BROADCAST SELF-REGULATION: THE NAB CODES, FAMILY VIEWING HOUR, AND TELEVISION VIOLENCE

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INTRODUCTION

Broadcast self-regulation of the content of broadcast material is as old as broadcasting itself. It has undergone a pendulum swing, starting initially as a way to assure the new regulators that the industry could police itself, and growing until, at its peak in the 1970s, it contained a formal code authority and substantial review powers over broadcast material. It declined dramatically in the 1980s after a series of constitutional and antitrust challenges and in response to a less regulatory atmosphere in Washington. In the 1990s, however, self-regulation has returned as part of the broadcast industry's response to the most recent wave of public concern about television violence. This account of the rise and fall and partial rise of broadcast self-regulation suggests that self-regulation cannot be understood apart from an underlying scheme of formal regulation. To illustrate this theme and to follow the pendulum swing of broadcast self-regulation, this discussion is divided into three main parts: (1) the growth of the broadcast codes established by the National Association of Broadcasters ("NAB"),[1] (2) an account of the family viewing policy established by the NAB in the 1970s,[2] and (3) the revival of industry self-regulation in response to renewed concern about television violence.[3]

I. THE CODES OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The NAB, founded in 1923, first attempted to regulate the industry in 1926 during the wavelength wars. The failure of this initial attempt at self-regulation is instructive in revealing the

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1 *See* discussion *infra* part I.

2 *See* discussion *infra* part II.

3 *See* discussion *infra* part III.

dependence of self-regulation upon an underlying scheme of government regulation.

During the 1920s, Secretary of Commerce Herbert Hoover exercised the limited authority granted him under the Radio Act of 1912[4] to regulate the airwaves in an attempt to prevent interference, by limiting licensees to particular frequencies, hours of operation, and power levels. In 1923, the Secretary's power to regulate was restricted.[5] In 1926, *United States v. Zenith Radio Corp.*[6] so severely restricted the Secretary's authority that the Attorney General issued an opinion that forbade the government from regulating the airwaves.[7]

What happened after that is well-known:

> So now all hell broke loose. From the middle of 1926, when the Commerce Department control broke down, there were wave jumpers and pirates everywhere. And in spite of the chaos in the air, new stations continued to apply for licenses every month. A report of the Department of Commerce in December 1926 revealed that since July 1 of that year there were 102 new stations (approximately five new stations a week), bringing the nationwide total to 620. By the end of 1926 it was impossible in most geographical areas to receive a consistent broadcast signal. In large metropolitan areas things became completely intolerable. At this time New York had 38 stations; Chicago, 40. Listeners usually weren't getting anything but babble and conflicting sounds. Sales of radio sets dropped off drastically, and for a time it appeared that all the great hopes for the future of broadcasting were to be dashed to the ground.[8]

The NAB actively attempted to control this chaos through a voluntary standstill program. It sent to all 536 radio stations a "certificate of promise." By signing and returning this certificate to the NAB, a station agreed to operate only on the wavelength and dur-

4 Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302 (1912). The 1912 Act set up a registration system for radio licenses that was adequate to coordinate point-to-point communications, but did not provide sufficient authority to regulate broadcast interference.

5 Hoover v. Intercity Radio Co., 286 F. 1003 (D.C. Cir. 1923), *appeal dismissed*, 266 U.S. 636 (1924) (holding Secretary of Commerce had no power to refuse a license, but could specify a particular frequency and impose other regulatory constraints).

6 12 F.2d 614 (N.D. Ill. 1926) (holding Secretary of Commerce had no power to issue regulations other than those in the 1912 Radio Act).

7 35 Op. Att'y Gen. 126 (1926).

8 GEORGE H. DOUGLAS, THE EARLY DAYS OF RADIO BROADCASTING 95 (1987). *See* CHRISTOPHER H. STERLING & JOHN M. KITTROSS, STAY TUNED: A CONCISE HISTORY OF AMERICAN BROADCASTING 88 (1978); SYDNEY W. HEAD, BROADCASTING IN AMERICA 130-31 (1976) (two hundred new broadcast stations went on the air from the time of *Zenith Radio Corp.* to the passage of the Radio Act of 1927); ERIK BARNOUW, 1 A TOWER IN BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES 189-90 (1966).

ing the hours that had been assigned by the Commerce Department prior to the Attorney General's opinion. However, only 150 stations responded. In September 1926, the NAB helped to organize the National Radio Coordinating Committee, an all-industry self-regulatory body consisting of every major group involved in broadcasting. While the committee attempted to control the airwave chaos through self-regulation, it quickly realized that the real solution lay in passing new federal legislation.[9]

Despite the industry's attempt at self-regulation, this wavelength chaos endured until Congress came to the rescue. In February 1927, the President signed the Radio Act of 1927, which clearly established government authority to regulate the airwaves and assigned this responsibility to a new independent regulatory commission, the Federal Radio Commission ("FRC").[10]

Proponents of self-regulation point to its intended function of providing stability, order, discipline, and control to markets that might not function otherwise. Critics often respond that when an industry is most in need of regulation to curb the destructive effects of untrammeled competition, it is precisely in these times that regulation is least effective in constraining the power of self-interest.[11]

The wavelength chaos example supports the critics. The failure of self-regulation to end the chaos was not a technical failure. The industry could have worked out a plan to assign frequencies, limit power, and restrict hours of operation. Indeed, during the 1920s, prior to *Zenith Radio Corp.*,[12] Secretary of Commerce Hoover had relied on annual industry conferences to help guide him in his frequency coordination decisions. The problem was enforcement of a self-regulatory plan in a circumstance where the natural incentives to break the rules were overwhelming. It might be in the industry's best interest for a particular broadcaster to leave the airwaves, but why would any particular broadcaster voluntarily do this? Commercial extinction was too great a sacrifice for the com-

9 *See* David R. Mackey, The National Association of Broadcasters—Its First Twenty Years 331-35 (1956) (unpublished Ph.D. dissertation, Northwestern University). For thorough discussions of the National Association of Broadcaster's efforts at self-regulation, see generally Patricia Brosterhous, *United States v. National Association of Broadcasters: The Deregulation of Self-Regulation*, 35 FED. COMM. L.J. 313 (1983); Daniel L. Brenner, Note, *The Limits of Broadcast Self-Regulation Under the First Amendment*, 27 STAN. L. REV. 1527 (1975).

10 Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927), *repealed by* Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151-610 (1988 & Supp. V 1993)).

11 *See, e.g.*, HEAD, *supra* note 8, at 432-36; DON R. LE DUC, BEYOND BROADCASTING: PATTERNS IN POLICY AND LAW 66-70 (1987).

12 12 F.2d at 614.

mon good.[13]

This tension between individual and industry interest would haunt the NAB as it developed its codes regulating program content and advertising practices. Broadcasters recognized right away that the new Federal Radio Commission would have to reduce the number of stations in order to impose order on wavelength chaos, and that there would always be more people who wanted to broadcast than there were available frequencies. They recognized, therefore, that the Commission would have to look at the character of the service provided by broadcasters in making decisions about who would receive a license.[14] Indeed, in one of its first statements of policy, the Commission firmly asserted its intention to look carefully at broadcast content and programming choices in assigning and renewing licenses. It expressed, for example, its preference for radio broadcasters who did something more with their stations than play phonograph records.[15]

A continuing theme of self-regulation is the extent to which it is undertaken to prevent government regulation. This theme was first illustrated by the decision of the NAB to develop a code with the conscious intention of preventing the newly-created FRC from intruding too directly into programming content as it went about its business of awarding broadcast licenses. It promulgated its first code on January 26, 1928, but this code, lacking both specifics and an enforcement mechanism, "not only had no teeth, but very soft gums."[16] The next code, adopted on March 25, 1929, was a step forward.[17] It had both a "code of ethics" and "standards of commercial practice."[18] The code of ethics prohibited "offensive" material, "fraudulent, deceptive or obscene" matter, and "false, deceptive or grossly exaggerated" advertising claims.[19] It required "great caution" in accepting advertising for products or services that "may be injurious to health" and called for "care" to be taken to prevent the broadcast of statements "derogatory" to other sta-

13 *See* STERLING & KITTROSS, *supra* note 8, at 88 ("The cacophony on the air after mid-1926 was ample proof that broadcasters could not cooperate sufficiently to function without outside regulatory force.").

14 *See* Mackey, *supra* note 9, at 346.

15 *See* Statement Made by the Commission on August 23, 1928, Relative to Public Interest, Convenience or Necessity (FRC Interpretation of the Public Interest), 2 F.R.C. Ann. Rep. 166 (1928), *reprinted in* DOCUMENTS OF AMERICAN BROADCASTING 49-55 (Frank J. Kahn ed., 3d ed. 1978).

16 Mackey, *supra* note 9, at 350.

17 *See* NAB Code of Ethics and Standards of Commercial Practice, Mar. 25, 1929, *reprinted in* DOCUMENTS OF AMERICAN BROADCASTING, *supra* note 15, at 63-66.

