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The regulation of electronic mass communication has been increasingly justified by reference to the welfare of children. One side of the coin is the protection of children from harm. Thus, indecency on the airwaves is to be channeled to late night hours, television sets are to be manufactured with V-chips, and ratings are to be developed to aid parents in blocking access to overly violent programming. The other side of the coin is the affirmative goal of using the mass media to educate children. Thus, broadcasters are to provide a three-hour per week minimum of children's educational programming as part of their license renewal obligations.

The program was designed to situate both sorts of child-welfare-based arguments in their policy contexts and in constitutional, empirical and socio-historical perspective. Christopher Wright, Deputy General Counsel of the Federal Communications Commission, addressed the justifications of the FCC's new spin on broadcasters' public interest obligations. Professor Dale Kunkel of the Department of Communications at the University of California, Santa Barbara commented on the social science data about media effects on children, including the results of recent research on violence. Professor Catherine Ross of the George Washington University Law School described the history of the idea of the child, the ways in which the rhetoric of child welfare has been deployed historically in media reform efforts, and the particular First Amendment dangers of governmental interventions today. Professor Jack Balkin of Yale Law School discussed the constitutional issues posed by attempts to reduce television violence and indecency, and the unintended cultural consequences of technological innovation. Professor Lili Levi of the University of Miami School of Law, moderator of the panel, used the lens of the FCC's approach to child-based regulation to characterize the agency's emerging administrative model.

Lili Levi:

Welcome to Sex, Violence, Children and the Media: Legal, Historical and Empirical Perspectives. I am Lili Levi from the University of Miami, Chair of this Section for another two hours. I wanted to sketch out for you "why this topic, why this panel" before we delve into it. The traditional rationale for broadcast regulation has been the scarcity of broadcast frequencies. Now, however, the most popular justification for broadcast regulation is the welfare of children. In memory of Thomas Kuhn, then, let us say that there appears to have been a paradigm shift in regulatory justification – from Red Lion to Pacifica. And that is terribly interesting.

We see the child-centered regulatory policies both at the congressional level and at the FCC. For example, Congress includes the V-chip in the otherwise structurally deregulatory Telecommunications Act of 1996. Similarly, Reed Hundt, the FCC Chairman, begins to talk about a revived public interest obligation that is grounded in part on the protection of children and in part on the enhancement of citizenly values. Courts, too, quickly accede to claims of compelling state interests in children: both in the protection of children and in parental control over children's access to broadcast material. In fact, they often do so without recognition of the potential tension between those two interests.

At the FCC level, this approach has led to the development of two regulatory models in the children context. One is an "affirmative" model, pursuant to which affirmative obligations are imposed on broadcasters. The Commission's recent adoption of a three-hour per week minimum requirement for children's educational programming for painless renewal is an example of such an affirmative approach. The second model emerging at the FCC is a "programming constraints" model. For example, the prohibition of broadcast indecency during daytime hours constrains broadcaster behavior. (The same might be said in the future in connection with the Commission's potential role in the implementation of V-chip ratings.)

The rhetoric of child welfare is thus a powerful force in the regulatory arena today. What this means is that we have a hot topic very much in the public eye. While much addressed, it has been
nevertheless underanalyzed. That was the reason for this particular panel.

Out topic raises a number of issues. Assuming that there is a consensus about the desire to protect children, what do we do? Where does this lead us in terms of regulatory actions? For example, what do we characterize as harm? "Compared to what," as Eddie Harris might ask. How do we assess harm? Who is in our protected category – how do we define children? What does it mean to include in the set of "children" both two-year-olds and seventeen year-olds? Should sex and violence be in the same regulatory boat? How should we assess the regulatory moves that already have been made in the name of child-protection? Can we discern any seeds of a particular ideology – in the style of regulation, in the selection of regulatory methods, or in implementation? What are the social as well as doctrinal, cultural as well as legal, settings and consequences of particular types of regulatory regimes and particular types of regulatory rationales.

In light of those questions, I would like to introduce the panelists. We are honored this morning to have with us Christopher Wright, who is the Deputy General Counsel of the FCC and has worked with Chairman Hundt in articulating the vision of the Hundt FCC. Then we will hear from Professor Dale Kunkel of the Communications Department at the University of California, Santa Barbara. Professor Kunkel has been very active in the National Television Violence study about which you have all been reading for the past year. He is also currently at the center of the debate on the issue of what type of rating system we should deploy in connection with the V-chip. Following Professor Kunkel will be Professor Catherine Ross of the George Washington Law School and Professor Jack Balkin of the Yale Law School, neither one of whom needs any additional introduction to this group. So, without further ado, I want to thank Mr. Wright and turn over the microphone.

Chris Wright:

Thanks, Lili. You’re right, we think there is a difference between "positive" and "negative" regulation of the mass media, and particularly with respect to children. Let me try to report to this group how we think about those issues and what I think the key cases are. I would be interested very much in learning from you.

When you work for a federal agency, most of your problems come to you. Academics have the luxury of studying what you like. But, to some extent we are necessarily reactive. Let me start with one of our reactions on the "positive" side first. One of the things we had to react to was the implementation of the Children’s Television Act of 1990. What that Act says is that, during the license renewal process for television stations, "the Commission shall . . . consider the extent to which the licensee . . . has served the educational and informational needs of children." The Act was passed by a Democratic Congress in 1990 that was very frustrated with the fact that the FCC, then chaired by a Republican, was not requiring anything at all from television stations with respect to children’s programming. The Act was an order to do something – something specific – during license renewals: to "consider the extent to which the licensee . . . has served the educational and informational needs of children." Beyond that, the statute does not tell you very much.

What we found – almost five years after the passage of the Children’s Television Act as we were going into a new round of license renewals – was that all television licenses were being renewed and that the staff was using an unpublished guideline of half an hour per week of children’s educational programming. That is, if a broadcaster was doing something it claimed to be educational for half an hour a week, it was getting passed and its license was getting renewed. Moreover, what was being claimed as educational included programs that hardly seem educational. Dale Kunkel provided us with a lot of this information, and he is better able to I to report his findings, but, for instance, some broadcasters claimed that the Power Rangers is an educational program. Some broadcasters weren’t doing even a half an hour a week of anything that anybody could say, with a straight face, was educational. The staff was actually calling those stations and getting them to promise that they would do a half hour of educational programming in the future.

That simply is not an acceptable implementa-

sanction or consider not renewing the license of a broadcaster, what do you do against this background? Of course, the FCC has to be consistent and when you have been renewing licenses, without sanction, where stations are doing half an hour a week, you can’t then all of a sudden start not renewing the licenses of stations that are doing the same thing. So we had a very controversial rulemaking proceeding that culminated in the three hour a week rule that Lili referred to. It was completed last summer. There were only four commissioners at the time and it’s certainly public knowledge that they were bitterly and equally divided on many of the issues facing them – but we nevertheless ended up with a three hour a week processing guideline. The guideline provides that if a broadcaster does three hours a week of something that is educational and aimed at children, then no further analysis will be done to see if the broadcaster is complying the Children’s Television Act. If a broadcaster has done less than three hours a week, a closer look will be taken and perhaps the licensee will persuade the Commission that it has taken other steps that ought to persuade the Commission to overlook the failure to provide three hours a week of educational programming.

In my view, in defending the guideline the most applicable precedent is the too-often-overlooked 1981 CBS case.\(^2\) As you may or may not remember, by a six to three vote the Supreme Court in that case upheld the only other specific positive obligation placed on broadcasters: the obligation to sell time to political candidates at the lowest unit charge. In CBS, the Court stressed that broadcasters are “granted the free and exclusive use of a limited and valuable part of the public domain,” and concluded that when they accept “that franchise it is burdened by enforceable public obligations.”\(^3\) Now, there is obviously some of Red Lion in there, but I think what is actually more important is that the broadcast spectrum has always been viewed as and is public property. I would think, for instance, that if we turned over our building at 1919 M Street to broadcasters and didn’t charge them rent and didn’t ask them to make any sort of “in kind” payment in return for using our building, there would be a scandal. You just can’t do that – right? In fact, there are rules against giving away public property. However, to some extent that’s what we’ve been doing for sixty years in broadcast area. But I think it is important to remind everyone that broadcast licensing has always been viewed as an “in kind” transfer. The broadcasters have always been given their licenses for free on the theory that they are public trustees.

