

3-1-1990

Television Violence: Social Science vs. the Law

Emily Campbell

Follow this and additional works at: <https://digitalcommons.lmu.edu/elr>

 Part of the [Law Commons](#)

Recommended Citation

Emily Campbell, *Television Violence: Social Science vs. the Law*, 10 Loy. L.A. Ent. L. Rev. 413 (1989).
Available at: <https://digitalcommons.lmu.edu/elr/vol10/iss2/2>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

COMMENT

TELEVISION VIOLENCE: SOCIAL SCIENCE VS. THE LAW

TABLE OF CONTENTS

I.	Introduction	414
II.	Violence on Television	417
III.	The Research	419
A.	Laboratory Experiments	423
1.	Instigation	423
2.	Imitation	424
3.	Criticisms	425
B.	Field Experiments	427
1.	Instigation	428
2.	Imitation	430
3.	Criticisms	431
C.	Correlational Studies	432
D.	Conclusions	435
IV.	The Cases	436
A.	The Case Facts	437
1.	Type 1—Instigation: <i>Zamora v. Columbia Broadcasting Sys.</i>	437
2.	Type 2—Imitation	438
a.	<i>Olivia N. v. National Broadcasting Co.</i>	438
b.	<i>Walt Disney Prod., Inc. v. Shannon</i>	439
c.	<i>DeFilippo v. National Broadcasting Co.</i>	439
B.	The Case Theory	440
1.	Negligence: The Plaintiff's Claim	441
2.	Incitement: The First Amendment Defense	444
a.	<i>Zamora v. Columbia Broadcasting Sys.</i>	450
b.	<i>Olivia N. v. National Broadcasting Co.</i>	451
c.	<i>Walt Disney Prod., Inc. v. Shannon</i>	451
d.	<i>DeFilippo v. National Broadcasting Co.</i>	452
C.	Summary	453
V.	Other Types of Legal Regulation	453
A.	Another Form of Impermissible Post-Broadcast Regulation	454

B.	Impermissible Forms of Direct Pre-Broadcast Regulation	456
C.	Potentially Permissible Facilitation by the Government to Promote Industry Self-Regulation.....	459
VI.	Alternatives to Legal Regulation	460
A.	Pressure Groups	461
1.	Advertisers	461
2.	Networks	462
B.	Television's Self-Control	463
C.	Regulation of Television in the Home	464
VII.	Conclusion	465

I. INTRODUCTION

With the invention of the printing press, mass communication was off and running. Since then, electronics have changed the face of mass media.¹ Now the ultimate mass medium reaches nearly all American homes—television. A single moment of television may be shared by millions of people.² When that single moment of television contains sex, violence, or other objectionable material,³ people become particularly concerned.⁴

1. Marshall McLuhan, author of *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* (1966), was among the first to point out the extraordinary powers of the electronic media. In this book, he described the role technology has played in the progress of civilization. Books became an extension of the eye and ear because they enabled people to receive information about times and places too distant to hear or see. However, the electronic media—television—went even farther. Within seconds, the information gathered from the camera's eye could be transmitted to the individual's brain.

2. Television programs are watched by millions of people. These programs are the products of a limited number of corporate entities. See B. BAGDIKIAN, *THE MEDIA MONOPOLY* 3-28 (1983) for a discussion of the "endless chain" of corporations and their role in the media. With mergers, the number of entertainment producers is becoming smaller. Diamond, *Gentlemen's Agreement*, NEW YORK, March 20, 1989, at 16-9 (Time, Inc. and Warner Communications, Inc. planning to merge).

3. Comprehensive surveys about public views of television, like R. BOWER, *TELEVISION AND THE PUBLIC* (1970), indicated that people were enthusiastic about the possibility of television broadening their horizons and teaching them about "new, different ways of life," *id.* at 158, but were also concerned about the negative effects such as profanity and nudity. *Id.* at 159. In general, people thought that violence, horror, crime, and gangsters were things that children should not see on television. *Id.* at 160-61.

4. Because of its similarity to reality, television has become a special concern. According to some people, watching television is very similar to "really being there." Television takes its viewers across time and space to witness a vast variety of experiences that could not possibly occur in a hundred lifetimes. Viewers have as many eyes as they have channels on their television sets. G. CHENEY, *TELEVISION IN AMERICAN SOCIETY* 2 (1983) [hereinafter CHENEY].

T. GORE, *RAISING PG-KIDS IN AN X-RATED SOCIETY* (1987) [hereinafter GORE], reminds us that it is not just movies and television, but also records, music videos, and videocas-

Although the relationship between televised violence and actual crime has not been demonstrated empirically,⁵ one can point to specific instances that seem to imitate televised violence. For example, when *The Doomsday Flight* was aired on NBC in the 1960s, apparent mimicking of actions in the film occurred in real life. The movie involved a bomb being placed on an airliner. The bomb was set to detonate when the plane flew below a certain altitude. The main character gave clues as to where the bomb was placed in exchange for money from the airline. Before the end of the television broadcast, one airline had received a bomb threat. Within a day, four more threats were reported. By the end of the week, eight bomb threats had been reported.⁶ Later, the movie aired in Australia, and again some viewers attempted to mimic the plot. Consequently, an Australian airline company paid \$500,000 in ransom to protect over one hundred passengers from a "copy cat" bomb threat.⁷

Other examples can be found. For instance, a seven-year-old boy was caught sprinkling glass in his family's stew because he wanted to see if it had the same effect he had seen on television.⁸ In another case, a sixteen-year-old was found entering the cellar of a house, wearing gloves,

settes that present more opportunities for people to be exposed to violence. In the book, she examines musical lyrics that discuss murder and suicide. *Id.* at 53-4. She also notes music videos that are replete with violence and sexual content. For example, Def Leppard's *Fooling* music video shows an eyeless woman playing a harp, along with a man in bondage who is tortured by a woman. *Id.* at 70.

T. Gore also identifies many violent films that can be obtained in video stores. Many of these films involve scenes of sexual violence, e.g., *Terror on Tape*, an anthology of scenes of sexual violence against women taken from other horror movies, and *Texas Chainsaw Massacre: Part 2*, which includes the skinning of a person. These kinds of tapes are bought and rented primarily by teens and are readily available without restrictions in neighborhood video stores. In many cases, they are not rated, or if they are, the rating is not enforced. *Id.* at 68-9.

5. See, e.g., Clark and Blankenburg, *Trends in Violent Content in Selected Mass Media*, in 5 TELEVISION AND SOCIAL BEHAVIOR: TELEVISION'S EFFECTS: FURTHER EXPLORATIONS (G. Comstock & E. Rubinstein eds. 1971). Clark and Blankenburg examined the possibility that televised violence might vary with the frequency of real crime. However, upon examining crime statistics from the Federal Bureau of Investigation, they found that the percentage of violent programs did not correlate with the Uniform Crime Report data on violence.

See also, Hennigan, Del Rosario, Heath, Cook, Wharton & Calder, *Impact of the Introduction of Television on Crime in the United States: Empirical Findings and Theoretical Implications*, 42 J. PERSON. & SOC. PSYCHOLOGY 461 (1982). These researchers compared crime rates in cities from 1949 to 1952. There were no effects of television on homicide or aggravated assault, or on burglary or auto theft. However, there was some increase in the incidence of larceny. The researchers suggested that this was not due to aggression but to the deprivation of poorer viewers compared to the affluent depicted on television.

6. Surgeon General's Scientific Advisory Committee on Television and Social Behavior, TELEVISION AND GROWING UP: THE IMPACT OF TELEVIEWED VIOLENCE 48-9 (1971) [hereinafter T.V. AND GROWING UP].

7. *Id.* at 49.

8. M. HOWE, TELEVISION AND CHILDREN 71-2 (1977).

claiming that he had learned this technique of avoiding leaving fingerprints from television.⁹ Another incident occurred when a nine-year-old boy, after showing his father his report card in which he had done poorly, suggested that he could improve the situation by giving a teacher a Christmas present—poisoned candy. He explained that the technique had been demonstrated on television by a man who decided to kill his wife.¹⁰ Besides specific incidents of “copy-cat” violence, some have claimed that the general proliferation of violence leads to the formation of violent tendencies. This was the opinion of John Hinkley, Jr. who attempted to assassinate Ronald Reagan in 1981. Hinkley stated that in the months before the attempt, he had spent countless hours watching television, which he later said was a dangerous practice leading him to engage in violent fantasies. He believed that these fantasies led him to collect handguns and to shoot the President of the United States.¹¹

Although such incidents of real violence modeled or encouraged by depictions of violence on television are rare, many people remain concerned about the effects of television violence.¹² Numerous studies have been performed to discern the effects of television violence.¹³ Although the research has tended to suggest that at least in some instances, violence may lead to increased aggressive behavior in children and adults,¹⁴ research in this area is problematic, as will be discussed below, and such studies are often inconclusive.¹⁵ Nevertheless, based on this research, plaintiffs have attempted to bring suit against the broadcasters for the broadcast of violence usually based on negligence theories, and others have argued for direct governmental regulation of television violence. While the question of whether watching violence on television leads to violent acts by viewers may be interesting for social scientists, the law

9. *Id.* at 71.

10. *Id.*

11. CHENEY, *supra* note 4.

12. Parents are among those who are particularly concerned about the effects of violence. Such concerns abound in the parenting literature. See, e.g., Spock, *How On-Screen Violence Hurts Your Kids*, REDBOOK 26 (Nov. 1987).

13. This research is discussed Part III *infra*.

14. Findings of the Surgeon General's Scientific Advisory Committee on Television and Social Behavior, TELEVISION AND SOCIAL BEHAVIOR VOL. I-V (1971) [hereinafter TELEVISION AND SOCIAL BEHAVIOR], were considered inconclusive. However, subsequent research has found support for the proposition that excessive violence on television leads to violent behavior in children. Children who watch a lot of violent programs are more likely to be aggressive during play, to accept force as a plausible solution to problems, as well as to be more fearful of becoming victims. National Institute of Mental Health, 1 TELEVISION AND BEHAVIOR: TEN YEARS OF SCIENTIFIC PROGRESS AND IMPLICATIONS FOR THE EIGHTIES (1982) [hereinafter N.I.M.H. VOL. 1].

15. See *infra* Part III.

must take a different view of this possibility. Courts have and should continue to find the results of research to be incompatible with legal concepts of foreseeability and incitement, and should continue to protect the first amendment rights of the broadcasters to transmit such information and the rights of the public to receive that information.

Part I provides an overview of the Comment. Part II discusses the use of violence in television as a form of entertainment. Part III examines the research on television violence, looking at laboratory experiments, field experiments, and correlational studies. What makes this article unique is the approach taken to analyze the research. The research has been broken down to specifically parallel the types of tort cases presented. In addition, the research is criticized both for its methodological problems and for its irrelevance to the legal issues of foreseeability and incitement.

Part IV discusses the appellate tort cases that have been brought against broadcasters for depicting certain acts of violence. The negligence theory upon which such cases rest is presented, as well as the first amendment defense raised by the broadcasters. Part V takes a brief look at other forms of legal regulation proposed by some to reduce the amount of violence on television, while Part VI proposes certain alternatives to legal regulation.

II. VIOLENCE ON TELEVISION

Commercial television in the United States has not attempted to teach; it has sought to entertain.¹⁶ It has followed in the footsteps of

16. There is a difference between the communication process used for entertaining and other types of communication. Compare entertainment with informational communication. The process of informational communication has four steps: 1) attract attention to the information, 2) have the information accepted, 3) have it interpreted by the recipient, and 4) store it away for later use. W. RIVERS & W. SCHRAMM, *RESPONSIBILITY IN MASS COMMUNICATION* 38 (2d ed. 1957) [hereinafter RIVERS & SCHRAMM]. Entertainment operates under different ground rules. Feedback is still important, as the artist must be approved to continue having her message accepted by the audience. However, entertainment requires a "willing suspension of disbelief." *Id.* at 48. Instead of requiring full and accurate reporting and remaining skeptical of anything not connected to reality, the entertainment audience must be willing to let down its defenses and expect artistic ambiguity and impossible occurrences. *Id.* The way the message is presented is expected to give pleasure to the audience.

However, entertainment may unobtrusively convey ideas, information, sentiments, and values to members of a society. Such information plays a role in the socialization process. It may help a young person to clarify which values and behaviors are to be emulated in reality and which are to be kept in the realm of fantasy. T.V. AND GROWING UP, *supra* note 6, at 25. A great deal of violent content found in television shows refers to times, places, and events that have no relation to reality. Many are fantasies such as western, science fiction, ghost and horror stories, and period and costume dramas. However, just because such fantasies are dis-

other types of violent entertainment. For example, most ancient cultures practiced ritualistic sacrifices which were designed to relieve the participants of aggressive feelings.¹⁷ Although there was a time when violence was kept off the theatre's stage, it has always constituted a major element of art. With the Greeks, on-stage messengers reported violence taking place offstage, but later the violence itself moved to the stage.¹⁸ Roman drama was extremely bloody and violent,¹⁹ as was Elizabethan, Jacobean, and nineteenth century Romantic drama.²⁰ Although Shakespeare is probably one of the most revered playwrights, even Shakespearean plays portray violence on stage.²¹

Furthermore, many meritorious literary works contain violence. Homer's *Iliad* and *Odyssey* are filled with violent acts of war.²² Literary violence for its own sake became prevalent in the eighteenth century social and industrial revolutions with such works as Lewis's *The Monk*, which was derived from the work of the Marquis de Sade.²³ Yet, people are not rushing to ban these books for depicting pervasive violence. Instead, they are trying to prohibit the use of violence on television.

Since the 1960s, approximately seventyfive percent of all programs have contained some elements of violence.²⁴ However, the number of violent acts per program has increased on prime-time programs.²⁵ In addition, violent acts on children's programs have followed a cyclical pattern, with increased violence one year and less violence the next year.²⁶

The National Institute of Mental Health stated:

tanced from reality does not mean that they have any less impact on the viewers when their content is violent. *Id.* at 37-8.

17. A. ARNOLD, *VIOLENCE AND YOUR CHILD* 15 (1969) [hereinafter ARNOLD].

18. Bennetts, *Do the Arts Inspire Violence in Real Life?*, N.Y. Times, April 26, 1981, at 1, col. 1.

19. *Id.*

20. *Id.*

21. Take for instance, *Hamlet*, *King Lear*, or *Julius Caesar*. These plays all contain much violence. *Hamlet* has its climatic fencing scene; *King Lear* has a scene in which one of the character's eyeballs are torn out; *Julius Caesar* depicts the murder of Caesar, as well as the continuous military battles.

22. ARNOLD, *supra* note 17, at 50, argues that these are different since both sides lose and it is a "homage to the futility of war." However, in response to such arguments, one should note that the *Iliad* and *Odyssey* mirrored Homer's times. How is *Miami Vice* any less representative of problems with drug trafficking and murder in Miami?

23. ARNOLD, *supra* note 17, at 50.

24. National Institute of Mental Health, 2 *TELEVISION AND BEHAVIOR: TEN YEARS OF SCIENTIFIC PROGRESS AND IMPLICATIONS FOR THE EIGHTIES* 168 (1982) [hereinafter N.I.M.H. VOL. 2].

25. *Id.*

26. *Id.*

[T]here is more to the problem than the sheer quantity of violence television presents, and [we] would not call for the total elimination of television violence. Symbolic violence is a story-telling device which can serve many purposes. . . . Our concern is with the kinds of violence shown, the systematic and resilient patterns of who commits violence and who is victimized. These lessons of power, powerlessness, risks, and fates may be critical mechanisms of social control. In cultivating among the many a fear of the power of the few, television violence may achieve its greatest effect.²⁷

Thus, although television violence may have some literary and dramatic value as a plot technique,²⁸ many argue that such violence is harmful²⁹ and would seek to prohibit it from the airwaves.³⁰

III. THE RESEARCH

Television's popularity raises important concerns and questions about its social effects. Television can best be understood in the context of a total mass communication theory.³¹ In the early 1970s, communication researchers relied on Stimulus-Response ("S-R") psychology to explain most of the effects of communication.³² S-R psychology attempted

27. *Id.* at 169.

