Broadcast Self-Regulation: The NAB Codes, Family Viewing Hour and Television Violence

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I have divided this discussion of broadcast self-regulation into three main parts: (1) the history of the codes established by the National Association of Broadcasters, (2) an account of the rise and fall of the Family Viewing Hour, and (3) the revival of industry self-regulation as part of the industry response to the most recent wave of public and Congressional concern about television violence.

The NAB Codes.

The NAB was founded in 1923 and first attempted to regulate the industry in 1926 during the wavelength wars. The failure of this first attempt at self-regulation is instructive in revealing the dependence of self-regulation upon an underlying scheme of government regulation.

During the 1920s Secretary of Commerce Herbert Hoover had attempted to use the limited authority granted to him under the Radio Act of 1912 to regulated the use of the airwaves to prevent interference by limiting licensees to particular frequencies, hours of operation and power levels. In 1926, even this limited authority was apparently stricken down in the Zenith case and on July 8, 1926, the Attorney General issued an opinion which forbade the government from regulating the airwaves.

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 wee 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."

The NAB was active during this chaos. It attempt to regulate the industry 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 during the hours assigned by the Commerce Department prior to the Attorney General's opinion. Only 150 stations responded. This response was ineffective -- especially when 5 new stations a week were starting up.

In September 1926, the NAB helped to organize the National Radio Coordinating Committee, an all-industry self-regulatory group consisting of every major group involved in broadcasting. While giving some lip-service to the idea of controlling the airwaves chaos through self-regulation, the main goal of the group was to pass new Federal legislation.

Despite the industry's attempt at self-regulation, this wavelength chaos endured until Congress came to the rescue. On February 23, 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.

Proponents of self-regulation point to its intended function of providing stability, order, discipline and control to a market that might otherwise not function at all. Critics often point out in response 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 it is least effective in constraining the power of self-interest.

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, Secretary 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 very overwhelming. It might be in the industry's best interests 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 common good.

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, and that therefore, the Commission would have to look at the character of the service provided by broadcasters in making decisions about who would receive a license. Indeed, in one of its first decisions, 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.

A continuing theme of self-regulation is the extent to which it is undertaken to prevent government regulation. This theme is first illustrated in the decision by 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 -- lacking both specifics and an enforcement mechanism -- this code "not only had no teeth, but very soft gums." The next code adopted on March 25, 1929 was a step forward. It had both a "Code of Ethics" and "Standards of

Commercial Practice." The code of ethics prohibited "offensive" material, "fraudulent, deceptive or obscene" matter, "false, deceptive or grossly exaggerated" advertising claims. It required "great caution" in accepting advertising for products or services which "may be injurious to health," and called for "care" to be taken to prevent the broadcast of statements "derogatory" to other stations, to individuals, or to other products or services.

These content generalities were not very serviceable as a guide to individual stations or network programmers. But some of the provisions of 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." And there was no provision at all for enforcement of the standards of commercial practice. Less than half of the radio stations were members of the NAB at the time, and there was no requirement that members had to comply with the code. This 1929 code was on the books, but largely ignored for several years.

Critics of industry codes often worry that the government might adopt them and give them the force of law. This possibility is illustrated in 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. 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 business 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. He appointed a seven-person Broadcaster Code Authority to supervise compliance. The codes provisions were 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 member 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, the NRA was abandoned. In May 1935 the Code Authority for Broadcasting was closed.

A new voluntary code was adopted to replace the NRA code, but it was largely ignored. Then in 1939, 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 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 nationally broadcast speech, on November 12, 1938, then FCC Chairman McNinck referred to the furor surrounding the broadcast of War of the Worlds, and warned: "If you can't police yourself, someone else will do it for you." Broadcasting magazine summarized the industry view concerning a new, enforceable code: "If it keeps the FCC on its technical-regulation beat, and prevents it from barging into program matters with a censorship warrant from Congress, it will be worth the price."

