TESTIMONY

STATEMENT
of
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"Rating Entertainment Ratings: How Well are They Working for Parents, and What can be Done to Improve Them?"

Mr. Chairman, distinguished members of the committee: My name is Roger Pilon. I am vice president for legal affairs at the Cato Institute, where I hold the B. Kenneth Simon Chair in Constitutional Studies and am the director of Cato's Center for Constitutional Studies.

I want to thank you Mr. Chairman for your invitation to testify this morning on the subject of "Rating the Entertainment Ratings: How Well are They Working for Parents, and What can be Done to Improve Them?" You have also asked me to address the issues raised in the June 19, 2001, letter to you from the National Institute on Media and the Family. The concerns raised in that letter have contributed, I gather, to the bill you co-sponsored and introduced in the Senate on April 26, 2001, S. 792, the "Media Marketing Accountability Act of 2001, about which I will also comment.

At the outset, let me say that I share many of the concerns raised in the Institute's letter, concerns that you have raised over the years about the quality of some of the entertainment that has been produced and distributed in America for some time, especially as it bears on the development of children. Obviously, this is a land of many tastes. Given our relative freedom and the market system it entails, producers will arise to satisfy those tastes. That can coarsen our culture, giving rise to "entertainment" that some

would prefer not to have in their midst. Yet the very freedom that enables that fare to arise also enables great and often controversial works to flourish. The issues here are ancient, of course. Sex and violence have been the stuff of literature and entertainment from our earliest days. The only question, therefore, is what to do about it. And on that, I part company with the proposals raised in the Institute's letter, especially as they might entail governmental initiation or oversight, and with the provisions contained in S. 792.

In so doing, however, I want to make it clear that I am not here to represent or to speak on behalf of any part of the entertainment industry. I am speaking only for myself, although I share, of course, the general outlook of my colleagues at the Cato Institute on the virtues of individual liberty and limited, constitutional government. In fact, it is a concern for that kind of government that will animate my remarks this morning and that so troubles me about the proposals before the committee. To go to the heart of the matter, I would ask, without elaboration for the moment, given the limits imposed on Congress by the Constitution and by the First Amendment, why are these hearings even being held? And why are they being held before, of all things, the Committee on Governmental Affairs? The regulation of the entertainment industry of a kind that is proposed in S. 792 is not only thought by most to be unconstitutional but is also not what one ordinarily thinks of as a "governmental affair" like management, rule in the District of Columbia, or campaign finance. It is an odd concern, at least.

Having noted my interest in these hearings and my basic concern about the proper role of government in the regulation of the entertainment industry, let me turn now, Mr. Chairman, to the question immediately before the committee and to the issues raised in the National Institute's letter. Regarding your question, I am afraid I do not know precisely how well entertainment ratings are working for parents, nor does anyone else, I submit. I am struck, however, by the implicit presumption of the National Institute to be speaking for "parents," as if parents spoke with one voice on the matter. Thus, their letter claims that "Parents and child development experts disagree with the current [media] ratings." No doubt some do. At the same time, annual national surveys conducted since 1969 by the Opinion Research Corporation of Princeton, New Jersey, show growing parental satisfaction with the

voluntary movie rating system in place since 1968. The latest poll, conducted in September, revealed that 81 percent of parents with children under age 13 found the ratings "Very Useful or Fairly Useful" as a guide for deciding what movies children should see. Only 17 percent found the ratings "Not Very Useful." Those numbers would seem to undercut the claims of parental dissatisfaction made by the National Institute.

More precisely, however, the National Institute claims that the voluntary rating systems now in place for television, video games, motion pictures, and music fail to identify sensitive material accurately, consistently, or in a way that helps parents. And there are too many rating systems, their letter says. Thus, they call for the creation and implementation of an independent ratings oversight committee composed of parents, media industry representatives, academic media and child health researchers, public health representatives, and child advocates. The committee would create a universal ratings system, would monitor media ratings for accuracy, and would conduct research to ensure valid ratings.

Although the National Institute asks only for "your support and influence," Mr. Chairman, including possibly "calling for hearings, issuing a statement to media executives asking for these changes, or convening a summit to discuss these issues," one imagines that they would like more. Government grants to support the proposed research come immediately to mind, of course, but more extensive "public-private partnerships" may be in the offing as well, including commissions with coercive legal powers. Quite apart from such possibilities, however, one also wonders why, if the concerns are as well-founded as they purport to be, there is not more private support to see them implemented. Why, that is, does the National Institute feel it necessary to come to Congress with its concerns? There is nothing, after all, to stop the people who signed the June 19 letter to you from establishing their own, privately funded committee to accomplish everything the letter sets out as being worthy of accomplishing. Our history is replete with examples of private self-help, of course, as de Tocqueville documented early in that history. Just what is the government angle in this case?