18 *Id.*

19 *Id.* at 64.

tions, to individuals, or to other products or services.[20]

These content generalities were not very serviceable as a guide to individual stations or network programmers. But some of the provisions of the standards of commercial practice were quite specific. These standards divided the day into the "business day" before 6:00 p.m. and the time for "recreation and relaxation" after this time. Commercials could not be broadcast between 7:00 p.m. and 11:00 p.m. Perhaps taking note of the FRC's views regarding phonograph records, the standard barred the broadcast of commercially-available phonograph records between 6:00 p.m. and 11:00 p.m. In both areas, however, enforcement was lacking. The code of ethics provided only that when a violation was charged in writing, the "Board of Directors shall investigate such charges and notify the station of its findings." There was no provision at all for enforcement of the standards of commercial practice.[21]

Once the NAB Code was in existence, it was possible for the government to adopt it and give it the force of law. This possibility was realized through the involvement of the NAB in the National Recovery Administration Codes. The National Industrial Recovery Act, which became law on June 16, 1933, authorized the President to set up a National Recovery Administration ("NRA") to draft a set of codes for each of more than 500 industries.[22] The Act suspended relevant antitrust regulations, and representatives of each industry (and labor and consumers) joined with NRA officials in writing the codes. Each NRA Code had two parts: a wage and hour section designed to stabilize labor practices, and a code of fair trading practices designed to avoid destructive competition. The NRA Codes were to be enforceable provisions of law, but those businesses who abided by interim provisions providing for minimum wages, maximum working hours, and a prohibition on child labor were permitted to display the NRA's blue eagle symbol for "doing their part."

On August 31, 1933, the NAB submitted a code of fair practices to the NRA; those stations that signed this interim Code could display the blue eagle. On November 27, 1933, President Roosevelt signed this Code and put the force of federal law behind its provisions.[23] He appointed a seven-person Broadcaster Code Authority to supervise compliance. The Code's provisions were

20 *Id.*

21 *Id.* at 65.

22 National Industrial Recovery Act of 1933, Pub. L. No. 73-67, § 3, 48 Stat. 196, 196-97 (1933).

23 *See* Mackey, *supra* note 9, at 355.

largely fair trade practice requirements derived from the 1929 Code's standards of commercial practice, including prohibitions on chiseling on rate cards, defamation of a competitor, exaggerated claims or coverage, and song plugging for a gratuity. Significantly, even though the NAB played a key role in drafting the broadcasting NRA standard and provided the members of the Broadcasting Code Authority, the Code applied to all radio broadcasters, regardless of whether they were members of the NAB or whether they had previously subscribed to the Code. This experiment in government-backed enforcement of the broadcast industry Code did not last long. In 1935, when the U.S. Supreme Court nullified the codes as an unconstitutional delegation of legislative power to the executive,[24] the NRA was abandoned. In May 1935, the Code Authority for Broadcasting was closed.[25]

A new voluntary code was adopted to replace the NRA Code, but it was largely ignored. Then, in 1938, the NAB passed a more specific code and created an enforcement group called the NAB Code Committee. The new code was adopted in part in response to the industry's perception that the Federal Communications Commission ("FCC"), the successor to the FRC, was prepared to insert itself into content regulation directly or would move structurally to attack network control over broadcasting as a way of addressing content concerns. In a nationally broadcast speech on November 12, 1938, then-FCC Chairman Frank R. McNinck referred to the furor surrounding the broadcast of *War of the Worlds* and warned that if the industry could not police itself, someone else would do it for them.

The 1938 Code had some novel features compared to the 1929 version. It called for close supervision of children's programs, required broadcasters to allot time fairly for the discussion of controversial views, and banned the sale of time for the airing of controversial views. It urged broadcasters to cooperate with educational groups for the airing of educational programs, required news programs to be fair and accurate, barred broadcasters from attacks based upon race or religion, and regulated commercials by requiring broadcasters to accept only those announcements from legitimate firms whose products were legal and complied with standards of good taste. Advertising time was limited by time of day and length of program. In addition, there were prohibitions against specific types of advertising, including hard liquor and for-

[24] *See* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[25] *See* Mackey, *supra* note 9, at 356.

tune-telling. Finally, a code committee would enforce the Code by determining whether a station was in compliance or had violated one of its provisions.[26]

Industry codes sometimes have the public relations function of creating a favorable impression of a responsible industry policing itself. This occurred in the initial reaction to the 1938 Code. The Code was heavily publicized to religious and national civic groups and received praise from all quarters. The American Civil Liberties Union ("ACLU"), for example, lauded it as "a great step forward in formulating a policy in the public interest."[27] The Chairman of the FCC gave public approval to the Code.[28]

The first application of the 1938 Code was under its ban on the sale of time for the airing of controversial views. Father Coughlin, the notorious radio broadcaster who had a national audience, bought time from stations across the country in order to bring his message to his listeners. This was in direct conflict with the new policy banning such time sales, and the NAB Code Authority cited him for violation of that section. The ACLU approved of this action, because the stations that aired Father Coughlin did not provide adequate response time to Father Coughlin's opponent. Because of the voluntary compliance of broadcasters with the NAB Code Committee's judgment, Father Coughlin found it more and more difficult to find outlets, and by September 1940—about one year after the adoption of the Code—he was off the air.[29]

The initial favorable reaction to the 1938 Code was soon transformed into public concern about the Code's implications for free expression on the airwaves. When the NAB revised its Code in 1945 to conform to a new FCC ruling that time should be sold for the airing of controversial views,[30] it took the opportunity to make it clear that the 1945 Code was not going to be enforced by a Code Committee, and that its provisions were intended merely as a "guide" to individual broadcasters.[31]

The experience of NAB in setting up radio codes in response to public and governmental concern about program content lead them to adopt the same strategy to respond to critics of early television. The early days of television set the pattern of congressional

[26] *See id.* at 374-76, 380.
[27] *Id.* at 382.
[28] *See id.* at 391-92.
[29] *See id.* at 383-85, 407-08.
[30] United Broadcasting Co., Decision and Order, 10 F.C.C. 515 (1945).
[31] Robert Shepherd Morgan, The Television Code of the National Association of Broadcasters: The First Ten Years 51 (1964) (unpublished Ph.D. dissertation, University of Iowa).

criticism, legislative developments, and industry self-regulatory response. In May 1951, Senator William Benton (D-Conn.) introduced a bill to establish a National Citizens Advisory Board for Radio and Television to oversee programming and to submit a yearly report to the Congress and the public concerning the extent to which broadcasting was serving the public interest.[32] The Board would have eleven members appointed by, and responsible to, the United States Senate.[33] In April 1951, just before the introduction of this bill, the NAB had established a Television Program Standards Committee to consider promulgating a television code. In July 1951, after the introduction of the "Benton bill," the committee began drafting a code.

The first NAB television Code was adopted at the end of 1951 and was effective in March 1952.[34] It contained a substantial amount of material from earlier codes, including the radio code and the motion picture code. It attempted to emphasize the positive, urging broadcasters to air sufficient amounts of educational and cultural programming. It did contain negative prohibitions, but its underlying premise seemed to be that critics were more concerned about what was not being broadcast than about what was being broadcast.[35]

The new Code also contained an enforcement mechanism. It created a television code review board to act as a clearinghouse for complaints. It would permit subscribers to display a code seal and withdraw this permission for "continuing, willful or gross" violations of the code. There were elaborate procedures for considering complaints. Penalties established by the Review Board were subject to two-thirds approval by the television board of directors.[36] Nevertheless, it was clear that there was no law by which enforcement could be obtained. The Code was purely voluntary.[37]

The Code contained explicit content restrictions on displays of violent action and sexual material. The Code also prohibited "reference to the kidnapping of children" and material that is "excessively violent." Provision (1) read: "Violence and illicit sex shall not be presented in an attractive manner nor to an extent such as will lead a child to believe that they play a greater part in life than they do. They should not be presented without indications of the

32 S. 1579, 82d Cong., 1st Sess. (1951). *See* 97 CONG. REC. 3169-72 (1951) (remarks of Sen. Benton).
33 *See* Morgan, *supra* note 31, at 78.
34 *See id.* at 94.
35 *See id.* at 86-87.
36 *See id.* at 187.
37 *See id.* at 87.

resultant retribution and punishment."[38] This explicit content regulation reawakened fears that the industry was suppressing the free expression of ideas. In sharp contrast to its earlier statements welcoming the radio codes, the ACLU attacked the new television Code. It characterized the Code as "stifling and illegal censorship,"[39] and asked the FCC to determine whether the code violated the provisions of the Communications Act banning censorship.

