



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 58 | Number 1

Article 6

10-1-1979

Violence on Television: An Old Problem with a New Picture

Richard P. Levi

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Richard P. Levi, *Violence on Television: An Old Problem with a New Picture*, 58 N.C. L. REV. 97 (1979).

Available at: <http://scholarship.law.unc.edu/nclr/vol58/iss1/6>

This Comments is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

COMMENT

Violence on Television: An Old Problem with a New Picture

Television, although a relatively new medium, has become an integral part of American life. By 1977, 72.9 million homes possessed at least one set.¹ These sets operate on the average over six hours per day² and are generally controlled by children through the early evening hours.³ By the time most children graduate from high school, they will have spent more time in watching television than in any other activity except sleep.⁴ In this time, it has been estimated that a child will have witnessed 18,000 murders and countless incidents of mayhem and crime.⁵ Many argue that, as a result of this exposure to violence, minors are more likely to commit acts of violence, often in imitation of those they have seen on television, and that they become desensitized to violence.⁶ Controversy over this possible impact and over whether tele-

1. 1978 BROADCASTING YEARBOOK B-176. This encompasses 98% of all homes in the United States, excluding Alaska and Hawaii. SURGEON GENERAL'S ADVISORY COMMITTEE ON TELEVISION AND SOCIAL BEHAVIOR, TELEVISION AND GROWING UP: THE IMPACT OF TELEVIEWED VIOLENCE 2 (1972) [hereinafter cited as SURGEON GENERAL'S REPORT].

2. SURGEON GENERAL'S REPORT, *supra* note 1, at 2. See also Murray, *Television and Violence: Implications of the Surgeon General's Research Programme*, in CHILDREN AND TELEVISION 285 (R. Brown ed. 1976); Holland, *Television and Crime—a Causal Link?*, 1975 AUCKLAND U.L. REV. 53.

3. SURGEON GENERAL'S REPORT, *supra* note 1, at 97. See also White, *What Can Parents Do About Unsavory TV Shows?*, U.S. NEWS & WORLD REP., June 19, 1978, at 83.

4. R. LIEBERT, J. NEALE & E. DAVIDSON, THE EARLY WINDOW: EFFECTS OF TELEVISION ON CHILDREN AND YOUTH at xv (1973) [hereinafter cited as EARLY WINDOW].

5. The Annenberg School of Communications at the University of Pennsylvania reports that there are more than seven acts of violence per hour on television between nine and eleven every night, nearly four per hour during the Family Viewing Hour (8-9 p.m. E.S.T.), and over sixteen per hour on Saturday mornings. *Sex and Violence on TV: Hearings Before the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 21, 62 (Comm. Print 1977) [hereinafter cited as *Sex and Violence on TV*]. See also *The War Against Television Violence*, BUS. & SOC'Y REV., Fall 1977, at 25. But see P. HIGGINS & M. RAY, TELEVISION'S ACTION ARSENAL: WEAPON USE IN PRIME TIME 35 (1978) (study revealed less violence than researchers had expected; "injuries were extremely antiseptic and victims rarely died").

6. See, e.g., EARLY WINDOW, *supra* note 4, at 34; P. HIGGINS & M. RAY, *supra* note 5, at 38-40; FCC REPORT ON THE BROADCAST OF VIOLENT, INDECENT, AND OBSCENE MATERIAL, 51 F.C.C.2d 418, 418 (1975); Note, *The Regulation of Televised Violence*, 26 STAN. L. REV. 1291, 1293 (1974).

Those claiming that television violence is imitated are quick to point to myriad alleged acts of imitation. See EARLY WINDOW, *supra* note 4, at 1-3; W. SCHRAMM, J. LYLE & E. PARKER, TELEVISION IN THE LIVES OF OUR CHILDREN 164 (1961) [hereinafter cited as LIVES OF OUR CHILDREN]; *Sex and Violence on TV*, *supra* note 5, at 29-30 (statement of Leo S. Singer); Note, *The Regulation of Televised Violence*, *supra*, at 1295 n.23.

vision violence should therefore be regulated has continued for over twenty years,⁷ and shows no signs of abating.

Efforts to control violence on television may be divided into three main areas: (1) government regulation, the traditional method⁸; (2) public activism, a method by which a vocal consuming public makes its desires known in the market place; and (3) judicial decision, an indirect method that attempts to hold the networks accountable for specific acts of violence. This Comment, in evaluating these alternative approaches to controlling violence on television, will show that both current psychological knowledge and the first amendment preclude holding the networks accountable for violent acts by viewers; that, although some forms of indirect government regulation could be justified consistent with the first amendment, government regulation should not be used because of the impediments to free speech; that deregulation, by allowing competition to fully develop the technological advances recently made, has the potential to defuse the impact of television violence by providing a wide range of nonviolent alternatives; and that, even if deregulation does not solve the problem of television violence, a vocal public that makes its desires known to the broadcasters is the optimal method of controlling television violence because it best balances both effectiveness and potential infringements on the first amendment.

I. RECENT CASES—ATTEMPTS TO HOLD NETWORKS ACCOUNTABLE FOR EFFECTS OF TELEVISION VIOLENCE ON MINORS

Plaintiff and defendant in two recent cases, *Olivia N. v. NBC*,⁹ and

7. The controversy began in the 1950s. See, e.g., R. SHAYON, TELEVISION AND OUR CHILDREN 19-23 (1951); SENATE SUBCOMM. TO INVESTIGATE JUVENILE DELIQUENCY, COMM. ON THE JUDICIARY, TELEVISION AND JUVENILE DELIQUENCY, S. DOC. NO. 1466, 84th Cong., 1st Sess. (1956).

8. Congressional interest in television violence has been regular for the past twenty-four years. For an overview of this history, see SUBCOMM. ON COMMUNICATION, HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 2D SESS., VIOLENCE ON TELEVISION 1-3 (Comm. Print 1977) [hereinafter cited as VIOLENCE REPORT]; Note, *supra* note 6, at 1291 n.2. Congress has held hearings on televised violence as recently as the fall of 1977. VIOLENCE REPORT, *supra*.

Demands on the Federal Communications Commission (FCC) have been similarly consistent, as demonstrated by the 25,000 letters of complaint in 1974. FCC REPORT ON THE BROADCAST OF VIOLENT, INDECENT, AND OBSCENE MATERIALS, 51 F.C.C.2d 418, 418-19 (1975). The FCC, however, has refused to use the provisions of the Communications Act to control violence in program content, *id.* at 419, and Congress has done little more than agree that there is a problem. See, e.g., VIOLENCE REPORT, *supra*, at 16 (additional comments of Rep. Thomas Laken) ("Congress has sufficient grounds to be concerned," but Congress should do no more than encourage others to do something).

9. 74 Cal. App. 3d 383, 141 Cal. Rptr. 511 (1977), *cert. denied sub nom.* NBC v. Niemi, 98 S. Ct. 1657 (1978).

Zamora v. State,¹⁰ respectively, sought unsuccessfully to hold the networks responsible for crimes committed by youthful viewers. Although these cases did not directly seek to reduce the level of violence on television, they would have had that result had they succeeded.¹¹

As one of its special features in the fall of 1974, NBC presented an 8 p.m. broadcast of "Born Innocent," a much-publicized television movie about life in a girls reform school.¹² One five-minute scene graphically portrayed four girls raping a young girl with the wooden handle of a plumber's helper.¹³ Four days later, four California minors raped a nine-year-old girl with a discarded beer bottle.¹⁴ The victim and her mother charged that this act was committed in imitation of the rape scene in "Born Innocent."¹⁵ They brought suit, in *Olivia N. v. NBC*,¹⁶ seeking eleven million dollars in actual and punitive damages¹⁷ against NBC for negligently showing this scene at a time when the network knew or should have known that minors likely to imitate what they saw were in the audience.¹⁸

At the original trial, prior to impanelment of a jury, NBC moved that the court decide the "constitutional fact" of "incitement."¹⁹ The trial judge viewed the film and found as a "constitutional fact" that the film "did not advocate or encourage violent and depraved acts and thus did not constitute an incitement."²⁰ Finding the scene, therefore, within the protection of the first amendment, he entered judgment for

10. 361 So. 2d 776 (Fla. App. 1978).