Let me tell you an anecdote. The offices of the National Association of Broadcasters are only a few blocks from our office, and in the Summer of 1994 the hot thing going on at the Commission was the auction of the licenses to provide personal communications services. We were holding the world’s first auction of spectrum licenses and we have now raised more than $20 billion on these auctions. I was walking out to lunch one day in the Summer of 1994 and saw one of the lawyers from NAB, who just happened to be walking by our building, and I said, “Can broadcast licenses be far behind?” The NAB lawyer knew exactly what I was talking about, and said, “No, no, no, no – broadcasters are public trustees. We’re given the free use of the spectrum because we serve the public interest.” I reminded him of that during the debate about the Children’s Television Act in which the NAB’s initial position was not favorable to the three hour guideline. As it happened, NAB came around and there was agreement on the three hour processing guideline that was ultimately adopted and there was no litigation. I sort of felt bad about that, as a litigator, since I would have handled it, but [laughter from the crowd] but I assume that we will have some litigation down the line. Somewhere, sometime, perhaps soon, some broadcaster is not going to do three hours of something that is educational and will not perform some reasonably comparable services. The Commission will presumably do something other than unconditionally grant renewal of the broadcaster’s license and we will then be smack in the middle of a debate first about what standard of review ought to apply and then how it ought to be applied. And as I say, if I am handling it at the time, I intend to use CBS as my leading precedent.

We managed to get a little mileage out of auctions from the D.C. Circuit last summer in the DBS case.\(^4\) I am not sure you are aware of the stat-

\(^3\) Id. at 394.
\(^4\) Time Warner Entertainment Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996).
ute governing direct broadcast satellite licenses says that, in return for one of those licenses, 4 to 7% of the channels have to be set aside for non-commercial educational programming. That provisions was challenged by Time Warner in the DBS case, which we called "the kitchen sink" case because Time Warner just went through the 1992 Cable Act and claimed that virtually every provision was unconstitutional. We won in the D.C. Circuit last August on all issues, and the panel mentioned prominently in the DBS set-aside portion its decision that, although we gave the first DBS licenses away for free under the old regime, we are now auctioning them. It noted that MCI had paid six hundred eight-two and a half million dollars for a recent DBS license. MCI presumably discounted its bid to take account of the fact that it was going to have to set aside four to seven percent of its channels for non-educational programming. These auctions point up the fact that there really is an "in kind" trade going on, and, if the 4 to 7% set aside isn't permissible, at the least there ought to be a re-auction, one would think, so the government can obtain the full value of the spectrum "in cash" rather than partly "in cash" and partly "in kind."

But getting back to television licenses, the Commission does not have authority to auction broadcast licenses right now and, as many of you probably know, a big issue that will get resolved in stages over the next couple of years is what to do with the new digital television licenses. What the broadcasters would like is for each existing broadcaster to get a new digital license for free that would allow them to carry four or five channels of broadcasting or do high definition TV or do a couple of channels of broadcasting and do other services like perhaps cellular service, and without any concrete public interest requirements attached.

It is not entirely clear exactly how the public will be guaranteed some return on the lease of public spectrum. The cleanest solution, from a constitutional point of view, would simply auction these licenses, put the proceeds in a trust fund, and use the interest to do all the sorts of things on the "positive" side that Congress would like to do. It is interesting, by the way, when you start to look at the numbers, that you could triple the budget of the Corporation for Public Broadcasting, fund the FCC, give money to political candidates equal to twice what they currently spend, and still have a lot of money left over. And that is based on a conservative estimate of the value of the spectrum. However, that doesn't seem to be in the works and I think, therefore, that we will proceed on the current path which is, as I have said, basically an "in kind trade" model. The broadcasters will get the spectrum, but they will be required to serve as public trustees in response, and we at the FCC will have the job of trying to make sure that the public gets something out of this deal. I would hope that making the broadcasters' promises as concrete as possible before the digital licenses are issued would be a big step toward achieving that goal.

In that connection, one of my other favorite analogies is to broadcast and cable. The broadcasters constantly complain that they're treated as a second class citizens. In fact, that is not true at all. Cable operators have to string their wires across public rights of way and have to get permission to do that on an exclusive basis. The norm in this country is that cable operators pay a licensing fee of 5% of their gross revenues. Federal law actually capped it at 5.6 If the localities could charge whatever they wanted, they would get more. And in addition, cable operators commonly set aside "PEG" channels - Public, Educational and Governmental channels - that they more or less turn over to the local franchising authority. The net result of the license fee and the PEG channels - which are "in kind" payments - is that typical cable operator pays eight to nine percent of its gross revenues to the locality either in cash or in kind. That is a pretty significant amount that, frankly, dwarfs the rather minor burdens placed on broadcasters. Anyway, that is one of my favorite analogies and I hope to continue to bring that up.

One other point I would like to make to this group is that one of the most interesting decisions that was made in this area was made in 1952 in the original decision issued by the FCC that essentially fixed the TV station allotments as we have them now. Part of that decision was that 25% of the channels were reserved for noncommercial educational use and now is the PBS system. I think it is interesting that nobody ever challenged that or ever thought that was a questionable sort of thing for the government to do. Obviously,


everything we do in this area is challenged vigorously today.

But it seems clear that we could do some other things comparable to the 1952 set-aside. For example, there is no reason that a broadcast license has to be for 24-hours a day. We could reserve 25% of that for PEG type purposes for the government to program as it chooses. I think, as you probably do, that we are better off with the current system. We are better off letting the licensees provide educational programming or other forms of public services themselves. They certainly prefer that. But it is odd how some of these alternatives, which are more burdensome from the broadcasters’ perspective, would probably be easier to defend.

Let me take one minute to discuss sex and violence, because I know others will have a lot to say about that. That’s the “negative” side of broadcast regulation. We won a case in the D.C. Circuit in 1995 before the en banc court called the ACT III case. It was my first step into sex and violence. We won seven to four in the D.C. Circuit. The Supreme Court denied certiorari, so that case is over. As you probably know, we ended up there with a 6 a.m. to 10 p.m. restriction on indecency, or a 10 p.m. to 6 a.m. safe harbor, depending on how you want to look at it. The court applied strict scrutiny and we prevailed under its application of that standard. In my view, the leading case in this area is Ginsberg v. New York, the decision from 1968 involving the sale of Sir magazine, which was a competitor to Playboy. That is, it was indecent, but obviously could not be considered obscene under any standard. And basically, the rule from that case, which remains the rule today with respect to magazines, is that you can sell whatever you want to adults, but you can’t sell whatever you want to people under a certain age. That case, I believe, involved a 16-year-old. The problem in broadcasting is that you don’t have someone at the point of sale to check viewers’ age. You don’t have the sales clerk to control the sale. Again, the broadcasters like to say that they are treated so much worse than everyone else. But I don’t think you could sell Sir magazine in a vending machine out on the street. And I don’t think you could put pictures from Sir on a billboard on Connecticut Avenue either. It seems to me that you can take some reasonable steps with respect to children.

Violence – when I first started thinking about television violence, I had the ACT III model in mind and my first take on it was that the main difference between violence and indecency is that there was a whole lot more scholarly literature showing that there is a real danger from children watching violence than indecency, and therefore a safe harbor of the sort that got approved in the ACT III case ought to work for violence as well. And Senator Hollings has been supporting a time channeling bill for violence for a long time. Of course, what we have ended up instead with the V-chip.

