

CHAPTER THREE

Three Questions About Television Ratings

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In the 1996 Communications Decency Act, Congress mandated that all television sets manufactured or distributed in the United States after February 1998 contain “a feature designed to enable viewers to block display of all programs with a common rating”—that is, to have a so-called V-chip.¹ A chip enabling viewers “to block display of all programs with a common rating” is, of course, meaningless without someone to sit down and actually rate programming. Who will rate, how, and with what effect, have thus become critical issues for television producers and artists, for parents, children and teenagers, and for others who may rely upon the ratings. This article poses three questions worth pondering as the United States for the first time embarks upon a massive program of evaluating, labeling, and blocking hundreds of thousands of broadcast and cable television productions.

First, what exactly is the TV rating system that the industry created in response to the CDA² meant to accomplish? The answer is not so obvious, and looking beyond the conventional answer (“parental empowerment”), it becomes clear that the congressional purpose was to disfavor, and hopefully chill, broad categories of speech of which Congress disapproved.

Second, who will rate programming, and how will they decide? Unless one believes that the mandated V-chip combined with the industry’s rating system will have no effect whatsoever on what is produced or viewed, these procedural questions are critical.

Finally, what are the likely political and artistic effects of the U.S. ratings scheme? The evidence is just beginning to come in, but it tends to confirm that the ratings will indeed be used to censor, chill, and pressure the industry into dropping controversial shows.

I. WHAT EXACTLY IS THE RATING SYSTEM MEANT TO ACCOMPLISH?

The V-chip law, which forced the TV industry's creation of the rating system, is often touted as a form of parental empowerment; that is, its proponents characterize it as an innocent means of giving information to parents that will enable them to decide for themselves what programs their children should and should not watch. But the law is not quite so benign and noncensorial as its defenders sometimes would have it appear. For the CDA singles out certain categories of television content that Congress disliked (primarily violence and sexuality), and imposes, or at least very strongly encourages, the creation of a rating system to identify, and facilitate the blocking of, programs with just this content. The V-chip law is thus not simply an attempt to inform parents generally about the content of television programming.

Indeed, the "findings" portion of the law is quite explicit on this point. It reads, in pertinent part:

The Congress makes the following findings:

- (1) Television influences children's perception of the values and behavior that are common and acceptable in society. . . .
- (4) Studies have shown that children exposed to violent video programming at a young age have a higher tendency for violent and aggressive behavior later in life than children not so exposed, and that children exposed to violent video programming are prone to assume that acts of violence are acceptable behavior. . . .
- (6) Studies indicate that children are affected by the pervasiveness and casual treatment of sexual material on television, eroding the ability of parents to develop responsible attitudes and behavior in their children. . . .³

These findings make clear that the purpose of the V-chip legislation was to target certain subjects and ideas with plainly stated censorial purposes. Those subjects and ideas, as spelled out in the law, are "sexual, violent, or other indecent material about which parents should be informed before it is displayed to children."⁴

But what is the basis for Congress's conclusions that "children exposed to violent video programming at a young age have a higher tendency for violent and aggressive behavior later in life," or that "casual treatment of sexual material on television [erodes] the ability of parents to develop responsible attitudes and behavior in their children"? Putting aside the constitutional questions raised by a law that imposes congressional value judgments about "responsible attitudes and behavior,"⁵ what precisely are the subjects or ideas that Congress thought to be harmful, and what is the nature of the social science evidence that is said to prove the point? The two questions are related, for without defining what we are talking about (*all* violence? only "excessive" or "gratuitous" violence? explicit sex? implied sex? irresponsible attitudes *about* sex?), it is impossible to say whether

“violence” or “sex” cause harm, or whether labeling and blocking TV programs is likely to reduce such harm.