The new code had some novel features compared to the 1929 version. It called for close supervision of children's programs. It 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 cooperated with educational groups for the airing of educational programs. It required news programs to be fair and accurate. It barred broadcasters from attacks based upon race or religion. It 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 fortune-telling.

Proponents of industry codes often point to their public relations function of creating a favorable impression of a responsible industry policing itself. This benefit of industry codes is illustrated in the 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, for example, lauded it as "a great step forward in formulating a policy in the public interest." The Chairman of the FCC gave public approval to the code.

The first application of the 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 into 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 prepared to cite him for violation of that section. Even 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 Code Committee's judgement, Father Coughlin found it more and more difficult to find outlets, and by mid-September 1940 -- about one year after the adoption of the new NAB code-- he was off the air.

In 1945, the FCC ruled that time should be sold for the airing of controversial views. The NAB revised its code to conform to this new FCC requirement. But it also took the opportunity to make it clear that the code was not going to be enforced by a Code Committee and that its provisions were intended merely as a "guide" to individual broadcasters. The 1948 code was more detailed but also lacked an enforcement mechanism.

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 criticism, legislative developments and industry self-regulatory response. In May 1951 Senator William Benton 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. The Board would have eleven members appointed by and responsible to the United States Senate.

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, right 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 of 1952. 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.

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, 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. Nevertheless, it was clear that there was no law by which enforcement could be obtained. The code was purely voluntary.

The code contained explicit content restrictions on displays of violent action and sexual material. The code prohibited "reference to the kidnapping of children" and material which is "excessively violent." Provision (l) 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 resultant retribution and punishment."

Although proponents of codes point to their positive public relations value, there is also the danger that they will be perceived as censorship. This possibility was realized in the reaction to the new code. Broadcasting magazine and the ACLU both attacked the code. The ACLU characterized the code as "stifling and illegal censorship" and they 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. 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 took on substantially the form they would have for the remainder of their existence.

Critics of industry codes point to the possibility that the government might step in to transform a voluntary code into a regulatory mandate. 1963, the FCC almost succeeded in realizing this possibility. The agency proposed to require all broadcasters to observe the limitations on advertising time in the NAB code. A major advantage of a voluntary code for an industry was flexibility -- those who could not live with time standards could simply opt out of compliance with the code. The broadcast industry 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. The rule lived on for a time, however, as a processing guideline governing whether the staff had delegated authority to renew the license of station.

Critics of self-regulatory boards are concerned that government pressure could transform a board's role from review to clearance. In 1969 Senator John Pastore tried to do this. 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.

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. The tobacco industry's argument that the commercials functioned only to change or establish brand loyalty seemed increasingly unrealistic and self-serving. But at the time cigarette advertising accounted for ten percent of all broadcast advertising revenue, and this economic fact prevented the code from being adjusted to restrict such ads. Perhaps because of this failure to act, Congress imposed a much more draconian rule -- a total ban on television cigarette advertising.

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 grounds that the NAB's voluntary code limit of nine and one-half minutes per hour was sufficient.

Family Viewing Time

Concerns about the violent content of television were evident from the beginning of television itself. Senatory Estes Kefauver held one of the first Congressional hearings on televised violence in 1954 with the primary focus on whether the depiction of violence in television programs was related to the problem of juvenile delinquency. A staff report to the Senate Judiciary Committee in 1955 recommended that the FCC develop standards for programming content, including violent content, and that the Commission enforce these standards using a series of sanctions beginning with fines and ending with license revokation. In 1956, Senator Kefauver, in an article for Readers' Digest entitled "Let's Get Rid of Televised Violence," brought these concerns to the general public. In 1961, Senator Thomas J. Dodd focussed again on television's impact on juvenile delinquency. He held a series of hearings on the effect on young people of the portrayal of crime and violence on television and concentrated specifically on the show The Untouchables. These hearings lasted through 1964. 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.

In 1969, Senator John 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. In January 1972, the report from the Surgeon General's Scientific Advisory Panel on television violence and behavior drew a "preliminary and tentative" conclusion that viewing televised violence was causally related to aggressive behavior. 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.