There were revisions in the television Code made throughout the 1950s, sometimes in reaction to intense outside criticism such as that directed at the industry during the quiz show scandals.[40] In 1962, the enforcement mechanism was altered with the creation of a Code Authority with jurisdiction over both radio and television. The Review Board became an appellate body. With this change, the Code and its enforcement mechanism assumed substantially the form they would have for the remainder of their existence.[41]

In 1963, the FCC almost succeeded in transforming parts of this voluntary Code into a regulatory mandate. The Commission proposed to require all broadcasters to observe the limitations on advertising time set by the NAB Code. The broadcast industry preferred the flexibility afforded by a voluntary code. They opposed this FCC initiative and urged Congress to intervene. Soon legislation passed the House of Representatives to prevent the FCC from adopting any rules governing the frequency of commercials. This bill did not pass the Senate, but the FCC got the message and terminated the proceeding.[42] The rule lived on for a time, however, as a processing guideline governing whether the staff had delegated authority to renew the license of a station.[43]

In 1969, Senator John Pastore (D-R.I.) tried to transform the NAB Code Board's role from review to preclearance. He suggested to the television networks that they allow the NAB Code Authority to clear entertainment programs. In return, he said, the industry could expect him to work closely with them on legislation to ease the process of broadcast license renewal. NBC and ABC agreed to this proposal, but CBS refused, arguing that they did not want a "single final arbiter" of which network programming was aired.[44]

38 *Id.* at 114.
39 *Id.* at 104.
40 *See id.* at 131.
41 *See id.* at 197.
42 *See* Commercial Advertising, Report and Order, 36 F.C.C. 45, 50 ¶ 11 (1964).
43 *See* ERWIN G. KRASNOW & LAWRENCE D. LONGLEY, THE POLITICS OF BROADCAST REGULATION 127-33 (2d ed. 1978).
44 *See* GEOFFREY COWAN, SEE NO EVIL: THE BACKSTAGE BATTLE OVER SEX AND VIOLENCE ON TELEVISION 54-56 (1979).

The interplay between regulation and the NAB Code could work in several directions: The industry failed to address the issue of cigarette advertising in the 1960s as concerns grew about the dangers of smoking and the effect of tobacco advertising in encouraging new smokers. It might have been possible for the broadcast industry to adopt a program to voluntarily restrict the amount and type of broadcast advertising. At the time, however, cigarette advertising accounted for ten percent of all broadcast advertising revenue, and this economic fact may have prevented the industry from adjusting its code to restrict such commercials. Perhaps in response to this failure to act, Congress imposed a much more draconian rule—a total ban on television cigarette advertising.[45]

In contrast, action by the NAB could sometimes prevent direct government regulation. In 1974, the FCC considered the question of what should be done to improve the quality of children's programming and noted the evidence in favor of the harmful effect of commercials on children's programming. But the agency refused to adopt its own rule limiting the amount of advertising on children's programs, on the ground that the NAB Code's voluntary limit of nine and one-half minutes per hour was sufficient.[46]

[45] Public Health Cigarette Smoking Act of 1969, § 6, 84 Stat. 87, 89 (1970) (codified at 15 U.S.C. § 1335 (1994)). *See* COWAN, *supra* note 44, at 105. Other factors may have been at work as well. In 1967, the FCC extended the Fairness Doctrine to require advertisers to present the point of view that cigarettes are unhealthy. *See* Television Station WCBS-TV ("Applicability of the Fairness Doctrine to Cigarette Advertising"), Memorandum Opinion and Order, 9 F.C.C.2d 921 (1967), *aff'd sub nom.* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). This change, coupled with the large amount of advertising money required for cigarette manufacturers to maintain their relative market positions, may have led them to struggle less vigorously to preserve their right to advertise cigarettes on television.

[46] *See* COWAN, *supra* note 44, at 90-91; *see also* HEAD, *supra* note 8, at 432; BARRY COLE & MAL OETTINGER, RELUCTANT REGULATORS: THE FCC AND THE BROADCAST AUDIENCE 248-88 (1978). The FCC's rationale for its inaction was revealing: it was not adopting a mandatory rule because "the standards adopted by [the NAB] are comparable to the standards which we would have considered adopting by rule in the absence of industry reform." Children's Television Report and Policy Statement in Docket No. 19142, 50 F.C.C.2d 1, 13 ¶ 42 (1974), *reconsideration denied*, 55 F.C.C.2d 691 (1975), *aff'd sub nom.* Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977) (footnote omitted). After the NAB repealed its code in 1981, the FCC revisited the question of compulsory advertising limits and found no need to impose new guidelines. *See* Children's Television Programming and Advertising Practices, Report and Order, 96 F.C.C.2d 634 (1984), *aff'd sub nom.* Action for Children's Programming v. FCC, 756 F.2d 899 (D.C. Cir. 1985). The industry did nothing further through self-regulation or voluntary measures, and in 1990 Congress stepped in and passed the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (1990) (codified in scattered sections of 47 U.S.C.), which not only required advertising limits during children's programs, but also imposed upon broadcasters an obligation to provide programming specifically designed to serve the educational and informational needs of children.

II. FAMILY VIEWING POLICY

Concerns about the violent content of television were evident from the beginning of television itself. Senator Estes Kefauver (D-Tenn.) held one of the first congressional hearings on televised violence in 1954, with the primary focus on whether the depiction of violence on television was related to the problem of juvenile delinquency.[47] A 1955 staff report to the Senate Judiciary Committee recommended that the FCC develop standards for programming content, including violent content, and that the FCC enforce these standards using a series of sanctions ranging from fines to license revocation.[48] Senator Kefauver brought these concerns to the general public in a 1956 article in *Readers' Digest* magazine entitled "Let's Get Rid of Televised Violence."[49] Between 1961 and 1964, Senator Thomas J. Dodd (D-Conn.) again directed the nation's attention to television's impact on juvenile delinquency, through a series of hearings on the effect on young people of televised crime and violence.[50] In 1969, a staff report to the National Commission on the Causes and Prevention of Violence concluded that violence on television was pervasive, increasing, and linked to violent forms of behavior.[51]

In 1969, Senator Pastore began a series of hearings on television violence, and he authorized a special study by the Surgeon General of the effects of televised violence on the attitudes and behavior of children.[52] In January 1972, the report from the Sur-

[47] *See Juvenile Delinquency: Hearings before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 83d Cong., 2d Sess. (1954). The focus of these hearings was to determine the negative effects "resulting from the increased exposure, and in dramatic form, of boys and girls to presentation of crime and violence on television." STAFF OF SUBCOMM. TO INVESTIGATE JUVENILE DELINQUENCY OF THE SENATE COMM. ON THE JUDICIARY, 84TH CONG., 1ST SESS., INTERIM REPORT ON TELEVISION AND JUVENILE DELINQUENCY 2 (Comm. Print 1955) [hereinafter INTERIM REPORT]. The House held earlier hearings in 1952 to "determine the extent to which radio and television programs currently available to the people of the United States contain immoral and otherwise offensive matter, or place improper emphasis on crime violence and corruption . . . ." *See Investigation of Radio and Television Programs: Hearings before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 82d Cong., 2d Sess. 1 (1952).

[48] *See* INTERIM REPORT, *supra* note 47, at 51.

[49] *See* ERIK BARNOUW, TUBE OF PLENTY: THE EVOLUTION OF AMERICAN TELEVISION 216 (2d rev. ed. 1990).

[50] *See Juvenile Delinquency: Hearings before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 87th Cong., 1st and 2d Sess., pts. 1-16 (1961-62); *see also Juvenile Delinquency: Hearings before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. (1964). These hearings uncovered various network editorial policies, especially relating to the show *The Untouchables*, which appeared to encourage television violence. *See also* BARNOUW, *supra* note 49, at 216, 571.

[51] *See* MASS MEDIA AND VIOLENCE: A STAFF REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE (1969).

[52] *See Federal Communications Commission Policy Matters and Television Programming: Hearings before the Subcomm. on Communications of the Senate Comm. on Commerce*, 91st Cong., 1st

geon General's special advisory panel on television violence and behavior drew a "preliminary and tentative" conclusion that viewing televised violence was causally related to aggressive behavior.[53] Later that year, in a congressional hearing before Senator Pastore, the Surgeon General was more direct, concluding that the link between television violence and real-world violence was sufficiently strong to warrant taking action.[54]

In the early 1970s, Congress and the public were up in arms about television violence. The scientific community seemed convinced that there was a real problem. How would the broadcasting industry react? From its first edition in 1952, the NAB Code had regulated the portrayals of violence on television. In 1974, the industry standards were laudable, proscribing "exploitative" uses of violence, urging the presentation of the consequences of violence, avoiding excessive, gratuitous, and instructional displays of violence, rejecting the use of violence for its own sake, and urging sensitivity in the handling of conflict in programs designed for children.[55] In addition, each television network had program standards and practices departments that examined each program for conformity to its policies. Two of the networks had written policies on violence into their programs.[56]

The public outcry on television violence suggested that these mechanisms were not working.[57] Something more than reaffirming existing codes and practices seemed to be needed. The industry's additional response was the family viewing policy, stating that entertainment programming inappropriate for viewing by a gen-

Sess. (1969). These hearings included an inquiry into crime and violence on television and a proposed study on the matter by the Surgeon General.

53 *See* SURGEON GENERAL'S SCIENTIFIC ADVISORY COMMITTEE ON TELEVISION AND SOCIAL BEHAVIOR, TELEVISION AND GROWING UP: THE IMPACT OF TELEVISED VIOLENCE (1972).

54 *See Surgeon General's Report by the Scientific Advisory Committee on Television and Social Behavior: Hearings before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 2d Sess. (1972). The remarks of Surgeon General Jesse L. Steinfeld were unusually direct: "There is a causative relationship between televised violence and subsequent antisocial behavior, and that relationship is strong enough that it requires some action on the part of responsible authorities." *Id.* at 28. Geoffrey Cowan suggests in his text that the advisory committee's "obfuscation" was a result of the presence on the panel of network employees and the network's veto of potential panel members of whom they disapproved. *See* COWAN, *supra* note 44, at 73-74.