11. If plaintiff had been successful in *Olivia N.*, the network would have been held directly liable for the effect of violence in its broadcast. Because of the difficulties of knowing what scenes of violence would be imitated, violence could not have continued on television in the face of this liability. If defendant in *Zamora* had been successful, in effect, the responsibility for a case of insanity would have been placed on the networks. Although this would not necessarily lead to a reduction in violence, it would have provided a very strong case for those calling for control.

12. NEWSWEEK, August 14, 1978, at 41.

13. 74 Cal. App. 3d at 386, 141 Cal. Rptr. at 512.

14. *Id.* at 386-87, 141 Cal. Rptr. at 512. Sharon Smith, age fifteen, raped Olivia with a discarded beer bottle while a fifteen-year-old boy and two younger girls watched. Ms. Smith subsequently spent three years in prison for this act. NEWSWEEK, August 14, 1978, at 41.

15. 74 Cal. App. 3d at 387, 141 Cal. Rptr. at 512.

16. 74 Cal. App. 3d 383, 141 Cal. Rptr. 511 (1977), *cert. denied sub nom. NBC v. Niemi*, 98 S. Ct. 1657 (1978).

17. New York Times, Aug. 8, 1978, at A12, col. 1-2.

18. 74 Cal. App. 3d at 386-87, 141 Cal. Rptr. at 512; New York Times, Aug. 8, 1978, at A12, col. 1-2. James Duffy, President of ABC, stated in a speech on Oct. 23, 1974 that "the race for audience ratings too often blinds us to our basic responsibilities . . . Yes, a program like 'Born Innocent' should be shown. But, no, it should not be shown at such an early hour . . . when children more often than not control the dial." *Quoted in* Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1095 (C.D. Cal. 1976).

19. 74 Cal. App. 3d at 387, 141 Cal. Rptr. at 513.

20. *Id.*

NBC.²¹

Plaintiff had contended that she could show actionable injuries in spite of first amendment protections, and, on appeal, the California Court of Appeals held that the trial court's action in making fact findings and rendering judgment violated plaintiff's constitutional right to trial by jury.²² At the new trial, the judge ruled that, in order to overcome the network's first amendment rights, plaintiff would have to prove both actual incitement and that NBC intended to incite rape when it showed the film.²³ Plaintiff argued for a definition of incitement that would be satisfied solely by the negligent stimulation of the real life crime.²⁴ The judge, however, refused to change the traditional definition of incitement, which is that the speech must be directed to inciting or producing imminent lawless action and that it must be likely to produce or incite such action.²⁵ Plaintiff acknowledged that it would be impossible to prove the network's intent in light of the judge's ruling and, therefore, did not contest NBC's motion to dismiss in the face of the judge's ruling.²⁶

In *Zamora v. State*,²⁷ defendant, a sixteen-year old male, and a friend were burglarizing an eighty-three-year old neighbor's apartment when the neighbor returned and recognized him. When the neighbor threatened to call the police, Zamora shot and killed her.²⁸ The defense argued that a steady diet of violence on television had caused Zamora to become "legally insane" at the moment of the murder—that the countless incidents of violence he had seen on television had so

21. *Id.*

22. *Id.* at 389, 141 Cal. Rptr. at 514. The court did note that whether "Born Innocent" fell outside the first amendment might be a question of law when the facts were not disputed, and that if the jury found for the plaintiff the court would then have to determine whether that verdict "could be sustained against a first amendment challenge to the jury's determination of a 'constitutional fact.'" *Id.* The court similarly noted that the trial court could have made the determination that the film did not constitute an incitement in connection with a motion for summary judgment, but such a motion had earlier been denied by another judge and no such motion was pending when judgment was rendered. *Id.* See also *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974) (juries do not have "unbridled discretion" to declare a film obscene and outside first amendment protection).

23. *New York Times*, Aug. 8, 1978, at A12, col. 1-2.

24. Plaintiff could not circumvent the first amendment's applicability even to negligence actions. See text accompanying note 55 *infra*.

25. 74 Cal. App. 3d at 389, 141 Cal. Rptr. at 513 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Hess v. Indiana*, 414 U.S. 105, 108 (1973)).

26. *New York Times*, Aug. 8, 1978, at A12, col. 1-2. Plaintiff would have had trouble proving that the assailant even saw "Born Innocent." The assailant said that she had not seen it, although she had heard talk about it at school. Plaintiff maintained that that alone was sufficient to hold the network liable. *NEWSWEEK*, August 14, 1978, at 41.

27. 361 So. 2d 776 (Fla. App. 1978).

28. *TV on Trial* 13 (PBS Broadcast Transcript 1978) [hereinafter cited as *TV on Trial*].

corrupted his values that he did not know right from wrong.²⁹ The defense produced both psychiatric testimony that Zamora was a sociopath³⁰ and testimony that he had watched six to eight hours of television per day from the ages of five to fifteen.³¹

With this background, the defense tried to show that sociopaths and emotionally disturbed children are so desensitized to violence by television that they should be granted a defense equivalent to that of intoxication.³² The court ruled, however, that the reliability of the tests tendered by the defense was neither reasonably demonstrated nor generally accepted in the scientific community.³³ The jury, which was not allowed to hear testimony about the effects of televised violence on viewers,³⁴ found Zamora guilty after only two hours of deliberations.³⁵

These cases illustrate that without even considering the first amendment several elements must be proved before a network can be held civilly liable or a new insanity defense created. To hold a network civilly liable for an alleged imitative act, the court must find that the network violated a duty of reasonable care. To establish this duty, it must be shown that viewing television violence has an adverse effect on minors generally, and, unless strict liability is to be imposed, that it is possible to know which scenes have that effect. To show a violation of this duty, moreover, the party seeking damages must show that the specific violent scene on television actually caused the imitative violence. Similarly, to create a new insanity defense, it would be necessary to

29. *Id.* at 22-24.

30. *Id.* at 20-21. A sociopath was characterized as "a person who is emotionally cool, calloused, has little in the way of remorse or guilt, has little or no ability to feel for other people, and otherwise presents pretty much as a normal person." *Id.* at 20 (testimony of Dr. Walter Reid).

31. *Id.* at 14-16, 31. The defense also introduced evidence that Zamora idolized Kojak, a television detective, to the point of wanting his head shaved. *Id.* at 17. "Kojak" was rated by the Parent Teacher Association as the most violent show on television. *New TV Season: Less Sex, Less Violence*, U.S. NEWS & WORLD REP., September 11, 1978, at 32.

32. *TV on Trial*, *supra* note 28, at 22-25.

33. *Id.* at 25. The defense's own witness, Dr. Margaret Thomas, admitted that she knew of no study showing a subject who was so affected by a television show that he did not know the difference between right and wrong, nor was she aware of any study linking television violence with insanity. *Id.* at 26-28 (testimony of Dr. Margaret Thomas).

34. *Id.* at 28.

35. *Id.* at 45-46. It was apparent from post-trial interviews with the jury that they did not accept the insanity defense. *Id.* The jurors made the following statements:

Maybe that's all he could come up with.

It has some influence on children, probably, but so did movies in my day.

I endorse any and all television. It's police shows, what it is doing is bringing the every day violence that occurs out on the street into your home and you're getting more educated.

Id.

demonstrate that television violence generally has an adverse effect on minors and that the specific act of violence in question was caused by exposure to television violence. Current psychological evidence, however, does not provide proof of these necessary elements, and, even if it did, the imposition of civil liability in such cases would violate the first amendment absent a revision of traditional first amendment definitions.