Let me just close my brief comments by saying if we get around to litigating that, I think the most useful case will be Meese v. Keene. That is the case from about ten years ago involving the requirement that films produced by foreign government have labels on them identifying them as “propaganda.” That requirement was approved by the Supreme Court, and in its opinion the Court said a lot of nice things about labels. And if a rating system can be viewed as a label – which it plainly can and should – that seems to be the way it ought to be defended. Well, let me give everyone else a shot.

Dale Kunkel:

Good morning. I don’t know many of you here and that is because I come from a different background, not a legal background. You’ve just had Chris give you a solid dose of legal perspectives on these topics. I am going to try to give you a small dose of historical and probably a heavy dose of empirical perspectives on the topic of children and media policy. My background is as a psychologist and someone who studies how children make sense of television; that is, how children of different ages understand messages in television content and then how they are influenced by that message.

I have suggested that there are three primary types of policy concerns that encompass the whole realm of children and media policy. The first deals with the adequacy of television’s service to the child audience. Children of different ages un-

7 Action for Children’s Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995).
8 390 U.S. 629 (1968).
derstand the world differently, but we have, as Chris underscores, one medium reaching all children. Imagine that you are an elementary school instructor. Could you envision using one book to teach children of all ages to read? Of course not. Children of different ages have differing capabilities. What is simple to a 10-year-old may be challenging to a child aged eight and incomprehensible to one aged six. Unlike print media, however, television rarely addresses its content to any subset of the overall child audience. And so when you ask is television adequately serving the needs of children, you can’t think of children as just a uni-dimensional construct. We have children of different ages who have different needs. And so the proper question is: is television serving the needs of children of all particular age ranges?

The Children’s Television Act speaks to this issue by saying broadcasters must provide content specifically designed to serve the needs of children. It doesn’t say it has to be age specific, but it says it has to be “specifically designed.” I have pleaded to the Commission that content cannot be specifically designed for children if it doesn’t take into account the age of the intended audience that it’s targeting, and the related learning needs and capabilities of that audience. But I am not going to focus on this first type of issue today.

The second of the basic concerns in the realm of children and media policy is the question of the fairness of advertising to children; in particular to children who we know from psychological research are too young to recognize and defend effectively against commercial persuasion. Here there are two fundamental types of evidence that are relevant: one that looks at the age at which young children first develop the skill to discriminate at a perceptual level television programming from advertising. To a very young child, television is initially a stream of messages on a screen. There are no categories used to differentiate these messages in any way.

Children first develop the ability to discriminate programs from commercials at a fairly young age – about four to five, depending on the individual. But that is only a necessary, though not sufficient, skill to “defend” against televised commercial persuasion. The more important cognitive capability here is the ability to recognize the persuasive intent that necessarily underlies all television advertising. Here, advertisers often assert that children at about age five or six can recognize that an ad wants you to buy the product. You’re a parent and you ask your child what that ad wants you to do. The child may be able to say “that ad wants me to buy something.” Yet there is more to understanding persuasive intent and defending against it than this simple understanding.

To have mature understanding of television advertising as a persuasive tool, one must understand that there is a source of the ad, that the source has interests that are different than the receiver, that the ad therefore is necessarily biased (e.g., will present the product in ways that are only favorable to the source’s perspective), and that messages that are biased demand different interpretive strategies than unbiased messages. Children generally don’t develop this level of comprehension until about age seven or eight. That is the point in time – the youngest point in time – when most psychologists would say that it would be fair to target young children with television advertising. But I am not going to talk about that today, either. [laughter from audience]

The third key type of issue and the one that I want to focus my remarks on deals with the adverse effects of program portrayals. I’ll choose my terminology carefully here, but what we are talking about is harm. These terms such as “adverse” or “harmful” necessarily involve value-oriented perspectives. But there is a societal consensus that promoting violence and aggression is harmful. It is not scientists playing social engineers saying here’s how we define harm; rather researchers clearly specify what types of effects can be identified in children who are exposed to certain types of material, and then the societal consensus comes into play in terms of the value filter about the implications of those outcomes.

The adverse affects of program portrayals are largely considered unintended effects of television content. And, I certainly think that is the case. I don’t believe that Dick Wolf, producer of a great deal of violent programming on television, really intends to change children’s attitudes and behaviors in a more anti-social or violent way. But, nonetheless, in making his programs that have a typically violent theme, that is the outcome when children view them, as we will see in a moment. This third area also encompasses indecency regulation as well as other realms that
would — depending on one's value perspectives — generate adverse effects from program portrayals.

Let's start with a little bit of a historical perspective on TV violence. If you go back to the earliest days of television in the 1950s, the Senate Committee on Juvenile Delinquency held the first Congressional hearing in 1954 and immediately drew the conclusion that television violence was contributing to violence and aggression in society despite the virtual absence of any scientific or empirical evidence on the topic. That didn't necessarily get things off on the right foot in terms of the linkage between research and policy. It did, however, serve as a catalyst to get researchers to investigate. Psychologists began to research this topic very actively later in the 1950s, so that by the 1960s we began to see the emergence of some solid evidence. This work implicated television violence in terms of influencing young children's attitudes towards aggressive behavior as well as increasing their likelihood of behaving aggressively after viewing televised violence.

Interestingly, while this information was developing in the 1960s, not all studies generated the same findings. In general, researchers only draw conclusions across studies, at least conclusions of any substance or consequence. We might say that one study generates this or that finding, but that is with one sample and one stimulus program and so forth, but we only draw solid conclusions across studies. And as the evidence was mounting up on TV violence effects, and looking collectively at the accumulated body of research, it was often the case that some studies didn't discover the effects that other studies did in terms of a child viewing an aggressive program and them responding in a more aggressive fashion. This puzzle wasn't really unraveled at the time, although we know today, with another twenty-five years of accumulated research evidence, that one reason all the studies didn't generate the same sort of uniform findings is that violence is not a uni-dimensional construct. That is, all types of violent portrayals are not necessarily the same.

There are many different ways in which one can depict an act of violence. It can be presented explicitly or implicitly. Violence can be shown at a distance or close up with graphic displays of harm or blood and gore and so forth. It can depict negative consequences for the perpetrator of the violence. It can depict the violence as being successful and rewarding or rejected and punished. Few of these factors were being examined back in the early research. Yet as it turns out, some types of violent portrayals pose more risk than others for harmful impact on the audience. It took some time for the scientific community to develop our thinking and our theorizing about the various types of depictions. But, that was coming together by, I would say, certainly the 1980s.

In the 1970s, there was a very important development from a policy perspective in this realm of TV violence that is almost lost history today. The U.S. Surgeon General had been commissioned by Congress to "answer once and for all" the issue of whether TV violence contributed to children's aggressive behavior. The Surgeon General's conclusion was modestly equivocal. It indicated that some violent depictions influence some children to behave more aggressively. Not all violent depictions cause the effect and not all children will be affected. The story of this report was broken first by The New York Times, which had obtained a leaked copy. The story was written by the television beat reporter, not a psychologist or a scientist, and released a day before the Surgeon General's press conference. Because of the complex language in the report, the story was entirely misunderstood and headlined as "television absolved of culpability for increasing child aggression." In my estimation that probably set back public understanding in this area about ten years. The press reaction pretty much followed the pattern set by that story for many years.

By the 1980s, the public's understanding about TV violence began to improve because you had virtually every major scientific organization drawing the same conclusion: most depictions of television violence contribute to aggressive attitudes and behavior in child viewers. Organizations including the American Psychological Association, American Medical Association, National Academy of Sciences, National Institute of Mental Health, all issued the same finding. Finally, that information penetrated the public consciousness and so by the start of the 1990s you had a situation where 80% or more of the American public believed that television violence contributes to aggressive behavior in child viewers. While it is essential to have the scientific base to pursue policies in this realm, it is critical from a political perspective, to have the public understanding and support to
pursue any policies in this area. By the 1990s both of these elements came together and that is why you see the movement that we have today to address the problems of TV violence.