One of the weaknesses in the social science literature on minors, television, and violence is precisely the inconsistency among researchers in defining these terms. Some studies attempt to identify the effects of films or TV shows with realistic physical violence; others look at make-believe play or cartoon violence; still others include verbal aggression. Some researchers attempt to distinguish “good” from “bad” violence—that is, they would excuse war movies, educational documentaries, or situations in which the hero uses force in self-defense. As a recent report by the Committee on Communications and Media Law of the Association of the Bar of the City of New York points out,

The subject of violence and aggression in psychology is vast. These topics are fundamental to the models and theories created in the fields of psychology, biology, ethnology and evolution. One author estimated that there were 20,000 to 30,000 references on the subject of human aggression. What is most striking, even after sampling only a small part of this literature and thought, is how little agreement there is among experts in human behavior about the nature of aggression and violence, and what causes humans to act aggressively or violently. There is even difficulty defining the words “aggression” and “violence.”⁶

The report goes on to note that aggression and violence themselves

are necessarily defined relative to culture, intent, and context. While all societies condemn murder, the same act may be seen as treason or heroism. Physical discipline of a child may be viewed as appropriate or abusive, depending on viewpoint and culture. Physical assault may be viewed as reprehensible conduct or as an appropriate part of a sport or entertainment, like hockey or boxing.⁷

Thus, despite numerous pronouncements over the past decade that a causative link between television violence and social or psychological harm has been definitively proven, the ambiguities in scientists’ own use of definitional terms is in itself enough to raise questions about the “findings” that Congress made.

The social science literature is too vast and technical to review in detail here; in any event, excellent critiques have been published elsewhere.⁸ The report of the Association of the Bar of the City of New York, however, does provide a useful summary of the types of studies that have been done and of what, if any, political, scientific, and legal conclusions can reasonably be drawn from them. The report notes first that there are many schools of psychology, only one of which considers “social learning” to be the primary cause of aggressive or violent behavior:

[P]sychologists do not even agree on the basic mechanisms that cause aggression—and therefore on the possible role of stimuli such as media

depictions of violence in contributing to it. Some see aggression as innate in human beings, a drive which demands discharge in some form. Evolutionary psychologists see human aggressiveness and destructive violence as a naturally evolved response to particular environments. Violence is simply the route to status in certain social environments. Another psychologist sees human destructiveness and cruelty not as an instinct but as a part of character, as “passions rooted in the total existence of man.” For psychologists who emphasize the social needs of humans, violence is a reflection of psychological trauma in establishing relations to others. The failure to develop a mediating conscience because of a deficient family structure may lead to an inability to control aggressive impulses which arise.

Finally, there are psychologists who believe aggressive behavior is learned from the environment. It is primarily these theorists who have looked particularly at television and violence. But, although it is sometimes sweepingly said that television violence causes violence in society, the research of these psychologists by no means supports so broad a statement. For over thirty years researchers have been attempting to discern the relationship, if any, between aggressive behavior and viewing television violence. The results remain controversial and skeptics abound.⁹

The report then describes the four basic methodological approaches that have been used by this last category of social scientists, who believe that “aggressive behavior is learned from the environment.” These four are laboratory experiments, field experiments, quasi or natural experiments, and longitudinal studies. After examining the strengths and weaknesses of each method, the report concludes that the results of empirical research

offer only modest support, and to a greater extent contradict, the legislative findings drawing connections between media violence and violent conduct or predispositions that underlie most of the efforts to regulate violent media content.

This is because, first,

most psychological studies of the effects of television are studies of aggression or aggressive attitudes, not violence. The distinction is significant: many behaviors which few would deem “violent” may be counted and measured by psychologists as aggressive. Yet the purported focus of most legislative efforts is violent behavior caused by media content. It would therefore be erroneous to rely on psychological studies of aggression to justify such regulations.

Second, as the report noted,

research studies are generally influenced by more fundamental, underlying conceptions of the causes of human social behavior—issues on which there is

little agreement. For example, theorists who believe that behavior is learned by children from what they observe are more inclined to construct studies focusing on television or media than theorists who place more weight on the child's family structure or position in a social pecking order.

Finally,

determining psychological causation is problematic, difficult and the subject of a considerable amount of disagreement. The empirical findings normally speak in terms of correlation of events and not causation; the researchers' findings are usually carefully limited and, in general, do not make broad or definitive assertions about the causes of particular behavior. For many reasons, generalizing from research results to everyday experience can be perilous. It is difficult, for example, for psychologists to duplicate the mix and range of violent and non-violent programming that an individual may choose. There is also great variation in the population viewing violent programming: some persons may be unusually susceptible to imitation of violent media portrayals, and research populations may be skewed by over-representation of such individuals. It is also difficult to isolate everyday viewing of violent media portrayals from other experiences that psychologists believe may contribute to violent behavior. There is no consensus among even the researchers who have found some correlations that there is any clear causal link between media violence and violent behavior. Many psychologists point to other factors—such as watching television in general, or watching fast-paced programming—as the most likely causes of any aggressiveness associated with television viewing. And no researcher, to our knowledge, purports to demonstrate that eliminating media violence is necessary to reducing violent behavior.¹⁰