In the early 1970s, then, the 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?

The NAB Television Code had from its first edition in 1952 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, and 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. 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 in their programs.

The public outcry on television violence suggested that these mechanisms were not working. Something more seemed to be needed than reaffirming existing codes and practices. The industry's additional response was Family Viewing Time, a policy that entertainment programming inappropriate for viewing by a general family audience would not be aired between 7:00 p.m. and 9:00 p.m., Eastern Standard Time.

The basic outline of this story is well-known. In mid-1974 the House Appropriations Committee sent a strong message to the Chairman of the FCC, Richard Wiley to report back to them by the end of the year "outlining specific positive actions taken or planned by the Commission to protect children from excessive programming of violence and obscenity." 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. 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. Eastern Standard Time would be suitable for children and that difficult programs after that time would be preceded by a warning. In addition, he met with the network heads to discuss these suggestions. In addition, he gave several public speeches urging the industry to think about taking these steps and warning that legislation or regulation, which he opposed on First Amendment grounds, might result from industry inaction.

Following these FCC initiatives, CBS took the lead in urging the NAB to modify its code to reflect a policy that the first hour of prime time should be suitable for family viewing. A letter from the head of the CBS Network to the head of the NAB Code Board was sent at the end of 1974 requesting this addition to the NAB. In early February 1975, the NAB Television 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 network. The Code Board voted to vest the NAB with ultimate enforcement authority over this new provision of its code.

The family viewing hour went into effect in the fall of 1975. Most action shows were moved out of family time. The comedy series All in the Family was moved to 9:00 p.m. (EST), 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 theme and language.

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 essence of the argument was that the adoption of the family viewing policy was not voluntary but was coerced by the threat of government regulation and hence was state action. Norman Lear, producer of All in the Family, brought an additional suit alleging economic damages based upon the movement of his show out of the family viewing hour.

The legal case turned on an analysis of the behavior of Chairman Wiley, the network executives, and the NAB representatives. The relevant meetings, speeches, 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, he 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 wish to adopt."

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 barred the networks from agreeing with the NAB to abide by a family viewing policy.

The district court's decision 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 analysis started from the principle that the individual broadcaster had the role under the Communications Act to determine the content of the programming on his station. Under a series of FCC decisions, this duty could not be delegated to someone else -- to do so would be to surrender the individual programming decision role assigned to the licensee as a condition of his receiving a license. If the NAB were to adopt and enforce a family hour policy, it would deprive broadcasters of their right and duty to make individual programming decisions. Key to this analysis was the idea that the NAB had an effective enforcement mechanism so that code provisions could overrule individual judgment.

In much of the rhetoric of this decision, the district court was aiming to undermine the validity of all collectively enforced broadcasting rules. The force of this rhetorical assault was a contributing factor in the demise of enforceable self-regulatory codes. For example:

> "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."

Although the court was careful to grant relief only with respect to the family viewing hour, the logic of his position would undermine any attempt by broadcasters to enforce a self-regulatory code. The broadcaster might "consider the views of other broadcasters as enunciated in the NAB code. They may not delegate their authority to the NAB, however."

The court chose strong language to characterize the NAB code. The NAB code board was referred to as "one all-powerful umpire" regulating prime time programming decisions. The NAB's decision to adopt a family viewing plan was described as a "joint attempt to monopolize the nation's airwaves." 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 the 'paramount' rights of viewers and listeners....The 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."

These remarks, of course, were not a binding part of the court's decision, but they suggested to the broadcasting industry that the days of a centralized enforcement mechanism for a self-regulatory code might be coming to a close. As a legal matter, however, this decision did not stand. It was overturned on appeal in 1979 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. The case was returned to the FCC for judgment about the appropriateness of Chairman Wiley's actions under the First Amendment.

Key to the appeals court's willingness to overturn the decision on jurisdictional grounds was the rejection of district court's fundamental premise, that only individual broadcaster judgment should determine what goes on the air. The appeals court emphasized that the FCC has power to limit the judgment of broadcasters in several ways including the regulation of indecent material. 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 attempted to resolve it.