The television industry responded to the strong concern in the early '90s about TV violence by acting on a plea from Senator Paul Simon, who had asked the industry to hire independent outside monitors to review the way in which violence was presented on television; in essence, to give the industry a report card and hold them accountable for their public commitments to reduce harmful depictions of violence. Two studies were commissioned in 1994, one funded by the broadcast industry, and a separate study funded by the cable industry. I am involved with the cable industry funded study, called the National Television Violence Study. NTVS involves leading researchers at four major universities. My team at the University of California, Santa Barbara examines the content of most all programming on television, including both broadcast and cable. I'd like now to give you a brief overview of some of the key findings from the study. My goal here is to give you a flavor for the type of work we are doing, and to underscore how the approach of this particular study emphasizes the premise that not all violence is the same — that some depictions of violence pose greater risks than others for child viewers. The goal of this research is to identify the depictions that pose the greatest risk, to identify where they are located, and who is presenting them and how often.

There are three levels of analysis at which we examine the content: (1) the overall program level where our coders make judgments about a theme or message that would have been present or absent at the level of the entire program; (2) scene level measures — I'm sure you understand generally what a scene refers to; and then (3) interaction level measures. An interaction is the most micro-level of our content measures. It is an exchange of violent behavior typically involving two or more people within a scene. So that if I hit this gentleman in the front row, I am now a Perpetrator. I have engaged in an Act of violence by hitting him. He is a Target. Thus, we have a PAT (perpetrator-act-target) interaction. Next we classify important contextual features that are related to that PAT. We look at issues such as: was the violence successful; was it rewarded; was it justified; and elements that are important in terms of understanding its likely effects.

Here's a summary of some of the key findings at, first, the program level. The first statistic at the very top of this figure is the least informative, nonetheless it is the one that gets the most attention in the press. It tells what proportion of programs contain any violence: 57% in 1994-95. Of that 57% if you go down to the middle of the table you see that only 4% have an overall anti-violence theme. An anti-violence theme is a program that underscores the pain and suffering of victims, that emphasizes alternatives to violence, and so forth. I just don’t have the time right now to go into detail on some of these measures, although all of the intricacies are included in the full report. My point here is that you shouldn’t necessarily assume that all violence is problematic violence. Nonetheless, we start at the level of identifying all violent acts and we see that over half of all programs on television contain some violence.

Next, you see that nine or more violent interactions appear in 33% of all violent programs. In other words, we see that one-third of all the violent programs have a relatively high amount of violence. Still, that doesn’t tell us about the context.

The more important factors are near the bottom of the table where it reports the pattern for depicting long-term negative consequences. Only 16% of the programs portray long-term negative consequences of violence. That would include the psychological harm of losing a loved one who was killed as a victim of violence, the economic hardships that might accompany a widow, the physical hardships of a victim crippled by violence. While there are many different ways of depicting long-term negative consequences, programs typically present few of them.

Next consider the contextual measures at the scene and interaction level. You see that at the scene level, nearly three out of four depictions of violence contain no punishment for perpetrators. This statistic was attacked by the Hollywood creative community. They said "You guys are supposed to be the watch dogs, and you’re telling us that we’re bad because three out of four times we write scenes that don’t contain punishment for

See Appendix I.
the violence within that same scene." (In fact, the measure considers the subsequent scene as well, but essentially it's a fair allegation.) They say, "How could I possibly write a good story that would have someone committing a violent act and being punished within the same scene? There is no suspense. There is no drama. That's silly. No one could do that." My response is — you're absolutely right — if your concern is solely with audiences of adults.

This statistic is not meant to be prescriptive information that should be applied to all situations. It's descriptive and has a particular purpose. This statistic is particularly meaningful for understanding how children will comprehend and be affected by portrayals of violence. Young children below the age of about seven to eight do not do a good job of linking cause and effect between scenes that occur early in a program and scenes that occur late in a program. A young child viewer who sees an act of violence early in a program and then sees it punished with the perpetrator being taken to jail later in the program will typically see these actions as discrete, unrelated events and the initial violent act, therefore, will be understood by a child viewer as violence that went unpunished. If you know the psychological literature, you know that violence that is unpunished increases the risk of a negative effect, of promoting aggressive attitudes and behaviors. So you can see, then, that the presentation of punishments within scenes has big implications for risk for child viewers.

One of my final points here involves the implications of these findings for the V-chip. The V-chip is a system that is designed to label programs. It's not inherently meant to provide a value judgment, although it may be evolving that way because of the implementation decisions made by the television industry. It certainly could be a descriptive system. It could be content-descriptive rather than age-based prescriptive as the industry has chosen to apply it.

If a content-descriptive approach was ever to be pursued, the findings that we've got here in terms of the measures for scenes and interactions would provide an excellent foundation for identifying and labeling the risks associated with different types of portrayals of violence. You probably can't do that in the current age-based system because it is too simple and basic and doesn't really indicate any consideration of content at all. The current system doesn't have the capability of levels for describing different types of content, such as a V 1-5. And so I don't think it's possible to apply the richness of the measures from the NTVS research to a system that is so rudimentary as the industry's initial V-chip rating plan. Should that plan, however, be replaced or supplemented by a more content descriptive system, this study would have much to contribute to the categorization of violence based on its risk of harm to the child audience.

Catherine J. Ross:

I've been asked to reflect on the historical and cultural context for the current debate. I take a different view of history than Dale because I have been a professional historian as well as a law professor. Because time is so short, I'll risk some loss of nuance in expressing three very simple ideas. First, societal anxieties that associate young people with disorder, violence and sexuality have a long historical lineage — even though our concepts of childhood have changed over time. Second, each new form of entertainment to emerge, from dime novels to nickelodeons and pinball machines, from silent movies to TV, radio and Internet has often been targeted as a cause of youthful disorder and immoral conduct. Third, there is a larger premise that may be so fundamental that it gets lost in the current debate over children and media: law and regulation are imbedded with social norms masquerading as either scientific findings or analytically derived legal certainties. The endurance of societal anxieties about the moral dangers facing youth lies at the core of the current debate on regulating children's entertainment. These fears are so resonant that they offer a temptation to overlook fundamental First Amendment and other liberty interests, including a risk of redistributing the power to control children's access to materials from parents to the regulatory state.

As to the first point, a psychiatrist who works with juveniles in Manhattan's Children's Court described the "shock of meeting youngsters under the age of sixteen who rob at the point of a gun, push dope, rape and kill ... boys of seven, so small they could barely clear the desk who had sold themselves to sex perverts; others had shot
out kids’ eyes, or had clubbed or knifed them, just for the fun of it.” It would be tempting to draw on a wealth of social science literature to attribute these tragedies, at least in part, to exposure to violence and sex on television. But, despite the temptation of clean explanations, the author wrote in 1954. And with all due respect to the Senate Committee that Dale mentioned, in 1954 very few American families even owned televisions and the nature of shows was considerably different than it is today. Indeed, this psychiatrist’s comments, with many more gruesome details, appeared in the *Saturday Evening Post*, a publication aimed at Norman Rockwell’s America which arrived in my own home weekly and was considered ideal reading for the whole family. The idea that there is trouble in River City and that is attributable to idleness, lack of adult supervision and the temptations of the imagination is hardly new.

But before I compare some of the concerns being voiced about modern media with former efforts to shield children from potentially harmful cultural influences, let me say a few words about the social construction of childhood itself. The underlying premise of children’s moral vulnerability that has informed the three themes I outlined earlier is based on a relatively recent view of childhood as a period of exceptional vulnerability and innocence. Historians have noted the integration of the worlds of child and adult as late the 16th century. Adults and children played the same games and joked about the same things, including sex and sexuality — material that would not be allowed in school libraries or the broadcast media during the “safe harbor” today. For example, the diary of the physician to the royal family of France reveals coarse and indecent joking with the Dauphin as a young child. When Louis XIII was a small boy, the diary reports, and I quote, “in high spirits he made everybody kiss his cock.” Before our modern phase of western culture, people didn’t worry so much about exposing children to death, violence or sexuality. Bear in mind that public executions were a leading form of popular entertainment to which families brought their children. Only after people began thinking of children as innocents who had to be protected did it occur to them, for example, that children should have their own separate reading matter or that certain artistic classics should be expurgated or Bowdlerized (in honor of Mr. Bowdler) especially for children.