55 *See* NATIONAL ASS'N OF BROADCASTERS, THE TELEVISION CODE 4 (18th ed. 1975). For a description of the NAB Code and its enforcement mechanisms just prior to the introduction of the family viewing policy, see Brenner, *supra* note 9, at 1530-32.

56 In 1975, only CBS did not have a written statement of principles regarding the editing of violence and sex on television. *See* COWAN, *supra* note 44, at 100-01.

57 The members of Congress who expressed their concern about television violence were reflecting widespread public displeasure. The FCC documented the extent of this public concern, noting that it had received 25,000 complaints about violent or sexually oriented material in 1974. *See* Broadcast of Violent, Indecent, and Obscene Material, Report, 51 F.C.C.2d 418, 418-19 (1975).

eral family audience would not be aired between 7:00 p.m. and 9:00 p.m. eastern standard time.[58]

The basic outline of this story is well-known.[59] In mid-1974, the House Appropriations Committee ordered FCC Chairman Richard Wiley to report by the end of the year "specific positive actions taken or planned by the Commission to protect children from excessive programming of violence and obscenity."[60] In response, Chairman Wiley instructed his staff to begin work on a notice of inquiry, a notice of proposed rulemaking, and a policy statement on televised violence.[61] He gave several public speeches urging the industry to think about taking additional steps against television violence and warning that legislation or regulation, which he opposed on First Amendment grounds, might result from industry inaction.[62] The Chairman also summoned the heads of the network Washington offices to a meeting at which he suggested that the industry might think about a policy that programs aired before 9:00 p.m. EST would be suitable for children and that difficult programs after that time would be preceded by a warning. He also met with the network heads themselves to discuss these suggestions.[63]

Following these FCC initiatives, CBS took the lead in urging the NAB to modify the Code to reflect a policy that the first hour of prime time should be suitable for family viewing. At the end of 1974, the head of CBS sent a letter to the head of the NAB Code Board, requesting this addition to the NAB Code.[64] In early February 1975, the NAB Code Board approved this change. The internal broadcaster controversy surrounding this policy concentrated less on whether such a policy should be adopted, and more on whether enforcement authority should be ceded to the NAB, or whether it should be left to the judgment of the individual broadcaster or net-

58 The family viewing policy that the NAB ultimately adopted stated that "entertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour. In the occasional case when an entertainment program is deemed to be inappropriate for such an audience, advisories should be used to alert viewers." NATIONAL ASS'N OF BROADCASTERS, THE TELEVISION CODE (18th ed. 1975).

59 For detailed background and chronology, see Writers Guild of Am. W. v. FCC, 423 F. Supp. 1064, 1094-1128 (C.D. Cal. 1976), *vacated sub nom.* Writers Guild of Am. W. v. American Broadcasting Co., 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980).

60 *See* H.R. REP. NO. 1139, 93d Cong., 2d Sess. 15 (1974). This House Report, released in June 1974, together with a hostile March 1974 hearing at which FCC Chairman Wiley appeared, factored significantly in the genesis of the family viewing policy. *See Writers Guild*, 423 F. Supp. at 1095; COWAN, *supra* note 44, at 84-88.

61 *See Writers Guild*, 423 F. Supp. at 1096; COWAN, *supra* note 44, at 89.

62 *See Writers Guild*, 423 F. Supp. at 1097-98; COWAN, *supra* note 44, at 93.

63 *See Writers Guild*, 423 F. Supp. at 1098-1101; COWAN, *supra* note 44, at 93-99.

64 *See Writers Guild*, 423 F. Supp. at 1107-10; COWAN, *supra* note 44, at 108-12.

work. The Code Board voted to vest the NAB with ultimate enforcement authority over this new provision of the code.[65]

The family viewing policy went into effect in the spring of 1975 to be applied to shows appearing on the fall 1975 schedule. Most action shows were moved out of family time. The comedy series *All in the Family* was moved to 9:00 p.m., although the argument was made by CBS that this was a regular programming decision and not an application of the new family sensitive policy. Other comedies in that time period were examined carefully for sensitive themes and language.[66]

After months of increased surveillance of their shows by network editors, a number of television writers and independent producers, under the leadership of the Writers Guild of America, decided to challenge the legality of the family viewing policy. On October 30, 1975, they brought suit in federal district court against the family viewing policy, alleging that their First Amendment rights had been abridged. The Writers Guild argued essentially that the adoption of the family viewing policy was not voluntary industry self-regulation. Rather, adoption of the policy was coerced by the threat of government regulation and therefore constituted state action.[67]

The legal case turned on an analysis of the behavior of Chairman Wiley, the network executives, and the NAB representatives. The relevant meetings, speeches, and memoranda were all analyzed in great detail. All the major participants in the events were deposed. The core question was whether the behavior of the FCC Chairman impermissibly influenced the development of the policy at the NAB. In the end, the court ruled that it had. In an opinion released on November 4, 1976, the court concluded that the FCC had engaged in "a successful attempt . . . to pressure the networks and the NAB into adopting a programming policy they did not

65 *See Writers Guild*, 423 F. Supp. at 1116-17; COWAN, *supra* note 44, at 113. The NAB was not given any pre-screening authority, but it did have an after-the-fact enforcement role. When the industry returned to self-regulation in the 1990s, it refused to grant any enforcement power to an industry-wide group, but relied instead on individual compliance with collective statements of principle. Shortly after the NAB adopted the family viewing policy, the FCC released its policy statement on violence, concluding that "[t]his new commitment suggests that the broadcast industry is prepared to regulate itself in a fashion that will obviate any need for governmental regulation in this sensitive area." *See* Broadcast of Violent, Indecent, and Obscene Material, Report, 51 F.C.C.2d at 422.

66 For a detailed description of the turmoil among writers and producers caused by network application of the family viewing hour, see COWAN, *supra* note 44, at 116-57.

67 Prior to the adoption of the family viewing policy, a number of writers articulated the general view that enforcement of the parts of the NAB Code that prohibited stations from airing certain types of content would be disguised state action. *See, e.g.*, Brosterhous, *supra* note 9, at 325-28.

wish to adopt."[68]

The court's ruling did not bar the networks from adopting a family viewing policy and did not order CBS to move *All in the Family* back to 8:00 p.m. EST. The court ruled that programming decisions of this kind were at the heart of the independent broadcaster judgment, and the courts, like the FCC, were barred from imposing their views on broadcasters in these matters. But the court did bar the NAB from enforcing a family viewing policy, and also barred the networks from agreeing with the NAB to abide by a family viewing policy.[69]

The court did not conclude that NAB enforcement of a code, even a code containing a family viewing hour, was *per se* government action for First Amendment purposes. Rather, the First Amendment problem was specific to the circumstances in which the NAB adopted the policy. The point was that any attempt by the NAB to enforce a family viewing policy that emerged from those circumstances was so impermissibly tainted by the government's conduct that it could no longer be labeled private action.[70]

But the suggestions and hints in the district court's decision went far beyond its carefully stated holdings. It not only attacked the involvement of the FCC in the development of the family viewing policy. It suggested that any joint attempt by the broadcasters to adopt a family viewing policy—even without any state action to coerce it—was a First Amendment problem. The bedrock principle of communications policy was that the individual broadcaster had the exclusive role of determining the content of the programming on his station. If the NAB were to adopt and effectively enforce a family viewing policy, wouldn't this deprive broadcasters of their right and duty to make individual programming decisions?[71] The court's summary of its intent in the matter clearly went beyond its explicit holdings:

> The networks are free to consider the views of others in making their decisions. They, thus, may consider the views of other broadcasters as enunciated in the NAB Code. They may not

68 *Writers Guild*, 423 F. Supp. at 1072.

69 *Id.* at 1161. The decision was not as clear on the larger question of whether the FCC could channel programming away times in which children made up a substantial portion of the audience. On the one hand, the court explicitly stated that FCC enforcement of the family viewing policy through the licensing process would violate the First Amendment. *Id.* On the other hand, the court did not rule out the possibility that the FCC could develop constitutional regulations relating to the exposure of children to violent programming. *Id.* at 1149. Apparently the problem the court saw with the family viewing policy "as enacted" was that it was "so vague that no one can adequately define it." *Id.*

70 *Id.* at 1155.

71 *Id.* at 1134.

> delegate their authority to the NAB, however. . . . Broadcasters have no right to jointly rule the airwaves. Their right is to make individual licensee decisions. The court hopes to stop joint rule of the airwaves so that the individual licensee rule can be restored.[72]

The court's rhetoric was even harsher. The family viewing policy became the "prime time censorship rule."[73] The NAB Code Board was "a national board of censors for American television."[74] The NAB's decision to adopt a family viewing plan was "[c]ensorship"[75] by a privately created review board and a "joint attempt to monopolize the nation's airwaves."[76] The court added:

> By engaging in a concerted plan to cause industry-wide delegation of programming authority, the defendants undermined the decentralized character of the system of broadcasting, achieved monopolistic control over American television, and thus imperiled not only the rights of the plaintiffs but also the "paramount" rights of viewers and listeners. . . . [T]he NAB has no constitutional right to set up a network board to censor and regulate American television. . . . Even when station managers are willing to abdicate their responsibilities by delegating their programming authority . . . the First Amendment requirement of diversity in decisionmaking does not protect such tie-in arrangements.[77]

These remarks, of course, were not a binding part of the court's decision, but they were intended to undermine the validity of all collectively enforced broadcasting rules. As a legal matter, however, this decision did not stand. It was vacated and remanded on appeal in 1979[78] on the ground that the district court was not the proper forum for the initial resolution of significant issues relating to the regulation of broadcasting.[79] The case was returned to the FCC for judgment about the appropriateness of Chairman Wiley's actions under the First Amendment.