The appeals court did not directly discuss the question of the NAB's self-regulatory authority, but it did hold in abeyance the district court's prohibition on the joint establishment and enforcement of a family viewing policy by the NAB. By this action and by implication, the appeals court removed some of the legal cloud from the self-regulatory approach. For if the invocation of the district court's principle of individual licensee autonomy did not rule out the possibility that the FCC might establish a family viewing policy, it surely did not automatically preclude the NAB from establishing such a policy.

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. The FCC did not address the underlying constitutional question of the FCC's power to adopt a family viewing hour on its own. It concentrated instead on arguing that the FCC had not crossed the line between permissible "jawboning" and coercion of a regulated industry. Indeed, by rejecting a suggestion that this distinction is the same as the distinction between what the FCC may regulate and what it may not, it held out the possibility that the FCC could suggest that broadcasters adopt self-regulatory measures which would be questionable for the FCC to adopt itself. Moreover, voluntarily-enforced industry self-regulation seemed to be vindicated. Iif the FCC had not erred in suggesting that the NAB adopt the family viewing hour, then the NAB would not necessarily be acting contrary to the First Amendment in adopting the family viewing hour on its own. 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.

At this point, however, this legal vindication of voluntary industry self-regulation by the FCC was largely irrelevant. In June of 1979, the U. S. Department of Justice filed an antitrust suit against the NAB alleging that the provisions of its code restricting advertising had the purpose and effect of restricting the amount of advertising on television and hence raising its price above competitive levels to the detriment of both advertisers and consumers. On March 3, 1982, the United States District Court for the District of Colunbia granted summary judgment in favor of the Justice Department. And in November of 1982, the Justice Department and the NAB entered into a consent decree settling the case in return for the NAB's agreement to cease enforcing or even suggesting compliance with the NAB's advertising guidelines. Shortly thereafter the NAB simply abandoned all parts of the code.

Two findings by the district court in this antitrust case were important for the future of self-regulation. The first was that the NAB code was not merely an advisory standard which subscribers may chose to ignore but a contractual obligation to which they are 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 terms of lost advertising should they be suspended. This claim was weaker than the claim in the Writers Guild decision that the enforcement provision of the NAB code deprived broadcasters of individual judgment. It did not follow from the antitrust court's opinion that any enforceable broadcast code was a violation of the antitrust laws, only that a provision of the code that had the effect of unreasonably

restricting competition could not be defended on the grounds that adherence to the code was purely voluntary. Nevertheless, the court's focus on the enforcement mechanism contributed to the cloud hanging over this type of self-regulation. It suggested that any future code should contain only advisory guidelines and should not be interpretated and enforce by a centralized industry body.

The second finding of interest for what was to come in the renewed dispute over television violence was the provision in the consent decree providing that the individual members of the NAB could act individually and unilaterally to impose the NAB's advertising restrictions on themselves. What was forbidden was not a limitation on advertising, but concerted action to limit broadcast advertising.

Television Violence

The family viewing hour was only one way to address the problem of television violence. Those who were concerned about television violence found a new weapon in their struggle -- the consumer boycott, and using this tool, they organized the largest and most effective campaign on the topic that had ever been waged up to that time.

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

They 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. And 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. And the action shows that remained contained significantly fewer depictions of violence.

The coalition pushing for less violence on television declared victory and went on to other things. Publicly expressed concerned about TV violence diminished. Actions shows made a come-back on network television in the mid-1980s.

But 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 aggression. The American Psychological Association and the American Academy of Pediatrics issued statements condemning televised violence, warning of its harmful effects on attitude and behavior, and calling for measures to decrease public exposure to it. In the late 1980s three reviews of the scientific literature concluded that the link between televised violence and aggression was real.