28. CHENEY, *supra* note 4, at 48-9 (1983); L. JACOBS, *THE MOVIES AS A MEDIUM* (1970).

29. For the social scientists' perspective on television violence, see *infra* Part III.

30. See *infra* Parts IV and V for a discussion of the types of legal regulation proposed.

31. Mass communication serves several important functions. MCQUAIL, *MASS COMMUNICATION THEORY: AN INTRODUCTION* 79 (1984) [hereinafter MCQUAIL]. First, mass communication provides people with information. *Id.* Second, media may explain, interpret, and comment on the meaning of events and information. *Id.* Such comment helps people to correlate their responses to challenges and opportunities which arise in the future and to reach a consensus on social actions. RIVERS & SCHRAMM, *supra* note 16, at 15 (2d ed. 1957). Third, the media provides continuity to society by maintaining common values and recognizing the dominant culture and subcultures. MCQUAIL, *supra* at 79 (1984). Specifically, mass communication helps transmit culture. Immigrants, for instance, often receive their first English lessons from television. RIVERS & SCHRAMM, *supra* note 16, at 15. Fourth, media is used as a tool for politicians, most notably through propaganda. MCQUAIL, *supra* at 81. Fifth, mass communication sells goods and services. *Id.* Television advertising is pervasive; some have argued that this is the chief function of television. Spence, *The Sale of the First Amendment*, A.B.A. J. 52, 54-5 (March 1989). Finally, mass communication entertains people. RIVERS & SCHRAMM, *supra* note 16, at 15. By providing amusement, the media provides a means of relaxation and reducing social tension. MCQUAIL, *supra* at 80. Producers of violent programming would say that their programs serve this last function, that is of entertainment.

32. W. Schramm, *The Nature of Communication between Humans*, in *THE PROCESS AND EFFECTS OF MASS COMMUNICATIONS* 7 (rev. ed. W. Schramm and D. Roberts eds. 1971). See also W. MULLER & M. MEYER, *COMMUNICATION RESEARCH AND BROADCASTING—CHILDREN AND FAMILIES WATCHING TELEVISION: A BIBLIOGRAPHY OF RESEARCH ON VIEWING PROCESSES* (1985) [hereinafter MULLER & MEYER].

to explain behavior in terms of behavioral responses to environmental stimuli. For example, a stimulus such as a hot stove when touched would elicit the behavioral response of removing one's hand from the hot area. With regard to communication theory, researchers proposed that a message would be followed by a particular behavioral response. However, behavioral theories alone were insufficient to explain the communication process. Rather, other theories had to be derived to more fully explain the social impact of the message. These theories included analyzing the receiver's relationship to the sender, and the consequences of accepting or rejecting the message, the consequences of acting or not acting upon the message combined with an understanding of the nature of the message, the conditions under which it was received, the abilities and attitudes of the receiver.³³

Communication came to be thought of as a relationship. Viewing communication as an act of sharing, rather than something someone did to someone else was a tremendous change in communication research.³⁴ Prior to that time, the audience was thought to be a "sitting target": so long as the communicator could hit the audience, he or she could affect it.³⁵ For example, those concerned with propaganda saw the audience as defenseless, but research revealed that sometimes the audience simply refused to be affected, or sometimes there were unintended effects.³⁶

Besides communications researchers, psychologists have been interested in the effects of watching television. In particular, psychologists have inquired into the behavioral effects of watching violence.³⁷ While

33. MULLER & MEYER, *supra* note 32.

34. Communication could be thought of as existing between two persons, or between one person and many. *Id.* at 13. The relationship does not have to be face to face, but can be symbolic. All who have experienced the music of Mozart or the plays of William Shakespeare would certainly agree. *Id.*

35. *Id.* at 8. One commentator addressed the issue of how the media affects the viewer, using children as an example:

In a sense, the term "effect" is misleading because it suggests that television "does something" to children. The connotation is that television is the actor; the children are acted upon. Children are thus made to seem relatively inert; television, relatively active. Children are sitting victims; television bites them. As between the two favorite images of the situation—the image of children as helpless victims to be attacked by television and the image of television as a great and shiny cafeteria from which the children select what they want at the moment—the latter is more nearly accurate. . . .

W. SCHRAMM, J. LYLE & E. PARKER, *TELEVISION IN THE LIVES OF OUR CHILDREN* 1-2 (1961).

36. For example, in experiments examining prejudice, subjects exposed to anti-prejudice propaganda did not show a reduction in prejudice. Rather, the subjects used the propaganda to reinforce their existing prejudices. Cooper & Jahoda, *The Evasion of Propaganda: How Prejudiced People Respond to Anti-Prejudice Propaganda*, 23 J. PSYCH. 15-25 (1947).

37. Prior to the advent of television, scientists were concerned with movie violence. Between 1929 and 1932, the Payne Fund, a non-profit foundation supporting research in educa-

there appears to be a general consensus that viewing violence on television causes an increase in aggressiveness,³⁸ there is a growing group of dissenters who have taken a careful look at the studies. These dissenters criticize the conclusions drawn.³⁹ As one critic declared, "[D]espite the apparent near unanimity on this issue, there is reason to question just how strongly the evidence supports [the conclusion that viewing violence leads to violent behavior]."⁴⁰

This section of the Comment will describe the methodological problems with many of the studies that have demonstrated positive effects, and, more importantly, will call the reader's attention to many studies which, in fact, do not demonstrate a positive relationship between exposure to violent programming and aggressive behaviors, such as hit-

tion, funded a four-year scientific investigation of the effects of movies on children. Payne Fund, MOTION PICTURES AND YOUTH (1933-35). These studies suggest that children's perceptions differed greatly from those of adults. While adults discounted what they saw, the younger children emotionally responded to the story. Furthermore, children who saw violent movies experienced sleep disturbances. S. Renshaw, V. Miller & D. Marquis, *Children's Sleep*, in MOTION PICTURES AND YOUTH (Payne Fund 1933-35). Of course, other researchers have been interested in the effects of pornography, and recently others have become interested in the effects of watching sexual violence. See Donnerstein & Linz, *Mass Media Sexual Violence and Male Viewers: Current Theory and Research*, 29 AM. BEHAV. SCIENT. 601 (1986) [hereinafter *Sexual Violence and Male Viewers*]; Linz, Donnerstein & Penrod, *The Effects of Multiple Exposures to Filmed Violence Against Women*, 34 J. COMMUN. 130 (Summer 1984); Malamuth & Briere, *Sexual Violence in the Media: Indirect Effects on Aggression Against Women*, 42 J. SOC. ISSUES 75 (1986); Slade, *Violence in the Hard-Core Pornographic Film: A Historical Survey*, 34 J. COMMUN. 148 (Summer 1984). However, this paper deals exclusively with the research which has focused on violence irrespective of any sexual overtones. The sexual violence research has generally not focused on direct measures of aggressive behaviors, i.e., the research has not sought to induce a man to rape a woman, or even correlate the likelihood of such an event. Rather, the research has examined whether men become less sympathetic to women after watching violence against women. See Donnerstein & Linz, *Mass Media Sexual Violence and Male Viewers: Current Theory and Research*, 29 AM. BEHAV. SCIENT. 601 (1986). What relevance this research would have to the legal issues of incitement and foreseeability is at most questionable, as the research is not specifically aimed at either imitation or instigation of violent acts. See *infra* Part IV for a discussion of how the violence research is applied to concepts of foreseeability and incitement.

38. See Geen & Thomas, *The Immediate Effects of Media Violence on Behavior*, 42 J. SOC. ISSUES 7 (1986); Huesmann, *Psychological Processes Promoting the Relation Between Exposure to Media Violence and Aggressive Behavior by the Viewer*, 42 J. SOC. ISSUES 125 (1986); Rosenthal, *Media Violence, Antisocial Behavior, and the Social Consequences of Small Effects*, 42 J. SOC. ISSUES 141 (1986); Rule & Ferguson, *The Effects of Media Violence on Attitudes, Emotions, and Cognitions*, 42 J. SOC. ISSUES 29 (1986); Turner, Hesse & Peterson-Lewis, *Naturalistic Studies of the Long-Term Effects of Television Violence*, 42 J. SOC. ISSUES 51 (1986).

39. See Berkowitz, *Situational Influences on Reactions to Observed Violence*, 42 J. SOC. ISSUES 93 (1986); Freedman, *Effect of Television Violence on Aggressiveness*, 96 PSYCH. BULL. 227 (1984) [hereinafter *Effect of Television Violence*]; Freedman, *Television Violence and Aggression: A Rejoinder*, 100 PSYCH. BULL. 372 (1986).

40. *Effect of Television Violence*, *supra* note 39, at 227.

ting or injuring other people. Moreover, where such positive effects occur one has to question the legal significance of the studies and their "real world" validity for social policy making.⁴¹

Generally, in the television research, violence has had a variety of operational definitions including "the inflicting of harm, injury, or discomfort on persons, or of damage to property,"⁴² and "the overt expression of physical force, with or without a weapon, against self or other, compelling action against one's will on pain of being hurt or killed, or actually hurting or killing."⁴³ Naturalistic studies⁴⁴ and laboratory experiments⁴⁵ have inquired into the tendency of viewers to engage in viewing violence and to engage in aggressive behavior. The 1982 National Institute of Mental Health report concluded:

After more than 10 years of research, the consensus among most of the research community is that violence on television does lead to aggressive behavior by [people] who watch the programs. . . . Not all [people] become aggressive, of course, but the correlations between violence and aggression are positive.⁴⁶

However, it was claimed that the 1982 NIMH report was based on over 2,500 studies, and this figure is vastly inaccurate.⁴⁷ The large number of studies refers to a complete bibliography on television, not only empirical research. Studies on television violence realistically number no more than 200.⁴⁸ These studies fall into three categories: 1) laboratory experiments,⁴⁹ 2) field experiments,⁵⁰ and 3) correlational studies.⁵¹

41. See Linz, Penrod & Donnerstein, *Issues Bearing on the Legal Regulation of Violent and Sexually Violent Media*, 42 J. SOC. ISSUES 171 (1986) [hereinafter *Issues Bearing on Legal Regulation*].

42. T.V. AND GROWING UP, *supra* note 6, at 5.

43. Gebner, Gross, Jackson-Beeck, Jeffries-Fox & Signorielli, *Cultural Indicators: Violence Profile No. 9*, 28 J. COMMUN. 176, 179 (Summer 1979).

44. See Turner, Hesse & Peterson-Lewis, *Naturalistic Studies of the Long-Term Effects of Television Violence*, 42 J. SOC. ISSUES 51 (1986) (review article summarizing prior research).

45. See Geen & Thomas, *The Immediate Effects of Media Violence on Behavior*, 42 J. SOC. ISSUES 7 (1986) (review article summarizing prior research).

46. N.I.M.H. VOL. 1, *supra* note 14, at 6.

47. *Effect of Television Violence*, *supra* note 39, at 229.

48. Unpublished articles and dissertations are not included in this total. *Id.*

49. Section A of Part IV *infra* discusses the laboratory experiments.

50. Section B of Part IV *infra* discusses the field experiments.

51. Section C of Part IV *infra* discusses the correlational studies. Correlational studies are inherently difficult to perform because of the difficulty in doing research over time, usually days or weeks.

A. Laboratory Experiments

The plausibility of causal hypotheses are best investigated by laboratory experiments. In laboratory experiments, subjects are randomly assigned to various conditions. Generally, subjects are presented with a film either created for or carefully selected for the research; the film usually depicts some aggressive behavior. After watching the film, subjects are given specific opportunities to aggress, usually by acting out the aggressive behavior displayed in the film. Laboratory experimenters attempt to control the conditions to which subjects are exposed in order to make systematic conclusions possible. In controlled laboratory studies, it is possible to insure that the causes precede the effects, and to try to rule out all other possible factors that could cause the effects observed.⁵² Laboratory experiments investigating the effects of televised violence on aggressive behavior have focused on two kinds of effects: instigation and imitation.⁵³

1. Instigation

Instigation occurs when what is viewed is followed by increased aggressiveness by the viewer. Representative studies of the instigation research can be found in the Surgeon General's Task Force on Television and Social Behavior.⁵⁴ One such study by Liebert and Baron⁵⁵ presented children with an opportunity to help or hurt another child after having viewed an aggressive or nonaggressive program. Each child watched a six and one-half minute excerpt from either *The Untouchables*⁵⁶ and commercials for the aggressive condition, or a race track film with the same commercials for the control condition. Then each child was told that another child was playing a game in another room. The subject was instructed that he/she could help the other child win, or harm the other child, and thus prevent the child from winning. The hurtful act consisted of pressing a button which would make the handle of the game that the other child was playing with become hot and difficult to turn. The helpful act consisted of pressing another button that would make the

52. TELEVISION AND GROWING UP, *supra* note 6, at 88.

53. *Id.* at 6.

54. TELEVISION AND SOCIAL BEHAVIOR, *supra* note 14.

55. Liebert & Baron, *Short Term Effects of Televised Aggression on Children's Aggressive Behavior*, in 2 TELEVISION AND SOCIAL BEHAVIOR: TELEVISION AND SOCIAL LEARNING 181 (Surgeon General's Scientific Advisory Committee on Television and Social Behavior, J. Murray, E. Rubinstein & G. Comstock eds. 1972). Children were divided into two age categories: five and six, and eight and nine.

56. The sequence contained a chase, two fist-fighting scenes, two shootings, and a knifing. *Id.* at 185.

handle easier to turn, and thus, enable the other child to win more prizes. The experimenter told the child that the more times he/she pushed the "help button," the more the other child would be helped, and similarly, the more the "hurt button" was pushed, the more the other child would be hurt.

Examining several measures of interpersonal aggression, such as the frequency and duration of hurting behavior, the experimenters found that children who had viewed the televised aggressive episode aggressed more against the other child. The five- and six-year-olds aggressed sooner and for a longer duration than the control group, while the eight- to nine-year-olds aggressed for a longer duration, but did not initiate aggression any sooner.

2. Imitation

Imitation occurs when what is seen is mimicked or copied by the observer. Probably the most classic studies in imitation were performed by Bandura, Ross, and Ross.⁵⁷ Bandura and his colleagues conducted a study to determine whether children will imitate aggression they observe in a film as readily as they will imitate aggression they observe performed by live adults.⁵⁸

Ninety-six nursery-school children participated in the study.⁵⁹ Bandura randomly assigned the children to one of four conditions. In the first condition, children were exposed to a "Real-Life Aggressive" condition. In this condition, each child was brought into a room and given some materials to play with at a small table. After the child settled down to play, an adult in another part of the room began playing with several toys, including a mallet and a five-foot inflated plastic Bobo doll. The adult was aggressive toward the Bobo doll, pummeling the Bobo doll on its head with the mallet several times. In the second condition, called the "Human Film-Aggression" condition, children watched a color film in which the same adult model displayed the same sequence of aggressive behaviors toward the Bobo doll. In the third condition, children viewed a cartoon film showing an adult costumed as a cat acting aggressively

57. Bandura, Ross & Ross, *Imitation of Film-Mediated Aggressive Models*, 66 J. ABNORM. & SOC. PSYCHOLOGY 3 (1963) [hereinafter Bandura, Ross & Ross].

58. Bandura and colleagues also conducted further studies which strengthened their conclusions. See Bandura, *Influence of Models' Reinforcement Contingencies on the Acquisition of Imitative Responses*, 1 J. PERSON. & SOC. PSYCHOLOGY 589 (1965); Bandura, Grusec & Menlove, *Observational Learning as a Function of Symbolization and Incentive Set*, 37 CHILD DEVELOP. 499 (1966); Bandura, Ross & Ross, *Vicarious Reinforcement and Imitative Learning*, 67 J. ABNORM. & SOC. PSYCHOLOGY 601 (1963) [hereinafter *Vicarious Reinforcement*].