In western bourgeois society, then, a new view of children emerged and that change placed children at the center of recurring debates on public regulation of entertainment and morality. In the late 19th century, educators and social reformers emphasized the importance of teaching children the puritan virtues, including self denial. And they self-consciously proclaimed the need to prolong innocence as long as possible. Today, most observers attribute numerous vulnerabilities to children, including inexperience, lack of education, lack of judgment and mature intelligence or, to frame it more negatively, naiveté, foolishness and irresponsibility. Adults, including those involved in making law, normally assume that the “different” way children look at the world is a “defective” way which they will outgrow.

These disturbing attributes of childhood were summarized by the Supreme Court (Rider 27) throughout *Bellotti* “peculiar vulnerability of children; [and] their inability to make critical decisions in an informed, mature manner . . .” The modern Western construction of childhood is thus ensconced in law and commonly supports the view that to the extent that children have any protected liberty interests under the Constitution, those interests may be constrained by the state in ways that would not survive constitutional scrutiny if applied to adults. Here, of course, lies the heart of the controversy on which we focus today, for the *Bellotti* Court also acknowledged “the importance of the parental role in child rearing” (Rider 27A) How far should the government go in putting teeth into the frequently cited dicta that “it is cardinal with us that the custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”

From a very early point in our jurisprudence, the primacy of the parental role was subject to parameters that were defined by social norms. These norms were enforced by moral gatekeepers and related constituencies that turned to the state and to law to enforce a vision of morality that included limitations on the external influences to which young people could be exposed. If any one person sums up the movement for state regula-
tion of entertainment to protect children, it is Anthony Comstock. Perhaps some of you recognize his name from Justice Douglas’ dissent in *Ginsburg v. New York* where the court upheld a special standard of obscenity for minors, as Chris mentioned earlier. Justice Douglas reminded us that Comstock waged war against obscenity from 1872 until he died in 1915, primarily as a United States Postal Inspector who was licensed to seize and destroy offensive materials under the provisions of a federal anti-obscenity act, adopted by Congress in 1873 largely due to lobbying by Comstock and his allies. (Rider 28)

Moral crusaders demanded that the state protect children from a seemingly endless variety of cultural dangers including: dime novels and serialized tales; story papers; books plays and paintings, including the classics, that might “arouse in young and inexperienced minds lewd and libidinous thoughts”; literature on contraception; illustrated newspapers depicting vile crimes that really happened; stage plays of “beastly character”; confectionery stores which sell prize chewing gum or run candy lotteries; and observing adults drinking alcohol or gambling. The Society for the Prevention of Cruelty to Children proclaimed that many a girl was ruined at the ice skating rink. Residents of small towns bemoaned the groups of boys who hung around confectioneries and train stations while their urban counterparts began to worry about the moral impact of movie theaters and automobiles. In crude anticipation of social science studies appearing today, late 19th century reformers began to count the instances of violence in novels. In one novel alone they lamented the hero gets into, among other things, five plain fights, seven fights with four or more men, is shot or attacked with knives twelve times and hurls twenty-one men through the air. Many progressive reformers attributed all forms of adolescent acting out to such cultural influences. Such acting out culminated in the juvenile crime witnessed in the newly formed juvenile courts. They insisted that the government ban these forms of amusement because too many parents were simply unaware of the noxious material their youngsters had hidden in their book bags. It's worth noting that such efforts flourished during a period of enormous social turmoil fueled by, among other things, unprecedented rates of immigration by a new type of immigrant who brought different looks, culture, and language to our shores. It was also a time of teeming slum life in growing urban centers and a sense that our society consisted of “us” and “them” to an unprecedented extent.

And this brings us to my third point: the relationship between social construction and social reality in the current debate. The contemporary anxiety about the nexus between child development and popular culture, whether it's rock lyrics, TV or the Internet, is sometimes couched in the secular language of the social sciences and sometimes in overt religious concern about morality. But in each instance, the underlying concern invests a great deal in an *image* of childhood that does not always conform to social realities. For example, proponents of the Communications Decency Act argue that it merely helps parents regulate their own children’s viewing. It’s possible that mandating provision of equipment to enable parents to block categories of shows more efficiently may withstand constitutional scrutiny. The problems lies, of course, in the rating system itself. Poll data indicates that parents want the kind of information Dale was talking about that would help them make choices informed by their own values and by the particular child whose viewing they are supervising. But this is not what the industry rating system proposes. The President has already declared that if parents remain dissatisfied with the ratings developed by the industry, he'll call industry leaders back in and start from scratch. This is a pretty diaphanous screen between government and industry code making. Edythe Wise has written a very interesting history of the FCC’s efforts to stem indecency, in which she explains that the concept of indecency has developed case-by-case, from an amorphous generalization poorly differentiated from obscenity into a concept intimately connected with the exposure of children to inappropriate material. In short, as various broader approaches failed to satisfy the courts, the Commission came to understand that the proclaimed goal of protecting children provided the biggest fig leaf – and to be sure there may be something underneath the fig leaf that most of us do not want our own children to see.

This use of children as a government shield from the First Amendment has largely worked until this past term in *Denver Area*. But as Justice Kennedy pointed out in a separate opinion in that case, the combination of new technology and the
weighty interest of the government in protecting children allowed the plurality in that case to evade any clear legal standard. Jack Balkin has addressed all of the ways in which ratings can promote self-censorship, and the ways in which ratings can force producers to flirt with getting to the edge of the line in an article in the Duke Law Journal. Ratings can also backfire. The subjects of regulation easily subvert it. My own ten-year-old begins with the presumption that a film with a PG rating should not be seen by a boy as sophisticated as he is. I can’t get him to go see those movies.

The debate over children in television tends to remove kids from their concrete world, whether that world is upper middle class suburbia or inner city poverty. The violence that children witness in their own families and their daily lives must surely be as significant to their development as what they see on TV. Yet as a society, we tolerate a level of violence in the inner city, where some children witness gun fire every single day on their way to school, that if fictionalized and broadcast would be deemed entirely unsuitable. As the local debates over school curricula in libraries over the last decade make clear, organized interest groups prove very powerful in leading to compromise of fundamental First Amendment interests. Government agencies that of necessity choose among various speakers, as schools and librarians do, have not demonstrated a convincing ability to withstand the pressure of such groups about what is appropriate for children. The potential for both formal and informal coercion is immense.

Similarly, our experience with the administration of vaguely worded child neglect laws underscores the dangers in recent moves to regulate children’s media under the guise of helping parents. Child neglect laws give enormous discretion to agencies and courts with dangers of personal interpretation and resulting disparate impact on the poor and the rich, the non-conformist and the conformist. To paraphrase the court in Cohen, one parent’s vulgarity may be another’s lyric. Will parental unwillingness or inability to use the rating and blocking systems present the same risk of government intervention into families revealed in cases about households deemed too dirty, too full of animals, or simply too poor to provide an appropriate environment for children? When government gets involved in the effort to protect children from disturbing imagery, it endangers essential legal, social, and family values that rest solidly in First Amendment and other liberty interests. Extreme caution is warranted in using children as an excuse to label and limit communication.

Jack Balkin:

I want to talk about three things today. First, I want to talk further about some of the things that Catherine Ross just raised concerning what I’m going to call the problematization of children. Second, I want to talk briefly about possible constitutional problems that the V-chip and the new ratings system raise. Third, I want to talk a little bit about problems with the V-chip that aren’t really constitutional, but are nevertheless worrisome. They are the kinds of problems that arise whenever you try to put any rating system into practice; and they apply to Internet ratings systems as well as the V-chip.