A. *Psychological Evidence on the Effects of Television Violence on Minors*

Many factors influence the effect that television violence has on a minor. Television serves as a surrogate peer or parent as the child develops, offering content, mode, tone and images that interact with him to correct, refine and clarify his thoughts and feelings.³⁶ The child's age,³⁷ personality,³⁸ environment³⁹ and reason for watching⁴⁰ all obvi-

36. Berry, *Television and the Urban Child: Some Educational Policy Implications*, 10 ED. & URB. SOC'Y 31, 42 (1977). Young children watch television, and they learn from observation just as they learn from their parents and their peers. See, e.g., *id.*; Murray, *supra* note 2, at 291; Note, *supra* note 6, at 1293-96.

"The child's learning during the first five or six years sets the foundations for his lifelong patterns of behavior and for further learning," SURGEON GENERAL'S REPORT, *supra* note 1, at 56, and, to a large number of children, TV is the society at large from which they learn. Speech by L. Pogrebin, reprinted in E. KAYE, *THE FAMILY GUIDE TO CHILDREN'S TELEVISION* 15 (1974).

37. Television becomes less important to children as they become adolescents as it fails to meet their altered social needs. H. HIMMELWEIT, A. OPPENHEIM & P. VINCE, *TELEVISION AND THE CHILD* 100 (1958) [hereinafter cited as *TELEVISION AND THE CHILD*]. Even some adolescents, however, do not understand that television is a world of make-believe. See, e.g., EARLY WINDOW, *supra* note 4, at 30-31 (report showed that 46% of adolescents interviewed felt that crime shows "tell about life the way it really is"); SURGEON GENERAL'S REPORT, *supra* note 1, at 12 ("very young have difficulty comprehending the contextual setting in which violent acts are depicted and do not grasp the meaning of cues or labels concerning the make-believe character of violent episodes in fictional programs"). See generally, Cohen, *Television and the Perception of Reality*, EDUC. DIGEST, March 1977, at 10.

38. See, e.g., *TELEVISION AND THE CHILD*, *supra* note 37, at 30-34; *LIVES OF OUR CHILDREN*, *supra* note 6, at 413. Whether the viewer tends to be uncritical of and attached to the medium will influence its effect on him, *TELEVISION AND THE CHILD*, *supra* note 37, at 18, as will whether he has the psychological resources of the stable mind. See also SURGEON GENERAL'S REPORT, *supra* note 1, at 32.

The degree to which the show is linked to the viewer's immediate needs and interests will also affect the impact of the show on him. *TELEVISION AND THE CHILD*, *supra* note 37, at 261 (viewer more likely to be affected the greater is his interest in that type of information); *LIVES OF OUR CHILDREN*, *supra* note 6, at 142-43.

The impact of televised violence will further be influenced by the degree to which the viewer is already frustrated and aggressive. See, e.g., SURGEON GENERAL'S REPORT, *supra* note 1, at 18; *LIVES OF OUR CHILDREN*, *supra* note 6, at 161; Howitt, *The Effects of Television on Children*, in *CHILDREN AND TELEVISION*, *supra* note 2, at 320, 325; Kniveton, *Social Learning and Imitation in Relation to Television*, in *CHILDREN AND TELEVISION*, *supra* note 2, at 236, 256.

Finally, people perceive what they want to see on television, extracting and molding what is presented on the screen to their own needs and interests. See, e.g., Holland, *supra* note 2, at 55.

ously affect this interaction and the impact that televised violence will have on him. Similarly, although television offers a view of the world and how to deal with it,⁴¹ including role models to copy,⁴² no authority would argue that modeling behavior from television is the sole cause of violent behavior, nor that everyone receives the same messages from the screen. A child's interactions with others will obviously have a more pronounced effect on his tendency to use violence and on his development than will his interactions with television.

Despite this variety of factors, the evidence does indicate that television does have *some* effect on *some* minors *some* of the time.⁴³ It is questionable, however, whether this evidence rises to the level of imposing a duty on the networks or of constituting a cumulative effect

See generally I. SHAW & D. NEWELL, *VIOLENCE ON TELEVISION* 133 (1972), Abel & Beninson, *Perception of TV Program Violence by Children and Mothers*, 20 J. BROADCASTING 355 (1976).

39. If the child is not already supplied with a set of values against which to judge the violence he sees on television, for instance, the violence will have a stronger effect. *See, e.g.*, TELEVISION AND THE CHILD, *supra* note 37, at 18 ("Television tended to make no impact where the child could turn for information to his immediate environment, parents, and friends."); Howitt, *The Effects of Television on Children*, in CHILDREN AND TELEVISION, *supra* note 2, at 320-324 ("Only when we can expect that the individual has no pre-existing tendencies or when there are circumstances particularly conducive to change can we expect the mass media to have much effect on the audience."); Kniveton, *Social Learning and Imitation in Relation to Television*, in CHILDREN AND TELEVISION, *supra* note 2, at 237, 262. ("The better able the child to develop his own interests, and the broader his own experience, the less susceptible he will be to a model's influence whether that model be parent, peer or television character."). Some empirical support has shown that first-born and only children who lack salient behavior models are more likely to adopt behavior modeled on TV. *See* D. HOWITT & G. CUMBERBATCH, *MASS MEDIA, VIOLENCE AND SOCIETY* (1975).

40. Youths watch television, for example, to learn, to pass time, to forget, for companionship, for social utility, for arousal and for relaxation. *See, e.g.*, Brown, *Children's Uses and Television*, in CHILDREN AND TELEVISION, *supra* note 2, at 116-36.

These differing reasons for viewing obviously cause differences in how closely the show is watched and how much of an impact it will have. Before age six children understand only what they view with full attention. SURGEON GENERAL'S REPORT, *supra* note 1, at 3. *Cf.* Rubin, *Television Usages, Attitudes and Viewing Behaviors of Children and Adolescents*, 21 J. BROADCASTING 355, 366-67 (1977) (discussion of changing affinity with television as the child ages).

41. "[V]iewers believe they are learning about the world, how to handle social situations, and how to cope with personal problems [from television]." SURGEON GENERAL'S REPORT, *supra* note 1, at 95.

42. The learning of behavior from observation, including observation of a model, is denoted the "observational learning" process. *See, e.g.*, EARLY WINDOW, *supra* note 4, at 39-43; Note, *supra* note 6, at 1293.

43. The most widely accepted summary on the effects of television violence on children was that presented in LIVES OF OUR CHILDREN, *supra* note 6, at 1 ("For *some* children, under *some* conditions, *some* television is harmful. For *other* children under the same conditions, or for the same children under *other* conditions, it may be beneficial. For *most* children, under *most* conditions, *most* television is probably neither particularly harmful nor particularly beneficial."). *See also* SURGEON GENERAL'S REPORT, *supra* note 1, at 20; VIOLENCE REPORT, *supra* note 8, at 6-7. For a general overview of the experimental evidence, see EARLY WINDOW, *supra* note 4, at 71-87; Note, *supra* note 6.

sufficient to support an insanity defense.⁴⁴ The methodology of proving a cause and effect relationship in particular cases has not been developed to the point at which it is generally accepted in the scientific community or readily demonstrable.⁴⁵ The tremendous number of variables that cause a person to act as he does pose an almost insurmountable barrier to the necessary proof that a particular episode of television violence was likely to be imitated⁴⁶ or that it actually caused a viewer to commit a similar act of violence.⁴⁷

44. Even if television violence does affect the young viewer, in order for him actually to use violence as a result of seeing it on television he must identify with that behavior, learn it or link it to his reality. See, e.g., SURGEON GENERAL'S REPORT, *supra* note 1, at 101, 157-60. If the modeling cues are acquired, there are three possible results: (1) the viewer may be more likely to perform imitative acts; (2) he may be less likely to perform imitative acts; or (3) there may be no performance changes. EARLY WINDOW, *supra* note 4, at 40-42. In addition, there are at least four different ways to view the interaction that occurs between television and the viewer, each with differing implications for what a child will learn from watching television. See McQuail, *Alternative Models of Television Influence*, in CHILDREN AND TELEVISION, *supra* note 2, at 343, 348-58.