Let me set that question aside for the moment, however, and look more closely at the National Institute's underlying assumptions. In claiming that current ratings are both

inaccurate and inconsistent, they imply that a more "accurate" and "consistent" system of ratings is not only desirable but possible. That implication is problematic at best. To be sure, the different media have different rating systems. But why should we assume that music should be rated by the same standards as, say, video games? And how could those ratings possibly be made consistent across the different media? Given the subjectivity that is inherent and inescapable in applying any rating system, consistency could be hoped for only if the rating were somehow centralized—performed by a single body or committee, as envisioned by the National Institute. But at current annual production levels, that "single" body would have to review some 650 films that are rated each year, some 2000 hours per day of TV programming (the equivalent of 1,000 movies every day, and growing), 1,300 computer and video games (forget web sites), and 40,000 music releases. To the extent that any committee undertook such a task, it would, as a practical matter, have to do so through many subcommittees, which would reintroduce all the purported problems of inconsistency. The National Institute's proposal sounds fine until you start to think about it.

But similar concerns arise over the claim of inaccuracy in the ratings. True, one can always raise questions about the "accuracy" of a particular rating; given the inherent and inescapable subjectivity of the enterprise, however, it is the very idea of "accuracy" that in the end is called into question. Just what does it mean to say that a film or a CD should have been given a higher or a lower rating? How many "sexual events" or "violent acts," and of what kind, given the larger context of the work, enter into that judgment? The very idea of "accuracy" in such judgments is illusory. This is not mathematics. It isn't even science.

Yet the National Institute's letter speaks of "valid ratings" and of "validity research known to the scientific community." The "science" on that subject, however, is anything but settled, nowhere more so than with the assumption implicit in the letter about the connection between media violence and violent behavior. In your bill, Mr. Chairman, you make that assumption explicit when you list among your congressional findings the contention that "Most scholarly studies on the impact of media violence find a high correlation between exposure to violent content and aggressive behavior." With all due respect, that is false. In a recent review

of the extant English-language research on the subject, Dr. Jonathan L. Freedman of the Department of Psychology of the University of Toronto concluded that "the research does not provide consistent or strong support for the hypothesis that exposure to media violence causes aggression or crime." In fact, he continues, "fewer than half (in some instances far fewer than half) of the studies provide evidence that supports a causal effect, while many find evidence against such an effect. … Moreover, studies outside the laboratory produced very weak results and none found consistent support for a causal effect." Correlation is not causation, of course, but neither is it the stuff of serious scientific inference. The cock's crowing is highly correlated with the sun's rising; yet only the cock would think he had caused the sun to rise.

But there is a deeper and often unnoticed problem with the assumption underlying the National Institute's letter. The behaviorism implicit in their efforts to correlate media violence with violent behavior has the unsavory result of taking that which is distinctly human—namely, choice—out of the equation. The stimulus-response model of behavior may be appropriate for studying lower life forms. When employed to study human behavior, however, it has the distinct disadvantage of denigrating us as human beings with a capacity to choose. To some extent, of course, we are all "influenced" by our environments. But even those who are influenced to action by what they see are held responsible for their actions only because they have independent choice. The irony of the causal model is that it denigrates us in the name often of uplifting us.

Let me conclude, Mr. Chairman, with a few legal comments on S. 792, which would prohibit as an unfair or deceptive practice, under regulations established and enforced by the Federal Trade Commission (FTC), the targeted marketing to minors of adult-rated media—providing a "safe-harbor" for producers or distributors who adhere to a voluntary self-regulatory system established under criteria drawn by the FTC. The first legal question one wants to ask about any proposal of that kind, of course, is where in the Constitution Congress finds its authority to act. The second question, having determined that the end is authorized to Congress, is whether the proposed means are necessary and proper—proper in not running afoul of any the guarantees afforded by the Constitution.

As we all know, since the notorious Court-packing scheme during the New Deal, the first question has been all but unasked. In the past few years, however, the Supreme Court has begun to ask that question, reviving the doctrine of enumerated powers in the process, albeit still in a very limited way. Nevertheless, whether a given end is proper to Congress —whether such a power was ever delegated to Congress—is a question very much back in play today. Thus, even before we get to the First Amendment, we can ask whether Congress has any authority to regulate the entertainment industry. Plainly, Mr. Chairman, the authors of S. 792 believe that Congress's power to do so, like so much else that Congress does today, falls under its power to regulate "commerce among the states." And, even under Chief Justice Rehnquist's readings of the Commerce Clause in the 1995 *Lopez* and the 2000 *Morrison* decisions, Congress can be said to have power to regulate the "instrumentalities" and the "channels" of interstate commerce —thus, presumably, the marketing of media.

