact, over its long history, has rather steadfastly avoided becoming a national censorship board on any topic—especially one so illusive and complicated as violence. Even after coming under intense congressional pressure in the mid-1970s to study and possibly step into this policy quagmire, the Commission pointedly rejected any direct governmental role in overseeing television violence: "As a practical matter, it would be difficult to construct rules which would take into account all of the subjective considerations involved in making such judgments."[10] Just as importantly, any "attempt at drafting such rules could lead to extreme results which would be unacceptable to the American public."[11] In sum, "violence" laws would represent the worst possible form of content regulation—engaging those entrusted to administer such laws in a process destined to highlight both the harm and the futility of government action.

Therefore, on this sixtieth anniversary of the Communications Act, and after decades of probing the issue in one congressional committee after another, it is time to acknowledge, emphatically, that the simple choice is between censorship and responsible voluntary conduct. There is, on this topic, no middle ground. While the government can cajole the industry—even talk over the industry directly to the American public—it is ultimately the public that must decide whether to watch, protest against, or

10. Report on the Brdcst. of Violent, Indecent, and Obscene Material, *Report*, 51 F.C.C.2d 418, 419 (1975).

11. *Id.*

turn off particular violent programming. It cannot be legislated on a program-by-program basis.

We face a far more diverse information and entertainment marketplace than existed when Senator Pastore squared-off with three over-the-air television networks which then controlled more than 90 percent of prime-time viewing. Policymakers must recognize this reality in their continuing efforts to monitor and influence a program content issue such as television violence. Indeed, with rapidly advancing communications technologies capable of spreading more sources of information and entertainment to a larger audience, the role of government in such matters should be diminished, not strengthened.

Violence will not and should not disappear from America's television screens. There will always be stories worth telling that contain conflict and violence. Our founding fathers had the wisdom to recognize the importance of freedom of expression to a democratic society. The architects of the Communications Act had the foresight to incorporate that fundamental principle into the body of the 1934 Act when they specifically denied the government the power of censorship over broadcast content. And, those who have been entrusted with the responsibility for overseeing and administering the Act for the past sixty years have displayed similar wisdom in guarding this principle.

The almost continuous forty-year record of congressional investigations, culminating in the 1993 violence hearings and numerous new concrete legislative proposals, provides compelling evidence that this principle cannot be taken for granted. However strong our common concern with violence on television, it is essential that the industry continue to police itself in response to legitimate criticism from viewers and their elected officials.

Legislation is not the answer. The solution, rather, lies in a continuation of the admittedly untidy, slow, and somewhat cumbersome process called public debate. The process should include: (1) more and continuous consciousness-raising by government officials and citizen groups; (2) expanded efforts by broadcasters to employ appropriate advisories in promotions and programs (including better methods for communicating such warnings to print media for inclusion in advance program listings); (3) increased development of children's programs with positive messages and information, offering both an alternative and counterbalance to programs containing violence; (4) public service announcements designed to educate and inform parents and children about the portrayal of violence and conflict in television programming; and (5) an increased focus by policymakers and

others on entertainment and program sources beyond the major networks and local stations.

We live in a communications world that is constantly changing. There is a steady swirl of activity to recast the Communications Act so as to reflect such marketplace changes. Nothing has changed, however, to warrant a reexamination of the bedrock principle of no censorship found in the Act. Indeed, on the sixtieth anniversary of the Communications Act, with continuing incidents of societal violence providing ongoing fodder for attacking violence on television, it is more important than ever that this one vital aspect of the governing statute remain totally unchanged. In this battle, as with all battles over broadcast content, Section 326 and the First Amendment precepts that support it should be cheered, not changed.