45. *TV on Trial*, *supra* note 28, at 25. See generally authorities cited note 43 *supra*.

46. Although there is some evidence as to what types of contexts will most likely cause imitation, the evidence is not conclusive enough to provide workable guidelines for the television industry to follow. See, e.g., SURGEON GENERAL'S REPORT, *supra* note 1, at 17-18.

The complexities of developmental processes in childhood and adolescence and the variations from one individual to another make it difficult to predict the effects of any single carefully controlled stimulus upon behavior and impossible to predict fully the effects of the wide variety of visual and auditory stimuli offered in television programs.

Id. at 37; cf. I. SHAW & D. NEWELL, *supra* note 38, at 174-75 (different ages perceive violence on television differently). See generally Note, *supra* note 6, at 1305-06. See also EARLY WINDOW, *supra* note 4, at 61-66 (experiment showing that for children the context of the violence is irrelevant). Some studies have found a correlation between the way violence is presented and aggressive behavior. McQuail, *Alternative Models of Television Influence*, in CHILDREN AND TELEVISION, *supra* note 2, at 343, 356.

If the person committing the violence also suffers or is punished for committing the violence, there is less likelihood of imitation. Note, *supra* note 6, at 1305. A painful death scene depresses aggression among viewers, but if the carnage and pain are highlighted, previously angered viewers become more aggressive. *Id.* See also Kniveton, *Social Learning and Imitation in Relation to Television*, in CHILDREN AND TELEVISION, *supra* note 2, at 236, 262. A role model who uses violence, and who is presented as intelligent, socially and technically competent, and with social status, carries more impact than one without these qualities. Note, *supra* note 6, at 1305. See also G. LESSER, CHILDREN AND TELEVISION—LESSONS FROM SESAME STREET 23-25 (1974) (use of role models to teach children).

47. See generally Howitt, *The Effects of Television on Children*, in CHILDREN AND TELEVISION, *supra* note 2, at 320, 328-34 (effects of mass media in a situation outside of the laboratory cannot be measured); Kniveton, *Social Learning and Imitation in Relation to Television*, in CHILDREN AND TELEVISION, *supra* note 2, at 237, 262 ("Social learning is a complex, long-term process and it is difficult for the social scientist to attribute changes in behaviour and attitudes to any particular one of life's many varied experiences."); Note, *The Family Viewing Hour: An Assault on the First Amendment?*, 4 HASTINGS CONST. L.Q. 935, 974-79, 989 (1977) (evidence of the effect of televised violence is not strong enough to make regulation of that violence a "compelling governmental interest," which would be necessary before "a fundamental interest such as that of freedom of expression" could be overridden); Holland, *supra* note 2, at 61 (more research needed to resolve issue whether television causes crime); see also *The War Against Television Violence*, BUS. & SOC'Y REV., Fall 1977, at 25 (contrast of views on whether a cause and effect relationship has been sufficiently demonstrated).

For example, to have let the theory advanced in *Olivia N.* go to the jury would have entailed letting the jury engage, to a large degree, in speculation. The alleged act of imitation occurred four days after the show,⁴⁸ and, in fact, the primary assailant said that she had not even seen the show, although she had heard talk about it at school.⁴⁹ Given the number of variables that cause a person to act as he does, it would be difficult to infer from this evidence that the televised scene caused the act in question in order to hold the network liable.

The theory advanced in *Zamora*—that a lifetime of viewing violence caused the act in question—similarly involved speculation. The effect of television violence on viewers is not as predictable as, for instance, that of alcohol.⁵⁰ The consumption of alcohol causes a physiological reaction whereby the brain and body are directly impaired through a chemical reaction. This reaction occurs in all consumers of alcohol.⁵¹ Television violence, on the other hand, involves psychological perceptions that are influenced by the viewer's own context.⁵² It does not involve a direct measurable reaction. The experimental and correlational studies on television violence show that the effect is neither certain nor measurable. Until a cause and effect relationship can be much more clearly shown, the effect of television violence on viewers is insufficient to support an insanity defense.

Because the psychological evidence of the effects of television violence on minors is not presently sufficient to put the networks directly on notice of what is acceptable and what is not, the only remaining argument is that the total amount of harm caused by television violence is significant enough to justify the imposition of strict liability. Strict liability, however, is unacceptable because the evidence does not support the conclusion that the amount of harm caused by television violence outweighs the potential "chilling effect" on otherwise socially justified speech.⁵³ This is also the reason that civil liability cannot co-

48. *TV on Trial Again*, NEWSWEEK, August 14, 1978, at 41.

49. *Id.*

50. See generally ALCOHOL AND THE IMPAIRED DRIVER (1970). Although drunkenness does not qualify as insanity in most jurisdictions, "chronic insanity resulting from inebriation will exonerate an individual from full responsibility for his acts. Drunkenness is no excuse for crime and negligence, but intoxication has been admitted in evidence to show lack of intent or even of knowledge of the facts in criminal action." *Id.* at 13.

51. See generally U.S. NATIONAL INSTITUTE OF MENTAL HEALTH, ALCOHOL & ALCOHOLISM (1967). A .05% blood alcohol level leads to sedation or tranquility, a .05 to .15% level generally causes a lack of coordination, a .15 to .20% level causes obvious intoxication, a .3 to .4% level may produce unconsciousness, and a level greater than .5% may be fatal. *Id.* at 21.

52. See text accompanying notes 44-47 *supra*.

53. See text accompanying notes 90-97 *infra*.

exist with the first amendment.⁵⁴

B. *Television Violence and the First Amendment*

Not only was there insufficient proof of causation to hold NBC civilly liable in *Olivia N.*, there was also an inability to circumvent the first amendment. Although the lawsuit involved private parties, action by the court in awarding damages would have involved state action to which the first amendment would have applied.⁵⁵ The plaintiff thus had to show either that television violence fell into an unprotected category of speech or that a new category of unprotected speech should have been created.

In determining whether a category of speech is to receive absolute first amendment protection, or some lesser degree of protection, courts weigh the state's interest against the constitutional protection given free expression.⁵⁶ For each category of speech the courts consider how the speech in question affects the political process,⁵⁷ whether it provides

54. This conclusion does not mean, however, that no problem exists or that nothing should be done. Former Surgeon General Jesse Steinfeld summarized the evidence as follows:

The data on social phenomena such as television and violence and on aggressive behavior will never be clear enough for all social scientists to agree on the formulation of a succinct statement of causality. But there comes a time when the data are sufficient to justify action. That time has come.

Hearings on the Surgeon General's Report by the Scientific Advisory Comm. on Television and Social Behavior Before the Subcomm. on Communications of the Senate Comm. on Commerce, 92d Cong., 2d Sess. 29 (Comm. Print 1972).

55. 74 Cal. App. 3rd at 387-88, 141 Cal. Rptr. at 513. The courts cannot help private persons take actions that would violate the Constitution if done by the state. The "determination of government action . . . hinges on the weighing of a number of variables, principally the degree of government involvement, the offensiveness of the conduct, and the value of preserving a private sector free from the constitutional requirements applicable to government institutions." *Wahba v. New York University*, 249 F.2d 96, 102 (2d Cir. 1974). "In keeping with these principles (though usually not articulating them) the courts have been quick to characterize resulting conduct as governmental when the government has been somehow involved with racial discrimination or other offensive conduct." *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1135 (C.D. Cal. 1976). See generally *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) ("What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."); *Barrows v. Jackson*, 346 U.S. 249 (1953) (court cannot subject white property owner who sold land to member of minority race to monetary damages for breaching a racially restrictive covenant); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (court cannot enforce covenant forbidding sale to member of racial minority).

56. See, e.g., *Schneider v. State*, 308 U.S. 147, 161 (1939) (where freedom of speech is abridged, courts "weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation"). See generally *Banzhaf v. FCC*, 405 F.2d 1082, 1101-03 (D.C. Cir. 1968). Compare the Court's opinion in *Konigsburg v. State Bar of California*, 366 U.S. 36, 49-51 (1961) with Justice Black's belief in the "absolute" nature of the first amendment, *id.* at 60-61 (Black, J., dissenting).