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72 *Id.* at 1155.

73 *Id.* at 1072.

74 *Id.*

75 *Id.* at 1073.

76 *Id.* at 1143.

77 *Id.* at 1143-44 (footnotes and citations omitted).

78 *See* Writers Guild of Am. W. v. American Broadcasting Co., 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980).

79 *Id.* at 365 ("While we agree that the use of these techniques by the FCC presents serious issues involving the Constitution, the Communications Act, and the APA [Administrative Procedure Act], we nevertheless believe that the district court should not have thrust itself so hastily into the delicately balanced system of broadcast regulation.") (footnote omitted).

Key to the Court of Appeals's willingness to overturn the decision on jurisdictional grounds was the rejection of the district court's fundamental premise that only individual broadcaster judgment should determine what goes on the air. The appellate court emphasized that the FCC had the power to limit the judgment of broadcasters in several ways, including the regulation of indecent material.[80] One issue in the case, then, was whether the FCC had the power under the First Amendment to impose a family viewing hour. The district court was not the proper forum for the case in the first instance, because it would have been instructive to have the FCC's view on this question before the courts had attempted to resolve it.[81]

In September 1983, the FCC ruled that former Chairman Wiley's actions had not amounted to government coercion, and that the networks, the NAB, and the NAB Code Authority had voluntarily adopted the family viewing policy.[82] It argued that the FCC had not crossed the line between permissible "jawboning"[83] and coercion of a regulated industry. Moreover, voluntarily enforced industry self-regulation seemed to be vindicated. The NAB was not necessarily acting contrary to the First Amendment in adopting the family viewing hour on its own.[84] The FCC even suggested that the networks' joint decision to adopt a family viewing policy was an exercise, rather than an abandonment, of their editorial discretion.[85]

At this point, however, this legal vindication of voluntary industry self-regulation by the FCC was largely irrelevant. In June

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80 *Id.* at 364.

81 The Ninth Circuit directly contradicted the district court's "bedrock principle" of exclusive individual broadcaster control over the airwaves: "It simply is not true that the First Amendment bars *all* limitations of the power of the individual licensee to determine what he will transmit to the listening and viewing public." *Id.*

82 *See* NAB Television Code ("Family Viewing Policy"), Report, 95 F.C.C.2d 700 (1983).

83 *Id.* at 707. "Jawboning" refers to informal efforts by the FCC to encourage or induce self-regulatory action by an industry. Jawboning is generally viewed as permissible tightrope-walking, as opposed to activity that may have a coercive effect. *See id.* at 707 n.26; *see also Writers Guild*, 609 F.2d at 359-60, 364-70.

84 As the FCC explained, "[v]oluntary industry action is often preferable to governmental solutions, and an industry frequently addresses a problem in order to forestall regulation by the Government; conversely, it is not unusual for a regulatory body to forego enacting rules when the regulated industry voluntarily adopts standards which deal with a perceived problem." NAB Television Code, Report, 95 F.C.C.2d at 710. This 1983 FCC adjudication may be relevant to the current controversy regarding the appropriateness of the voluntary agreement by Westinghouse to air additional children's educational programming. Westinghouse made this commitment in the context of a petition asking the FCC to deny the transfer of the broadcasting licenses held by CBS. The FCC Chairman, Reed Hundt, was criticized by others on the Commission and some members of Congress for improperly influencing Westinghouse. *See* Chris McConnell, *Westinghouse Makes Kids Commitments*, BROADCASTING & CABLE, Sept. 25, 1995, at 16.

85 *See* NAB Television Code, Report, 95 F.C.C.2d at 711.

1979, the U.S. Department of Justice filed an antitrust suit against the NAB.[86] The Justice Department alleged that the provisions of the NAB Code restricting advertising had the purpose and effect of restricting the amount of advertising on television, causing prices to rise above competitive levels to the detriment of both advertisers and consumers. On March 3, 1982, the U.S. District Court for the District of Columbia granted summary judgment in favor of the government.[87] And in November 1982, the Justice Department and the NAB entered into a consent decree settling the case in return for the NAB's agreeing to cease enforcing or even suggesting compliance with the NAB's advertising guidelines.[88] Shortly thereafter, in January 1983, the NAB simply abandoned all parts of the Code.[89]

Two aspects of these antitrust decisions were important for the future of broadcast self-regulation. The first was the district court's finding that the NAB Code was not merely an advisory standard which subscribers may choose to ignore, but rather a contractual obligation to which they were obligated to adhere. The district court was impressed with the enforcement mechanism the NAB had set up, the credibility of the suspension sanction, and the harm to broadcasters in lost advertising should they be suspended.[90] This claim, together with the *Writers Guild* view that the enforcement provision of the NAB Code deprived broadcasters of individual judgment, contributed to the cloud hanging over collective enforcement of self-regulatory codes. It suggested that any future code should contain only advisory guidelines, and should not be interpreted or enforced by a centralized industry body.

The second finding of interest for the future was the *Consent Decree* provision that individual members of the NAB could act individually and unilaterally to impose the NAB's advertising restrictions on themselves.[91] What was forbidden was not a limitation on advertising, but concerted action to limit broadcast advertising.

86 *See* United States v. National Ass'n of Broadcasters, 536 F. Supp. 149 (D.D.C. 1982).

87 *Id.* at 169-70.

88 *See* United States v. National Ass'n of Broadcasters, 1982-83 Trade Cas. (CCH) ¶ 65,049 (D.D.C. Nov. 23, 1982) [hereinafter *Consent Decree*]. The *Consent Decree* was found by the court to be in the public interest at 1982-83 Trade Cas. (CCH) ¶ 65,050 (Nov. 23, 1982) (memorandum opinion).

89 *See Laid Back in Puerto Vallarta*, BROADCASTING, Jan. 24, 1983, at 39-40. While it is often stated that the NAB Code was abandoned because it was found to be in violation of the antitrust laws, a more measured assessment is that the NAB discontinued its use, even though only a small portion of it was declared invalid, out of an abundance of legal prudence.

90 *See National Ass'n of Broadcasters*, 536 F. Supp. at 164.

91 *See Consent Decree*, 1982-83 Trade Cas. (CCH) ¶ 65,049, at 70,845.

III. TELEVISION VIOLENCE: THE RETURN OF SELF-REGULATION

The family viewing policy was only one way to address the problem of television violence. At the same time as the court struggle in *Writers Guild*, those who were concerned about television violence found a new weapon—the consumer boycott—and, using this tool, they organized the largest and most effective campaign against television violence that had been waged up to that time.[92]

A loose coalition headed by the National Parent-Teachers Association, the American Medical Association, and the National Citizens' Committee for Broadcasting was formed in 1975, headed by former FCC Commissioner Nicholas Johnson. These groups coalesced around the idea of providing viewers with information about which advertisers supported violent programs, so as to bring economic pressure to bear upon the networks which aired those programs. To do this they relied on the violence index constructed by George Gerbner,[93] and trained monitors to apply this index to televised programs and to record which companies advertised in violent shows.

The coalition conducted the first series of reviews in the summer of 1976 and warned that, unless television violence dropped by the fall of 1977, they would organize a consumer boycott of offending companies. The tactic appeared to work. Advertisers adopted new guidelines steering their dollars away from violent programs. The networks reacted. The 1977-78 television season saw substantially fewer action shows than the previous year. The weaker action shows were cancelled and not a single new one was added for the 1977-78 season. The action shows that remained contained significantly fewer depictions of violence.[94] The coalition, which had pushed for less violence on television, declared victory and went on to other things. Publicly expressed concern about television violence diminished.[95]

92 *See* KATHRYN C. MONTGOMERY, TARGET: PRIME TIME 107-22 (1989).

93 *See* George Gerbner & Nancy Signorielli, Violence Profile 1967 Through 1988-89: Enduring Patterns (1990). This index has been widely criticized. *See, e.g.*, Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1157-68 (1978); E. Barrett Prettyman, Jr. & Lisa A. Hook, *The Control of Media-Related Imitative Violence*, 38 FED. COMM. L.J. 317, 323 n.17 (1987).

94 *See* MONTGOMERY, *supra* note 92, at 117-18.

95 Congress had been active during this anti-violence campaign. *See* STAFF OF SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 1ST SESS., REPORT ON VIOLENCE ON TELEVISION (Comm. Print 1977). The initial conclusions of this report, regarding the causal link between television violence, real violence, and the responsibility of the television networks, were so controversial that they could not gain approval by a majority of the subcommittee. *See* James A. Albert, *Constitutional Regulation of Televised Violence*, 64 VA. L. REV. 1299, 1310-17 (1978).