59. The average age of the children was four and one-half.

towards a cartoon Bobo doll. The fourth condition was a control condition; children were not exposed to aggressive models.

After watching the model act out against the Bobo doll, each child was taken into another room where an experimenter told the child that he/she could play with the toys in the room. Once the child began playing with the toys, the experimenter interrupted the play, telling the child that the toys were then reserved for some other children. The experimenter indicated that the child could play with some toys in another room instead. Preventing the child from playing with these toys with which the child was already enjoying himself or herself was designed to frustrate or anger the child. The experimenters believed that by frustrating the child at this stage of the experiment, the child would be more likely to aggress when given the opportunity in the next part of the experiment.

Once the child was removed to the other room, the child was permitted to play with another set of toys. These toys included a Bobo doll and a mallet like the ones seen earlier modeled by the adult in person, or by the adult or cartoon character in the film. The child played for twenty minutes. While watching through a one-way mirror, the experimenters observed and scored the child's behavior.

The primary finding of this study was that children who had observed adult aggression either in person or in the film prior to being frustrated were more aggressive in their subsequent play than those who had been frustrated but had not observed any adult aggression. Children who had observed the adult models would imitate the models. Scores for imitative aggression were significantly higher for the children who had observed models than for the control children. However, an interesting observation was made that there was some aggressive gunplay displayed equally among the various groups. Aggressive gunplay was not modeled by the adults in the experiment.

3. Criticisms

These studies exemplify the types of research performed to demonstrate that people learn some of the behavior they observe. However, the research can be criticized both from a scientific viewpoint and from a legal relevance standpoint. The laboratory work suffers from strong experimenter demands.⁶⁰ Experimenter demands lead subjects to comply with what they perceive to be the desired result of the experiment. For example, subjects may infer what the researchers' hypotheses are from

60. Bandura, Ross & Ross, *supra* note 57.

the surrounding circumstances, from the experimenters' attitudes, or from the experiment itself, and thus, try to comply with what the subject perceives to be the goals of the experiment, i.e., to aggress. Rather than aggressing because it is the natural response to the experimental condition, the subject aggresses because he or she believes the experimenter expects aggressive behavior.

Because the experimenter chooses what films will be viewed, the participants can assume that the experimenter approves of the particular film and its content. This is particularly true in the studies of imitative violence where the experimenter then makes it possible for the participant to have access to the same toys or instrumentalities seen in the film.⁶¹ If the items were perceived as harmful or "bad," they would probably not be available to the subject.⁶² Thus, if violent content may be seen as permissible, and when the participants are given the chance to behave aggressively, they will be more likely to do so because, in a sense, they have been given permission to do so.⁶³ In addition, the experiments used Bobo dolls, widely sold, as punching bags. Children may simply be responding appropriately to such toys. As observed in the Bobo doll study, children played aggressively with the toy guns in the room without modeling prior to their play. One explanation for such non-observed behavior is that toy guns have always been used in aggressive play, as children use toy guns to play such games as "cops and robbers" and "cowboys and Indians."

Despite the advantages of laboratory experiments in achieving control, they are subject to criticism for their failure to generalize to the "real" world.⁶⁴ The measures of aggression used in laboratory research are only analogues of aggression.⁶⁵ Punching a Bobo doll cannot be equated with either punching or killing a real person.⁶⁶ Further, pushing a button to make it more difficult for another person to win a game cannot be equated with physically injuring another person.⁶⁷

Furthermore, subjects in laboratory experiments are aware that

61. *Id.*

62. *Id.*

63. *Id.*

64. Field experiments that have more applicability to actual, real life circumstances are criticized for the limited amount of control the investigator has. TELEVISION AND GROWING UP, *supra* note 6, at 89.

65. See *Effect of Television Violence*, *supra* note 39; Friedrich-Cofer & Huston, *Television Violence and Aggression: The Debate Continues*, 100 PSYCH. BULL. 364, 365 (1986) [hereinafter *Television Violence and Aggression*].

66. See *Effect of Television Violence*, *supra* note 39, at 228; *Television Violence and Aggression*, *supra* note 65, at 365.

67. *Effect of Television Violence*, *supra* note 39, at 228.

their behavior will not be punished, nor will they suffer retaliation.⁶⁸ Although social scientists would like to argue that these behaviors reflect how aggressive subjects would act if they were given the opportunity, this conclusion is uncertain.⁶⁹ Some sequence of their learning is exhibited spontaneously in their play, particularly when the setting is right. That is, where the experimental setting is similar to that depicted in the film, the child may be likely to imitate the behavior seen. However, in real life, the setting is never the same as that seen on television. Based on probabilities, it is very unlikely that many of the staged events in the laboratory would elicit the exact response seen by a viewer.

Laboratory studies have not always used violent programs that appear on television as stimulus materials.⁷⁰ Furthermore, subjects are not exposed to more than one or a few programs in the experiment.⁷¹ Typically, experimenters have selected the programs to maximize their effects.⁷² Maximizing effects for scientific purposes may be interesting for science's sake, but may distort the reality of the effects. Such selectivity is quite different from the effects of a mixture of violent and non-violent programs, which is the usual pattern of exposure in a natural setting.⁷³ Thus, one must ask: Is the statistical significance found practically significant? Do these scientific percentages have anything to do with reality and the legal system?

In *all* conditions, including the control conditions, subjects display aggressive behaviors. Thus, even subjects who never saw the film of the Bobo doll getting punched, begin to beat up the Bobo doll. What makes people who have not seen the model behave aggressively in the first place? It would seem likely that it cannot be *just* the film that is *causing* the aggression. Some other factors are probably involved, including the fact that the Bobo doll's only purpose is to be used as a punching bag.

B. Field Experiments

Field experiments are studies in which subjects are observed in relatively natural settings. In these studies, subjects are randomly assigned to conditions, are allowed to watch varying types of movie or television

68. *Effect of Television Violence*, *supra* note 39, at 228. Cf. *Vicarious Reinforcement*, *supra* note 58 (characters in a film presented were shown as being punished or rewarded; subjects were less likely to imitate the behaviors shown in the film when the model was punished).

69. *Effect of Television Violence*, *supra* note 39, at 228.

70. *Id.* at 228-29.

71. *Id.* at 228.

72. *Id.*

73. *Id.*

programming, and are measured for aggressiveness.⁷⁴ These field experiments are characterized by studies of instigated and imitative aggression.

1. Instigation

Few field experiments have yielded data consistent with laboratory findings. Parke, Berkowitz, Leyens, West, and Sebastian⁷⁵ studied the aggressive behavior of delinquent boys in a penal institution. One cottage of boys was shown nonviolent films for five days, while in another cottage, boys were exposed to five consecutive nights of violent television programming. The boys were observed and rated on fourteen aggressive behaviors which were combined into three categories of aggression: general, interpersonal/verbal, and physical. Boys who viewed the violent content were more aggressive overall. However, interestingly enough, the boys who exhibited a low amount of aggression prior to viewing the violent movies displayed more aggression than those individuals who were more violent prior to the viewing. In addition, there was no cumulative impact of seeing movies each night of the experimental period. In other words, if there had been a cumulative effect, more aggression should have occurred during the last part of the week than during the first few days of exposure to the violent programming.⁷⁶

While a few field studies provide evidence to support the hypothesis that viewing violent programming leads to violent behavior, a growing number of studies fail to support that conclusion. For example, Friedrich and Stein⁷⁷ conducted a study of the aggressive behavior of summer nursery school children. Children were divided into three groups. They were taken in groups to view either aggressive, prosocial, or neutral television programs. The experiment ran over a period of twelve days, in which subjects watched one film per day. Measures of physical, verbal, object, and fantasy aggression were taken during the children's free-play periods. These measures were taken prior to the children viewing the programs so that initial levels of aggressiveness could be obtained, and these measures were again taken after viewing the films.

74. *Effect of Television Violence*, *supra* note 39, at 228.

75. Parke, Berkowitz, Leyens, West & Sebastian, *Some Effects of Violent and Nonviolent Movies on the Behavior of Juvenile Delinquents*, in 10 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 135 (L. Berkowitz ed. 1977).

76. With findings such as these, one must ask, what is the legal relevance of general aggressiveness? Should social science dictate social policy? *See Issues Bearing on Legal Regulation*, *supra* note 41.

77. Friedrich & Stein, *Aggressive and Prosocial Television Programs and the Natural Behavior of Preschool Children*, 38 *MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT* (No. 4) (1973).

Although there were no effects on any of the four measures of aggression, a significant effect was found between the initial level of aggression and the treatment condition. For high-initial aggressive children, their scores were significantly different at the end of the experiment from those in the neutral group. Children who initially displayed a large number of aggressive behaviors behaved less aggressively after viewing the violent films. There was no significant effect based on the type of film viewed. Thus, this study found no evidence that the violent film was followed by more aggressiveness than the neutral or prosocial films. Given that high-level aggressive children decreased in aggressiveness, one must question whether viewing the violent programs acted as a catharsis, by providing an outlet for their naturally aggressive tendencies.⁷⁸

Similarly, Feshbach and Singer found results supporting this catharsis theory.⁷⁹ They studied boys in seven residential schools who were assigned to watch either violent⁸⁰ or nonviolent⁸¹ television programs for six weeks. Measures of aggressive behavior were taken throughout the study. These measures included fistfighting, hitting, and kicking; pushing and shoving; angry verbal outbursts; cursing; being destructive with property; and throwing things.⁸² In general, the results of the study found that boys who watched only nonviolent television programs were generally more aggressive than those who watched violent television programs. This study has been criticized primarily because of the problems in finding nonviolent programming that would be as entertaining as the violent programs. Possibly the frustration of being required to watch

78. For a discussion of the catharsis effect, see *infra* note 79.

79. FESHBACH & SINGER, *TELEVISION AND AGGRESSION* (1971) [hereinafter FESHBACH & SINGER], have suggested that viewing televised violence provides an opportunity to discharge aggressive feelings, reducing the chance that the viewer would behave aggressively. This process is known as catharsis. The theory underlying the catharsis hypothesis expresses the notion that a child who views violence on television vicariously experiences the violence and thereby harmlessly discharges his own hostility and aggression. Feshbach, *The Stimulating Versus Cathartic Effects of a Vicarious Aggressive Activity*, 63 J. ABNORM. & SOC. PSYCH. 381 (1961); S. Feshbach, *The Catharsis Effect: Research and Another View*, in *MASS MEDIA AND VIOLENCE: A STAFF REPORT TO THE COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE* (R. Baker & S. Ball eds. 1969). However, this theory is inconsistent with the majority of research findings. T.V. AND GROWING UP, *supra* note 6, at 67. Other researchers have unsuccessfully attempted to replicate the catharsis effect. See Wells, *Television and Aggression: Replication of an Experimental Field Study*, unpublished manuscript, University of Chicago Graduate School of Business (1973), cited in Friedrich-Cofer & Huston, *Television Violence and Aggression: The Debate Continues*, 100 PSYCH. BULL. 364, 365 (1986).

80. Violent programs included *Alfred Hitchcock Presents*, *The FBI*, *Combat*, and some fifty other programs. FESHBACH & SINGER, *supra* note 79, at 57.

81. There were approximately one hundred possible nonaggressive programs, including *Beverly Hillbillies*, *Ed Sullivan*, *Gilligan's Island*, and *Mister Ed*. *Id.*

82. See *id.* at 70-1.

uninteresting programs could have generated aggression. Despite methodological flaws, this study strongly disconfirms the hypothesis that television viewing leads to aggressive behavior.⁸³

2. Imitation

Social scientific studies often ask whether exposure leads to general aggressive tendencies. However, the relevant legal question is whether any specific incident viewed on television actually and proximately causes a criminal act. One series of eight studies examined the effects of viewing a specific act of illegal behavior—*theft*—on the subjects' subsequent behavior. Milgram and Shotland⁸⁴ examined whether viewing someone commit a particular antisocial act on television increased the likelihood that someone would commit a similar act. Subjects were assigned to one of three conditions and were promised a radio as a reward for watching a program. The program was an episode of "Medical Center" which had been specially constructed into three conditions for the research. In condition one, a young man, motivated by serious financial problems, breaks into and steals from several collection boxes containing money for the hospital's charity drive, is caught by the police, and is sent to jail. In condition two, the young man escapes with the stolen money. In condition three, the young man intends to steal from the box, but instead winds up making a contribution. After viewing the film, subjects were then told to come to another building at a specified time one week later to pick up their prizes. However, when they arrived, no one was there to reward them. Instead, a notice was posted that the radios were no longer available. There was also a charity box in the room, with money clearly visible in it and a dollar bill hanging from the box. The experimenters examined whether the subjects took the bill and/or broke into the charity box.

Although limited to a single act of antisocial behavior which may not be representative of other types of antisocial behavior, this research found no evidence that subjects imitated antisocial acts observed on television. None of the programs evoked an antisocial response in the viewer.

This type of research has the most legal significance because it goes directly to the issue of whether the viewer imitates an act that is criminal or tortious. Yet, this is precisely the type of research that is not usually done. Rather, social scientists use abstract acts of violence unrelated to

83. *Effect of Television Violence*, *supra* note 39, at 229-30.

84. MILGRAM & SHOTLAND, *TELEVISION AND ANTISOCIAL BEHAVIOR: FIELD EXPERIMENTS* (1973).

actual violent acts, and expect an inference to be drawn from the "generic" research. Specifically, many social scientists argue that their research should be used to make policy decisions. Many scientists want the legal system to apply the findings of these generic studies where lesser forms of violence are exhibited, to cases in which serious violence has been done, i.e., where humans are seriously injured or killed. Where research, such as the Milgram and Shotland study discussed above, does exist, the results tend to be negative. Thus, examining the most relevant evidence, the claims of those that viewing violent acts on television leads to violence in real life are simply not supported.

3. Criticisms

These studies may be criticized on a variety of grounds. First, when viewing takes place outside the home, the research setting may not represent a normal viewing environment.⁸⁵ Second, studies in which people in institutions have been observed may not represent the population as a whole.⁸⁶ Third, such studies may be affected by the fact that the normal activities of the residents are interrupted. For example, their choice of programming is restricted.⁸⁷ Fourth, these studies typically involve observation of aggressive behaviors such as hitting, pushing, destruction of property, and the like, in groups in which there is already some amount of this activity. Data is typically collected from delinquent adolescents who are institutionalized. Although there may be a *statistically* significant change in scores reflecting aggressiveness in the subjects both before and after the violent program has been viewed, such effects have not had any *practical* significance;⁸⁸ although it may be statistically significant to have one more incident of hitting in a community which already has a number of such incidents, is such an effect meaningful in the grand scheme of things? Does it matter that there are twenty such inci-

85. See *Television Violence and Aggression*, *supra* note 65, at 366.

86. See *id.*

87. See *id.*

88. When an event is statistically significant at the .05 level, the event would not be expected to occur by chance alone more than five times out of one hundred. Similarly, when an event is statistically significant at the .01 level, the event would not be expected to occur by chance alone more than one time in a hundred. When an event occurs more frequently than by chance alone, it may become statistically significant. However, statistical significance is not affected solely by the frequency of the event being studied, but may also be affected by things such as the number of subjects being studied. It is well-known that virtually any event may become statistically significant if enough subjects are included in the study. Thus, just because an event is statistically significant, it may not be practically significant. The statistical significance must be interpreted in light of the practical realities and the purposes for which the experiment was conducted.

dents of violence before the study, and after viewing the violent programs, there are twenty-one incidents of violence? More importantly, where subjects' natural aggression levels were not calculated prior to the intervention, one has to question whether the violence observed was any greater than what it would have been otherwise.