57. For examples of discussions of the importance of free speech, see *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government"); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (historic function of

information on matters of public importance,⁵⁸ whether it is a form of self-expression,⁵⁹ whether it contributes to an exchange of ideas,⁶⁰ and what effect the removal of first amendment protection will have on other speech.⁶¹ Under this analysis, several types of speech have been held, in varying degrees, to fall outside first amendment protection. These include obscenity,⁶² libel,⁶³ fraud,⁶⁴ solicitation of crime,⁶⁵ "fighting words,"⁶⁶ conspiracy⁶⁷ and incitement.⁶⁸ In each case the utterances are so devoid of social value or threaten harm to others to such an extent that the right to first amendment protection is outweighed.⁶⁹ Television violence, however, is used to convey social messages: it contributes to an exchange of ideas, and it provides information on matters of public importance.⁷⁰ All violence cannot be removed from the pro-

free speech); *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (country founded on principle of free speech, which is only way to arrive at truth), *overruled on other grounds*, *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the ultimate good desired is better reached by free trade in ideas"). See generally Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 878-86 (1963).

58. See, e.g., *Banzhaf v. FCC*, 405 F.2d 1082, 1102 (D.C. Cir. 1968).

59. See, e.g., *id.*

60. See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968).

61. See, e.g., *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968).

62. E.g., *Miller v. California*, 413 U.S. 15 (1973); *Ginzburg v. United States*, 383 U.S. 463 (1966); *Roth v. United States*, 354 U.S. 476 (1957).

63. E.g., *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Cf. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (media has first amendment protection from defamation actions brought by public figures unless libelous statement was made with actual malice).

64. E.g., *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178 (1948).

65. E.g., *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Fox v. Washington*, 236 U.S. 273 (1915).

66. E.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

67. E.g., *Abrams v. United States*, 250 U.S. 616 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

68. E.g., *Dennis v. United States*, 341 U.S. 494 (1951); *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Gitlow v. New York*, 268 U.S. 652 (1925); *Schenck v. United States*, 249 U.S. 47 (1919).

69. "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly out-weighted by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (footnote omitted).

70. See, e.g., SURGEON GENERAL'S REPORT, *supra* note 1, at 190. "The experience of humanistic scholars suggests that, for adults at least, violent content in fiction is sometimes a vehicle for presenting to a general audience 'messages' about important social and cultural issues. The authors and producers need not be fully aware that they are doing this." *Id.* The Oedipus plays, for instance, did not appeal to the Greeks primarily because of their violence. *Id.* The purpose of "Born Innocent" was to reveal the situation in a girls reform school; the violent depiction undoubtedly made that presentation much stronger. See also K. GRUNDY & M. WEINSTEIN, *THE IDEOLOGIES OF VIOLENCE* (1974) (violence itself justified in political context).

tection of the first amendment without a clear demonstration of overriding danger from its continued protection.

It can be argued, nonetheless, that some violence is used solely for its own sake, in which case it may serve none of these purposes, and that this violence can be removed from first amendment protection without affecting other speech in the same way that courts have removed obscenity from first amendment protection without adversely affecting other references to sex.⁷¹ Although the Supreme Court has never dealt directly with this issue, in *Winters v. New York*,⁷² it struck down a New York law that had been held to prohibit the distribution of a magazine principally composed of articles dealing with criminal deeds of bloodlust that might incite violent crimes against the person⁷³ as unconstitutionally vague and overbroad.⁷⁴ The Court held that the statutory prohibition on articles and pictures "so massed as to incite to crime" was so indefinite that it would be impossible for the actor to know where the line between the permissible and the impermissible was drawn; thus, the law unconstitutionally abridged freedom of speech.⁷⁵ The Court distinguished the terms "obscene, lewd, lascivious, filthy, indecent or disgusting" as having acquired definite meanings through long usage.⁷⁶

Justice Frankfurter strongly argued in dissent in *Winters* that the legislature could reasonably believe that a type of "massing of print and pictures" was an effective means to incite to crime and that it was not for the Court to impose its beliefs on the legislatures of over half

71. See, e.g., *Roth v. United States*, 354 U.S. 476, 487 (1957) (distinction between sex that is used in artistic, literary and scientific works and obscenity).

72. 333 U.S. 507 (1948).

73. N.Y. PENAL LAW, § 1141(2) (McKinney 1941), as construed by the New York State Court of Appeals.

74. 333 U.S. at 519. But see *Fox v. Washington*, 236 U.S. 273 (1915) (law punishing publications encouraging an actual breach of the law upheld). For examples of state courts upholding such laws prior to *Winters*, see *State v. McKee*, 73 Conn. 18, 22, 46 A. 409, 412 (1900) (law banning distribution of material principally composed of "criminal news, police reports, pictures and stories of deeds of bloodshed, lust, and crime" upheld as it "is impossible to say . . . that such publications do not tend to public demoralization, as truly as descriptions of mere obscenity"); *Strohm v. People*, 160 Ill. 582, 43 N.E. 622 (1896) (conviction for disseminating to minors magazine principally composed of stories of crime and bloodshed upheld without discussing constitutionality).

75. 333 U.S. at 518-20. The Court noted that a legislature could plainly extend the limits of the impermissible if it did not transgress the constitutional boundaries of free speech. *Id.* at 520. The Court further found that the words "so massed as to incite to crime" could "become meaningful only by concrete instances." *Id.* at 519. It did not indicate how these instances were to transpire once the law was invalidated. Justice Frankfurter argued in dissent that the majority was "confusing want of certainty as to the outcome of different prosecutions for similar conduct, with want of definiteness in what the law prohibits." *Id.* at 535 (Frankfurter, J., dissenting).

76. *Id.* at 518.

the states that had such laws.⁷⁷ He also noted that the Court did not hesitate to decide what type of literature amounted to obscenity.⁷⁸

There *are* differences between violence and obscenity, however, and both the terms "so massed as to incite to crime" and "violence used for its own sake" pose problems that are not found in the area of obscenity. Although obscenity has been socially outlawed in literature throughout history, violence has not been similarly treated.⁷⁹ There is guidance for the producer concerning what is obscene and what is not in the definitions that have developed during the years of controversy surrounding the issue.⁸⁰ As was noted by the Court in *Winters*, however, there is little guidance about what violence would be acceptable.⁸¹ Further, the only speech adversely affected by regulating obscenity should be that that appeals to prurient interests and has little social value.⁸² Any and all violence, on the other hand, would be chilled by removing televised violence from first amendment protection because

77. *Id.* at 533 (Frankfurter, J., dissenting).

It would be sheer dogmatism in a field not within the professional competence of judges to deny the . . . legislature the right to believe that the intent of the types of publications which it has proscribed is to cater to morbid and immature minds—whether chronologically or permanently immature. It would be sheer dogmatism to deny that in some instances . . . deeply imbedded, unconscious impulses may be discharged into destructive and often fatal action.

Id. at 529-30.

In the related area of obscenity, the Court, in *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973), noted the arguable correlation between obscenity and crime and stated that the "interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself" are justifications for regulating obscenity. *Id.* at 58. The Court further stated:

The sum of experience . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased or distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

Id. at 63. This same language could arguably also be applied to television violence, but the Court has not done so.

78. 333 U.S. at 533 (Frankfurter, J., dissenting). "What gives judges competence to say that while print and pictures may be constitutionally outlawed because judges deem them 'obscene,' print and pictures which in the judgment of half the States of the Union operate as incitements to crime enjoys constitutional prerogative?" *Id.* (Frankfurter, J., dissenting).

79. See authorities cited note 70 *supra*.

80. See, e.g., 333 U.S. at 518. See generally *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957).

81. 333 U.S. at 518.