However, scientific opinions linking television violence and aggression continued to accumulate. In 1982, the National Institute of Mental Health reaffirmed the conclusion of the Surgeon General's report of a decade earlier, finding that exposure to televised violence increased physical aggression in children.[96] In the late 1980s, three reviews of the scientific literature concluded that the link between televised violence and aggression was real.[97]

During the 1980s, congressional hearings continued[98] and the issue was the focus of a Department of Justice Task Force.[99] Senator Paul Simon (D-Ill.) became the chief critic in Congress of television violence, and sponsored a bill providing for a three-year exemption from the antitrust laws to permit networks, broadcasters, cable operators and programmers, and trade associations to draft joint standards to reduce the amount of violence on television. After passing the Senate several times, but failing to pass in the House, the Television Program Improvement Act was signed into law at the end of 1990.[100]

There was some question about whether such a statutory anti-

96 *See* NATIONAL INSTITUTE OF MENTAL HEALTH, 1 TELEVISION AND BEHAVIOR: TEN YEARS OF SCIENTIFIC PROGRESS AND IMPLICATIONS FOR THE EIGHTIES: SUMMARY REPORT (1982).

97 *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 Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. 27 (1993) [hereinafter *Joint Hearings*] (prepared statement of Brian L. Wilcox, Director, Public Policy Office, American Psychological Association).

98 *See Media Violence: Hearing before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 98th Cong. 2d Sess. (1984).

99 ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE (1984). This report discusses the development of broadcast industry standards and industry capability to monitor television violence, and makes two special recommendations regarding violence in the media:

> 1. The Task Force places major responsibility for reducing and controlling the amount of violence shown on television on the networks, their affiliates, and cable stations.
>
> 2. The motion picture industry should reevaluate its rating standards to make the ratings more specific and informative.

Id. at 110.

100 Television Program Improvement Act of 1990, 104 Stat. 5127 (1990) (codified at 47 U.S.C. § 303c (Supp. V 1994)). *See* EXEMPTING CERTAIN ACTIVITIES FROM PROVISIONS OF THE ANTITRUST LAWS, S. REP. NO. 365, 100th Cong., 2d Sess. (1988); S. REP. NO. 535, 99th Cong., 2d Sess. (1986) (same title). *See also Television Violence Act of 1989: Hearing before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) [hereinafter *Hearings on H.R. 1391*]; *Television Violence Act of 1988: Hearing before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988); *Television Violence Antitrust Exemption: Hearing before the Subcomm. on Antitrust, Monopolies, and Business Rights of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987); *TV Violence Antitrust Exemption: Hearing before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986). These hearings all considered the constitutionality of the antitrust exemption. *See, e.g., Hearings on H.R. 1391, supra*, at 159-69 (prepared statement of Professor Cass R. Sunstein, University of Chicago Law School). The hearings also aired the argument that the antitrust exemption was needed to eliminate the competitive pressures that force broadcasters to produce violent programs. *See, e.g., Hearings on H.R. 1391, supra*, at 131 (statement of Barry W. Lynn, Legislative Counsel, American Civil Liberties Union) (against passage of the bill).

trust exemption was necessary to permit these entities to cooperate in constructing joint standards in the area. Indeed, in 1993, when the law was scheduled to expire, the Department of Justice issued an opinion suggesting that the industry could continue its cooperation to reduce television violence without a legislative exemption from the antitrust laws.[101] However, when Senator Simon, in his meeting with network representatives, asked why they had not developed these joint standards, he was told that there were problems under the antitrust laws.[102] Such was the caution instilled in the industry after *Writers Guild* and *National Ass'n of Broadcasters*. Codes had vanished from the broadcast industry during the 1980s in reaction to these hostile court cases, the new sense in the industry that broadcasters were full First Amendment speakers whose rights would be threatened by a new code, and the less regulatory mood at the FCC.[103]

However, the issue of television violence brought codes back. Prior to, and in anticipation of, the passage of Senator Simon's antitrust exemption bill, the NAB had taken action. In June 1990, the NAB Joint Board issued new "voluntary programming principles"[104] in four areas: children's television, indecency and obscenity, drugs and substance abuse, and violence. The principles on violence harkened back to the old NAB Code and reflected the standards on the books at each of the networks. Portrayals of violence should be "responsible," not exploitative; the consequences of violence should be presented; presentations of violence should avoid "the excessive, the gratuitous and the instructional;" the use of violence for its own sake should be avoided; and "[p]articular care" should be exercised where children are involved in the depiction of violent behavior.[105]

These principles were essentially those that had been part of

101 *See* Letter from Sheila Anthony, Assistant Attorney General for Legislative Affairs, U.S. Department of Justice, to Sen. Paul Simon (D-Ill.) (Nov. 29, 1993) (on file with the *Cardozo Arts & Entertainment Law Journal*).

102 *See* S. REP. NO. 535, *supra* note 100, at 2 ("Industry spokespersons state that the television industry's uncertainty about liability under the antitrust laws prevents it from undertaking the beneficial joint activity authorized by this legislation. S. 2323 [a predecessor bill to the 1990 Television Program Improvement Act] removes this federally-placed obstacle and allows the industry to use its considerable collective resources to address a serious problem.").

103 *See* Brosterhous, *supra* note 9, at 338 for the view that the NAB Code was a "unique outgrowth" of the public trustee model of broadcast regulation, and declined in the 1980s when this model was under attack.

104 National Association of Broadcasters, News Release, *NAB Approves Voluntary Programming Principles* (Jan. 21, 1990) (reprinting Statement of Principles of Radio and Television Broadcasting).

105 *Id.*

the old NAB Code. But the NAB had learned from *Writers Guild* and *National Ass'n of Broadcasters*. The NAB was careful to note that there would be no interpretation or enforcement of these principles by the NAB itself. The principles were simply meant to record the generally accepted standards of the broadcast community. Application, interpretation, and enforcement would remain within the sole discretion of the individual broadcast licensee.[106]

After Senator Simon's bill became law, a number of preliminary industry meetings were held in 1991, but it did not look as though the broadcast and cable industry would be able to present a united front on the violence issue. The National Cable Television Association hired George Gerbner to review cable programming to get a baseline from which progress could be judged.[107] But the broadcast industry made no such attempt at collective review of its programming. The NAB reaffirmed its new standards in June 1991 and distributed them widely to broadcast stations and program producers. But it was not until 1992 that the broadcast industry responded more fully.

Concern about televised violence grew steadily in 1992. The Task Force on Television and Society of the American Psychological Association issued its report condemning the extent of violence on television and, in a widely repeated quotation, dramatically illustrated the level of televised violence:

> By the time the average child graduates from elementary school, she or he will have witnessed 8,000 murders and more than 100,000 other assorted acts of violence. Depending on the amount of television viewed, our youngsters could see more than 200,000 violent acts before they hit the schools and streets of our nation as teenagers.[108]

In June 1992, Brandon S. Centerwall published in the *Journal of the American Medical Association* an epidemiological study which, for the first time, connected television viewing not only with increased physical aggression, but also with violent crime.[109] In another widely quoted passage, Dr. Centerwall put dramatic (if

106 *Id.*

107 *See Violence on Television: Hearings before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 103d Cong., 1st Sess. 214 (1993) [hereinafter *House Hearings*] (statement of Winston H. Cox, Chairman and CEO, Showtime Networks).

108 ALETHA C. HUSTON ET AL., BIG WORLD, SMALL SCREEN: THE ROLE OF TELEVISION IN AMERICAN SOCIETY 53-54 (1992).

109 Brandon S. Centerwall, *Television and Violence: The Scale of the Problem and Where to Go From Here*, 267 JAMA 3059 (1992).

implausible) numbers on the possible effects of television on crime rates:

> Manifestly, every violent act is the result of an array of forces coming together—poverty, crime, alcohol and drug abuse, stress—of which childhood exposure to television is just one. Nevertheless, the epidemiological evidence indicates that if, hypothetically, television technology had never been developed, there would today be 10 000 fewer homicides each year in the United States, 70 000 fewer rapes, and 700 000 fewer injurious assaults.[110]

The epidemiological data did not attribute this increase in crime to the amount of violence shown on television, but merely to the existence of television. Also, nothing directly followed from Dr. Centerwall's study regarding how much crime reduction could be achieved by a reduction in televised violence. The study did, however, allow critics of television violence to argue that even if the numbers were off by a wide margin, they still showed that televised violence was a serious problem and that the industry would have to do something to reduce the amount of violence shown.[111]

A study solicited by *TV Guide* of the amount of violence on television seemed to suggest that the industry had a long way to go. According to the study, a single day's television contained 1846 acts of violence, including 389 serious assaults, an additional 362 assaults using guns, and 273 isolated punches.[112] The television day reviewed included cable programming, and the study found that broadcast television's violent content, compared to that of its cable competitors, was relatively mild.

Pointing out how bad cable was, however, would not persuade Congress that television violence was harmless or that broadcasters needed to do nothing further to demonstrate that they understood the problem. At the end of 1992, broadcasters responded to the year's steadily increasing pressure to do more. In December, ABC, NBC, and CBS issued and agreed to abide by a set of new joint standards for the depiction of violence in television programs.[113] The new standards had been developed by the networks' standards

110 *Id.* at 3061.

111 *See, e.g., House Hearings, supra* note 107, at 10 ("That is pretty powerful medicine. Even if he is wrong by 50 percent, that is pretty powerful medicine.") (statement of Sen. Paul Simon).