C. Correlational Studies

There have been a number of correlational studies done which obtain a measure of viewing violent television and relate this to a measure or group of measures of aggressive behaviors.⁸⁹ In such studies, measures of violent television exposure include time spent viewing, preferences for violent programs, and amount of viewing of violent programs.⁹⁰ Measures of aggressive behavior have included self-reports of actual behavior and attitudes toward violence.⁹¹

Singer and Singer⁹² studied 141 nursery school children. Children were observed four times. The correlations between viewing violence on television and aggression were generally positive, but varied substantially. Boys' correlations had a positive low range, indicating a weak relationship between viewing violence and aggressive behavior. Girls' correlations, however, were more difficult to interpret, because there were some negative correlations. A negative correlation would suggest that, in some cases, the more violence seen on television, the less aggres-

89. See, e.g., M. Lefkowitz, E. Walder & L. Huesmann, *Television Violence and Child Aggression: A Followup Study*, in 3 TELEVISION AND SOCIAL BEHAVIOR: TELEVISION AND ADOLESCENT AGGRESSIVENESS (G. Comstock & E. Rubinstein eds. 1971) [hereinafter *Child Aggression*] (total viewing time was not related to peer reports of aggression). Cf. McLeod, Atkin & Chaffee, *Adolescents, Parents and Television Use: Self-Report and Other-Report Measures from the Wisconsin Sample*, 3 TELEVISION AND SOCIAL BEHAVIOR: TELEVISION AND ADOLESCENT AGGRESSIVENESS (G. Comstock & E. Rubinstein eds. 1971) [hereinafter *Adolescents, Parents and Television Use*] (found modest but statistically significant correlations (.17 to .23) between total viewing time and both self-reports and others' reports of aggression); McIntyre & Teevan, *Television and Deviant Behavior*, in 3 TELEVISION AND SOCIAL BEHAVIOR: TELEVISION AND ADOLESCENT AGGRESSIVENESS (G. Comstock & E. Rubinstein eds. 1971) (examined the relationship between preference for violent programs and aggression finding only trivial correlations (.02 to .06) between the violence level of the respondents' favorite programs and five types of deviance, i.e., getting in trouble with the police). Based on these small correlations, it can be tentatively concluded that there is, at most, a modest relationship between exposure to television violence and aggressive behavior or aggressive tendencies. However, correlation does not, in and of itself, demonstrate the presence of a causal relationship, so that the data must be interpreted carefully. See *infra* text and accompanying notes 99-105.

90. T.V. AND GROWING UP, *supra* note 6, at 79.

91. *Id.* at 81.

92. J. SINGER & D. SINGER, TELEVISION, IMAGINATION, AND AGGRESSION: A STUDY OF PRESCHOOLERS' PLAY (1980).

sion that occurred in real life. Furthermore, where the correlations were positive for the girls, they varied greatly. In practical terms, a close look at the exact type of violent behaviors might be necessary to determine which types of behavior might increase by viewing violence. Simply stating that overall there was an increase in aggressiveness does not reveal whether these are the types of violent behavior with which the law should be concerned.

Miavsky, Stipp, Kessler, and Rubens⁹³ studied over three thousand subjects, ranging in age from seven to sixteen. The subjects came from a large number of classes in several schools in two cities. Many of the correlations for younger boys were small and insignificant, but were positive, indicating at best a weak relationship between viewing violence and acting aggressively. For older boys, the correlations were even lower and not as consistent. In some cases, the older boys' correlations were negative again, indicating that for some behaviors, the more violence seen, the less likely the individuals were to display certain behaviors. It is important to note that while the experimenter tried to control for socioeconomic status and race, such variables had positive correlations with aggression. In the words of the experimenters, "[T]here might be other mutual causes of television and aggression that work in a different way."⁹⁴ If, for example, poor people are more affected by television violence, would the legal system want to regulate television violence even though only a select group is affected?

Another study had similar problems eliminating other variables that had correlations with aggressiveness. Belson⁹⁵ divided subjects into groups of high and low viewers of television violence and then computed means for the two groups on various measures of aggression: total number of violent acts, total number of violent acts weighted by degree of severity of the act, total number of violent acts excluding minor acts, and total number of more serious acts of violence.⁹⁶ Although there were positive correlations for viewing violent programming at each level of aggression, for serious acts of violence, the total amount of time that individuals watched television, including non-violent programs, had a

93. J. MILAVSKY, H. STIPP, R. KESSLER & W. RUBENS, *TELEVISION AND AGGRESSION: A PANEL STUDY* (1982) [hereinafter *PANEL STUDY*].

94. *Id.* at 114.

95. W. BELSON, *TELEVISION VIOLENCE AND THE ADOLESCENT BOY* (1978).

96. Belson had the public rate the acts of violence in terms of severity. Examples of minor types of violence include: calling a girl a "slut," telling a policeman to "piss off and leave me alone," teasing, and displaying rude finger gestures. Examples of more serious types of violence include: trying to force a girl to have sexual intercourse, threatening to kill one's father, beating up an old woman, and deliberately kicking a boy in the crotch. *Id.* at 242-46.

more significant correlation than simply viewing violent programs only. In fact, violence after viewing non-violent programming was also statistically significant. In other words, it did not seem to matter whether the subjects watched a violent program or a non-violent program; both types of viewing led to some increases in violence. Belson attempted to correct this discrepancy between his hypothesis and results by matching groups on total time spent viewing television. However, the amount of non-violent viewing that occurred was not analyzed, and matching the subjects on total television viewing of all kinds cannot take into account some predispositional factor that may cause subjects to prefer violent television.⁹⁷ Additionally, as with most correlational studies, the results are dependent on the reliability of the subjects' self-reports of their viewing behaviors and their aggressive behaviors.⁹⁸

Although many of the studies have demonstrated a relationship between exposure to television violence and aggressive behaviors, these positive correlations have been of very low magnitudes, and have not always been verified, as the Belson study indicates. Furthermore, the statistical analyses for examining whether there is a correlation between two things, and if so, the magnitude of that relationship, cannot demonstrate causation. Instead, the correlational statistics can only indicate that two variables—television violence and aggressive behavior—are related.⁹⁹ In this case, the correlation could reflect any of three causal sequences: 1) that viewing violent programs leads to aggression; 2) that aggression leads to viewing violent programs; or 3) that both viewing violent programs and aggression are products of a third condition or set of conditions.¹⁰⁰ Other variables, such as socioeconomic status,¹⁰¹ age,¹⁰² and sex,¹⁰³ have

97. *Effect of Television Violence*, *supra* note 39, at 238 (discussing Belson's study).

98. Self-reports are reports by subjects concerning their own behaviors. With such reports, there is always the question of whether these reports are accurate.

99. The correlation coefficient indicates the strength of the tendency of two variables to vary concomitantly. T.V. AND GROWING UP, *supra* note 6, at 86. Covariation of two variables may occur for a variety of other reasons. *Id.* at 87. Correlation is a necessary condition for causal inference, but alone it is not enough. *Id.* Although causation can never be demonstrated with absolute certainty, in general, three requirements are necessary for causal inference: 1) correlation must be demonstrated, 2) the specified cause must occur prior to the change in the specified effect, and 3) no other reasonable explanations for the results obtained. *Id.* at 88. Correlation coefficients can satisfy only part of the requirements; the other requirements are a function of the design of the experiment. *Id.*

100. T.V. AND GROWING UP, *supra* note 6, at 8.

101. See Robinson & Bachman, *Television Viewing Habits and Aggression*, 3 TELEVISION AND SOCIAL BEHAVIOR: TELEVISION AND ADOLESCENT AGGRESSIVENESS (G. Comstock & E. Rubinstein eds. 1971) [hereinafter *Viewing Habits*] (modest relationship between violence level of favorite programs and aggression, but when controlling for "education of mother" the relationship for some groups was eliminated). Cf. *Adolescents, Parents and Television Use*,

been found to interact with aggressive behavior. Other variables, such as pre-existing levels of aggression¹⁰⁴ and personality factors,¹⁰⁵ may be influential.

The studies indicate that under some conditions watching violent events on television may cause some people to act aggressively. However, scientists cannot predict which individuals will react aggressively to violence, and precisely what kinds of televised violence will have a net negative result on society. Even if broadcasters limited the amount of violence aired, it is unclear what the effect would be.

[P]eople hunt and choose the kinds of stimulus material they want. Violent material is popular. If our society changed in no other way than changing the balance of television offerings, people, to some degree would still seek out violent material. How much effect a modest quantitative change in television schedules would have is now quite unanswerable. More drastic changes, such as general censorship, would clearly have wide effects, but of many kinds, and some of them distinctly undesirable.¹⁰⁶

D. Conclusions

Although in the future social scientists may be able to predict aggressive behavior accurately, even under optimal conditions it is unlikely that more than fifty percent of the variance in behavior could be explained.¹⁰⁷ Even if the predictions were 95% accurate, such accuracy would not guarantee predicting who would engage in the harmful behav-

supra note 89 (controlling for socioeconomic status or for school performance did not bear on relationship between violence viewing and aggression).

102. *See Adolescents, Parents and Television Use, supra* note 89 (found relationship between violence viewing and aggression to be lowest among younger children). *Cf. Child Aggression, supra* note 89 (no relationship between age and aggression).

103. *See* Dominick & Greenberg, *Attitudes Toward Violence: The Interaction of Television, Family Attitudes & Social Class*, in 3 TELEVISION AND SOCIAL BEHAVIOR: TELEVISION AND ADOLESCENT AGGRESSIVENESS (G. Comstock & E. Rubinstein eds. 1971) (girls more aggressive than boys). *Cf. Child Aggression, supra* note 89 (no differences for girls).

104. *Viewing Habits, supra* note 101 (controlling for levels of aggression a year prior to the study eliminated the relationship between preference for violent programs and aggression for ninety percent of the sample. This finding supports a third variable hypothesis that preexisting levels of aggression produce the patterns of aggression seen in the experimental conditions).

105. *See Child Aggression, supra* note 89 (suggests that observed relationship between violence level of favorite programs and aggression may be essentially a product of a very small number of extremely aggressive boys).

106. T.V. AND GROWING UP, *supra* note 6, at 5.

107. *Issues Bearing on Legal Regulation, supra* note 41, at 178.

ior because of the infrequency of the events.¹⁰⁸

The studies relating to the effects of television violence indicate that violence depicted on television can induce aggressive behavior by children immediately or shortly after the observation.¹⁰⁹ However, the evidence does not suggest that televised violence has a uniform negative effect, or that it affects a majority of children. The evidence does indicate that televised violence may lead to increased aggression in certain subgroups of children. These subgroups constitute only a small portion of viewers.¹¹⁰ The evidence only suggests that those who are most responsive to television violence are those who are highly aggressive by nature, that is those who are prone to engage in spontaneous aggressive actions.¹¹¹ What the Surgeon General said in 1972 is still true today:

For *some* [people], under *some* conditions, *some* television is harmful. For *other* [people] under the same conditions, or for the same [people] under *other* conditions, it may be beneficial. For *most* [people], under *most* conditions, *most* television is probably neither particularly harmful nor particularly beneficial.¹¹²

IV. THE CASES

Some people have mimicked or been encouraged by television violence. As a consequence, these individuals have either injured themselves or others. When such incidents have occurred, legal action often results.¹¹³ Four important cases have considered whether the television broadcaster may be held liable for acts of violence perpetrated by viewers inspired to act based on what they have seen:¹¹⁴ *Zamora v. Columbia*

108. *Id.* There are important difficulties when the base rate of the activity being studied is low. Even when predictive accuracy is high, the decision-maker can overpredict the number of people who will engage in the undesirable behavior. *Id.* This same problem occurs when social science is used to predict such things as dangerousness and who might be a hijacker or drug trafficker. See J. MONAHAN & L. WALKER, *SOCIAL SCIENCE IN LAW* (1985).

109. *Cf.* PANEL STUDY, *supra* note 93 (NBC examined long-term implications of viewing television violence and was not able to find a significant association between violent television exposure and subsequent change in aggression). For a review of this work, see Kenny, *The NBC Study and Television Violence*, 34 J. COMMUN. 176 (Winter 1984).

110. T.V. AND GROWING UP, *supra* note 6, at 75.

111. *Id.*

112. W. SCHRAMM, J. LYLE & E. PARKER, *TELEVISION IN THE LIVES OF OUR CHILDREN* (1961), quoted in T.V. AND GROWING UP, *supra* note 6, at 13 (emphasis in original).

113. For a discussion of cases that have resulted in court decisions as well as settlements, see Dee, *Media Accountability for Real-Life Violence: A Case of Negligence or Free Speech?*, 37 J. COMMUN. 106 (Spring 1987).

114. See also, *Bill v. Superior Court*, 137 Cal. App. 3d 1002, 187 Cal. Rptr. 625 (1982). In *Bill*, the plaintiff attended the showing of a movie about youth gangs. As she was leaving the

Broadcasting Sys.,¹¹⁵ *Olivia N. v. National Broadcasting Co.*,¹¹⁶ *Walt Disney Prod., Inc. v. Shannon*,¹¹⁷ and *DeFilippo v. National Broadcasting Co.*¹¹⁸

The case law, like the social science research, may be divided into two categories: instigated violence and imitative violence.¹¹⁹ With instigated violence, it is alleged that violent programming, in general, caused the actor to instigate violence to injure another individual. With imitative violence, it is alleged that a specific program caused the actor to imitate a type of violent behavior to either injure himself or another individual. In both categories, defendant broadcasters have raised the first amendment as a complete defense to liability. The next section summarizes the facts of the four relevant cases in this area, and then analyzes the legal resolutions of these cases.

A. The Case Facts

1. Type 1—Instigation

a. *Zamora v. Columbia Broadcasting Sys.*

In *Zamora v. Columbia Broadcasting Sys.*,¹²⁰ Ronny Zamora's parents brought an action on behalf of their son against CBS, ABC, and NBC on the theory that television violence had caused the minor to become involuntarily addicted to and "completely subliminally intoxicated" to television violence. The plaintiffs argued that by viewing violent television programs offered by these defendants, Zamora was encouraged to kill an eighty-three year old woman.¹²¹ The defendants were

theatre, she was shot by someone who had also just viewed the movie. The court refused to impose liability upon the movie producers. Cf. *Silva v. Showcase Cinemas Concessions of Dedham, Inc.*, 736 F.2d 810 (1st Cir. 1984) (theatre owners as distinguished from movie producers can be held liable for injuries to a patron received on theater premises since violence had occurred there before).

115. 480 F. Supp. 199 (S.D. Fla. 1979).

116. 74 Cal. App. 3d 383, 141 Cal. Rptr. 511 (1977).

117. 247 Ga. 402, 276 S.E.2d 580 (1981).

118. 446 A.2d 1036 (R.I. 1982).

119. See *supra* note 53.

120. 480 F. Supp. 199 (S.D. Fla. 1979).

121. *Id.* at 200. In a criminal trial for the murder of the eighty-three year old woman, Zamora raised the defense of insanity based upon "T.V. Intoxication." The trial court refused to allow a psychologist to testify on the effects of television violence upon sociopathic children because the psychologist was unable to conclude that Zamora himself was unable to distinguish between right and wrong. Therefore, the testimony was irrelevant to the insanity defense. *Zamora v. State*, 361 So. 2d 776, 779 (Fla. Dist. Ct. App. 3d 1978).

See also *State v. Molina*, No. 84-2314 (11th Jud. Dist. Dade County, Fla. filed Oct. 1984), in which the defendant pled not guilty by reason of insanity, alleging that "T.V. Intoxication" was a contributing factor to stabbing the victim to death.

charged with breaching a duty to plaintiffs by failing to use ordinary care to prevent Ronny Zamora¹²² from being "impermissibly stimulated, incited, and instigated" to imitate the violence he had viewed on television.¹²³ Plaintiffs did not allege that any particular program incited Ronny Zamora to commit murder, or that his viewing of one network was more or less frequent than any of the others. Instead, the plaintiffs claimed that television, in general, had caused their son to commit the murder.