82. Artistic, literary and scientific references to sex do not appeal to prurient interests and are protected by the first amendment. *Roth v. United States*, 354 U.S. 476, 487 (1957). See also *FCC v. Pacifica Foundation*, 98 S. Ct. 3026, 3037 (1978) ("At most, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities.").

the contours of the concept of violence used for its own sake are too indefinite to limit without seriously curtailing all violence on television.⁸³

Because, as the *Winters* Court recognized, certain types of violence cannot be removed from first amendment protection without curtailing all violence, the question becomes whether all violence falls into a currently unprotected category of speech or whether the harm caused by television violence in its entirety outweighs its benefits to society so that a new category of unprotected speech should be created. The closest category of speech not protected by the first amendment into which television violence might fall is incitement or advocacy. Advocacy can be controlled by the state only when it is directed to inciting or producing *imminent* lawless action *and* when it is likely to produce or incite such action.⁸⁴ Even when incitement is present, the "substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."⁸⁵ All ideas constitute an incitement to some degree, but the fact that someone may take an idea and implement or copy it does not remove that speech from the protection

83. This was aptly demonstrated by the attempt to curtail violence during the Family Viewing Hour (FVH), in which the standard used was "we'll know it when we see it." *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1149 (C.D. Cal. 1976); Note, *supra* note 47, at 982-85. That standard has led, and can only lead, to a spirit of censorship. See, e.g., *Violence Report*, *supra* note 8, at 33-35 (separate views of Rep. Henry A. Waxman) ("Because family viewing was a 'negative guideline' in that the networks could never be more explicit about it than knowing what they did not want, producers 'pulled back' on some stories because they 'didn't want to have trouble.'").

Although Justice Stewart has stated with regard to obscenity that "I know it when I see it," *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), differences between television violence and obscenity make this standard much more damaging to the first amendment in the area of televised violence. See text accompanying notes 86-89 *infra*.

84. *Hess v. Indiana*, 414 U.S. 105, 108 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); see D. TOOHEY, R. MARKS & A. LUTZKER, *LEGAL PROBLEMS IN BROADCASTING* 96 (1974) (courts will limit violence only on a showing of "clear and present danger"). See also *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949) ("the alternative [of less stringent requirements for actual danger] would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups").

This definition of incitement apparently includes intent as an essential element, as noted by the court in *Olivia N.* See *New York Times*, Aug. 8, 1978, at A12, col. 1-2. The Supreme Court has stated that teaching the need for violence without actually seeking the immediate instigation of that violence does not constitute incitement, even if someone should act on that teaching, see *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969), and the same result should follow for portrayals of violence. It is unnecessary to consider this argument, however, because the immediacy of incitement requirement cannot be met. See text accompanying notes 86-89 *infra*.

85. *Bridges v. California*, 314 U.S. 252, 263 (1941); see *United States v. Dennis*, 183 F.2d 201, *aff'd*, 341 U.S. 494, 510 (1957) ("In each case [the court] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid danger.").

of the first amendment.⁸⁶ In the case of television violence, the substantive evil is serious; the dangers of inciting murders and rapes are not to be taken lightly. The degree of imminence, however, is not high—viewers do not generally rush out to imitate what they have seen on television. In *Olivia N.*, for instance, the alleged act of imitation occurred four days after the show,⁸⁷ while in *Zamora* it was argued that a lifetime of viewing led to murder.⁸⁸ This will not satisfy the immediacy required by the traditional definition of incitement.⁸⁹

Before the incitement definition can be reshaped to include television violence, or before an entirely new category of unprotected speech is created, it must be shown that the potential harm from television violence outweighs the potential adverse effect that removing it from first amendment protection would have. The potential harm is increased crime and a nation insensitive to violence; the potential adverse effect of nonprotection is a totally bland television spectrum.⁹⁰ There is no way to determine when violence on television is "so massed as to incite to crime" or when it will likely be imitated. In fact, there is no agreement on what constitutes violence on the screen.⁹¹ To hold the networks potentially liable anytime anything was imitated would prohibit not only the showing of violent police action programs but also "Roots" and the works of Shakespeare.⁹² Although some studies have

86. *See, e.g.*, *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684 (1959) (New York law denying license to films that are "obscene, indecent, immoral, inhuman, sacrilegious, [or] of such character that its exhibition would tend to corrupt morals or incite to crime" held unconstitutional as applied to prevent advocacy of the idea that adultery may be acceptable).

87. *NEWSWEEK*, August 14, 1978, at 41.

88. *TV on Trial*, *supra* note 28, at 5.

89. "There may come a time when the studies become so conclusive that televised violence causes aggressive behavior that the regulation of violence may fit a recognized exception to censorship prohibitions for material inciting a crime." Note, *First Amendment Rights of the Broadcast Licensee and the Public Interest in Entertainment Programming*, 17 *WASHBURN L.J.* 262, 281-82 (1978). That time has not yet arrived.

90. The networks could not afford to show any violence in the face of \$11 million lawsuits. *See, e.g.*, *NEWSWEEK*, August 14, 1978, at 41; *VIOLENCE REPORT*, *supra* note 8, at 33-35 (separate views of Rep. Henry A. Waxman) (chilling effects of the Family Viewing Hour on television production).

91. *Compare* violence is "the overt expression of physical force against others or self, or the compelling of action against one's will on pain of being hurt or killed" (including accidental or humorous incidents), *SURGEON GENERAL'S REPORT*, *supra* note 1, at 5 with violence covers "any act which may cause physical and/or psychological injury, hurt or death to persons, animals or property, whether intentional or accidental," I. SHAW & D. NEWELL, *supra* note 38, at 3 and violence is "that which is physically or psychologically injurious to another person or persons whether intended or not, and whether successful or not," *VIOLENCE REPORT*, *supra* note 8, at 4.

92. *See, e.g.*, *NEWSWEEK*, August 14, 1978, at 41-42 (David Gerber, producer of the television series "Police Woman": "If a kid sees Peter Pan in a theatre and jumps off a roof, or if a kid stabs somebody in the gut because he saw Shakespeare, there will be a suit. . . . [W]here the hell will it stop?").

begun to indicate what type of televised scenes are more likely to be imitated, at present the networks would be acting blindly if they tried to control only violence they thought would be imitated.⁹³

The harm from television violence, on the other hand, has not been conclusively shown. It is impossible to determine how much of any increase in crime is due to violence on television.⁹⁴ It is also almost impossible to show that any specific act of violence occurred because of what was shown on television.⁹⁵ The evidence only shows that violence on television does induce some violent behavior in some minors in some instances.⁹⁶ Although the results may be serious, until more evidence can be produced, this does not amount to a state interest sufficient to support the infringement of the first amendment that would result from holding the networks civilly liable for acts of televised violence.⁹⁷ Civil liability simply sweeps too broadly without hope of refinement. Although government regulation offers the potential for more detailed control, it too runs into difficulty with the first amendment.

II. GOVERNMENT REGULATION OF TELEVISION VIOLENCE

Soon after the introduction of radio it became obvious that some type of regulation of this new medium was needed.⁹⁸ By 1927, the radio spectrum was in total chaos, with stations broadcasting on any frequency with any power.⁹⁹ Congress responded with the Radio Act of 1927,¹⁰⁰ which created the Federal Radio Commission (FRC) to promote use of the radio spectrum consistent with the public interest by licensing stations to operate and by establishing rules for them to oper-

93. See notes 44-47 and accompanying text *supra*.

94. See Valenti, *An Outlet for Artists*, in *The War Against Television Violence*, BUS. AND SOC'Y REV., Fall 1977, at 25, 35:

It is true that crime has increased, from a rate of 143 violent crimes per 100,000 population in 1935 to 481.5 per 100,000 in 1975. It is true that TV viewing is high, with more than 70 million TV homes in America today. It is true that young people watch TV in greater numbers than would have been conceived two decades ago. But logic demands linkage, and the recounting of these figures is relevant only if they connect to definite conclusions.

