

**IN THE NAME OF CHILDREN:
CONGRESSIONAL EFFORTS TO BAN SEX AND VIOLENCE FROM THE
MEDIA**

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{1} Washington has passed a law to regulate media sex and violence. It is doing so in the hope that a reduction of sexual and violent images to which our children are exposed will improve our deteriorating social conditions. Many are dubious about the efficacy of attacking the culture of sex and violence rather than the underlying social ills; and many lawyers are skeptical of the whole notion that Congress has the power under the First Amendment to regulate culture at all, even in the name of children. Nevertheless, the media has become the target of choice for politicians seeking to respond to widespread public concern about the general breakdown of civility in society.

{2} The Telecommunications Act of 1996, now law, takes two distinct approaches to regulation of media sex and violence. One would mandate electronic television ratings, activated by parents through a "V-Chip" to be required in all future

TV sets. The second would criminalize the making of certain material available to teenagers on interactive computer services such as the Internet.

The V-Chip and Electronic Television Ratings

{3}Politicians are persuaded that the V-Chip with electronic ratings is an affordable, effective and constitutionally-friendly way of empowering parents to control what their children see on television. Is it?

{4}The Telecom Bill contains three essential elements: First, the establishment by the FCC of "guidelines and recommended procedures" for the rating of "video programming" that contains "sexual, violent or other indecent material" about which parents should be informed before it is shown children (defined as anyone under 18 years of age). Ratings would be mandated only if the industry is unable voluntarily to come up with an acceptable ratings system within one year of passage of legislation (something the industry proposed to do just this week). Second, the incorporation of those ratings into the electronic signals transmitted by "distributors" of video programming. And third, the incorporation of television circuitry capable of decoding those electronic ratings in all new television sets manufactured or sold in the United States. With such a system in place, it is the hope of legislators that parents will "lock in" the ratings levels for the video programming they want their children to view, thereby driving objectionable programming off the air.*

{5} Since the system relies on a confidential "PIN" number presumed to be inaccessible to kids or teenagers, parents will be empowered, say legislators, to control the video material available to their children even if they are not at home or are otherwise unable personally to monitor their kids' television viewing. This legislation is viewed as a high-tech "solution" to the widely-perceived negative impact on impressionable children of televised sex, violence and foul language.

Why does Industry Object To This System?

{6} Some objections are rooted in principle (or ideology, depending on your perspective); others are pragmatic.

{7} In the first place, says the industry, while electronic means of permitting parents to control what children view on television is fine, the government should not be in the business of labeling certain television programming as objectionable. Determination of what is objectionable TV fare is a matter for parents, based on the virtually infinite variety of contexts in which sexual or violent images are handled and based on what these parents deem appropriate viewing for their children, given their age, maturity and sensibility. A particular parent might, for example, consider "The Sally Jesse Raphael Show" objectionable because of its celebration of bizarre sexual behaviors; another parent may consider "NYPD Blue" entirely appropriate because they want their kids to see NYPD Blue's realistic depiction of urban life. Different parents might come to precisely the opposite conclusion with respect to those two

programs. Uniform government-mandated labels inevitably will be unable to reflect the myriad range of possible program contexts and parental choices.

{8}Secondly, according to broadcasters, if the government labels a particular TV program as objectionable for kids' viewing, government or special interest group pressures will lead advertisers to shy away from supporting it even if adults want to see it. Since broadcasters are totally dependent on advertising revenues, popular programming aimed at adult viewers may be driven off the broadcast networks, perhaps to pay cable networks less dependent on advertising. For those unable or unwilling to pay for cable service, the diversity of viewing options will be diminished. And moving adult-oriented entertainment from broadcast to cable will simply "shift," but not "solve," whatever problem may exist in children's access to objectionable programming.