2. Type 2—Imitation

a. *Olivia N. v. National Broadcasting Co.*

In *Olivia N. v. National Broadcasting Co.*,¹²⁴ the plaintiff brought an action against NBC for injuries she sustained when she was raped in a similar manner to the way a young girl was raped on the television broadcast of *Born Innocent*,¹²⁵ shown the previous evening. *Born Innocent* fictitiously depicted the harmful effects of a state-run home upon an adolescent girl who had become a ward of the state.¹²⁶ In one scene, the girl entered the community bathroom at the home to take a shower.¹²⁷ She was depicted taking off her clothes, stepping into the shower, and bathing for a few moments, when suddenly the water stopped and four teenage girls were standing across from her.¹²⁸ One of these girls was carrying a plunger. The girls violently attacked the younger girl, forcing her legs apart. Then, the girl with the plunger was depicted making intense thrusting motions with the handle of the plunger until one of the four said, "That's enough." The younger girl was left on the shower floor, naked and crying.¹²⁹

In *Olivia N.*, the plaintiff, a nine-year old, was attacked by minors at a San Francisco beach, and forcibly raped with a bottle. The plaintiff alleged that the assailants had seen the "artificial rape" scene in *Born Innocent* and that such viewing had caused them to commit the rape in

122. Ronny Zamora had been watching violent programming from the age of five to the time that the action was brought (age fifteen). *Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. at 200.

123. *Id.*

124. 74 Cal. App. 3d 383, 141 Cal. Rptr. 511 (1977).

125. While this is a sexually violent act, and while the research on desensitization to the plight of the victim would most definitely be introduced, that research is not specifically dealt with in this Comment. See *supra* note 37.

126. 74 Cal. App. 3d 383, 386, 141 Cal. Rptr. 511, 512 (1977).

127. *Id.*

128. *Id.*

129. *Id.*

question.¹³⁰

b. *Walt Disney Prod., Inc. v. Shannon*

In *Walt Disney Prod., Inc. v. Shannon*,¹³¹ a negligence claim was brought on behalf of an eleven-year old child against the producer, syndicator, and broadcaster of *Mickey Mouse Club*, a children's program, to recover for injuries sustained when the child sought to reproduce a sound effect demonstrated on the program. During one episode, the audience was shown how to reproduce the sound of a tire coming off an automobile by putting a BB pellet inside a round balloon, filling the balloon with air, and rotating the BB inside the balloon. The child tried to repeat the television stunt by taking a piece of lead almost twice the size of a BB and putting it into a skinny balloon. He blew up the balloon, and when the balloon burst, it impelled the lead into his eye, partially blinding him.

c. *DeFilippo v. National Broadcasting Co.*

In *DeFilippo v. National Broadcasting Co.*,¹³² the parents of a deceased minor sued NBC after their son apparently hanged himself while imitating a stunt he had observed on the *The Tonight Show*.¹³³ On May 23, 1979, one of Johnny Carson's guests was Dar Robinson, a professional stuntman. While introducing Robinson, Carson announced that Robinson would "hang" Carson as a stunt.

Before the stunt was performed, Robinson stated: "'Believe me, it's not something that you want to go and try. This is a stunt. . . . I've seen people try these things like this. I really have. I happen to know somebody who did something similar to it, just fooling around, and almost broke his neck. . . .'"¹³⁴ Then the program broke for a commercial. When the show resumed, Carson was standing on a gallows with a noose hanging by his side. Robinson and a "hangman" were standing nearby. A hood was placed over Carson's head, and the noose was put over the hood. The trapdoor was opened, and Carson fell through. Carson survived the stunt without injury.

The plaintiffs claimed that their son regularly watched *The Tonight Show* and that he saw this particular broadcast. Several hours after the

130. *Id.* at 387, 141 Cal. Rptr. at 512.

131. 247 Ga. 402, 276 S.E.2d 580 (1981).

132. 446 A.2d 1036 (R.I. 1982).

133. The plaintiff proposed four theories of recovery: 1) the defendants were negligent in permitting the stunt to be broadcast, 2) the defendants failed to adequately warn and inform their son of the dangers, 3) products liability, and 4) intentional tort-trespass. They sought ten million dollars in damages. *Id.* at 1038.

134. *Id.* at 1037-38.

broadcast, the plaintiffs found their son hanging from a noose in front of the television set, which was still on.

B. The Case Theory

Common law theories of tort liability were presented in these cases in an attempt to obtain judicial redress for acts of violence on television.¹³⁵ Tort law has typically focused on the foreseeability of harm resulting from the defendant's conduct.¹³⁶ Where a defendant anticipates that his or her act or omission creates a sufficiently high probability of harm, liability may be imposed.¹³⁷

In these cases, the first amendment has been asserted as a defense against the imposition of liability. In *Brandenburg v. Ohio*, the United States Supreme Court delineated a test that has been used in these cases.¹³⁸ *Brandenburg* requires that the speaker "incite" the listener to act.¹³⁹ Moreover, *Brandenburg* requires that the speaker be advocating something that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."¹⁴⁰

Although courts tend to blur the distinction between incitement and foreseeability, the concepts are not identical.¹⁴¹ Incitement implies that a high probability of danger is *intended* by the speaker, while foreseeability also incorporates *unintended* consequences.¹⁴² Nevertheless, regardless of the concept the courts choose to focus upon, the courts have declined to find the broadcaster defendants liable. Usually, the focus has been on first amendment protections, but because negligence actions will continue to be asserted both in cases of instigated and imitative violence, a look at the foreseeability issues and incitement issues is warranted.

135. See *Olivia N. v. National Broadcasting Co.*, 74 Cal. App. 3d 383, 141 Cal. Rptr. 511 (1977); *Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. 199 (S.D. Fla. 1979); *Walt Disney Prod., Inc. v. Shannon*, 247 Ga. 402, 276 S.E.2d 580 (1981); *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982).

136. *Prettyman & Hook, The Control of Media-Related Imitative Violence*, 38 FED. COMM. L.J. 317, 347-48 (1987) [hereinafter *Prettyman & Hook*].

137. *Id.*

138. 395 U.S. 444 (1969).

139. *Id.* at 447.

140. *Id.*

141. One other commentator makes this point clear. See *Hoffman, From Random House to Mickey Mouse: Liability for Negligent Publishing and Broadcasting*, 21 TORT & INS. L.J. 65, 77 (1985) [hereinafter *Hoffman*].

142. *Id.*

1. Negligence: The Plaintiff's Claim

Negligence has been the most common cause of action.¹⁴³ In a negligence action, the plaintiff must demonstrate that 1) a duty exists requiring the defendant to conform to a certain standard of conduct for the protection of others against unreasonable risks, 2) a breach of that duty, 3) a causal relationship between the defendant's conduct and the plaintiff's injury, and 4) actual damages as a result of the plaintiff's injury.¹⁴⁴ The imposition of a duty is essentially a policy question because the question centers around whether the harm that occurred was foreseeable.¹⁴⁵ In these specific imitative act cases, is it unforeseeable that people will model their behavior on these television programs?¹⁴⁶

One commentator suggests that the question of foreseeability might be a jury question:

In each case, plaintiffs undoubtedly could have produced expert testimony of psychologists that such imitative conduct was clearly foreseeable. . . . Indeed, the psychologists . . . have been complaining for some years that television violence has an adverse impact upon the audience, especially young viewers. Scientific studies claim that children commonly imitate the violent acts they observe on television. If the only concern was remoteness and not the protection of free expression, the amount of research supporting the connection between television violence and antisocial behavior would almost certainly be considered sufficient to state a jury question in claims against broadcasters and publishers; the evidence upon which plaintiffs would rely is not significantly less reliable than the type of expert opinion evidence used to get a jury in routine tort litigation.¹⁴⁷

143. Some commentators have suggested that strict liability or products liability may be potential causes of action for plaintiffs injured by imitative violence. See, e.g., Pearlman & Marks, *Broadcast Negligence: Television's Responsibility for Programming*, 16 TRIAL 40 (August 1980); Urwin, *Tort Liability of Broadcasters for Audience Acts of Imitative Violence*, 19 PUB. ENT. ADVERT. & ALLIED FIELDS L.Q. 315, 346-48 (1981). However, according to W. PROSSER, LAW OF TORTS § 78 (4th ed. 1971), in order to make a claim for strict liability, the plaintiff must demonstrate that an inherently dangerous instrumentality is used. Television, however, is generally considered to be a usual, normal instrument. In addition, television programs are not considered products. See *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1980) (discussing cases concerning the fact that a television broadcast is neither a tangible item nor a product).

144. RESTATEMENT (SECOND) OF TORTS § 281 (1965). See *Prettyman & Hook*, *supra* note 136, for a more complete discussion of proving these elements of negligence.

145. *Prettyman & Hook*, *supra* 136, at 347.

146. *Id.*

147. *Id.*

In most cases, the probability that a given action was foreseeable rests on the facts presented.¹⁴⁸ Thus, a broadcaster's ability to foresee imitation of televised violence depends on empirical evidence demonstrating the probability that the defendant knew or should have known that the harm that occurred was a probable result of televising certain violent programming.

However, should the fate of broadcasting turn on the social science evidence? An examination of the research presents conflicting results, and is questionably related to legal policies of liability. As discussed earlier, how relevant is it that children viewing an adult beating a Bobo doll are more inclined to imitate that behavior against a Bobo doll? Can that compare with any of the more violent acts such as murder in *Zamora* or rape in *Olivia N.*? In addition, when one considers that millions of people watch the same programs, and only one person allegedly "copies" the acts portrayed, can that one harmful act be foreseen by the broadcasters?

As discussed in Part III, the studies tend to conclude that *some* children under *some* conditions are likely to imitate what they see on television,¹⁴⁹ but it is impossible to know beforehand which individuals will be affected. It would be unfair to impose liability upon broadcasters under these conditions, and courts faced with these issues generally have not imposed a duty upon television broadcasters.¹⁵⁰

Causation also presents a particularly difficult problem for plaintiffs in such cases.¹⁵¹ To establish causation in an imitative violence situation, a plaintiff must prove that "but for" viewing the television show, the

148. Cf. *Weirum v. RKO* discussed *infra* at note 150 which seems to determine foreseeability as a matter of fact for the jury.

149. See *supra* note 112 and accompanying text.

150. *Olivia N. v. National Broadcasting Co.*, 74 Cal. App. 3d 383, 141 Cal. Rptr. 511 (1977); *Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. 199 (S.D. Fla. 1979); *Walt Disney Prod., Inc. v. Shannon*, 247 Ga. 402, 276 S.E.2d 580 (1981); *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982).

See also *Bill v. Superior Court* discussed *supra* at note 114. But cf. *Weirum v. RKO Gen., Inc.*, 15 Cal. 3d 40, 123 Cal. Rptr. 468 (1975), in which a radio station conducted a promotional contest. A disc jockey traveled around town in a conspicuous red car and the first person to locate the disc jockey and correctly answer a question, posed in person by the disc jockey, received a prize. While following the disc jockey, two teenagers drag-raced, reaching speeds up to eighty miles per hour. During this time, they forced a car off the highway, and, as a result, a person in that car was killed. *Id.* at 43-5, 123 Cal. Rptr. at 470-71. The *Weirum* court found that the risk of negligent conduct by the teens was foreseeable, and imposed a duty on the broadcaster to anticipate that the contest would lead to this type of behavior. The court declined to allow a first amendment challenge to liability. The court stated that the contest was an unusual type of broadcast and would not lead to unwarranted claims of liability. *Id.* at 46-51, 123 Cal. Rptr. at 472-74. The *Weirum* case seems to be the exception rather than the rule.

151. *Prettyman & Hook*, *supra* note 136, at 360-66.

actor would never have committed the harm. Resolution of this issue depends upon whether the relationship of the broadcast violence to the plaintiff's injuries is sufficiently direct, natural and probable to justify imposing liability upon the defendant.¹⁵²

The scientific research is often used to demonstrate that it is probable that the violence in the specific case could result from viewing violence on television. However, demonstrating causation may be difficult because of the inconclusive results of scientific research.¹⁵³ Furthermore, other factors, such as personality factors, have not been completely eliminated as potential causes of reactive violence.¹⁵⁴

The plaintiff in *Zámora* could not identify any one program that may have caused him to act illegally.¹⁵⁵ Yet, as one commentator points out, "[T]his fact has not prevented other courts from establishing enterprise liability for an entire industry such as the diethylstilbestrol ("DES") manufacturer, even though the plaintiff could not identify a specific manufacturer who produced the product causing the harm."¹⁵⁶ Thus, the basis for the dismissals of the negligence claims may not necessarily have to do with negligence law, but may turn on more important first amendment considerations. Certainly, a first amendment argument would be the only defense protecting a broadcaster defendant when plaintiffs can point to specific programs which led to their injuries.¹⁵⁷ For example, in *DeFilippo*, the child hung himself in front of the very television on which he had just seen Johnny Carson's hanging stunt.

While social psychological research may not be able to establish the causal link between a specific scene and a specific harm, the research may be able to establish general causal links between exposure to violent programs and violent behavior.¹⁵⁸ Some have argued that for the plaintiff to recover, the plaintiff should only have to demonstrate that his or her injury resembled, in some unique detail, a similar act portrayed in the violent materials to which the perpetrator was exposed. For example, one commentator argued:

Generally speaking, the type of behavior portrayed in the media that may resurface in individual violent acts may be called "predictable harm" type behavior. It is necessary to clarify at the outset the definite distinction between the portrayal of "pre-

152. *Id.* at 365.

153. *Id.*

154. See *supra* notes 101-05 and accompanying text.

155. See *supra* notes 120-23 and accompanying text.

156. Hoffman, *supra* note 141, at 79.

157. *Id.*

158. See *Issues Bearing on Legal Regulation*, *supra* note 41, at 185-88.

dictable harm" type acts and of generally violent acts. . . . [W]e can readily see a difference between a relatively commonplace punch in the nose—a generally violent act—and throwing an infant out a twelfth floor window—a predictable harm type act.

Several characteristics are common to portrayal of predictable harm type behavior in the media. One characteristic is the rare or uncommon nature of the depicted act. . . . [E]xamples include murder by means of a "magnum" gun rather than an ordinary gun . . . and a stabbing with a machete instead of a more mundane knife. . . .

Another common characteristic of the method by which "predictable harm" type acts are portrayed is the detail with which these violent acts are presented. In order to glorify violent acts, producers and directors go to great lengths, using, for example, slow-motion, close-ups, or repetitions and reruns. . . .

The techniques of uniqueness, glamorization, and detail are used by directors and producers to highlight violence. The net effect reinforces the act in the viewer's mind, directly increasing the likelihood of reproduction in real life. . . .¹⁵⁹

This line of reasoning is faulty because it is arbitrary to distinguish between general acts of violence and specific acts which could be identified as having *caused* someone to act. By focusing, however, on the uniqueness of the act, the creativity which directors, writers, special effects artists, and stuntmen try to achieve is certain to be censored. Arguably, the first amendment was designed to prevent this type of censorship in order to preserve the free exchange of information.

2. Incitement: The First Amendment Defense

The courts have not yet dealt directly with the negligence issues of foreseeability and causation, but have typically resorted to disposing of the plaintiff's claims on first amendment grounds. The media's ability to freely exchange information and offer entertainment to the public has been protected by the first amendment.¹⁶⁰ From the time the Bill of Rights was ratified, freedom of the press has been under attack, and has centered around whether the government has any right to regulate the media.¹⁶¹ Whether the government may make mass media responsible to

159. Spak, *Predictable Harm: Should the Media Be Liable*, 42 OHIO ST. L.J. 671, 672 (1981).

160. J. TEBBEL, *THE MEDIA IN AMERICA* (1974).

161. *Id.* at 68.

public interests is still in dispute.¹⁶² The above tort cases fall into the category of judicially sanctioned post-broadcast regulation, and are subject to constitutional scrutiny.