95. See text accompanying notes 43-47 *supra*.

96. See note 43 *supra*.

97. See, e.g., Note, *supra* note 47, at 989 ("Until a more precise and substantial body of evidence exists proving that televised violence affects a significant portion of the population adversely, the government cannot and should not interfere with or regulate broadcast content.").

98. For a general summary of the problem, see *NBC v. United States*, 319 U.S. 190, 210-12 (1943).

99. See, e.g., *id.*

100. Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162.

ate under.¹⁰¹ The provisions of this Act were incorporated into the Communications Act of 1934,¹⁰² which replaced the FRC with the Federal Communications Commission (FCC). The basic purpose of the FCC was the same as that of the FRC—to balance the public interest in the airwaves with a system of free competition in broadcasting.¹⁰³

Although the ultimate choice of programming rests with the individual licensees,¹⁰⁴ the FCC's role involves more than issuing licenses and policing the stations to see that they do not interfere with each others' transmissions. Because of the limited number of frequencies,¹⁰⁵ section 307 of the 1934 Act provides that licenses are to be granted in the "public interest, convenience and necessity."¹⁰⁶ Because the public interest requires some consideration of program content, the FCC is not merely a traffic policeman, directing frequency allocation.¹⁰⁷ It has the authority to determine just what constitutes the public "convenience, interest or necessity."¹⁰⁸ It neither exceeds its power nor transgresses the first amendment "in interesting itself in general program format and the kinds of programs broadcast by licensees."¹⁰⁹ Section 326, however, prohibits the FCC from acting as a censor by providing that "no regulation or condition shall be promulgated or fixed by the

101. See generally *NBC v. United States*, 319 U.S. 190, 212-13 (1943); *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1133 (C.D. Cal. 1976). Cf. *Daly v. CBS*, 309 F.2d 83, 85 (7th Cir. 1962) ("The basic purpose of the Act is regulation in the public interest and creation of private rights.")

102. 47 U.S.C. §§ 151-609 (1976).

103. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973). Congress could have chosen total government control but preferred to preserve the traditional journalistic role as far as possible. *Id.*

104. See, e.g., *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1133-34 (C.D. Cal. 1976).

105. Under the 1912 Radio Act, the Secretary of Commerce licensed all stations to operate upon either 750 or 833 kilocycles. With the proliferation of stations, chaos ensued, and after 1924 the Secretary adopted the policy of assigning a specific frequency to each station. There were more stations than available frequencies, however, to accommodate more stations, the Secretary therefore limited the power and hours of operations of stations so that more might use the same frequency. By 1925 there were almost 600 stations, every channel in the standard broadcast band was occupied by at least one station, and there were 175 new applicants. *NBC v. United States*, 319 U.S. 190, 211 (1943).

106. 47 U.S.C. § 307 (1970).

107. *NBC v. United States*, 319 U.S. 190, 215 (1943).

108. See, e.g., *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *FRC v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933); *National Ass'n of Independent Television Producers & Distribs. v. FCC*, 516 F.2d 526, 536 (2d Cir. 1975).

109. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969). See, e.g., Note, *supra* note 89. Yet, "[i]n the absence of carefully defined categories of speech falling outside First Amendment protections, FCC regulation of program content has been permitted only insofar as it has served to promote greater diversity in the broadcasting medium." *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1147 (C.D. Cal. 1976).

Commission which shall interfere with the right of free speech by means of radio communication.”¹¹⁰

The FCC has interpreted its role as one of maintaining the balance “between the preservation of a free competitive broadcast system . . . and the reasonable restriction of that freedom inherent in the public interest standard.”¹¹¹ In spite of repeated attempts¹¹² to get the FCC to regulate television violence, the agency has consistently maintained that it has no authority over the actual content of entertainment programs,¹¹³ and it has enforced the public interest standard solely by requiring that stations make a good faith effort to find and fulfill the needs and interests of their communities.¹¹⁴ The FCC did, nonetheless, coerce the networks into adopting the Family Viewing Hour (FVH) in 1974 by threatening government involvement in program content unless the industry took some action itself in response to the public outcry about violence on television.¹¹⁵ This method of coercion, however, was later held unconstitutional,¹¹⁶ and, although the FVH remains a part of the Code of the National Association of Broadcasters,¹¹⁷ it has not

110. 47 U.S.C. § 326 (1970). Television is one form of radio communication. *Allen B. Dumont Laboratories, Inc. v. Carroll*, 184 F.2d 153, 155 (3d Cir. 1950).

111. Statement of Dean Burch, former FCC chairman, *quoted in Home Box Office, Inc. v. FCC*, 567 F.2d 9, 29 (D.C. Cir. 1977).

112. *See, e.g., In re Petition by The Foundation to Improve Television*, 25 F.C.C.2d 830 (1970) (seeking FCC promulgation of regulations banning “fictional violence and horror during all but the late evening hours”); FCC REPORT ON THE BROADCAST OF VIOLENT, INDECENT, AND OBSCENE MATERIAL, 1 F.C.C.2d 418, 418-19 (1975) (25,000 complaints about sex and violence on television sent to the FCC in 1974).

113. *See, e.g., In re Complaint of the Polite Soc’y, Inc. Against Station WLS-TV*, 55 F.C.C.2d 810, 811 (1975) (complaint denied due to FCC position that it cannot regulate mayhem or violence on television); FCC EN BANC PROGRAMMING INQUIRY, 44 F.C.C. 2303, 2310 (1960) (FCC “concedes that it is precluded from examining a program for taste or content, unless the recognized exceptions to censorship apply”).

114. *See, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 29 (D.C. Cir. 1977) (“The Commission has struck this balance by requiring licensees to conduct formal surveys to ascertain the need for certain types of non-entertainment programming, while allowing licensees wide discretion in the area of entertainment programming.”); FCC EN BANC PROGRAMMING INQUIRY, 44 F.C.C. 2303, 2312 (1960) (licensee meets his public responsibility if he engages in “a diligent and continuing effort to discover and fulfill the tastes, needs and desires of his service area”). *See generally* Note, *supra* note 89, at 265-67, 280.

115. *See Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1142-43 (C.D. Cal. 1976).

116. *Id.* at 1155; *see* text accompanying notes 175-86 *infra*.

117. The Code provides in part: “Additionally, entertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour.” THE TELEVISION CODE OF THE NAT’L ASS’N OF BROADCASTERS, § 1, *reprinted in* WORKING MANUAL OF THE NAT’L ASS’N OF BROADCASTERS CODE AUTHORITY (1978). The Code also provides that violence is not to be used exploitatively, excessively, gratuitously or instructionally. *Id.* § 4. The consequences to the victim and perpetrator should be shown, and violence is not to be used for its own sake. *Id.*

proved to be an effective means of controlling violence.¹¹⁸

Although the government has done little to regulate television violence, an argument can be made that with sufficient justifications the FCC can and should interfere directly in program content through the use of formal procedures rather than informal coercion. Moreover, if the justifications for direct government interference are not sufficient to override the first amendment, the government can still act indirectly to control violence. The FCC could use its licensing power to require certain types of nonviolent programming; it could make suggestions to the networks for more effective self-regulation without going to the lengths used in the FVH case; or Congress could act to remove from programming the commercialism that many claim causes television violence.¹¹⁹ In each case, however, it must be decided that the reduction in violence is worth any resultant infringement of the first amendment. It must also be decided whether it would be better to attack what many feel is the basis of the problem, the structure of the broadcast industry itself, and, if so, what method will best accomplish this goal.

A. Direct Government Regulation

There are four possible justifications for holding that the FCC can and should, consistent with the first amendment, interfere, at least to some extent, in television program content in order to control the amount of violence on television:

- (1) television has a uniquely pervasive presence within the privacy of the home;
- (2) television is uniquely accessible to children;
- (3) television has a limited number of available frequencies, thus those available must be operated in the public interest, and television violence is not in the public interest; and
- (4) television violence is injurious to the public health.