In short, Congress's "findings" about exposure to TV violence and subsequent behavior do not hold up to even the most cursory examination. The effects of art and entertainment on the complex and idiosyncratic human mind are still largely a mystery. The unavoidable conclusion is that Congress seized upon social science literature to cloak what was essentially a political and moral judgment that large, vague categories of television programming are offensive or at least inappropriate for youth.¹¹

II. WHO WILL RATE PROGRAMMING, AND HOW WILL THEY DECIDE?

The V-chip puts significant power in the hands of the people who will actually rate TV programming. Those parents who choose to activate the chip will not be evaluating programs themselves to determine if they are consonant with their own values or appropriate for the age and maturity levels of their children. Instead, parents will be blocking programs based on simple, conclusory V, S, L (for language), or D (for dialogue) labels,

combined with the industry's originally proposed TV-G, TV-PG, TV-14, and TV-MA age-based recommendations.¹² The system will give no further information about the multitude of shows subject to the rating system—their context, purpose, viewpoint, quality, or educational value.

Those parents who block will thus do so based on *Congress's* determination that it is sex, "indecency," and violence that must be restrained, and the industry's apparent interpretation of "indecent," to the extent it differs from "sexual," to mean primarily "coarse" language (L) or "suggestive dialogue" (D).¹³ Other types of content that have occasionally been blamed for juvenile delinquency or other ills—for example, racist speech, discussions of drug use, or paeans to "Satanism" or other disapproved religious beliefs—are not included.

Critics of ratings systems have pointed out the dangers of using broad, conclusory labels as measures of the value of speech, or of the harm it may cause. An often cited, and still powerful, example is Steven Spielberg's film *Schindler's List*, which will presumably receive V, S, L, and D labels because of its violent content (it is, after all, about the Holocaust) and occasional nudity (Schindler has affairs—sexual nudity—and the Jews who are being rounded up for slaughter are frequently deprived of their clothing—nonsexual nudity). Yet *Schindler's List* is probably among the most important and educational of commercial films in recent years. Whatever arguments might be made about the psychological effects on children of *gratuitous* violence, the violence shown in *Schindler's List* can hardly be deemed gratuitous, and indeed the film has been criticized in some quarters for not giving a vivid *enough* depiction of the horrors of the Nazi regime. What then, is the point exactly of shielding minors, particularly teenagers, from the knowledge of human pain and brutality imparted by this and other historical films? How are they to learn about human history without studying the evil that characterized one of its most gruesome episodes? Does it really help educate young people to airbrush the atrocities of history—or, for that matter, to pretend that the powerful force of human sexuality does not exist? Certainly, there is little basis to believe that viewing *Schindler's List* will cause young people to develop greater tolerance for violence, to behave more aggressively, or to acquire irresponsible attitudes about sex.¹⁴

Eyes on the Prize, to cite an example of a program specifically designed for TV, is a powerful documentary of the American civil rights movement, and contains violence galore—most of it visited by Southern white citizens or law enforcement officers against black protesters. The film would be historically false if it did not. Yet its educational value and dramatic power cannot be doubted. What is the justification for labeling with a V—and therefore suggesting to parents that they block it as unsuitable—this masterwork of documentary filmmaking?

On a more mundane level, the process of deciding whether a program merits a V, D, S, or L—or a TV-14 or TV-MA—will inevitably be subjective, value-laden and time consuming, as a Fox Broadcasting executive noted in September 1997.¹⁵ Ellen DeGeneres, the recently "out" lesbian of the popular eponymous ABC sitcom, discovered in October 1997 that her completely nonviolent and nonsexually explicit show was slated to receive a TV-14, presumably because it deals approvingly with homosexuality. "How can I go

forward?” DeGeneres was quoted as asking. “This is blatant discrimination. . . . This advisory is telling kids something’s wrong with being gay.”¹⁶