In each of these cases, courts have been reluctant to impose liability for depictions of violence that may have contributed to the viewers' violence because of first amendment considerations. Material communicated by the public media, including fictional material such as television dramas, are generally to be accorded protection under the first amendment—any regulation should be content-neutral.¹⁶³ In *Joseph Burstyn, Inc. v. Wilson*,¹⁶⁴ the Supreme Court addressed the status of motion pictures. It stated:

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.¹⁶⁵

In addition, in *Zacchini v. Scripps-Howard Broadcasting Co.*,¹⁶⁶ the Court stated: "There is no doubt that entertainment, as well as news, enjoys First Amendment protection."¹⁶⁷

The protection of television violence has not been considered directly by the Supreme Court. However, in *Winters v. New York*,¹⁶⁸ the Court invalidated a New York law that prohibited the distribution of a magazine primarily comprised of articles dealing with criminal deeds that might incite people to commit violent crimes.¹⁶⁹ The Court found that the statute was unconstitutionally vague and overbroad and stated:

The . . . New York Penal Law . . . prohibits distribution of a magazine principally made up of criminal news or stories of deeds of bloodshed, or lust, so massed as to become vehicles for inciting violent and depraved crimes against the person. . . . [W]e find the specification of publications, prohibited from dis-

162. See *infra* Part V.

163. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Winters v. New York*, 333 U.S. 507 (1948).

164. 343 U.S. 495 (1952).

165. *Id.* at 510.

166. 433 U.S. 562 (1977).

167. *Id.* at 578.

168. 333 U.S. 507 (1948).

169. *Id.* at 508-20.

tribution, too uncertain and indefinite to justify the conviction of this petitioner. Even though all detective tales and treatises on criminology are not forbidden, . . . we think fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications. No intent or purpose is required—no indecency or obscenity in any sense heretofore known to the law. "So massed as to incite to crime" can become meaningful only by concrete instances. This one example is not enough. . . .

Collections of tales of war horrors, otherwise unexceptionable, might well be found to be "massed" so as to become "vehicles for inciting violent and depraved crimes." Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained.¹⁷⁰

The Supreme Court distinguished the terms "obscene, lewd, lascivious," as having definite meanings in the law, while "violence" as such did not have a definite meaning.¹⁷¹ The Court indicated that a more specific statute might be constitutionally permissible so long as the printed matter for which punishment was being sought was "not protected by the principles of the First Amendment."¹⁷²

Obscenity is one type of speech that traditionally has not been given first amendment protection.¹⁷³ Other types that have received only limited protection include libel and slander,¹⁷⁴ profanity,¹⁷⁵ speech or writing used to violate a valid criminal statute,¹⁷⁶ "fighting words,"¹⁷⁷ and speech directed to inciting or producing imminent lawless action and which is likely to incite or produce such action.¹⁷⁸ In all of the cases which have considered a broadcaster's liability for depictions of violence mimicked by viewers, courts were faced with the question of whether the depicted violence constituted "incitement," and thus, was not constitu-

170. *Id.* at 518-20.

171. Interestingly enough, this finding corresponds with the fact that social scientists cannot agree on a single definition of violence. See *supra* notes 42 and 43 and accompanying text.

172. 333 U.S. at 520.

173. See *Miller v. California*, 413 U.S. 15, 23-4, *reh'g denied*, 414 U.S. 881 (1973).

174. Libel and slander are generally considered outside the scope of protection because false statements of fact have no constitutional value. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). See also, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

175. See, e.g., *Cohen v. California*, 403 U.S. 15, *reh'g denied*, 404 U.S. 876 (1971).

176. See, e.g., *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

177. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

178. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

tionally protected speech.¹⁷⁹

The "incitement" test was adopted by the United States Supreme Court in *Brandenburg v. Ohio*.¹⁸⁰ In *Brandenburg*, the defendant had been convicted under Ohio's criminal syndicalism statute. In a speech at a Ku Klux Klan rally, the defendant had advocated revenge. However, the Court determined that the speech did not advocate immediate action, and also found the syndicalism statute overbroad and impermissibly intruding upon protected speech. The Court overturned the conviction and stated: "The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."¹⁸¹

The television violence cases above have interpreted the *Brandenburg* test as requiring immediate effects and the intention to cause such effects. Because visual portrayals often only depict violent conduct and do not per se instruct how to act violently or advocate for such violent behavior, such portrayals may only indirectly precipitate viewers to act unlawfully. For example, in a movie, a man may be depicted killing his wife, but the man would not be explicitly giving directions to viewers of how to kill their wives, or explicitly stating that viewers should kill their wives.¹⁸² However, while media violence may show viewers violent acts, it does not necessarily follow that depictions of such violence urge viewers to behave violently. Television may simply teach an aggressive behavior, but other factors may incite a particular person to act aggressively.¹⁸³

179. Some people have questioned why the Court has declined to compare violence with obscenity:

Would it be a violation of your child's rights if, when your neighbors had an orgy, or even an ugly altercation, you drew the blinds so that he did not witness them? Would you willingly submit your child to watch the act of love, before he is sufficiently mature to understand the relationship of which it is a part? Why is violence any different? Is a child who is too immature to understand the sex act capable of sorting out the perversion of human relationships expressed in acts of incredible violence?

ARNOLD, *supra* note 17, at 32. However, such critics rely on social science to make their points and typically do not understand the legal issues involved in these cases.

180. 395 U.S. 444 (1969).

181. *Id.* at 447.

182. For a similar hypothetical, see *Prettyman & Hook*, *supra* note 136, at 375 nn.244-45.

183. *Id.* at 375. In *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917), Judge Learned Hand stated:

[That the material at issue may] have a tendency to arouse emulation in others is clear enough, but that they counsel others to follow these examples is not so plain. . . . One may admire and approve the course of a hero without feeling any

Any restrictions under *Brandenburg* would require a close relationship between the speech in question and the later unlawful act—that the violent act depicted on television directly caused the viewer's violent behavior.¹⁸⁴ In the situations in which the speech has occurred, the evaluation of imminence rests upon proximity of the speech to the resulting harm. In these cases, *Brandenburg* requires the advocacy to be so closely related to the harmful action that more speech could not have prevented the harm.¹⁸⁵ Particularly where children are the viewers being urged to do violent acts from watching television, parental input to discourage such acts would certainly be the further speech that could prevent the harm if parents would provide such input for their children.¹⁸⁶ Reading *Olivia N.*, one wonders about the lack of parental supervision over child-viewing habits. Where were the children's parents when they were watching *Born Innocent*? With supervision, perhaps the children could have been told that rape was a harmful and illegal act that no one should ever commit. Perhaps if their parents had explained the consequences of rape and discussed the film with the children, they would never have acted out a similar rape.

With regard to social science evidence as proof of incitement, a statement by Krattenmaker and Powe in their 1978 law review article on this subject¹⁸⁷ is still pertinent today: the social science literature must demonstrate that the portrayal of violence resulted in an identifiable, particularized, and specific harm and the likelihood of the harm's occurrence given the inciting depiction must be relatively high.¹⁸⁸

duty to follow him. There is not the least implied intimation in these words that others are under a duty to follow. The most that can be said is that, if others do follow, they will get the same admiration and the same approval. Now, there is surely an appreciable distance between esteem and emulation. . . .

244 F. at 541-42.

184. Prettyman & Hook, *supra* note 136, at 377.

185. *Id.*

186. *Id.* Generally, where sufficient time exists for rebuttal and consideration, the Supreme Court has long assumed that additional speech will prevent the harm. *Id.* There are studies which indicate that, in fact, additional speech may be able to lessen or eliminate any negative effects of watching television violence. See *Sexual Violence and Male Viewers*, *supra* note 37, at 610-11; Eron, *Interventions to Mitigate the Psychological Effects of Media Violence on Aggressive Behavior*, 42 J. SOC. ISSUES 155 (1986); Singer & Singer, *Family Experiences and Television Viewing as Predictors of Children's Imagination, Restlessness, and Aggression*, 42 J. SOC. ISSUES 107 (1986) [hereinafter *Family Experiences*]. Cf. Mattern & Lindholm, *Effect of Maternal Commentary in Reducing Aggressive Impact of Televised Violence on Preschool Children*, 146 J. GENET. PSYCH. 133 (1983) [hereinafter *Maternal Commentary*] (unable to obtain positive results with discussion).

187. Krattenmaker & Powe, *Televised Violence: First Amendment Principles and Social Science*, 64 VA. L. REV. 1123 (1978).

188. *Id.* at 1135.

Krattenmaker and Powe's suggested standard is even more stringent than that of foreseeability. Given that the research is insufficient to support a foreseeability argument, it is most unlikely that it could pass the incitement test. Social science is probably not able to assist in determining whether incitement effects were present in a given situation because the current data on the effects of violent programming does not directly demonstrate that exposure to these materials results in observers mimicking the specific behaviors portrayed in films.¹⁸⁹ Ethically, psychologists cannot manipulate or make available real-life opportunities to observe the types of violence that occur in these cases.¹⁹⁰ Because of the inability of the studies to examine the more serious forms of violence that result in severe injuries or death, such studies are legally irrelevant, and should be excluded because of their prejudicial effect. It is misleading to juries to have social science *experts* testify that viewing violence leads to aggressive behavior, when the type of behaviors studied in a controlled environment are different from those in the cases presented before the courts.¹⁹¹

Furthermore, it is doubtful that a jury would be persuaded that the producers of media violence were advocating immediate violence, regardless of what evidence social scientists gathered about the effects of televised violence.¹⁹² The function of entertainment is generally considered to be to entertain, not to advocate a position, especially one of violence.¹⁹³ Usually, the intended effect of entertainment is not to persuade or disseminate information, promote learning activity or problem solving, or even change attitudes or behaviors. Rather, it is aimed at evoking certain emotions in viewers, as well as to get people to watch the show thereby increasing ratings. Principally, the media affects viewers through emotional and aesthetic arousal.¹⁹⁴

Courts have recognized that the media's function is entertainment and not persuasion. In order to protect the media's right to broadcast

189. *Issues Bearing on Legal Regulation*, *supra* note 41, at 187. The research discussed *supra* in Part III did not deal with the more violent acts that occurred in each of the cases discussed herein, but, rather, studied lesser forms of aggressive behaviors.

190. *Issues Bearing on Legal Regulation*, *supra* note 41, at 187.

191. Juries may give deference to experts in these cases where expert testimony concerns the likelihood of violent acts resulting from viewing violence. As indicated in other law review articles on the subject of television violence, lawyers may take the social science evidence to suggest that viewing violence leads to viewer aggression. If lawyers have thus far been misled as to the legal relevance of such studies, how would juries be any better able to judge the relevance of such studies?

192. See Prettyman & Hook, *supra* note 136, at 374-75.

193. *THE PROCESS AND EFFECTS OF MASS COMMUNICATION* (rev. ed. W. Schramm & D. Roberts eds. 1971).

194. *Id.* at 49.

entertainment, the courts in *Zamora*, *Olivia N.*, *Walt Disney*, and *DeFilippo*, have all applied the *Brandenburg* incitement test. As discussed below, the *Brandenburg* test as applied has given maximum protection to free expression.

a. *Zamora v. Columbia Broadcasting Sys.*

In *Zamora v. Columbia Broadcasting Sys.*,¹⁹⁵ the defendants moved for summary judgment contending that to permit the plaintiff's claim that general acts of television violence broadcast over time had led Ronny Zamora to commit murder would abridge their first amendment rights; that no duty of the type alleged existed by statute or otherwise; and that in any event, the complaint failed to establish any facts upon which proximate cause could be based. The court determined that the imposition of a legal duty in this case was a policy matter. The nexus between the negligence duty claimed in the case and the first amendment protections became decisive. The court stated that "the imposition of civil responsibility for damages would have an impact upon and indeed, act as a restraint on the defendants' exercise of their asserted first amendment rights."¹⁹⁶

The *Zamora* court concluded that because no specific acts of violence were enumerated that could possibly have "incited" Zamora to act unlawfully, allowing recovery would violate the protections of the first amendment.¹⁹⁷ The court stated:

Reduced to basics, the plaintiffs ask the Court to determine that unspecified "violence" projected periodically over television (presumably in any form) can provide the support for a claim for damages where a susceptible minor has viewed such violence and where he has reacted unlawfully. Indeed, it is implicit in the plaintiffs' demand for a new duty standard, that such a claim should exist for an untoward reaction on the part of any "susceptible" person. The imposition of such a generally undefined and undefinable duty would be an unconstitutional exercise by this Court in any event. To permit such a claim by the person committing the act, as well as his parents, presents an A Fortiori situation which would . . . give birth to a legal morass through which broadcasting would have difficulty finding its way.

At the risk of overdeveloping the apparent, I suggest that

195. 480 F. Supp. 199 (S.D. Fla. 1979).

196. *Id.* at 203, citing *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964).

197. *Id.* at 204.

the liability sought for by plaintiffs would place broadcasters in jeopardy for televising *Hamlet*, *Julius Caesar*, *Grimm's Fairy Tales*; more contemporary offerings such as *All Quiet On The Western Front*, and even *The Holocaust*, and indeed would render John Wayne a risk not acceptable to any but the boldest broadcasters.

Further, the imposition of the duty claimed would discriminate among television productions on the basis of content. . . . The works of creative artists and entertainers must be protected. The First Amendment casts a "heavy burden" on those who seek to censor. The plaintiffs' complaint wholly fails to allege any specific broadcasting conduct which is unprotected because it incited young Zamora to commit the crime in question.¹⁹⁸

b. *Olivia N. v. National Broadcasting Co.*

In *Olivia N. v. National Broadcasting Co.*,¹⁹⁹ the trial judge determined that the rape scene in the film *Born Innocent* did not advocate or encourage the violent rape perpetrated upon the plaintiff, and thus did not constitute an "incitement" according to constitutional standards. The trial judge never submitted the case to a jury. On appeal, the case was remanded with directions to impanel a jury and proceed to trial. The California Court of Appeal recognized that it was within the jury's province to determine whether the defendant was liable and whether the first amendment protected NBC from liability.²⁰⁰ The court stated, however, that even if a jury were to conclude that the film was responsible for the viewer's violence, the trial judge or the Court of Appeal could reevaluate the evidence to determine whether the jury's fact determination could be sustained against a first amendment challenge.²⁰¹

c. *Walt Disney Prod., Inc. v. Shannon*

In *Walt Disney Prod., Inc. v. Shannon*,²⁰² the trial judge granted the defendants' motions for summary judgment under general tort principles and on first amendment grounds, finding that the sound effect portrayed on the *Mickey Mouse Club* did not cause the child to attempt to replicate

198. *Id.* at 206.

199. 74 Cal. App. 3d 383, 141 Cal. Rptr. 511 (1977), *cert. denied*, 458 U.S. 1108 (1982).

200. *Id.* at 389, 141 Cal. Rptr. at 514.

201. *Id.*

202. 247 Ga. 402, 276 S.E.2d 580 (1981).

it.²⁰³ The Georgia Court of Appeals reversed, refusing to hold, as a matter of law, that the defendants could not be held liable in tort for the plaintiff's injuries. On appeal, the Georgia Supreme Court reversed, holding that the description of how the sound effects were made was protected speech under the first amendment. The court stated: "[W]e agree with the trial judge that this suit is barred by the First Amendment. To hold otherwise would, as the saying goes, open the Pandora's box; and it would, in our opinion, have a seriously chilling effect on the flow of protected speech through society's mediums of communication."²⁰⁴

d. *DeFilippo v. National Broadcasting Co.*

In *DeFilippo v. National Broadcasting Co.*,²⁰⁵ the trial court granted the defendants' motion for summary judgment on the basis that the first amendment barred relief for the plaintiffs' claim that the broadcast of the hanging stunt on *The Tonight Show* constituted an incitement, leading their son to hang himself while attempting to perform this stunt in his home. On appeal, the Supreme Court of Rhode Island agreed and affirmed the trial court decision. The court stated the main difficulty in permitting relief to the DeFilippos was that incitement cannot be measured precisely. Their son was the only person who was alleged to have emulated the action portrayed in the "hanging" on the May 23, 1979 broadcast of *The Tonight Show*. The court refused to find that the broadcast constituted an incitement. The court focused on the fact that the stuntman had stressed the dangers of performing the stunt, saying "it's not something that you want to go and try."²⁰⁶ Although the plaintiff's son felt encouraged to emulate the stunt, others may have avoided attempting to duplicate the stunt because of the warnings.²⁰⁷

Specifically, the court stated:

To permit plaintiffs to recover on the basis of one minor's actions would invariably lead to self-censorship by broadcasters

203. *Id.* For unknown reasons, the court applied the "clear and present danger" test articulated in *Schenck v. United States*, 249 U.S. 47 (1919), instead of the "incitement" test under *Brandenburg v. Ohio*, 395 U.S. 444 (1969). However, the two tests are very similar, with *Brandenburg* affording more protection to speech because of the requirement that the danger be imminent. Therefore, since the broadcast passed under *Schenck*, there is no reason to think that it would not have passed under *Brandenburg*.