I’ve just suggested that children are “problematized.” What does this mean? Well, I simply mean that at certain points in history, certain kinds of questions become a central focus of concern; they become the lens through which all sorts of other issues are imagined and discussed. “Problematization” means that something becomes increasingly thought of as a problem, a recurrent object for analysis, discussion, worry, and concern through which many other things will be understood, categorized and addressed. When something becomes problematized, people tend to focus on it; indeed, they may tend to focus on it obsessively.

This is not to say that what gets problematized isn’t something important or something people always worry about to some degree, and rightly so. That’s probably one of the reasons it got problematized in the first place. After all, people love their children and have always been concerned about their welfare. But I’m concerned here with the notion that people focus obsessively on children as a recurrent trope for understanding society or as the master story for discussing and solving social problems. It becomes a sort of all-purpose way of formulating issues.

What explains this problematization of children? Catherine has pointed out that this is not the first time it’s happened. Behind this phenomenon is an important concern: How can we or
should we regulate culture given our commitment to free speech? We want to shape and control the development of our culture, and we also want to protect free speech, but these desires clash with each other. Hence the turn to children as the master trope, the perspective through which we can talk about cultural control, while at the same time professing our respect for freedom of speech. Because children have fewer first amendment rights than adults, because children need to be protected, shaped, educated, and so on, and because children are the future of our culture, we can reconcile our conflicting desires by viewing all cultural issues in terms of children and their interests and needs.

This approach has advocates both on the left and on the right. The right wants to ban smut. However the communitarian left is very interested in stamping out misogyny and racism, and promoting civic virtue.

Problematization often comes complete with paradigm cases of concern. When the Computer Decency Act was being debated in Congress there was a Time Magazine cover featuring a cherubic looking six-year-old. His face is illuminated by the light of a computer monitor in front of him. His eyes are wide open in surprise – he’s just stumbled upon some horrible thing on the Internet. The magazine doesn’t show us what he’s watching, but you just know from his expression that it must be something quite terrible. That’s the paradigmatic image that Congressmen and other politicians have been promoting. In fact, however, people are really worried not about six-year-olds who accidentally stumble upon naughty Web sites, but teenagers – sixteen- and seventeen-year-olds – who are actively looking for these sites. These teenagers are much more technologically sophisticated than their parents, and as a result, these teenagers are getting remarkably and dangerously close to being beyond the control of anyone. Well, they are probably already beyond the control of anyone [laughter from audience].

As a result of these concerns – and this is related to Chris Wright’s remarks – we are witnessing a movement from Red Lion to Pacifica as the governing theory of content-based regulation of mass media. These two cases have very different effects. Red Lion is based on the rationale of scarcity; Pacifica is based nominally on something called “pervasiveness.” But really it’s a protection of children rationale, although it’s unclear whether the rationale is the protection of parental control over children or the protection of children regardless of what their parents want.

The move from Red Lion to Pacifica is a move from a concern with what must be on television to a concern with what must not be. The scarcity rationale is a much better justification for talking about what you have to put on. It’s much less good as a justification of what should be kept off, unless you are going to dictate virtually the whole of the programming day on the grounds of scarcity.

Children’s programming – for example a requirement that networks commit to three hours a week of “high-quality” programming designed for children – makes much more sense in terms of the older Red Lion vision than in terms of Pacifica, which mixes issues of parental control, harm to children and privacy.

Nevertheless, Pacifica is becoming, I think, the key case that people will focus on in attempts to regulate both sex and violence. Why is this happening? To begin with, we must recognize that there is a very genuine cultural anxiety in this country. Such anxieties come in waves, produced by many different factors. We are now in the middle of a large scale change in the nature of our society, our mores and our economy. These changes produce lots of anxiety about what is happening and what the future holds. In such moments people try to cling to the world that they see slipping away from them. And they become like the drunk that searches for the keys near the lamp post because the light is better there. They focus on the mass media as the most obvious symbol of what’s happening and what’s going wrong with the world. People are tempted to think that control of the mass media might in some way counteract or ameliorate the many changes they see occurring around them. To be sure, the mass media probably are having some effect on social transformation, but it’s likely that many other social and economic phenomena are also contributing to changes in our values and our situation.

Finally, although people are worried about these trends – including changing mores, economic dislocation, changes in the composition and structure of the family, and so on – they feel they can’t really change them. Or at least they can’t really change them without spending a
whole lot of money, whereas regulating the mass media is what we might call an unfunded mandate [laughter from audience] as defenders of federalism call it.

We should not underestimate the genuine cultural anxiety and the genuine concern that parents feel about changes in family relationships in the last quarter of this century. There are many more single-parent households. In more and more cases where a child lives with two parents, both parents work. Those parents get to spend less time with their children. And parents feel more and more that they don't have any say in educating their children or in shaping what their children learn and assimilate. For many families the television is becoming the ad hoc baby-sitter.

We should also consider the role of accelerating technological development in producing cultural anxiety. One of the most interesting features of the technological revolution we're currently undergoing is that it creates an increasing skills gap between parents and their children. Parents look at their six-year-old children with amazement – they can already install software, log on to the Internet, crack Defense Department security codes. The parents, on the other hand, sit helplessly in front of VCRs that are blinking “12-12-12.” This emerging technology gap is related to Catherine’s story about the changing historical conceptions of the relationships between parents and children. In an important sense it represents something new: an accelerating technological divide in which parents see themselves increasingly baffled by the new technology, while they see their own children increasingly comfortable with it. They ask themselves: “What are these kids doing with this stuff that I can’t operate and can’t even understand?” That fear of an increasing technological gap between the generations shapes attitudes that parents have about their children; it underlies parental concerns about the Internet as well as television programming.

Behind the slogan of “protecting our children” are three different possible concerns. One is a concern about harm to children, another is the desire to make children better citizens, and the third – which I think is really at the heart of the current cultural anxieties – is the desire to promote parental control over children.

These three concerns are quite distinct from each other and may even be in conflict. For example, we assume that most parents love their children and want the best for them. Yet we usually do not sanction parents who make programming choices we would not make. Parents are perfectly free to bring R-rated movies home and leave them lying around, even though their children could put them in the VCR and watch them. Parents can also leave magazines and books with adult or violent themes within reach of children. If the state criminally punished parents for doing this, or brought them up on charges of child abuse, I think most parents would strongly object to this, including parents who are the most fervent supporters of better and cleaner TV.

My point is that most parents don’t want the government to sanction them for exposing their children to what the government thinks is harmful. What they want is to have more control over what their children are watching. This concern about parental control is not the same thing as a concern with protecting children from a state-enforced conception of harm. Different people may have different views about what is harmful to children. Some parents may not want their children exposed to evolutionary theory, others want them kept away from discussions of homosexuality, still others may want to shield them from reactionary views about gender or race, still others from violent depictions of war, endless streams of commercials, and so on.

A similar logic applies to the goal of fostering better citizens. What government policy makers think will foster better citizens may well conflict with parents' views about what is harmful to their children and may interfere with parental control. Some parents don’t want their children to be exposed to PBS – the great Satan of secular humanism. They may want to keep their children away from the kinds of things that others think will make them better citizens.

To be sure, one argument for regulation of television is precisely that “other people” will not control their children in the way you think best. These “other people” will leave their children in front of the television all day long, the children will absorb all of this violent and misogynist programming, and then they will go onto the playground and beat the stuffing out of your kids. This fear is related to the familiar claim that education is a public good: educating children and making them into responsible adults has positive
benefits for others who will have to deal with them in the future. Conversely, lack of education or bad education is a public harm; it imposes negative external costs on others. Perhaps this may be behind some of the calls for regulation of television. People may be thinking to themselves: "We've got to regulate what children watch because their shiftless, lazy, no-good parents won't do it, and as a result their kids will beat up our kids or be bad citizens and burdens on society." There are all sorts of elitist and class issues lurking beneath the surface here. But my larger point is that when the matter is put this way you can see that the conflict between protecting children from harm (as defined by elites or government officials) and parental control is pretty starkly posed.