A December 1993 report from North Dakota Senator Byron Dorgan is pertinent here. The report summarized the results of a one-week survey of violence on prime time television conducted by college students earlier that year. Among the shows found to contain the highest number of violent acts per hours were *The Miracle Worker*, *Civil War Journal*, *Star Trek 9*, *The Untouchables*, *Murder She Wrote*, *Back to the Future*, *Our Century: Combat at Sea*, *Teenage Mutant Ninja Turtles*, and Alfred Hitchcock’s classic *North by Northwest*.¹⁷ Even if a TV ratings system purported to give pejorative V labels to only the programs on this list deemed to contain “bad” violence, which the industry’s current plan does not, it would be difficult for a team of raters to make those judgments, expected as they will be to decide upon labels for dozens of programs daily. Indeed, the subjectivity of judgments about “value” or about the meaning or propriety of the messages contained in creative works, as well as long-standing First Amendment rules against “viewpoint discrimination,”¹⁸ are one reason that the ratings, like the Communications Decency Act itself, do not distinguish between “good” and “bad” violence or sex.

But if making value judgments of this type is both difficult and offensive to our anti-censorship instincts, a system that fails to do so, and thus encompasses *all* programming bearing on large subjects like sexuality or violence, is hopelessly overbroad. As Professor Burt Neuborne recently pointed out:

The impossibly broad reach of a literal ban on all speech depicting violence inevitably requires a narrowing set of criteria designed to distinguish *Hamlet* from forbidden speech depicting violence. But any effort by the FCC, or anyone else, to decide when speech depicting violence crosses the line from an acceptable exercise in artistic creation, as in *Hamlet*, or *Oedipus Rex*, or *Antigone*, or *The Crucible*, to a forbidden depiction of “gratuitous” or “excessive” violence must involve purely subjective notions of taste and aesthetic judgment. Indeed, once it is recognized that the ban on violence cannot be applied literally, any effort to apply a narrower ban is utterly without objective guidance. In effect, efforts to ban violent programming would turn the FCC into a drama critic, forced to pass judgment on the artistic merits of any effort to depict a violent act.¹⁹

The problems Professor Neuborne identifies with respect to a ban are equally present in a ratings system. The American Psychological Association has acknowledged that “[t]elevision violence per se is not the problem; rather, it is the manner in which most violence on television is shown that should concern us.”²⁰ But as Professor Neuborne points out, trying to distinguish between “excessive” or “gratuitous” violence on the one hand, and violent material presented in an instructive or morally approved way, as the APA suggests, would enmesh whoever is responsible for the ratings in a vast process of policing thought and censoring ideas.

Nor are these problems resolved if television companies decide not to assign the task of rating to in-house staff but instead force producers or directors to evaluate and

label their own programs. Many of those on the creative side of the industry will object to being compelled to attached pejorative ratings to their works, or will bridle at the constraints of a system that substitutes overgeneralized and fundamentally uninformative labels for real contextual information about programs.²¹ If, despite their objections, they are forced to label, the results are likely to be arbitrary and idiosyncratic. For example, the distinction between “strong, coarse language,” requiring a TV-14 rating, and “crude indecent language,” requiring a TV-MA,²² is likely to elude many raters and lead to inconsistent results.

On the other end of the television continuum, there are countless programs with no violence, sex, “coarse language,” or “suggestive dialogue,” and also with little educational or artistic value. Mindless entertainment—the “idiot box” of popular discourse—may be a greater threat to healthy child development, to the nurturing of thoughtful young people who are knowledgeable about and capable of dealing with the complexities and tragedies of human life, than violent or sexual content per se. Justice Brandeis’s much-quoted rhetoric about “more speech”²³ is pertinent here: teaching young people about responsible sexuality or other aspects of human behavior requires education and discussion, not censorship.

III. WHAT ARE THE LIKELY POLITICAL AND ARTISTIC EFFECTS OF THE U.S. RATINGS SCHEME?

Regardless of its unambiguously stated censorial purposes,²⁴ the 1996 V-chip law, it is sometimes said, will not have any speech-suppressive effect, or at least none attributable to the government. Parents will make their own decisions based on accurate information about programming—an outcome no more repressive of free speech than the existing operation of market forces as consumers choose some programs and reject others.