204. *Id.* at 583.

205. 446 A.2d 1036 (R.I. 1982).

206. *Id.* at 1041 (footnote omitted).

207. *Id.*

in order to remove any matter that may be emulated and lead to a law suit. . . .

Under the facts of this case, we see no basis for a finding that the broadcast in any way could be construed as incitement. . . . [T]he incitement exception must be applied with extreme care since the criteria underlying its application are vague. Further, allowing recovery under such an exception would inevitably lead to self-censorship on the part of broadcasters, thus depriving both broadcasters and viewers of freedom and choice, for "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."²⁰⁸

C. Summary

In all of these tort actions, the plaintiff's claims are weighed against the first amendment rights of the broadcasters to transmit such entertainment.²⁰⁹ This protection affords defendants a presumption in their favor. However, such rights are not absolute, as is evidenced by limited governmental control over broadcast media.²¹⁰

When regulation does occur, the public's right of access to the broadcast media must be protected. As the court in *DeFilippo* concluded: "[S]elf censorship would not only violate defendants' limited right to make their own programming decisions, but would also violate the paramount rights of the viewers to suitable access to 'social, aesthetic, moral, and other ideas and experiences.'"²¹¹

V. OTHER TYPES OF LEGAL REGULATION

Freedom of expression in the United States stems from a basic set of values derived from libertarian theories.²¹² Basically, libertarian theory prescribes that an individual should be free to publish what he or she wants to publish.²¹³ John Stuart Mill argued for no governmental re-

208. *Id.* at 1041-42 (citation omitted).

209. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

210. *See Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726 (1978); *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367 (1969).

211. *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036, 1041-42 (R.I. 1982) (citations omitted).

212. *See RIVERS & SCHRAMM*, *supra* note 16, at 37-8.

213. The following precepts describe the principles of a free press: 1) publication should be free from any prior censorship by any third party; 2) the act of publication and distribution should be open to a person or group without a permit or license; 3) attack on any government,

straint, basing his argument on the premise that men have reason and wisdom to distinguish between truth and fiction.²¹⁴ Men can exercise their reason so that given a free and open exchange, truth would prevail.

Yet, freedom is never absolute. All media systems are subject to some basic statutory controls. For instance, there are laws designed to protect individuals or groups from defamation. Copyright laws protect authors and publishers. Other statutes exist to protect the state against treasonable utterances. Most agree that even in a free system such restrictions are permissible.²¹⁵

Each society controls its mass media consistent with its policies and needs. Such controls may be legal, political, economic, or social.²¹⁶ Although the basic policy in the United States concerning freedom of expression can be found in the first amendment,²¹⁷ it is clear that not all forms of free speech are permitted. For example, an individual is not free to yell "Fire!" in a crowded theatre,²¹⁸ and the media cannot depict certain types of obscenity and pornography.²¹⁹ Yet, the types of speech that are unprotected are very limited, and as discussed above, television violence has never been categorized as speech which deserves less constitutional protection. Therefore, other types of tort actions, or direct regulation by Congress or the Federal Communications Commission ("F.C.C."), should be unconstitutional. At most, Congress might be able to facilitate the industry's attempts to arrive at some self-regulatory standards to govern violent content in programming.

A. *Another Form of Impermissible Post-Broadcast Regulation*

Some commentators have suggested that another possible approach

official or political party should not be punishable; 4) in matters of opinion and belief, a publication of "error" is protected equally with that of truth; 5) no restriction should be placed on the collection by legal means of information for publication; and 6) there should be no restriction on the import of foreign information. McQUAIL, *supra* note 31. In a libertarian mass communication system, mass communication would result from private enterprise in a competing open market. Thus, the essence of the theory is that society's task is to provide a free marketplace of ideas so that people may exercise reason and choice.

214. In *On Liberty*, Mill discussed the value of a person's opinion. Mill stated that if society silences an opinion, it may be wrong; the truth may be what is silenced. Even a wrong opinion may contain a grain of truth. Even if a commonly held opinion is true, such an opinion will not continue to be held and have potency if it remains unchallenged.

215. See RIVERS & SCHRAMM, *supra* note 16, at 54-5.

216. *Id.* at 29.

217. Interestingly enough, even in the Soviet Union, citizens are guaranteed "freedom of speech" and "freedom of the press." Article 125 of the Soviet Constitution, cited in RIVERS & SCHRAMM, *supra* note 16, at 28-9.

218. *Schenck v. U.S.*, 249 U.S. 47 (1919).

219. *Miller v. California*, 413 U.S. 15 (1973).

in tort law is to impose upon the broadcaster a duty to warn viewers. Thus, the broadcaster is made liable for " 'misrepresentations' since the harm [in the tort cases discussed] typically resulted from the defendant's failure to warn of the danger presented or, more explicitly, from his failure adequately to contradict an appearance of safety."²²⁰ Rather than censoring the material, the broadcaster would simply be obliged to warn the viewer that the subject matter might not be suitable for all members of the viewing audience.²²¹ Arguably, this standard seems most appropriate to the *Walt Disney*²²² type of case where a demonstration of how the sound effect was made "invited" the child to try it for himself.²²³ In fact, the show opened with the comment: "Our special feature on today's show is all about the magic you can create with sound effects."²²⁴ However, prior warnings may not completely protect the listener.

Warnings given prior to the show may be insufficient for several reasons. Many people do not tune into the program until after the show has started. Although at one time, the industry considered a particular warning device—the use of a white dot in the corner of the screen during an entire program—the idea was not pursued.²²⁵ It is possible that the industry might pursue the use of such warnings again. However, despite the nature and frequency of warnings, warnings are probably ineffectual for the type of viewer about which those opposing television violence are most concerned. If people select violent programming because they enjoy it,²²⁶ a simple warning will not deter them. Warnings are likely to be

220. Note, *Tort Liability for Nonlibelous Negligent Statement: First Amendment Considerations*, 93 YALE L.J. 744, 753 (1984).

221. In that respect, warnings would probably serve the type of function that movie ratings mandated by the Motion Picture Association of America do.

222. 247 Ga. 402, 276 S.E.2d 580 (1981). See *supra* note 131 and accompanying text for a discussion of the case facts.

223. Cf. *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982) (Johnny Carson and the stuntman gave warnings prior to performing the stunt, but these warnings were obviously not enough to deter the individual from hanging himself). See *supra* notes 132-34 and accompanying text for a discussion of the case facts.

224. *Walt Disney Prod., Inc. v. Shannon*, 247 Ga. 402, 276 S.E.2d 580, 581 (1981).

225. See Note, *It's All in the Family: Family Viewing and the First Amendment*, 7 N.Y.U. REV. L. & SOC. CHANGE 83, 105 (1978).

226. The television viewer is regarded as a person who comes to television chiefly for relaxation, excitement, and escape. RIVERS & SCHRAMM, *supra* note 16, at 205. The media perceives people as coming to the television screen, not in a mood to think about the artistic form of the film, but rather to suspend their critical faculties, to give themselves to the story, to vicariously live the experiences of the characters, and to forget about their daily problems. *Id.* In line with this is the assumption that the media has a profound effect on these passive viewers. Some viewers are more likely to be affected than others. *Id.*

If a boy is rather planning to run away from home anyway, he may be more swayed than others by Huckleberry Finn's adventures. A disturbed person, whose aggressions or criminal tendencies are already well developed, may find a crime program

effective only for those individuals who would choose not to watch the program in the first place. Such warnings will alert viewers who prefer not to watch television violence to change the channel, but will do nothing for those viewers who choose to watch the program despite its violence.

B. Impermissible Forms of Direct Pre-Broadcast Regulation

One common proposal is to allow direct government intervention to censor television programs before they are broadcast. Yet, even those who would argue that the government should become directly involved recognize the dangers associated with government regulation.

In the United States, censorship generally occurs at the state or municipal level.²²⁷ At the national level, there is no body which acts as a censor; in fact, under federal law the F.C.C. does not have the power to act as a direct censor.²²⁸ Indeed, the F.C.C. has historically refused to regulate violent programming.²²⁹ For example, in *In re George D. Co-rey*,²³⁰ the F.C.C. declined to apply the "Fairness Doctrine" in regard to violent programming. The Fairness Doctrine requires broadcast licensees to allow adequate time for rebuttal if they air controversial opinions on any issue.²³¹ The F.C.C., however, refused to find that violent programming constituted the presentation of one side of a controversial issue. Instead, the F.C.C. determined that television violence was not controversial enough to trigger the doctrine because the adverse effects on viewers were inconclusive.

At the national level, censorship has not always been struck down as an impermissible violation of the first amendment. In *Federal Communications Commission v. Pacifica Foundation*,²³² the Supreme Court considered whether a limited regulation could be imposed to prohibit the

useful in a way that was never intended—for example, as a demonstration of how to burglarize a second story, or strangle a victim, or avoid the police.

Id. at 219. There is no doubt that there is some effect under some conditions which may cause some people to imitate behavior from popular art. What is not known is the extent of the effect. *Id.*

227. RIVERS & SCHRAMM, *supra* note 16, at 35.

228. 47 U.S.C. § 326 (1982) ("[N]o regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.").

229. See *KCOP Television, Inc.*, 71 F.C.C.2d 1430, 45 R.R.2d 1063 (1979) (F.C.C. would not consider complaints that broadcaster's programs were excessively violent in determining whether license should be renewed).

230. 37 F.C.C.2d 641, 25 R.R.2d 437 (1972).

231. 47 U.S.C. § 315a (1982).

232. 438 U.S. 726 (1978).

afternoon broadcast of a monologue by George Carlin which contained offensive language. The Court held that the F.C.C. could constitutionally ban the radio broadcast during afternoon hours. However, the Court did note that the F.C.C. possessed limited authority, and stated that its decision was narrowly confined by the argument of the parties.²³³

The *Pacifica* Court addressed the regulation of indecent language. Though the Court recognized that the language did not reach the level of obscenity, it held that the use of indecent speech over the airwaves when children were likely to be in the audience posed sufficient justification to directly regulate the broadcast.²³⁴ Although this decision clearly regulated content, it was justified because of the need to protect children in the audience.²³⁵

It could be argued that the regulation of television violence is justified using similar reasoning. However, television violence differs from offensive speech because television violence is generally an integral part of the story line. While many movies on television can excise offensive language by replacing "Fuck" with "Damn"²³⁶ and not affect the plot, taking out a murder scene in a murder mystery would substantially alter the entertainment value of the work.

Some could argue that television violence should be given less protection, similar to the treatment given to indecent language in *Pacifica*. However, unlike indecent language, which is similar to obscenity under the first amendment, and which historically has not been given first amendment protection, violence has never been singled out as less valuable, and thus, less deserving of protection. The F.C.C. has refused to act in the area of television violence because such depictions "have never been held to be profane or obscene . . . nor indecent. . . ."²³⁷ Furthermore, there is no evidence that many viewers have given up television because of violence, and, in fact, looking at the ratings, violent programs continue to be very successful.²³⁸

On what basis would the Court today find that television violence was deserving of less protection? The Court would probably do so on the

233. *Id.* at 742, 750.

234. *Id.* at 749.

235. *Id.*

236. This is a popular technique with many movies such as *Beverly Hills Cop*, which recently appeared on NBC; Eddie Murphy's language was toned down by dubbing less offensive language over the more pronounced forms of cursing that Murphy is famous for using.

237. *In re Complaint of the Polite Soc'y, Inc., Against Station WLS-TV*, 55 F.C.C.2d 810, 813 (1975).

238. One of the programs which has been very successful is NBC's *Miami Vice*. See T. JANESHUTZ & R. MACGREGOR, *THE MAKING OF MIAMI VICE* (1986).

basis of the social science evidence. However, this evidence should not lead to the Court granting less protection for television violence.

Would such evidence provide Congress or the F.C.C. with a compelling interest to reduce the amount of television violence? Although Senators and Representatives have acted upon the psychological evidence by proposing bills to regulate television violence,²³⁹ thus far, none of the bills has been passed by both Houses, probably due to first amendment considerations. So far, the legislators have not found the research compelling.

However, if legislation against television violence was enacted, would it pass constitutional muster? Would it be enough that only some aggression might result? Would society want to give up some first amendment protections in order to protect itself from unknown types of violence that might be harmful, and ban such violent programs or regulate them in such a way as to make it unlikely that broadcasters would produce them?

In 1975, the television networks adopted a type of self-regulatory process, called the Family Viewing Hour.²⁴⁰ Program content was reviewed by the individual networks, and for the hours between seven and nine p.m., the content had to be acceptable for viewing by the entire family. The policy was adopted as an amendment to the National Association of Broadcasters' Television Code, which is no longer in effect today.²⁴¹ The purpose of the Family Viewing Hour was to specifically limit the quantity of sex and violence that was aired.²⁴² The policy was challenged and invalidated in *Writers Guild of America, West v. F.C.C.*²⁴³ Although the policy had been voluntarily adopted by the networks, there was substantial evidence that the Family Viewing Hour was adopted as a result of pressure exerted by the F.C.C. Adoption on this basis violated the first amendment. However, the court never decided whether the policy itself was constitutional, but instead focused on the method by which the policy was adopted. Had the F.C.C. not interfered, the policy might have been acceptable.

239. For a listing of some of these bills, see Prettyman & Hook, *supra* note 136, at 332 n.58 (1987).

240. *Writers Guild of America, West, Inc. v. F.C.C.*, 423 F. Supp. 1064, 1119 (C.D. Cal. 1976), *vacated*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980).

241. See *infra* notes 271-78 and accompanying text.

242. Pre-Trial Memorandum of National Citizens Committee for Broadcasting and Action for Children's Television as Amici Curiae at 37, in *Writers Guild of America, West, Inc. v. F.C.C.*, 423 F. Supp. 1064 (C.D. Cal. 1976), cited in Note, *Regulation of Programming Content to Protect Children After Pacifica*, 32 VAND. L. REV. 1377, 1414 n.228 (1979).

243. 423 F. Supp. 1064 (C.D. Cal. 1976).

Yet, under *Butler v. Michigan*,²⁴⁴ the Family Viewing Hour would probably not pass constitutional muster when evaluated on its own merits. In *Butler*, the Court struck down a Michigan statute prohibiting distribution of sexually explicit material to adults because of the potential adverse effects on children, stating such a prohibition would reduce people to reading only what was fit for children.²⁴⁵ If the Family Viewing Hour were reinstated, programming might deteriorate into the "family blandness hour."²⁴⁶ Many parents would probably prefer that their children watch programs containing violence when they are present in order to instruct their children about the violence and its social impact and significance, rather than to have nothing but trivial programs on which no comment is necessary.²⁴⁷ Although it is in the public interest to reduce the incidence of aggression in society, it has not been sufficiently demonstrated that violence in the media is a sufficient cause of aggression such as murder. However, lesser forms of aggression, such as those used as measures of aggression in the research,²⁴⁸ do not warrant the chilling of free speech.