{9}Third, industry executives argue that the V-Chip system is neither affordable nor effective. In order for it to work, they point out, every television set in a household will have to be replaced with one containing new V-Chip technology. That will cost a family a lot and will take at least 10 years to accomplish, discriminating in the meantime against those more likely to need the system -- younger, less affluent, single-parent families. And, industry asks, will parents really utilize technology that relies on a complex "PIN" system already available (but not used) in many of today's high-end TV sets -- a technology, furthermore, that teenagers

are better able to understand (and to break) than their parents? In the end, industry executives predict that few, if any, parents will actually use the V-Chip. In their view, the V-Chip will become another well-intended government regulatory scheme that will simply not produce the promised results.

What's The Government Response To These Concerns?

{ 10 } Congressman Education Markey of Massachusetts, the champion of the V-Chip system, asserts that broadcasters "doth protest too much." Broadcasters do not oppose the V-Chip because it won't work, he says, but because they are afraid it will work by shaming advertisers away from sexual or violent programming.

{ 11 } And Congressman Markey does not shy away from the charge that the government is labeling programming. So long as it is the parents who make the ultimate choice of what they want their kids to watch, he says, so much the better if objectionable programming is driven off the air. Even if that objectionable programming simply migrates to cable, he argues, parents at least make the affirmative choice whether to subscribe to a cable service, unlike broadcast signals that come into their homes and are accessible to their kids whether they like it or not.

"Smut" on the Internet

{12} Politicians are also persuaded that they can ban pornography from the Internet without doing damage to freedom of speech on this promising new medium. Can they?

{13} The Telecom Bill makes it a crime to use interactive computer services (including the Internet) to display "in a manner available to a person under 18 years of age" any material that "depicts or describes ... sexual activity or organs" in terms "patently offensive as measured by contemporary community standards." It would be a defense to prosecution that a person making such material available had taken "good faith, reasonable, effective, and appropriate actions" to restrict access to such materials by minors.

Why Is The Internet Community Up In Arms?

{14} The Internet community opposes what they see as a broad grant of police power to law enforcement personnel to prosecute what some "community" might find to be "patently offensive" speech about sex. As they see it, computer-mediated communications and access to information on the Internet is emerging as a truly significant component of modern communications, enabling individuals and virtual communities to share gossip and information on matters of common interest. Potentially, this form of communication promises to fulfill the First Amendment's

goal of a true marketplace of ideas, where speech is "cheap" to utter to wide audiences and where the "electric soap box" is truly available to all. Distinctly non-majoritarian communities, with idiosyncratic sensibilities, will finally have an opportunity not only to find and communicate widely to others. and, they point out, the Internet will become an increasingly important means of electronically accessing magazines, books and other literature. In the world of electronic communications and electronic libraries , it is inevitable and appropriate that some amount of content will concern "sexual activities," ranging from graphic sexual pictures, to gay and lesbian relationships, to marital issues, to birth control and safe sex, to on-line soap operas, to teenage dating.

{ 15}By criminalizing the "making available" to teenagers of sexual material that is "patently offensive" in terms of "contemporary community standards," the legislation would permit law enforcement officers to prosecute private communications about sexual activities that "patently offend" majoritarian sensibilities; and the legislation would permit law enforcement officers to prosecute electronic libraries who make available to teenagers books, magazine articles or newspapers dealing with "sexual activity or organs" that "contemporary community standards" would deem offensive.

{ 16}The pot reach of this legislation is exacerbated when one realizes that the terms "patently offensive" and "contemporary community standards" are not defined or otherwise delimited. The legislation can be viewed as an extraordinary grant of

power to law enforcement personnel to "pick and choose" who they will prosecute and for what -- a delegation of police power that is constitutionally suspect when dealing with speech. If prosecutors were to apply local community standards, enforcement efforts will reflect local religious or cultural majoritarian sensibilities, and may well become quite arbitrary and capricious.