During the late 1980s, Senator Paul Simon became the chief Congressional critic of television violence, and sponsored a bill providing for a three-year exemption from the antitrust laws to permit the networks, broadcasters, cable operators and programmers, and trade associations to come together 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 antitrust exemption bill finally passed at the end of 1990. This was the first bill directed at the reduction of television violence ever to become law.

There was some question about whether such an antitrust exemption was legally 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 Congressional exemption from the antitrust laws. But when Senator Simon had asked network representatives why they did not have or would not develop such standards he was told that there were problems under the antitrust laws in meeting together for these purposes. Such was the caution instilled in the industry after the Writers Guild and antitrust cases against the NAB code.

Code-writing had vanished from the broadcast industry during the 1980s partly in reaction to the hostile court cases, partly in reaction to the new sense in the industry that broadcasters were full First Amendment speakers whose rights would be threatened by a new code, and partly in reaction to the less regulatory mood at the FCC.

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" 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; consequences of violence should be presented; presentations of violence should avoid "the gratuitous, the excessive and the instructional"; the use of violence for its own sake should be avoided; and "particular care" should be exercised where children are involved in the depiction of violent behavior.

These principles were essentially those that had been part of the old NAB code. But the NAB had learned from Writers Guild and the Justice Department's antitrust case. The NAB was careful to note that there would be no interpretation or enforcement of these principles by the

NAB. 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.

After Senator Simon's bill became law, a number of preliminary 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. But the broadcast industry made no such attempt at collective review of its programming. The NAB reaffirmed its new standards in June of 1991, and distributed them widely to broadcast stations and program producers. But it was not until 1992 when public concern became widespread that the broadcast industry responded more fully.

Concern 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.

In June 1992, Brandon Centerwald published an epidemiological study in the Journal of the American Medical Association which for the first time connected television viewing not just with increased physical aggression but with violent crime. In another widely quoted passage, he put dramatic if 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.

Of course, the epidemiology did not attribute this increase in crime to violence on television, merely to the existence of television. And nothing directly followed from Dr. Centerwald's study regarding how much crime-reduction could be achieved by a reduction in televised violence. But the study allowed critics of television violence to argue that even if the numbers were off by a 95%, it showed that televised violence was a serious problem and the industry had to do something to reduce the amount of violence on television.

A TV Guide study 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 1,846 acts of violence, including 389 serious assaults, an additional 362 assaults using guns, and 273 punches. The television day reviewed included cable programming services and the study found that compared to their cable competitors broadcast television's violent content was comparatively mild.

But pointing out how bad cable was 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. The new standards had been developed by the network standards and practices executives and were intended, like the NAB principles, to reflect the best in current practice. The accompanying preface to the new standards noted that they were consistent with each network's long-standing policies on violence, but were set forth in a "more detailed and explanatory manner to reflect the experience gained under the preexisting policies."

The lessons from Writers Guild and the antitrust action against the old code 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." 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.

The networks 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.

In 1993 the concern about television violence increased dramatically. Additional hearings were held and new legislation was introduced. Senator Ernest Hollings 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. Representative Ed Markey introduced a bill requiring TV set manufacturers to include in TV sets a chip (the Violence Chip or V-chip) that could enable viewers to block specific time slots and channels and to work with an electronic signal supplied by the broadcaster or cable programmer to block shows carrying a violence rating. These "channeling" and "V-chip" bills were not seen as idle legislative efforts because their sponsors were the Chairmen of the panels through which this type of legislation must pass to become law, namely, the Senate Commerce Committee and the House Telecommunications Subcommittee, respectively.

Other bills followed. Senator Byron Dorgan introduced legislation essentially codifying the strategy used by the NCCB and the PTA in the late 1970s. It would require the FCC to evaluate the level of violence on television quarterly and to issue a "report card" to the public

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 the network schedules. In April, Los Angeles Times critic, Howard Rosenberg, wrote that the 1993 May sweeps would resemble "Murder, Inc." Tom Shales, critic of the Washington Post, called the May sweeps, "Murder Month."