112 *See Joint Hearings, supra* note 97, at 2 (opening statement of Sen. Simon).

113 *See* ABC, CBS, and NBC Television Networks, Standards for the Depiction of Violence in Television Programs (Dec. 1992). Fox Television later adopted these standards as well. *See* Judith Barra Austin, *TV Industry Responds as Concern over Violence Grows*, GANNETT NEWS SERVICE, Jan. 14, 1994.

and practices executives and, like the NAB principles, were intended to reflect the best in current practice. The accompanying preface to the new standards noted that they were consistent with each network's longstanding policies on violence, but were set forth in a "more detailed and explanatory manner to reflect the experience gained under the preexisting policies."[114]

The lessons from *Writers Guild* and *National Ass'n of Broadcasters* were reflected in the caution that "each network will continue the tradition of individual review of material, which will necessitate individual judgments on a program-by-program basis."[115] While each network had an individual policy calling for the scheduling of sensitive material after 9:00 p.m., the new joint standards, again reflecting the concerns of *Writers Guild*, called only for taking into account the composition of the audience when scheduling a program.[116] The networks then announced an additional step; in the summer of 1993, an industry-wide conference would be held in Los Angeles to discuss the new joint standards and to examine what else could be done to reduce the level of violence on television.[117]

In 1993 the concern about television violence increased dramatically. Senator Ernest Hollings (D-S.C.) introduced a bill instructing the FCC to establish rules prohibiting the distribution of violent programs during hours when children are likely to comprise a substantial portion of the viewing audience.[118] Representative Edward Markey (D-Mass.) introduced a bill requiring television set manufacturers to include in all sets a "violence chip," or V-chip, that could enable viewers to block specific time slots and channels and, with an electronic signal supplied by the broadcaster, cable programmer, or other party, to block shows carrying a violence rating.[119] These "channeling" and "V-chip" bills were not seen as idle legislative efforts because their sponsors chaired, respectively, the Senate Commerce Committee and the House Telecommunications Subcommittee, the panels having jurisdiction over this type of legislation.

114 ABC, CBS, and NBC Television Networks, Standards for the Depiction of Violence in Television Programs (Dec. 1992).

115 *Id.*

116 *Id.*

117 *See House Hearings, supra* note 107, at 186 (prepared statement of Thomas S. Murphy, Chairman of the Board, Capital Cities/ABC, Inc.).

118 Children's Protection from Violent Programming Act of 1993, S. 1383, 103d Cong., 1st Sess. (1993). *See* 139 CONG. REC. S10,581 (daily ed. Aug. 5, 1993) (introductory statement of Sen. Hollings).

119 Television Violence Reduction through Parental Empowerment Act of 1993, H.R. 2888, 103d Cong., 1st Sess. (1993). *See* 139 CONG. REC. E2011 (daily ed. Aug. 5, 1993) (introductory statement of Rep. Markey).

Other bills followed. Senator Byron Dorgan (D-N.D.) introduced legislation that essentially codified the strategy used by the National Citizens' Committee for Broadcasting and the National Parent-Teachers Association in the late 1970s.[120] It would require the FCC to evaluate the level of violence on television quarterly and to issue a "report card" to the public listing the most violent shows and their sponsors.[121]

Advance publicity concerning the network schedule for May 1993 alarmed many critics of television violence and left them wondering whether the new joint standards and planned industry conference were having any effect on network programming. In April, *Los Angeles Times* critic Howard Rosenberg characterized the 1993 May sweeps as resembling "Murder, Inc."[122] Tom Shales, critic for the *Washington Post*, repeatedly described the May sweeps as "Murder Month."[123]

On May 21 and June 8, Senator Simon held oversight hearings on the implementation of the antitrust exemption[124] and invited witnesses from the broadcast networks, cable programming services, and the motion picture industry. Remarks by Senator Howard Metzenbaum (D-Ohio) illustrate the tone of the hearing:

> We will find a way to come down heavily on the television industry if you don't do that which is necessary. We are concerned. The American people are concerned. We would have public opinion on our side.
>
> I will just tell you we gave you a 3-year exemption from the antitrust laws. Use it. Maybe you have to have your own body that decides what is too violent and what isn't, but if you just do nothing and if you just tell us you are doing something while giving us all the violence that is being portrayed in the May sweeps and on television every night and every day, we are going to come down harder on you than you would like us to do.
>
> We don't want to do that. I am not saying that in a threatening manner. I am saying that to you—
>
> [Laughter.][125]

120 Television Report Card Act of 1993, S. 973, 103d Cong., 1st Sess. (1993). *See* 139 CONG. REC. S6022 (daily ed. May 18, 1993) (introductory statement of Sen. Dorgan).

121 S. 973, 103d Cong., 1st Sess. § 3(d).

122 Howard Rosenberg, *Time for the Prime-Time Crime Wave*, L.A. TIMES, Apr. 14, 1993, at F1.

123 Tom Shales, *On CBS, 'Prophet' and Loss*, WASH. POST, May 4, 1993, at C3; Tom Shales, *The Killing Keeps on Coming*, WASH. POST, May 18, 1993, at E2; Tom Shales, *Mayhem: Television's Violent Streak*, WASH. POST, May 21, 1993, at B1. *See Joint Hearings, supra* note 97, at 3 (opening statement of Sen. Simon).

124 *Joint Hearings, supra* note 97.

125 *Id.* at 65.

The networks responded to this drumbeat of concern. On June 30, 1993, they released the details of an advance parental advisory plan under which they agreed to provide on-air and print warnings whenever a program had an amount or type of violent content that would make warnings to parents appropriate.[126] Many applauded this step, including President Clinton.[127] The typical reaction was that this was a good first step, but one that did not address the basic issue of reducing the amount of violence on television.[128]

Indeed, on July 1, the day after the industry announced its advance parental advisory plan, at a hearing on television violence Representative John Bryant (D-Tex.) reacted angrily to the network witnesses and their efforts against television violence:

> You came out with a code of conduct which, in all respects, is laughable and contemptible. And the day before this hearing, you announced that you are going to solve this problem by putting parental warnings on the air so that parents will know when there is going to be a violent program on the television. In my view that is an insult to the intelligence of the American people. . . .[129]

A lot was riding on the industry-wide meeting on August 2. If the industry could show that it was determined to move forward on the issue, legislative momentum could be slowed. But the meeting produced an unexpected turn of events. Senator Simon gave the luncheon speech before the conference attendees, and he used the occasion to raise a new issue. Could the industry agree on an outside monitoring group? This group would be independent of the networks and cable programmers, and would have no standard-setting or enforcement authority. It would, however, provide a neutral, objective way to evaluate whether the industry was making progress. The alternative the Senator suggested was legislation

126 *See* ABC, CBS, NBC, and Fox Television Networks, Advance Parental Advisory Plan: A Four-Network Proposal for a Two-Year Test (June 30, 1993). The plan was subsequently endorsed by fifteen cable programming services. *See* National Cable Television Association, Voices Against Violence: An Industry-Wide Anti-Violence Initiative (Feb. 1, 1994) [hereinafter Voices Against Violence]. In addition, the Association of Independent Television Stations ("INTV") adopted a policy to encourage its member stations to place advisories on programs with violent content. *See Joint Hearings*, *supra* note 97, at 138-45 (prepared statement of Al DeVaney, representing INTV).

127 *See* Letter from President Bill Clinton to Thomas S. Murphy, Chairman, Capital Cities/ABC, Inc. (June 30, 1993) (on file with the *Cardozo Arts & Entertainment Law Journal*).

128 *See, e.g.*, Office of Sen. Kent Conrad, News Release, *Conrad Applauds Parental Advisory System; Says More Must be Done; Nationwide Petition Drive Continues* (June 30, 1993).

129 *See House Hearings*, *supra* note 107, at 168.

mandating the creation of such an industry monitor.[130] Given the mood in Congress at the time, such legislation would almost certainly have passed, and perhaps taken along with it the channelling proposal from Senator Hollings as well as Representative Markey's V-chip proposal.

Concerns in the industry about a new NAB Code Authority made the initial response to Senator Simon's proposal less than enthusiastic.[131] But legislative pressure continued. Representative Markey held a further hearing in the House Telecommunications Subcommittee, at which Surgeon General Joycelyn Elders warned of the dangers of television violence.[132] In a hearing on October 20 before the Senate Commerce Committee, Attorney General Janet Reno declared that the bills before Congress regulating television violence, including Senator Hollings's "channeling" bill, would pass constitutional muster. According to the Attorney General, they were narrowly tailored to meet a substantial government need and could be imposed without impermissibly infringing upon the First Amendment rights of electronic speakers.[133] In January 1994 the ACLU and a coalition of law professors would question her legal opinion,[134] but in the fall of 1993 the Attorney General's views had the effect of sweeping away one of the strongest arguments against legislation regulating television violence.

In light of this legislative situation, in the fall of 1993 the broadcast and cable industry tried to accommodate Senator Simon and his monitoring proposal. In early 1994, these efforts succeeded. On February 1, the four broadcast networks announced that they would undertake jointly an annual qualitative assessment

130 Sen. Paul Simon, Remarks at the Television/Film Meeting on TV Violence, Los Angeles 6 (Aug. 2, 1993) (transcript on file with author).