Let’s examination this seductively simple proposition. First, even in the constitutional sense (as the First Amendment generally applies only to government), the television ratings are not likely to operate wholly in the unregulated sphere of private choice. Some public schools will rely upon the ratings in choosing—or, more accurately, disqualifying—what may be worthy and valuable TV programs for homework assignments or in-class viewing. Indeed, there are school districts that already rely upon the familiar Motion Picture Association of America/Classification and Rating Administration movie ratings in just this fashion,²⁵ despite the fact that MPAA/CARA raters have no background or expertise in education or child development.²⁶ Just as numerous students have been deprived of *Schindler’s List* as part of their high school history courses because of its R rating from CARA, so *The Accused*, *The Miracle Worker*, *The Civil War*, and countless other educationally profitable TV movies or other shows with violent content will receive V ratings and be subject to at least a presumption against curricular use in many public schools.

Second, ratings necessarily imply that certain programs contain themes that are morally disapproved or psychologically harmful to minors. They thus provide an easy set of symbols for “family values” activists in local communities to seize upon. The average public school administration will not be particularly eager to countenance curricular use

of S-, V-, L-, or D-rated material in the face of likely protest from such groups. Ratings thus advance censorship by giving private pressure groups easy red flags to wave in the faces of nervous government officials.

Moving from the local to the national government level, it is difficult to imagine that the Federal Communications Commission, which is so enmeshed in the regulation of “indecenty” in broadcasting,²⁷ will not be drawn into disputes over ratings as well. It will no doubt receive complaints from politicians, members of the public, and perhaps rival broadcasters, that some companies are not accurately rating their programming, or are refusing to rate at all. Indeed, one member of Congress has already made such a threat explicitly. In September 1997, Senator John McCain wrote to NBC, which had so far resisted the addition of content-based letter labels to the original age-based industry ratings plan, that if NBC continued to “refuse to join with the rest of the television industry,”

I will pursue a series of alternative ways of safeguarding, by law and regulation, the interests that NBC refuses to safeguard voluntarily. These will include, but not be limited to, the legislation offered by Senator Hollings to channel violent programming to later hours, as well as urging the Federal Communications Commission to examine in a full evidentiary hearing the renewal application of any television station not implementing the revised TV ratings system.²⁸

Is the FCC to ignore the complaints of Senator McCain and others? It may, to be sure, be wary of initiating formal reviews of allegedly inaccurate or deceptive ratings, for fear of establishing the very “state action,” and consequent vulnerability to a First Amendment court challenge, that the authors of the V-chip legislation attempted to avoid. Nevertheless, the agency is charged by law with evaluating a broadcast licensee’s record of contribution to the “public interest” when reviewing requests for license renewals, transfers, or acquisitions.²⁹ Just as the commission has long considered broadcasters’ records on community programming and their capacity to disseminate diverse points of view,³⁰ and just as it has threatened adverse licensing action based on complaints of “indecenty,”³¹ it is likely to consider allegations that broadcasters have rated programs improperly when it makes licensing decisions. At the very least, the possibility that it may do so, and the power of economic life and death that the FCC holds over broadcasters, will make the television industry cautious about displeasing the agency.

What about private censorship? Putting aside the legal question whether private marketplace choices made as a result of the V-chip law create First Amendment concerns,³² it cannot be doubted that such private choices do have an effect on artistic freedom. Again, the analogy to movie ratings is instructive. Just as many theaters are reluctant to book NC-17 movies, some advertisers will be reluctant to support V-, S-, L-, or D-rated TV shows. Less advertising means less revenue, which in turn means less likelihood that the show will survive—unless, of course, its content is toned down. In many situations, advertisers’ threats of withdrawal will not even be necessary, since for large entertainment companies the mere prospect of pejorative ratings may be daunting enough in terms of public relations to cause them to instruct producers to self-censor their material.

In recent years, the MPAA/CARA film ratings system has had just this effect.

Leading directors like the late Louis Malle have been forced to eliminate artistically important scenes from their work because of the studios' insistence on obtaining at least nothing more pejorative and audience-thinning than an R rating.³³ Self-censorship will thus be a predictable and intended effect of the V-chip law.