On May 21, Senator Simon held an oversight hearing on the implementation of the antitrust exemption and invited the witnesses from the broadcast networks, cable programming services and the motion picture industry. Sen. Howard Metzenbaum's comments illustrate the tone at 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 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.]

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 made warnings to parents appropriate. Many applauded this step, including President Clinton. But the typical reaction was that this was a good first step which nevertheless did not address the basic question of reducing the amount of violence on television.

Indeed, on July 1, the day after the industry announced its advance parental advisory plan, at a hearing on television violence Rep. John Bryant reacted angrily to the network witnesses and their moves against television violence:

> You came out with a code 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...

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, the 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 to 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 mandating the creation of such an industry monitor. Given the mood in the Congress such legislation introduced by Senator Simon, the chief critic of television violence, would almost certainly pass -- and perhaps take with it the "channelling" proposal from Senator Hollings and the V-Chip proposal from Representative. Markey.

Concerns in the industry about a new NAB code authority or a revived Hays Office made the initial response to Senator Simon's proposal less than enthusiastic. But legislative pressure continued. Representative Markey held a further hearing in the House Telecommunications Subcommittee at which the Surgeon General warned of the dangers of television violence. In a hearing on October 20 before the Senate Commerce Committee, Attorney General Janet Reno declared that the bills before Congress regulating TV violence, including Senator Hollings' "channeling" bill, would pass constitutional muster. They were narrowly tailored to meet a substantial government need, and like the regulation of indecency which had been upheld in the Pacifica case, they could be imposed without impermissibly infringing on the First Amendment rights of electronic speakers. In January 1994 the ACLU and a coalition of law professors would challenge that legal opinion, but in the fall of 1993 it 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 reach an accommodation with Senator Simon on his monitoring proposal. In early 1994 these efforts succeeded. On February 1, 1994 the four broadcast networks announced that they would jointly undertake an annual qualitative assessment of violence in network television programming. Separately, a coalition of cable programmers agreed to appoint an outside monitor of cable programming. Senator Simon reacted to this agreement with assurances that he would for the time being oppose any and all legislative efforts to regulate television violence.

In 1994, the likelihood of legislation on television violence diminished. Continued reassurances from television executives and program producers were born out when the 1994 May sweeps were described by Tom Shales as less violent than 1993's. Representative Markey continued to push for incorporation of a "V-chip" in new television sets, but promised to refrain from legislation if the industry voluntarily agreed to build at least some sets containing this technology. The trade association representing the electronics industry, the Electronics Industry Association, 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.

After a series of disputes with representatives of the broadcast industry, the relevant committee of the EIA voted to adopt this industry code in September 1994. With the assurance that the television set industry was on its way to building sets with a V-chip in them, Representative Markey refrained from moving his bill.

Conclusion.

Many dismiss broadcast self-regulatory codes as " public relations instruments used to protect the interests of broadcasters and to prevent outside regulation." 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." Nevertheless, 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, Broadcasting magazine, and even the ACLU lauded self-regulation as the answer to how the industry could resist the destructive effects of competition, while not being saddled with onerous, intrusive, rigid and inflexible government regulations. This began to change in the 1950s when Broadcasting magazine and the ACLU urged broadcasters to resist self-regulation because it was only disguised government regulation. In the 1970s the Writers' Guild case and the Department of Justice's successful antitrust suit persuaded the NAB and broadcast leaders that self-regulation was the wrong path. It would not only inhibit the free action of individual broadcasters, it would cause expensive and embarrassing legal trouble.

In the early 1990s the pendulum swung back a little bit. Self-regulation of television violence includes NAB principles, the joint advisory guidelines issued by the four networks, and the advance parental advisory system, and the four networks annual public assessment of television violence. 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 and 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 penalized them as a result of the outcome of that assessment.

This level of industry self-regulation contains no effective collective enforcement mechanism, and so is susceptible to erosion under competitive pressures. One counterweight to potential competitive pressure must come from government leaders. They represent the public in the "self-regulatory game," but they need to play their part in this game 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.