C. Potentially Permissible Facilitation by the Government to Promote Industry Self-Regulation

At present, a bill entitled the Television Violence Act has been introduced in Congress which would allow the government to facilitate discussion among industry officials about the reduction of television violence.²⁴⁹ The bill would exempt networks and producers from anti-trust prohibitions and allow them to jointly consider formulating voluntary guidelines to curb violent programming.²⁵⁰ At present, antitrust laws prohibit these large corporate competitors from meeting to address

244. 352 U.S. 380 (1957).

245. Cf. Federal Communications Comm'n v. Pacifica Found., discussed *supra* at notes 230-33 and accompanying text.

246. Pre-Trial Memorandum of National Citizens Committee for Broadcasting and Action for Children's Television as Amici Curiae at 37, in *Writers Guild of America, West, Inc. v. F.C.C.*, 423 F. Supp. 1064 (C.D. Cal. 1976), cited in Note, *Regulation of Programming Content to Protect Children After Pacifica*, 32 VAND. L. REV. 1377, 1414 n.228.

247. *Id.* at 6.

248. See *supra* note 82 and accompanying text.

249. The Bill was originally introduced in 1988 as HR 3848, but it died in the House Committee. However, the bill was reintroduced this year in the House as HR 1391, and a similar version was introduced as SB 593. The two versions of the Television Violence Act were passed respectively by the House and the Senate. A conference will be called during the January session of Congress, and the proposal that comes out of the committee must be passed by both the House and the Senate to become law. Interview with Alan Feyerherf of Douglas Bereuter's Office, Lincoln, NE, November 1989.

250. See also *Bill Aims to Reduce Television Violence*, INSIGHT, April 10, 1989.

the issue as an industry.²⁵¹ The exemption period would last three years, giving industry members time to discuss and implement voluntary guidelines to reduce television violence. The bill proposed would pose no programming restrictions itself.

The bill does not seem objectionable. Rather than mandating programming changes through direct regulation, the government would encourage the industry to make its own decisions regarding violent programming. However, as in *Writers Guild*,²⁵² since it was the conditions under which the Family Viewing Hour was adopted that were objectionable, it is possible that congressional pressure might be seen as similar to the pressure exerted by the F.C.C. in *Writers Guild* to force broadcasters to take action.

VI. ALTERNATIVES TO LEGAL REGULATION

There are a number of non-legal alternatives to deal with the perceived problem of extensive television violence. One critic of the amount of violence in the media recognized the need for social, but not necessarily legal, intervention:

The dilemma for society is how to preserve personal and family values in a nation of diverse tastes. Tensions exist in any free society. But the freedom we enjoy rests on a foundation of individual liberty and shared moral values. Even as the shifting structure of the family and other social changes disrupt old patterns, we must reassert our values through individual and community action. People of all political persuasions—conservatives, moderates, and liberals alike—need to dedicate themselves once again to preserving the moral foundation of our society.

Censorship is not the answer. In the long run, our only hope is for more information and awareness, so that citizens and communities can fight back against market exploitation and find practical means for restoring individual choice and control.

As parents and as consumers, we have the right and the power to pressure the entertainment industry to respond to our needs. Americans, after all, should insist that every corpora-

251. Antitrust laws are implicated because, for instance, the three major networks (CBS, NBC, and ABC) could choose to meet and make certain types of programming decisions that might make their networks more favorable to the public. Were the networks to collaborate, they might injure competitors such as the Fox network or Home Box Office.

252. See *supra* note 241 and accompanying text.

tion—whether it produces chemicals or records [or television]—accept responsibility for what it produces.²⁵³

Individuals and groups may exert pressure on broadcasters and advertisers, and where children are concerned, parents can make an active effort to monitor the amount of television the child watches. Furthermore, the industry itself may take some steps on its own to try to determine acceptable levels for violent content.

A. Pressure Groups

Media executives, audience research, media research, and attention to mail and telephone calls govern what the media offers to viewers.²⁵⁴ Because of the economics of the industry, which tries to meet the tastes of a large number of people,²⁵⁵ pressure groups have been influential in film and television. The strongest pressure on entertainment films has come from the Roman Catholic Church.²⁵⁶ Likewise, African American organizations protest stereotyping, and Jewish organizations have spoken out against anti-semitic entertainment.²⁵⁷ These pressure groups exert influence on advertisers, the sources of broadcasting support, and on the networks through ratings.²⁵⁸

1. Advertisers

One of the basic commandments of advertising is: "Thou Shalt Not Offend."²⁵⁹ An advertiser does not want to spend money to make enemies. If viewers are unhappy with the programming, they may purposefully choose not to buy the advertiser's products.²⁶⁰ In 1976, the National Citizens Committee for Broadcasting began publicizing the names of the sponsors of the most violent programs.²⁶¹ Endorsed by such groups as the Parent-Teacher Association, the Committee attempted to persuade people to buy other products.²⁶² Advertisers re-

253. GORE, *supra* note 4, at 12-3.

254. RIVERS & SCHRAMM, *supra* note 16, at 200-01.

255. *Id.* at 201. Popular art is a success when it is a commercial success. This is measured by the number of people who will spend time in front of the television set to experience it.

256. *Id.* at 126. The Catholic Church has been instrumental in prohibiting Catholics from seeing certain films such as "Forever Amber." *See id.*

257. *Id.* at 127. For Jews, the movie "Oliver Twist" raises some concerns as the character Fagin is portrayed as an evil Jew. *See id.*

258. *Id.* at 128.

259. CHENEY, *supra* note 4, at 21.

260. *Id.*

261. *Id.* at 22.

262. *Id.*

sponded by moving their advertisements to other programs,²⁶³ and the networks responded by decreasing violence at that time.²⁶⁴

2. Networks

While networks can be attacked indirectly by citizens attacking their source of funding—the advertisers—direct attack may be taken through the ratings as well. The most widely accepted ratings come from the Nielsen Company.²⁶⁵ Nielsen reports on how many people watch the various programs. Nielsen reports two types of statistics.²⁶⁶ First, Nielsen calculates the percentage of all television sets in America that are tuned into a certain channel at a particular time. Seventeen percent or better is what a show seeks.²⁶⁷ Second, a program's "audience share" is calculated, which is the percentage of all television sets that are turned on and turned to that program. Networks aim for a share of at least thirty-three percent. When a show drops to twenty-five percent, the show is usually cancelled.²⁶⁸

Nielsen samples a small percentage of America's televisions and extrapolates from that data to determine what most people are watching.²⁶⁹ By using electric monitors and having families keep program diaries, Nielsen is able to calculate its data.²⁷⁰ While there are certain critics of the Nielsen rating system, it remains the gauge by which producers rate their success.²⁷¹ Shows with high ratings stay on the air while others disappear. As long as violent programming receives high ratings it will continue to be aired. Until viewers' tastes and habits change, the selection of programs available on television will probably not change. As one commentator stated: "Besides complaints, protests, and offering substitute programs, we can still make the ultimate move: turning off our sets."²⁷² Perhaps that is what those most opposed to television violence should encourage people to do—turn off the set.

263. *Id.* After "Born Innocent" was aired, *Miracle Whip* cancelled over two million dollars in advertising. M. COAKLEY, *RATED X: THE MORAL CASE AGAINST TV* 261 (1977) [hereinafter *RATED X*].

264. CHENEY, *supra* note 4, at 22 (1983).

265. *Id.* at 17.

266. *Id.*

267. *Id.*

268. *Id.*

269. CHENEY, *supra* note 4, at 17 (1983).

270. *Id.* at 17-8.

271. *Id.* at 18.

272. *RATED X*, *supra* note 263, at 269.

B. *Television's Self-Control*

Prior to 1976, the National Association of Broadcasters had a "Television Code" in effect which had definite strictures on the qualitative aspects of violence that could be depicted on television.²⁷³ The Television Code acknowledged the duty of television to promote the democratic process by public enlightenment. The Code linked promoting the public good with promoting public morals.²⁷⁴ The Code said that violence was never justified for its own sake: "[V]iolence . . . may only be projected in responsibly handled contexts, not used exploitatively. Programs involving violence should present the consequences of it to its victims and perpetrators. Presentation of the details of violence should avoid the excessive, the gratuitous and the instructional."²⁷⁵

Further, the Code stated that "the detailed dwelling upon brutality or physical agony, by sight or by sound, are not permissible."²⁷⁶ However, there is no evidence that indicates to what extent the industry guidelines mitigated possible negative effects of violent content in television programming.²⁷⁷ Since there was no legal compulsion to comply with the Code, producers could deviate from it.²⁷⁸

In 1982, a federal court found that some parts of the Television Code could be in violation of the Sherman Antitrust Act.²⁷⁹ Shortly after the decision, the National Association of Broadcasters abolished the entire Code.²⁸⁰ Thus, although the Television Code is no longer in force, many of its principles are still followed by individual networks.

Each network has its own standards for programming. For example, the American Broadcasting Company's ("ABC") programming decision process has been the subject of communication studies.²⁸¹ ABC's Broadcast Standards and Practices Department is responsible for approving all entertainment programming and commercials which appear

273. National Association of Broadcasters, *THE TELEVISION CODE* (21st ed. 1980).

274. RIVERS & SCHRAMM, *supra* note 16, at 212.

275. National Association of Broadcasters, *THE TELEVISION CODE* 4-5 (21st ed. 1980), cited in Prettyman & Hook, *supra* note 136, at 356 n.161.

276. *Id.*

277. See T.V. AND GROWING UP, *supra* note 6, at 47.

278. Some commentators categorize the problem with the Code as one of being treated as a "chain" rather than as a "guide" because the Code was introduced as protection and adopted out of fear of governmental censorship and public dissatisfaction. RIVERS & SCHRAMM, *supra* note 16, at 230.

279. *United States v. Nat'l Ass'n of Broadcasters*, 536 F. Supp. 149 (D.C. 1982).

280. *In re Children's Television Programming and Advertising Practices*, 96 F.C.C.2d 634, 640-41 n.21 (1984).

281. See, e.g., A. Wurtzel & G. Lometti, *Determining the Acceptability of Violent Content at ABC*, 28 J. BROADCAST. 89 (1984).

on the network.²⁸² Employing a staff of over two dozen editors who review and evaluate the writing and production for episodes, the Department meets with producers to discuss making changes in scripts when the Department identifies a problem.²⁸³ With regard to unacceptable levels of violence, the Department has a method to determine the acceptability of violence by evaluating the overall context within which the violence is portrayed. This weighting system is based on the idea that the impact of the violence upon the viewer depends upon the circumstances in which it occurs.²⁸⁴ The type of violence, its severity, its intended victim, and its consequences, as well as the context within which the violence is portrayed, are evaluated.²⁸⁵ This system enables the editor to identify excessive and gratuitous violence; ultimately, this system helps in giving an overall program acceptability rating.²⁸⁶

This tool is used by ABC to eliminate programs it finds unacceptable given the totality of circumstances. It is important to note that an industry member makes these difficult decisions, not the government, or some other body censoring the network's programs. This self-regulation is certainly more acceptable than having the government order the networks to change its programming content.

The networks should be able to look at their programs and determine the worth of such violent acts within the totality of the plot structures to see if such violence would be acceptable. In this way, the artistic efforts of writers, directors, producers, and special effects personnel will be most protected.²⁸⁷ If the industry chooses to cut down on televised violence, that is its prerogative, and similarly, if the networks choose not to, that should be within their prerogative as well.

C. *Regulation of Television in the Home*

Viewers concerned specifically about children viewing violence could consider having parents take an active role in choosing programs to watch in the home. Studies indicate that family viewing habits may play a significant role in the development of aggressive behavior patterns.²⁸⁸ Furthermore, some early studies suggest that parent-child dis-

282. *Id.* at 90.

283. *Id.*

284. *Id.* at 91-2.

285. *Id.* at 92.

286. A. Wurtzel & G. Lometti, *Determining the Acceptability of Violent Content of ABC*, 28 J. BROADCAST. 94 (1984).

287. Editors will seek to evaluate not just the quantity of blood that is spilled in a given scene, but whether the violence was a part of the plot.

288. See *Family Experiences*, *supra* note 184.

cussion of violence on television may mitigate or even eliminate negative effects of televised violence.²⁸⁹

Some parents have applied these principles to help their children understand violence on television and select appropriate materials for their children to view. Action for Children's Television ("ACT") was formed by a group of parents concerned with what their children were watching on television. ACT monitors children's shows for levels of violence and gives advice on how to control children's viewing habits.²⁹⁰ ACT stresses that parents take an active part to monitor and select programs for children to watch. While parents cannot be held responsible for every single show the child sees on television, unless they place a "lock" on the television set, parents should not place that responsibility on government. Parents should not encourage the government to take a paternalistic role in choosing which programs are most appropriate for viewers, and in doing so, deny access to certain programs to adults who choose to watch such programs and to children who are allowed by their parents to watch those shows.²⁹¹

VII. CONCLUSION

Throughout history, there has been a deep hostility toward popular entertainment. Plato saw mass culture as posing a threat to the minds of the young.²⁹² Periodically, social scientists have tried to validate such claims. However, this evidence is not convincing, and, instead, indicates that it would be improvident to impose liability or attempt to justify any governmental regulation of media violence.

While all ideas constitute an incitement to some degree,²⁹³ the fact that someone may take a speaker's idea and copy it does not remove that speech from first amendment protection. Television broadcasting is entitled to first amendment protection.²⁹⁴ So long as the televised broadcast

289. See *id.*; see also *Sexual Violence*, *supra* note 37, at 610-11; Malamuth & Check, *The Effects of Mass Media Exposure on Acceptance of Violence Against Women: A Field Experiment*, 15 J. RESEAR. PERSON. 436 (1981). Cf. *Maternal Commentary*, *supra* note 184.

290. See E. KAYE, *HOW TO TREAT TV WITH TLC: THE ACT GUIDE TO CHILDREN'S TELEVISION* (rev. ed. 1979).

291. There is value in letting the individual make his/her own programming decisions. Furthermore, children are the adults of tomorrow and to prohibit them from making programming selections may be hindering their ability to receive minority viewpoints and other ideas that, although their parents may not espouse are nevertheless important. See Comment, *Exclusion of Children from Violent Movies*, 67 COLUM. L. REV. 1149, 1157-58 (1967).

292. PLATO, *THE REPUBLIC* 68-9 (tran. F. Cornford 1954).

293. See *Gitlow v. New York*, 268 U.S. 652 (1925) (Holmes, J. dissenting).

294. See *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969); *Writers Guild of America, West, Inc. v. F.C.C.*, 423 F. Supp. 1064 (C.D. Cal. 1976).

does not involve unprotected speech,²⁹⁵ the first amendment protection for free speech should limit the states' ability to award damages in a negligence action,²⁹⁶ and should limit the government's ability to regulate this important broadcast medium.

The technology of the modern media is capable of delivering works of art and historic events to millions of viewers instantaneously.²⁹⁷ While the industry may be seen by some to be preoccupied with violence, we must take the bad with the good in order to preserve free expression. If most viewers are so unhappy with violent broadcasts, they have the ability to make the ratings drop and thus get the show off the air. All they have to do is just turn off the set.

*Emily Campbell**

295. See *supra* notes 171-77 and accompanying text for those types of speech that receive less constitutional protection.

296. See *Olivia N. v. National Broadcasting Co.*, 74 Cal. App. 3d 383, 141 Cal. Rptr. 511 (1977).

297. Television could have beneficial effects. Shows like *Sesame Street* can be used as a teaching tool. See CHENEY, *supra* note 4, at 60.

* Advanced student in the Joint Degree Law and Psychology Program at the University of Nebraska, Lincoln, Nebraska; B.A. Mercer University, Macon, Georgia.

This article was completed while the author was in receipt of a National Institute of Mental Health ("NIMH") Fellowship. The financial support of NIMH is gratefully acknowledged.

The author wishes to thank Alan Tomkins, J.D., Ph.D., of the Law and Psychology Program at the University of Nebraska, for his helpful comments in preparation of this article.