I have discussed in the previous two sections whether such pressures to self-censor are justifiable, given the ambiguity of the social science literature, the difficulty of defining what it is that is supposed to be harmful, and the dangers of reposing discretionary ratings powers in either program producers themselves or large numbers of industry-employed functionaries. The point here is that, regardless of the strength of the justifications or the fairness of the procedures, the inevitable pressures of the ratings system will in many instances lead to blander, less provocative programming—less coverage of controversial but important issues like sexuality, and less artistic freedom.³⁴

V-chips and ratings will do nothing to solve the tough, persistent social problems we associate with youth: poor education, violence, alienation, high teen pregnancy rates. American political leaders, however, seem increasingly devoted to the art of making symbolic gestures while ignoring serious solutions to social problems. V-chips and ratings are such gestures, but they are not entirely empty ones. For although they will do nothing to reduce irresponsible sexual activity or violence, they will restrain artistic freedom. Moreover, they create the illusion that “something is being done,” and reinforce the pernicious notion that information about such complex human phenomena as sexuality and aggression is better suppressed than examined.

Notes

1. 47 U.S.C. §303(x), Public Law 104-104, Title V, §551(c). The law only applies to TV sets with screens 13 inches or larger, and allows the FCC to alter the requirement consistent with advances in technology. *Id.*, §551(c)(4).
2. The law provided that if the television industry did not within a year develop a ratings system satisfactory to the Federal Communications Commission, the FCC must “prescribe” one that would identify “sexual, violent, or other indecent material,” and then, “in consultation” with the industry, must establish rules requiring programmers to transmit the ratings in a manner allowing parents to block rated shows. 47 U.S.C. §303(w). Despite initial protests, the industry responded promptly by setting up a committee to design a ratings system. See n. 12, *infra*.
3. Section 551(a), Public Law 104-104 (1996), published in the Historical and Statutory Notes to 47 U.S.C. §303(w). Congressional “findings” may or may not be based on accurate empirical evidence, and in any event are not binding on courts, particularly not in First Amendment cases, where the judicial branch must make its own judgment about the facts on which the government relies to justify restrictions on free speech. See, e.g., *Sable Communications, Inc. V. FCC*, 492 U.S. 115, 129 (1989); *Landmark Communications v. Virginia*, 435 U.S. 829, 843 (1978).
4. 47 U.S.C. §303(w). The section goes on to assure that “nothing in this paragraph shall be construed to authorize any rating of video programming on the basis of its political or religious content.” *Id.*
5. A fundamental First Amendment principle is that government cannot suppress ideas because it thinks them dangerous. See Marjorie Heins, “Viewpoint Discrimination,” 24 *Hastings Con.L.Q.* 99 (1996); *American Booksellers Association v. Hudnut*, 771 F.2d 323 (7th Cir.), *aff’d mem.*, 475 U.S. 1001 (1985); “Violence in the Media: A Position Paper,” *The Record of The Association of the Bar of the City of New York*, vol. 52, no. 3 (April 1997), at 283–84 (citations omitted). Reprinted with permission from *The Record of The Association of the Bar of the City of New York*, copyright 1997, 52 *The Record* 273, 283–84.
7. *Id.* at 284.