{17}Local prosecutions may not only be arbitrary, they are also unlikely to be effective in solving the perceived problem of smut on the Internet. Efforts by Tennessee to prosecute a California posting of sexual material, by Germany to limit a Canadian posting of Neo-Nazi literature, by China to isolate itself from unwanted political views -- all are efforts to apply "local" standards to this distinctly non-local, international communications medium. It is far from clear that these efforts to regulate the Net will work.

How Realistic Are The Fears of Such Prosecution?

{18}Some would argue that these fears of arbitrary prosecution are overstated. But the language of the legislation is broad and vague and leaves much room for prosecutorial discretion and judicial interpretation. The history of this country's efforts to ban "The Catcher In The Rye" and other books offensive to particular adult majoritarian sensibilities does not give one confidence in the tolerance of local communities toward minority sexual tastes.

Is This Legislation Constitutional?

{19} Each branch of this regulation pushes well beyond existing precedent in government regulation of speech.

{20} The V-Chip legislation seeks to regulate a category of speech -- that embodying or reflecting "violence" -- that enjoys full First Amendment protection. Absent language that causes a "clear" and "present" danger, more precisely, absent language "inciting" violence (*Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam)), modern court decisions have not permitted regulation of "violent" speech in any context, even if done in the name of children. For example, a 1948 Supreme Court case invalidated a law that prohibited the distribution to minors of any publication "principally made up of ... accounts of criminal deeds, or pictures, or stories of bloodshed, lust or crime." *Winters v. New York*, 333 U.S. 507, 508 (1948). The prosecution of Communists and communist-sympathizers in the 1950s for advocating the violent overthrow of our government suggests the danger of allowing government to regulate "violent" speech deemed to be dangerous to society based on theoretical inferences of causation not immediately related to violent behavior.

{21} And the Anti-Smut provisions seek to regulate speech in a telecommunications medium -- interactive computer services -- whose non-obscene speech content has never before been regulated, a medium that very much resembles newspapers.

{22} Finally, the Anti-Smut provisions represent an extraordinary delegation of discretionary prosecutorial power to law enforcement personnel to intimidate unpopular speech.

{23} Congressman Markey and others point to a recent appellate decision in *Action For Children's Television, et al. v. Federal Communications Commission*, 1995 U.S. App. Lexis 16078 (D.C. Circuit 1995) (en banc) (which the Supreme Court recently decided not to review) upholding regulation of non-obscene "indecent" speech designed to protect children. Based on that decision, politicians argue that the government has a "compelling interest" in protecting children and may do so in the carefully-tailored manner of the V-Chip and the Anti-Smut legislation.

{24} But the *Action for Children's Television* case dealt with the problem of the "indecent" broadcast material that comes into the home uninvited and may be accessible to children without parental intermediation. The Anti-Smut provisions do not implicate that concern; and the V-Chip provisions are primarily concerned with categories of speech held to higher First Amendment standards than is "indecent" speech.

Conclusion

{25} One thing is certain: this new and extended speech regulation will be challenged. While the Supreme Court has let stand lower court decisions approving

narrowly-tailored efforts to protect children, it historically has been hostile to broad and ill-focused efforts to ban "indecent" or other speech. Unqualified acceptance of the government's power to regulate speech "in the name of children" risks the embrace of comprehensive, politically correct "speech codes" outlawing images of discrimination, subordination, harassment, hate and any other manner of distasteful communication.

{26}The success of the inevitable constitutional challenges to this law may well turn on the ability of the challengers to dramatize the enormous expansion of power being asserted in this legislation over speech in the mainstream media and in our private communication. Just imagine how far we are from the explicit language of the First Amendment, "congress shall pass no law abridging freedom of speech or of the press...."

***Endnote:** The legislation does not define "video programming" or "distributors," although the legislative history focuses almost entirely on video material that comes into the home on broadcast and cable television, as opposed to videocassettes or computers. Surprisingly, the legislation does not exempt news or sports programming, although earlier versions of the legislation did.

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