This is the flip side of what Catherine was talking about earlier: she noted that an important question is whether government bureaucracy is going to take over the parental role. The movement for regulation of television programming may stem from a desire for parental control but it often ends up becoming a bureaucratic regime that ironically undercut parental control.

Now let me talk a little about some of the constitutional issues surrounding the new television ratings system and the V-chip. By now you've probably noticed that little icons like "PG-TV" are popping up at the beginning of each program. The networks and some cable programmers have started implementing the Valenti Commission's ratings system, which is based on the MPAA movie ratings system.

By law the industry was required to put a ratings system in place by the beginning of 1997, subject to what I call the "fail-safe" provisions of the 1996 Communications Act: if the industry didn't put anything in place, then the FCC would appoint a bunch of experts to come up with something. In fact, the safe-provisions do more that this: if the FCC doesn't like what the industry comes up with, it can reject it and appoint a panel to devise an alternative ratings system.

Here's where the constitutional issues come in. Meese vs. Keene aside (I'll come back to it in a second), there's a serious constitutional problem with imposing a particular rating system and requiring that the broadcasters use it in their programming. The V-chip legislation is actually cleverly written to avoid this constitutional difficulty. It only says that if you already have a rating system, you must encode it for the V-chip that we're going to require be put in all television sets. What's left open is whether or not the FCC has the authority or the power to require that its own rating system be used by broadcasters and put into TV broadcasts.

That second question is constitutionally much more dicey. With all due respect to Chris, I don't think Meese vs. Keene will get you there. After all, Meese involved the application of a statute to a person who was not actually bound by its requirements; he simply objected to the government's labeling of a film on acid rain as "propaganda." But normally the government is free to engage in its own speech, including creating a system of classifications. Surely one can't object to the Library of Congress cataloguing system because the government has created it and uses it in its own libraries. But if the government required all libraries (whether public or private) to classify their books according to that system, there might be a problem.

Moreover, the V-chip ratings system is more than simply a neutral apolitical classification system, it's more than simply a question of labeling. It sends a whole bunch of other messages as well, some of which I'll discuss in a moment.

In any case, I don't think that the FCC really has to impose its own system on the broadcast industry. And I doubt that it really wants to. Rather, what the FCC may want to do is simply use its persuasive power to jawbone the industry to come up with something it likes a little better without actually threatening that it will scrap the whole system and put its own system in place. There are lots of ways the FCC can do this. So the FCC doesn't have to mandate anything, and I suspect that's probably how they will proceed if it finds the Valenti proposals sufficiently unsatisfactory. It's not an either-or situation: either the Valenti proposal or an entirely new system. Of course, in public Valenti apparently has been adamant: it's my way or the highway, he's said. But again, this strikes me as being the opening bargaining position rather than the final result. Chris might know more about that than I would.

Now I'd like to discuss a slightly different set of issues concerning ratings systems. The present ratings system is aged-based. Dale Kunkel has pointed out the benefits of an informational sys-
tem that is content-based rather than age-based, because it is more useful to parents. I think this choice is importantly related to whether the V-chip is justified on grounds of parental control or harm to children. If you think it's about parental control, then obviously, you want to foster choice; but if it's about harm to children, you might actually want to reduce the options parents have.

With a system like the proposed Canadian one - with three content categories each rated from 1 to 5 - parents have much more opportunity to fine tune what they want their children to see. On the surface, at least, it seems to offer them much more control. But this is not completely the case because we have yet to discuss what is in those content-based categories. And there is a further problem, which I'm sure that Valenti and his associates were worried about.

The more categories you create, the more difficult it is to create a simple and efficient blocking mechanism. That's really what the V-chip is - a blocking mechanism. The goal is to create a blocking mechanism that is simple enough to be used by technological idiots, but that is also effective enough to keep away people who are much more technologically sophisticated - that is, children. This not a problem of constitutional law but of technological design. The dead-bolt lock is a good example of a simple and effective blocking mechanism. It is easy to operate. Even an ordinary 35-year-old parent can operate it. On the other hand, the dead-bolt lock is often very effective at keeping certain kinds of people out. So what the V-chip system really needs is something technologically equivalent to the dead-bolt lock. Nevertheless, you face problems of how you're going to design it, how many categories there will be, and so on. And then there are problems that inhere in any ratings system. Let me mention a few of those right now.

Any rating system, whether it's designed by Jack Valenti, or whether it's designed by Dale Kunkel, or whether it's designed by your favorite media maven, has two problems. One is the problem of coarseness, and the other is the problem of equivalency. By coarseness I mean the number of possible categories you use - the number of possible boxes to put things in. The fewer categories you have, the coarser the ratings become, and the less flexibility you have in designing it. On the other hand, the more categories you have, the more difficult the system is to implement. So there is usually a tradeoff between coarseness and ease of use.

If coarseness is the question of how many categories or boxes there are, equivalency is the question of what gets counted as in the same category, or put in the same box. Equivalency is not the same as coarseness: Imagine a system in which you have only two settings - call them "sacred" and "profane." (The V-chip sort of reminds me of these anthropologist's categories). In one ratings system, homosexual conduct is considered "profane," and in the other system, it's in the "sacred." Everything else is kept the same. Note that these two ratings systems are equally coarse, but they make very different things equivalent. In the second system, homosexual conduct and Walt Disney specials are in the same box, and in the first system, homosexual conduct and slasher films are categorized the same. The two systems are equally coarse, but the point is that what each system calls equivalent, makes equivalent, is different in each.

Coarseness is a problem for parental control because it undermines your ability to fine tune what your kids watch. But the problem of equivalency is, I think, even more problematic from the standpoint of parental control - and from the standpoint of having informed parents. The organizations who rate programs get to decide what gets rated as equivalent to what. Take a horror film where a woman is slashed by some nut in a hockey mask who terrorizes women and then laughs about it. Now take a film in which two men fall in love and are kissing. Are these equivalent or not? It depends on the ratings system we use.

Take two men kissing and a man and a woman having sex. If you say they are both examples of sexual content, will one be rated 5 and the other 4, or will they both rated in the 4 category? Or consider dirty words. Consider the example of sex - the F word - and racism - the N word. Which gets rated higher, the F word or the N word? Or is the F word equivalent to the N word? In one version of the Canadian ratings system I believe that the F word was rated as worse than the N word. But it doesn't matter - either way, there's going to be a politics involved in the choice.

Thus, even though what we would ideally like is a sort of value-free social-scientific vision that is
merely descriptive, and simply empowers parental choice, unfortunately, that's not what we're going to get in practice. What were going to get in practice are decisions about what's equivalent to what. These decisions are going to be written into the code of the V-chip system, and they are going to be used to block out things. And this system of equivalencies is going to have significant political effects. This is unavoidable even if it is not desirable.

Rating homosexuality is one example where these effects will be quite important. Societal attitudes about homosexuality are changing. They have been changing over a period of time, but the change is accelerating. This is a difficult and problematic time to be deciding what will be considered to be equivalent to what. It is likely – here I am just being pessimistic – that scenes that make fun of gay people will be treated as much more appropriate for children then any genuine expression of affection between homosexuals. The latter situations will probably be considered appropriate only for more mature audiences. And this choice does have a definite political spin. It will probably be defended on the grounds that broadcasters don't want to be controversial. But what's implicit in that choice is that making fun of gay people is not controversial. On the other hand, showing gay people kissing or as being ordinary people who have loving relationships with each other will be seen as a very controversial idea that will involve a high level of sexual content in the ratings. Of course you could design a rating system in which both heterosexual and homosexual expressions of affection are considered equivalent sexual content. You could devise a rating system in which homosexual affection is seen as just as normal as heterosexual affection. But I doubt anyone will understand that choice as nonpolitical and value neutral.