8. See, e.g., Jonathan Freedman, "Television Violence and Aggression: A Rejoinder," *Psychological Bulletin*, Vol. 100(3), 372–78 (1986); Robert Kaplan, "Television Violence and Viewer Aggression: A Reexamination of the Evidence," *Journal of Social Issues*, vol. 32, no. 4, 35–70 (1976); Robert Kaplan, "TV Violence and Aggression Revisited Again," *American Psychologist*, vol. 37, no. 5, 589 (May 1982); O. Wiegman, M. Kuttschreuter & B. Baarda, "A Longitudinal Study of the Effects of Television Viewing on Aggressive and Prosocial Behaviours," *British Journal of Social Psychology*, vol. 31, 147–64 (1992).
9. "Violence in the Media," *Record of The Association of the Bar of the City of New York*, *supra* n. 6, at 286 (citations omitted).
10. *Id.* at 296–97 (citations omitted).
11. Social science studies with respect to sexual situations on television are quite limited compared to the extensive, if inconclusive, literature on violence. The few studies that do exist are at best suggestive of a correlation, not necessarily a causal relation, between viewing habits and sexual behavior. See, e.g., Charles Corder-Bolz, "Television and Adolescents' Sexual Behavior," *Sex Education News*, vol. 3 (Jan. 1981), p. 3 (survey showed that of seventy-five adolescent girls, half of them pregnant, the pregnant ones watched more TV soap operas and were less likely to think that their favorite characters used contraceptives). As the American Academy of Pediatrics, a proponent of more sexually responsible TV programming, acknowledges, "there is no clear documentation that the relationship between television viewing and sexual activity [among teenagers] is causal." American Academy of Pediatrics, "Children, Adolescents, and Television," *Pediatrics*, vol. 96, no. 4 (Oct. 1995), p. 786.
12. The industry's original plan, submitted by the National Association of Broadcasters (NAB), the Motion Picture Association of America (MPAA), and the National Cable Television Association (NCTA) to the FCC for its approval on January 17, 1997, was wholly age-based and gave no information about the content of specific programs. It encountered widespread criticism from politicians and advocacy groups. After a six-month period of negotiations with these groups, the three industry associations agreed to add V, S, L, and D labels to the scheme. See Letter Submission of Jack Valenti, President and CEO of the MPAA, Decker Anstrom, President and CEO of the NCTA, and Eddie Fritts, President and CEO of the NAB, to William Caton, FCC Secretary, Aug. 1, 1997 (hereinafter, "Valenti letter").
13. *Id.*, p. 2. As a legal term, "indecenty" derives from the Federal Communications Commission's policing of radio and television broadcasting, as approved by the Supreme Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The monologue by comedian George Carlin found to be indecent in *Pacifica* consisted of the repetitive use of the so-called seven dirty words, not of any explicit description of sexual activity.
Under the industry's plan, news and sports are to be exempt from labeling requirements. See Valenti letter, p. 3. Disputes may easily be anticipated about what programming qualifies as "news."
14. Many other examples of fine films with violent content could, of course, be cited: *The Accused*, *Bonnie and Clyde*, *The Burning Bed*, *Psycho*, and almost any war story or Biblical epic.
15. Lawrie Mifflin, "Helping or Confusing, TV Labels are Widening," *New York Times*, Sept. 30, 1997, p. E1 (quoting Roland McFarland, Vice President for Broadcast Standards and Practices at Fox, as stating that "the process had become much more time-consuming now that D, L, S, and V had to be considered." "Is it a punch? A gunshot? A gunshot plus killing? These are all subjective interpretations. The classic discussion here is around shows where there's heavy jeopardy involved, but not real on-screen violence. You might see a body, the aftermath of violence. . . . Where's the tilt factor, as far as giving it a V?") *Id.*, p. E8.
16. Bill Carter, "Star of 'Ellen' Threatens to Quit Over Advisory," *New York Times*, Oct. 9, 1997, p. E3.
17. Press Release from U.S. Senator Byron L. Dorgan (North Dakota), "Report on Television Violence Shows Fox Network Has the Most Violence Programming," Dec. 16, 1993, and attached report, "Television Violence Demonstration Project Conducted at Concordia College, Moorhead, Minnesota, Sept.–Dec. 1993."
18. See n. 5, *supra*.
19. Television Rating System: Hearings on S.409 Before the Senate Comm. on Commerce, Science and Transp., 105th Cong. (1997) (testimony of Burt Neuborne, Professor of Law, New York University).
20. Comments of the American Psychological Association to the Federal Communications Commission 3 (April 8, 1997) (in the matter of Industry Proposal for Rating Video Programming, No. 97-55).
21. In the analogous context of Internet ratings, producers of online information have loudly objected to proposals that they "self-rate" their sites: as one editor explained, "The rating of content, particularly in the area of violence—to tell people whether they should or shouldn't read about war in Bosnia—takes news and turns it into a form of entertainment." Amy Harmon, "Technology," *New York Times*, Sept. 1, 1997, p. D3.
22. As set out in the Valenti Letter, *supra* n. 12, p. 2.