131 Some thought the industry reaction to the mounting pressure already amounted to self-censorship. *See generally* Julia W. Schlegel, Note, *The Television Violence Act of 1990: A New Program for Government Censorship?*, 46 FED. COMM. L.J. 187 (1993).

132 *See House Hearings*, *supra* note 107, at 371-75 (prepared statement of Surgeon General Joycelyn Elders).

133 *See S. 1383, Children's Protection from Violent Programming Act of 1993; S. 973, Television Report Card Act of 1993; and S. 943, Children's Television Violence Protection Act of 1993: Hearing before the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong., 1st Sess. 30 (1993). Attorney General Reno also characterized the steps taken by the industry up to that point as "itty-bitty steps." *Id.* Sen. Hollings summarized her view as stating that "regulation by the Government is constitutionally permissible in this area" and, referring to the failure of self-regulation from the time of the family viewing policy to 1993, concluded that the Congress had "no recourse but to assume that responsibility under the Constitution." *Id.* at 38.

134 *See* Letter from Forty-Seven Professors of Constitutional Law to Sen. Ernest Hollings and Sen. Paul Simon (Jan. 26, 1994) (suggesting that S. 1383, S. 973, and S. 943 are "constitutionally flawed") (on file with the *Cardozo Arts & Entertainment Law Journal*).

of violence in network television programming.[135] Separately, a coalition of cable programmers agreed to appoint an outside monitor of cable programming.[136] Senator Simon reacted to this agreement with assurances that, for the time being, he would oppose any and all legislative efforts to regulate television violence.[137]

In 1994, the likelihood of legislation on television violence diminished. Representative Markey continued to push for incorporation of a V-chip in new television sets, but indicated that legislative activity might be unnecessary if the industry voluntarily agreed to build at least some sets containing this technology. The Electronics Industry Association, the trade association representing electronics manufacturers, agreed to take the first step toward the construction of television sets equipped with V-chips, by adding to an industry standard a set of requirements for manufacturers to follow in order to incorporate program advisory material. With this assurance that the television set manufacturers would build sets containing V-chips, Representative Markey refrained from moving his bill during the 103d Congress.[138]

In 1995, the subject of television violence was back before Congress and soon reached a new high point of visibility with Senator Robert Dole's (R-Kan.) speeches attacking Hollywood violence and sex.[139] After this, the momentum toward enactment of legislation against television violence became irresistible. Senators Kent Conrad (D-N.D.) and Joseph Lieberman (D-Conn.) successfully added an amendment to a telecommunications reform bill which called for content ratings and a "choice" chip, and required transmission of content advisory material.[140] The amendment urged the cable and broadcast industries to adopt a ratings system for violence and other objectionable content and established a commission with public and industry membership to develop a ratings system if the industry failed to act within one year.[141]

135 *See* CBS Television Network, News Release, *The Four Broadcast Networks Agree to Joint Assessment of their Programming with Respect to Violence* (Feb. 1, 1994).

136 *See* Voices Against Violence, *supra* note 126.

137 *See* Office of Senator Paul Simon, News Release, *Simon Announces Accords with Networks on Independent Monitoring of TV Violence* (Feb. 1-8, 1994).

138 *See EIA Sets 'V-Chip' Specs*, CONSUMER ELECTRONICS, July 18, 1994, at 15; *V-Chip Technology Moved a Step Closer to Reality Last Week; Incorporation of Electronic Industries Association Standards*, BROADCASTING & CABLE, Dec. 19, 1994, at 72.

139 *See* Kevin Merida, *Some in Senate See Dole as Late Enlistee in War on Cultural Excesses*, WASH. POST, June 10, 1995, at A7.

140 *See* 141 CONG. REC. S8251-52 (daily ed. June 13, 1995); Daniel Pearl, *Senate Backs Tool to Block Violent TV*, WALL ST. J., June 14, 1995, at B4.

141 Telecommunications Competition and Deregulation Act of 1995, S. 652, 104th Cong., 1st Sess. §§ 501-505 (1995) (Title V, termed the "Parental Choice in Television Act of 1995").

Shortly thereafter, President Clinton endorsed this V-chip measure and Representative Markey added a similar measure to the House version of the telecommunications reform bill.[142] Unlike the Senate bill, the House bill does not require the industry to implement a ratings system. With companion provisions in both House and Senate bills, some version of the V-chip requirement is likely to become law. The 104th Congress has also begun to take action on Senator Hollings's "safe harbor" bill[143] and Senator Dorgan's "report card" bill.[144] On July 12, 1995, the Senate Commerce Committee held hearings on these bills, and on August 9 reported them favorably to the full Senate.[145]

CONCLUSION

Many dismiss broadcast self-regulatory codes as "public relations instruments used to protect the interests of broadcasters and to prevent outside regulation."[146] Others dismiss it as censorship.[147] The conventional wisdom regarding broadcast self-regulation, however, is that "the broadcasting industry agrees to meaningful self-regulation only when its leaders are convinced that the government will act if they don't."[148] Within this framework of government regulation, broadcast self-regulatory codes have an important function.

There has been a dramatic reversal of industry position since the early days of the NAB Code. Then, industry leaders, the NAB, and even the ACLU lauded self-regulation as the means by which the industry could resist the destructive effects of competition

142 *See* Mark Landler, *House Passes Bill Curtailing Rules on Phones and TV*, N.Y. TIMES, Aug. 5, 1995, at A1; Christopher Stern, *Markey Wins on V-Chip*, BROADCASTING & CABLE, Aug. 7, 1995, at 10. As part of their efforts to avoid V-chip legislation, broadcasters agreed to devote $2 million to a fund to develop and market parental control technology apart from the V-chip. The alternative technology would require parents to program their sets themselves to block those shows they judged problematic, rather than have parents rely on an electronic signal provided by the broadcaster, cable programmer, or other party.

143 *See supra* note 118 and accompanying text. Sen. Hollings introduced S. 470, the Children's Protection from Violent Programming Act of 1995, on February 23. *See* 141 CONG. REC. S3059 (daily ed. Feb. 23, 1995) (introductory statement of Sen. Hollings).

144 *See supra* note 120 and accompanying text. Sen. Dorgan introduced S. 772, the Television Violence Report Card Act of 1995, on May 9. *See* 141 CONG. REC. S6349 (daily ed. May 9, 1995) (introductory statement of Sen. Dorgan).

145 *See* Robert Green, *TV Violence Under Renewed Attack in Congress*, REUTERS, July 12, 1995; *V-Chip Gets Prominence in Senate Hearing on Televised Violence*, COMM. DAILY, July 13, 1995, at 3; Christopher Stern, *Senators Push for V-Ban*, BROADCASTING & CABLE, Aug. 14, 1995, at 4.

146 GEORGE GERBNER, 102 UNESCO REPORTS AND PAPERS ON MASS COMMUNICATION: VIOLENCE AND TERROR IN THE MASS MEDIA 9 (1988).

147 *See generally* Schlegel, *supra* note 131.

148 *See* COWAN, *supra* note 44, at 90; *see also* Brosterhous, *supra* note 9, at 345 ("Self-regulation of the broadcast industry was only relevant when active government regulation was a possible alternative.").

while avoiding the burden of intrusive and inflexible government regulations. Despite some misgivings when the ACLU switched positions in the 1950s and began to urge broadcasters to resist self-regulation as a threat to free speech, the industry continued to rely on the code throughout the 1970s. It reached its high point in the family viewing hour policy. But *Writers Guild* and *National Ass'n of Broadcasters* persuaded the NAB and broadcast leaders that self-regulation was the wrong path to follow. It not only would inhibit the free action of individual broadcasters, but it also would cause expensive and embarrassing legal trouble.

In the early 1990s the pendulum has swung back a little. Self-regulation of television violence includes NAB principles,[149] the joint advisory guidelines issued by the four networks,[150] the advance parental advisory system,[151] and the four networks' annual public assessment of television violence.[152] There is no collective enforcement of joint standards; broadcasters will have to use individual judgment in determining whether they are in compliance with industry standards. If they make a mistake in judgment, there will be no industry sanctions against them. Their programming might be criticized by the annual violence assessment, but no industry group will penalize them as a result of the outcome of that assessment.[153]

This level of industry self-regulation contains no effective collective enforcement mechanism, and so it is susceptible to erosion under competitive pressures. One counterweight to potential competitive pressure must come from government leaders. They represent the public, but they need to play their part with great care. They may not threaten the industry so overtly that they transform industry action into state action, but they can keep the spotlight of public attention on what the individual participants in the industry are doing. Collective industry standards facilitate this role. Public officials can keep the industry on its toes not by regulating, not by threatening to regulate, but by shining the light of adverse publicity on those industry participants who do not live up to the industry's own standards.

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149 *See supra* note 104 and accompanying text.

150 *See supra* note 113 and accompanying text.

151 *See supra* note 126 and accompanying text.

152 *See supra* note 135 and accompanying text.

153 The first report in the network-sponsored three-year study of television violence was released in September 1995, and found excessive violence in children's programs, on-air promos, and theatrical films aired during the 1994-95 season. Overall, the report found that the networks were doing better in their depiction of violence. *See* Cynthia Littleton, *Violence Study Finds 'Promising Signs'*, BROADCASTING & CABLE, Sept. 25, 1995, at 20.