But as Justice Thomas has noted in concurrence in both those cases, the Chief Justice's reading, albeit a bit narrower than that of the past 60 years, is a far cry from the original understanding of the Commerce Clause. The clause was written to enable Congress to ensure the free flow of goods and services among the states, especially in light of state efforts at the time to erect protectionist barriers to free commerce. It was not meant to be the equivalent of a general police power of a kind that belongs to the states, enabling Congress to regulate anything for any reason, provided only that the thing "affected" interstate commerce. In fact, the Court over the years has repeatedly said that there is no general federal police power, even as it has allowed the commerce power to be used as such, in effect, for more than 60 years. Thus, properly read, with reference to its function, Congress's commerce power kicks in only if necessary to ensure the free flow of commerce among the states, particularly in light of state action that might impede that commerce. There is nothing here to indicate any such warrant for Congress to act. In fact, commerce in media is flourishing, and no states are impeding it.

But what about the "deceptive practices" that S. 792 addresses? Does Congress not have power to regulate those? Again, the regulation of fraud and other such practices is a function, quintessentially, of the general police power that belongs to the states. Only if such regulation were to be so

uneven or inconsistent as to threaten or impede the free flow of commerce would the federal commerce power kick in. That is how a functional account of the clause, the original understanding, would limit its scope and hence would limit federal power. Had the ratifying generation thought they were giving Congress the kind of regulatory power Congress regularly exercises today, the Constitution would never have been ratified.

Yet there is something almost as disturbing here as the absence of congressional authority to enact S. 792. It is the bill's characterization of targeted marketing to minors of adult-rated media as an "unfair or deceptive practice." Just how is that "unfair or deceptive"? Where is the deception? The movie or CD, say, is rated. It is not parading under false colors. It is just being marketed, presumably, to an inappropriate audience, one for which it is not suited. That is not unfair or deceptive. No one is being defrauded. Plainly, this is an effort, using linguistic legerdemain, to recast a police power action of a kind that belongs to the states—the protection of minors—as a regulation of commerce and hence, under the modern reading of the Commerce Clause, as an end authorized to Congress. If there is any deception, it is in this bootstrapping effort.

We come, finally, to the second constitutional question, whether S. 792, even if grounded in constitutional authority, runs afoul of any constitutional guarantees. As a practical matter today, of course, it is the First Amendment that poses the greatest risk to the bill. And the drafters appear to have understood that, for they have provided a "safe-harbor" for producers and distributors—other than the one set forth explicitly in section 102 of the bill. Section 101 declares illegal the targeted marketing to minors of adult-rated media. In section 106, however, we find "adult-rated" defined as "a rating or label voluntarily assigned by the producer or distributor of such product, including a rating or label assigned pursuant to an industry-wide rating or labeling system." Thus, it would appear that a producer or distributor could remove himself from the coverage of the act, if enacted, simply by not rating his product. The bill's incentives, therefore, are perverse. If enacted, the measure would encourage less rather than more information. Out of simple self-protection, producers and distributors would be encouraged to avoid labeling their products.

Yet even that reading may not be accurate, for the

subordinate clause in the above definition introduces an ambiguity. On a natural reading of the definition, a rating "voluntarily" assigned by a producer "includes" one assigned pursuant to a labeling system to which he "voluntarily" subscribes. In other words, "voluntary" "includes" voluntary membership or operation under such a system. An alternative reading, however, would enable such a system to "assign" a label, whether or not the producer subscribed to the system. That, of course, would not amount to a voluntary assignment and so would not seem to be "included" under the term "voluntary."

But even on the more natural reading, the speech of the producer is burdened and chilled. For whatever reason, a producer may want to label his product—perhaps to hype it. If he does so, however, the bill imposes a cost and hence burdens his speech by forcing him under its provisions. It thus acts also to chill his speech.

Yet the explicit "safe-harbor" of section 102 is also coercive, even though it purports to be "voluntary." That section says that targeted advertising of adult-rated products will not be treated as targeted advertising "if the producer or distributor responsible for the advertising or marketing adheres to a voluntary self-regulatory system" established under criteria written by the FTC. This is a classic example of coercion, little different than the mugger's proposition: "Your money or your life—you choose." You hand over your money "voluntarily" only because the alternative is worse. This is "voluntary" self-regulation only under Orwellian principles.

In sum, this appears to be one of those classic examples of a problem searching for a solution in the wrong place—government. The Founders established a limited constitutional government on the understanding that not every problem required a government solution. The problem here is occasional irresponsible behavior—how occasional is open to debate. The solution, as with most examples of irresponsibility, is moral suasion. Will that solve the entire problem? Of course not. But it is far better, as the history of overregulation has demonstrated in spades, than introducing the heavy hand of government where it does not belong—morally or constitutionally.

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