These are some of the problems that face us in trying to put a viable V-chip system in place. The problem with the Valenti proposal – and I think this relates to Dale's concerns – is that it basically sweeps all of these issues of coarseness and equivalency under the rug by basically hiding everything under age-related categories, so that you don't really know what is being made equivalent to what. Because you don't know, you are less likely to complain. That's a good thing from the standpoint of the industry, because if people actually did know what was being made equivalent to what in these age-related categories, different groups would complain very loudly on many different fronts, making varied and possibly inconsistent demands. But the jury is still out on whether it's a good thing from the standpoint of the public.

Lili Levi:

Thank you very much to all the panelists. We have heard many interesting things. Let me take a moment as moderator to comment on some of them. The argument for the "need" for child-protective regulation appears to rest on two sorts of assumptions: one, that the electronic medium is a powerful source of social effects, and the other, that parents can not control their children's listening and viewing, especially now that television is the national nanny.

We have heard that this focus on reforming the media to protect children at first might look somewhat ironic because, outside the mass media context, the notion of the protection of children is often honored in the breach. Even though we pay lip service to notions about the welfare of children, we also pass the current welfare legislation despite its predictable effects on the well-being of children. Perhaps, in reassessing our initial reaction, we might conclude that the public discussion of television lately rests on a developing image of the medium – a re-imagining of television as some sort of adjunct to the public education system. What is the administrative vision that animates (or at least accompanies) that kind of approach? One possibility that we have heard today is something of a "quid pro quo" rationale: that if we are not going to allocate broadcast spectrum by an auction model, then regulation should be justified as a quid pro quo for the assignment of public property to broadcasters. Note that this rationale is not limited to the protection of children (even if child welfare notions can justify the particular quid pro quo exacted). Catherine might say that this would justify really rather extensive and potentially quite intrusive regulatory oversight, at least with regard to certain sorts of things that the Chairman and others at the Commission have characterized as predictable areas of market failure.

Another possibility – based on a literal reading
of some of the public statements and writings of Chairman Hundt— is that the animating administrative vision at the FCC today is a civic republican notion. This language, too, is susceptible to an interventionist regulatory interpretation.

But if we look closely at what the FCC has been doing we might conclude that neither a full-fledged quid pro quo rationale nor a civic republican framework is really what's going on. We might say that the FCC's approach appears to be the adoption of a kind of middle way between some notion of really intrusive, full-fledged governmental regulation on the one hand and completely laissez-faire private ordering on the other hand.

How is that middle way going to be interpreted? It seems to have two aspects. In some contexts, the middle position is some direct regulation of content—such as the children’s educational programming requirement. Yet this direct regulation purports to be, and is advertised as, relatively targeted and narrow. In other contexts, the middle position is a kind of regulation that is facilitative of private choices. By such facilitative regulation, I mean to refer to information designed to further private ordering—such as V-chip ratings and other information-labeling approaches designed to enable parents to make the appropriate kinds of decisions about what their kids should watch.

The FCC would presumably say that neither one of these middle position approaches should be particularly disturbing. We are predisposed to think of affirmative regulations as particularly problematic because of the government’s direct weighing in. Yet, with regard to its current content regulation, the Commission can point to the fact that the direct regulation now in place is awfully proceduralist, clearly viewpoint neutral and, at least at an abstract level, content neutral as well. With regard to children’s educational television, for example, the FCC would argue that the agency’s intervention is nothing more than micromanagement at the procedural level, with no substantive definition clearly set by the Commission about what counts as children’s educational programming.

We are also not supposed to worry about the facilitative regulatory possibilities because they are by definition designed to be non-coercive. Supporters say that they simply require the provision of information. This is like food labeling. In fact, the more detailed, concrete, contextual and empirically-based the labeling, the more intelligent the likely parental decisionmaking. Some might even say that such detailed calls for content are less worrisome from the point of view of promoting a monolithic politics because the effect of providing information is simply to enable all parents—regardless of their different political views on the spectrum—to make informed choices for their kids.

So why should we worry about an administrative model that seems to be not terribly intrusive in terms of direct content regulation, is based on the unexceptionable goal of protecting children, rests on a quid pro quo argument that is not entirely irrational, and only facilitates intelligent decision-making by parents pursuant to an FTC approach?

First, the problem of direct content regulation as envisioned by this FCC. If the content regulation is going to be so targeted, quantified, narrow and “neutral”—as part of a quid pro quo, contractarian approach—we can interpret that in two ways. On the one hand, we can warn that these interventions presage an immense exercise of governmental power without great gains. By contrast, we could bemoan the adoption of the current, anemic public interest obligations requirements in lieu of any possibility of real and effective regulation, arguing that the public is not really getting very much for what the Commission has thus far foregone. Or maybe what we are getting is just a kind of shrinking of the FCC.

On the indirect or facilitative model, we have heard that there are subtle but significant dangers that such regulations can serve as the occasion for the infiltration of government-imposed or approved values and political views. Dale admits that the empirical data on television’s effects on children needs to be and will be deployed through a value filter. He also proposes that there is social consensus, at least as to violence, in regard to the value filter. By contrast, Jack asks about what we do—say particularly in the sexual expression context—with regard to issues where consensus has not yet developed, or where we can begin to discern a shift. Will whatever ratings system we select be grounded on and contain the vision of a governmentally-approved ideal family or an ideal child? Is that vision the image of the middle class child with the middle class parent watch-
ing television together and discussing the child's reaction to a program's anti-violence message? If so, that result is clearly political, suggests Jack. Is it good or not?

While Catherine's account of the cyclical history of child-protective regulation of expression is somewhat reassuring, none of the solutions thus far has fully addressed the problem. We are still at the beginning of the discussion—regulatorily, in terms of the development of legal doctrines, and in terms of cultural affects. Thank you.
APPENDIX I

Overall Industry Averages: Year 1 vs. Year 2 Comparisons

<table>
<thead>
<tr>
<th>Category</th>
<th>Year 1</th>
<th>Year 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>VIOLENT PROGRAMS</td>
<td></td>
<td></td>
</tr>
<tr>
<td>% of Programs with Violence</td>
<td>58</td>
<td>61</td>
</tr>
<tr>
<td>% with an Anti-Violence Theme</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>% that show Long-Term Negative Consequences</td>
<td>16</td>
<td>13</td>
</tr>
<tr>
<td>% with &quot;Bad&quot; Characters who go Unpunished</td>
<td>37</td>
<td>37</td>
</tr>
<tr>
<td>% with Violence in Realistic Settings</td>
<td>51</td>
<td>55</td>
</tr>
<tr>
<td>VIOLENT SCENES</td>
<td></td>
<td></td>
</tr>
<tr>
<td>% with No Remorse, Criticism or Penalty for Violence</td>
<td>73</td>
<td>75</td>
</tr>
<tr>
<td>% with Blood and Gore</td>
<td>15</td>
<td>14</td>
</tr>
<tr>
<td>% with Humor</td>
<td>39</td>
<td>43</td>
</tr>
<tr>
<td>VIOLENT INTERACTIONS</td>
<td></td>
<td></td>
</tr>
<tr>
<td>% that show No Pain</td>
<td>58</td>
<td>55</td>
</tr>
<tr>
<td>% that depict Harm Unrealistically</td>
<td>35</td>
<td>40</td>
</tr>
<tr>
<td>% with use of a Gun</td>
<td>25</td>
<td>23</td>
</tr>
<tr>
<td>% with Repeated Behavioral Violence</td>
<td>58</td>
<td>58</td>
</tr>
<tr>
<td>VIOLENT CHARACTERS</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Perpetrators who are Attractive</td>
<td>37</td>
<td>40</td>
</tr>
<tr>
<td>Targets who are Attractive</td>
<td>43</td>
<td>45</td>
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