23. “Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly, discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine. . . . [T]hey knew that . . . the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.” *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
24. See *supra*, text accompanying notes 2–3.
25. See *Borger v. Bisciglia*, 888 F.Supp. 97 (W.D.Wis. 1995) (rejecting First Amendment challenge to school district’s ban on showing any R-rated film as part of curriculum, which resulted in inability of students to see *Schindler’s List* as part of their study of the Holocaust); *Desilets v. Clearview Regional Board of Education*, 137 N.J. 584 (1994) (striking down school authorities’ refusal to allow student newspaper to review R-rated films, *Rain Man* and *Mississippi Burning*); “‘Schlinder’ Blacklisted,” *New York Times*, March 18, 1994, p. A28 (Letters to the Editor) (describing Plymouth, Massachusetts’s school board’s decision not to allow high school students to see *Schindler’s List* because of R rating); “Twin Falls, Ohio,” *American Library Association Newsletter on Intellectual Freedom* (Sept. 1997), p. 127 (describing parent’s challenge to use of films *Schindler’s List* and *Macbeth* because of their R ratings).
26. See Richard M. Mosk, “Motion Picture Ratings in the United States,” in this volume. I do not mean to suggest that a ratings board composed of literary or psychological experts, as is found, for example, in Britain, would necessarily be an improvement.
27. See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Action for Children’s Television v. FCC* (“ACT III”), 58 F.3d 654 (D.C. Cir. 1995), cert. denied, 116 S.Ct. 701 (1996).
28. Letter from Senator John McCain, chairman, Senate Committee on Commerce, Science, and Transportation, to Robert Wright, President and CEO, National Broadcasting Company, Sept. 29, 1997. At around the same time, Senator McCain asked each of four new FCC commissioner candidates “to agree to consider a station’s use or nonuse of the revised ratings-code as a factor in deciding whether to renew a station’s license.” Lawrie Mifflin, “Media,” *New York Times*, Oct. 6, 1997, p. D11. Although refusing to use the letter labels, NBC was already giving “full-sentence advisories” about violent content at the start of some shows. *Id.*
29. See 47 U.S.C. §§ 303-309.
30. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (approving FCC’s consideration of diversity of viewpoint in awarding licenses), overruled on other grounds in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).
31. See *Action for Children’s Television v. FCC* (“ACT IV”), 59 F.3d 1249, 1266 (D.C. Cir. 1995), cert. denied, 116 S.Ct. 773 (1996) (Tatel, J., dissenting) (noting FCC use of administrative “indecentcy” determinations to threaten loss of broadcast licenses).
32. In *Denver Area Educational Telecommunications Consortium v. FCC*, 116 S.Ct. 2374 (1996), Justice Stephen Breyer, writing for a plurality of four members of the Supreme Court, asserted that although a law authorizing private cable companies to censor “indecent” leased access cable programming was clearly “state action,” it did not violate the First Amendment because, among other things, the law addressed “an extremely important problem”—“protecting children from exposure to patently offensive depictions of sex”—and it reflected a balancing of cable companies’ and leased access programmers’ free speech rights. *Id.* at 2385, 2382–88. As to public, educational, and governmental access cable programming, the Court reached the opposite conclusion. *Id.* at 2394–97.
33. See Marjorie Heins, *Sex, Sin and Blasphemy: A Guide to America’s Censorship Wars* 58–59 (1993) (describing Malle’s cutting, over protest, of his controversial film, *Damage*); Stephen Farber, *The Movie Rating Game* 71 (1972) (recounting how line about pubic hair was cut from *The Reivers* to obtain GP rating and how pot-smoking scene and two short love-making scenes were eliminated from *Alice’s Restaurant* for the same reason); see also *Miramax Films Corp. v. Motion Picture Association of America*, 560 N.Y.S. 730, 734 (Supreme Ct., NY County 1990) (“[t]he record also reveals that films are produced and negotiated to fit the ratings. After an initial ‘X’ rating of a film whole scenes or parts thereof are cut in order to fit within the ‘R’ category. Contrary to our jurisprudence which protects all forms of expression, the rating system censors serious films by the force of economic pressure”). Since the decision in *Miramax*, CARA’s dreaded X has been replaced with the almost equally undesirable NC-17.
34. Some critics of ratings claim that the censorial purpose may backfire—that is, the quest for adventuresome (especially teenage) audiences may in some cases cause producers gratuitously to add sexual or violent content to their work, for what self-respecting adolescent wants to attend a G-rated movie? Whatever the accuracy of this speculation, it seems evident that television ratings, like movie ratings, will distort artistic judgments and introduce extraneous pressures into the creative process.