Although the courts have never specifically dealt with these justifications in relation to televised violence, they have dealt with them in

118. See, e.g., EARLY WINDOW, *supra* note 4, at 140-41, 169-70 (failure of the industry to regulate itself under the NAB CODE). See also, e.g., *Sex and Violence on TV*, *supra* note 5, at 64 (1977) (statement of Timothy E. Wirth) (violence continues to appear in the Family Viewing Hour); VIOLENCE REPORT, *supra* note 8, at 25 (dissenting views of Rep. Henry A. Waxman) ("[E]ven as the networks were proclaiming family viewing as an effective policy which would have a positive impact, the level of violence on television remained relatively undiminished.").

119. See generally text accompanying notes 194-96 *infra*.

other contexts. The Supreme Court, in *FCC v. Pacifica Foundation*,¹²⁰ relied heavily on the first two of these justifications in upholding the regulation of "indecent," as opposed to "obscene," speech on a radio broadcast, thereby creating a new type of speech that is to be given a lesser degree of first amendment protection.¹²¹ The Court conceded that the speech in question was merely patently offensive and did not rise to the level of obscenity by appealing to the prurient interest of listeners.¹²² Nonetheless, the Court held that the use of indecent speech over the airwaves when children were likely to be in the audience involved sufficient potential harm to justify its direct regulation.¹²³ It can similarly be argued that the Court should also classify television violence as a type of speech that should be given a lesser degree of first amendment protection because of its potential for harm. The justifications for so treating television violence, however, are not as strong as those supporting such action with regard to indecent speech.

The first justification for a similar treatment of television violence is that television has attained a uniquely pervasive presence within the privacy of the home. The right to be let alone in the privacy of the home outweighs the first amendment rights of an intruder in contexts other than television, and television should be given no greater protection.¹²⁴ Even though the viewer must take affirmative action to turn on the set and invite the broadcast into his home, the general tendency is to turn on the set without knowing what is on or to scan the dial in search of interesting programming. Even prior warnings may not completely protect the listeners or viewers. Warnings before the show are insufficient for two reasons: (1) children often control the dial and cannot generally be expected to have the maturity to act in their "best" interests, and (2) people often tune in after the show has started. As the court noted in *Pacific Foundation*, "[t]o say that one may avoid further offense by turning off the radio . . . is like saying that the remedy for

120. 438 U.S. 726 (1978).

121. The Court in *Hamling v. United States*, 418 U.S. 87, 114 (1974), held that "indecent" as used in 18 U.S.C. § 1461 had the same meaning as "obscene" as defined in *Miller v. California*, 413 U.S. 15 (1973). Now the Court has given "indecent" a broader definition than that given "obscene." 438 U.S. at 734-41; *see id.* at 778-80 (Stewart, J., dissenting).

122. 438 U.S. at 739-41; *see id.* at 767 (Brennan, J., dissenting) ("[B]ecause the Carlin monologue is obviously not an erotic appeal to the prurient interests of children," the Court is in effect preventing children from hearing material constitutionally protected as to them.).

123. 438 U.S. at 749-50; *see id.* at 759-60 (Powell, J., concurring).

124. 438 U.S. at 748; *see Rowan v. United States P.O. Dep't*, 397 U.S. 728, 738 (1970) (sanctuary of the home can be protected from unwanted mailings); *Beard v. Alexandria*, 341 U.S. 622 (1951) (statute forbidding solicitation of private residence without the consent of the owner upheld).

an assault is to run away after the first blow."¹²⁵ The FCC, in *In re WUHY-FM*,¹²⁶ found that the usefulness of radio for millions of people might be drastically curtailed if listeners found themselves faced with offensive programming across the dial.¹²⁷ The same argument can be made for television. Television and radio have established themselves in the home; to say now that the broadcasters' interests are paramount because they have been invited is unacceptable.

The presence of violence on television, however, does not rise to the level of "indecent" or "offensive" programming, which was characterized in *Pacifica* as lacking literary, political or scientific value, and as being vulgar, shocking and offensive.¹²⁸ The FCC has refused to act in the area of television violence because "[p]ortrayals of mayhem and violence have never been held to be profane or obscene . . . nor . . . indecent."¹²⁹ Violence in literature has not traditionally been characterized as vulgar, shocking and offensive; it has, on the other hand, been recognized as having literary value.¹³⁰ One of the characteristics of offensive speech is that it offends and people would prefer not to be confronted with it. No present data supports the argument that substantial numbers of viewers have given up television because of the violence.¹³¹ Many argue, in fact, that violence continues on television because of its popularity,¹³² a popularity that indicates that the presentation of violence is not offensive. Network shows do not survive unless they obtain a substantial rating, and the presentation of violence seems to be a simple and effective way to draw a large audience.¹³³

125. 438 U.S. 748-49.

126. 24 F.C.C.2d 408 (1970).

127. *Id.* at 411-12.

128. 438 U.S. at 746-47.

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

130. See authorities cited note 70 *supra*.

131. Still, 35% of those surveyed in one poll favored removing all television shows that showed violence. The Gallup Opinion Index, April 1977, at 18.

132. See, e.g., VIOLENCE REPORT, *supra* note 8, at 20-24 (dissenting views of Rep. Henry A. Waxman); EARLY WINDOW, *supra* note 4, at 146 ("Present network standards on portrayals of violence are weak because they appear to be based on little more than a fear of losing viewers." (quoting TASK FORCE ON MASS MEDIA AND VIOLENCE, 11 NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, MASS MEDIA AND VIOLENCE 613 (1969) (staff report))); *The War Against Television Violence*, BUS. & SOC. REV., Fall 1977, at 25, 32 ("The networks are resisting change because they feel they are giving the public what they want.").

133. See, e.g., E. KAYE, THE FAMILY GUIDE TO CHILDREN'S TELEVISION 66 (1974) ("the only way to reduce the violence on television would be to take children's programming out of the ratings system," *i.e.*, to remove the commercial incentives); SURGEON GENERAL'S REPORT, *supra* note 1, at 81 (studies show that proportion of violence on American television is greater than that of several nations surveyed, thus giving some support to theory that television violence is en-

Television violence, therefore, cannot be considered an invasion of the privacy of the home in the way that indecent speech can.

The second justification for government regulation of televised violence is the accessibility of television to children. It is well established that a state can "adopt more stringent controls on communicative materials available to youths than on those available to adults."¹³⁴ But only "in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [children]."¹³⁵ Although other forms of expression can be withheld from children without totally restricting the material at its source, this is not so for television and radio.¹³⁶ The "ease with which children may obtain access to broadcast material," coupled with the government's interest in the well-being of its youth and in supporting parents' claims to authority in their own household, were held in *Pacifica Foundation* to justify special treatment of indecent broadcasting.¹³⁷

Television violence, however, does not affect parental authority the way that offensive speech does. Offensive speech teaches children words to which parents do not want their children subjected. Television violence, on the other hand, can be used to portray literary, philosophical and political ideas.¹³⁸ The state does not have the power to

couraged by the American competitive economic system); Note, *supra* note 6, at 1313 (networks have no incentive to regulate violence so long as it brings in profits through mass appeal).

134. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975); *see, e.g., Ginsberg v. New York*, 390 U.S. 629 (1968).

135. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975); *see, e.g., Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (right of students to wear black arm bands in protest of Vietnam war); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968) (statute that prevented youths from seeing films that describe or portray brutality, violence or sexual promiscuity in a manner likely to incite young persons to crime, delinquency or sexual promiscuity invalidated); *Rabeck v. New York*, 391 U.S. 462 (1968) (per curiam) (invalidated statute prohibiting sale of "any . . . magazines . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes").

136. Although the ban cannot be total, stores can be prevented from selling obscene books to minors, and minors can be kept out of theatres. *See FCC v. Pacifica Foundation*, 438 U.S. at 749.

137. *Id.* at 749-50; *see id.* at 757-58 (Powell, J., concurring). Similarly, in *Ginsberg v. New York*, 390 U.S. 629, 639 (1968), the Court held that those responsible for a child's well-being could be supported by laws designed to help them discharge their responsibilities. In that case, however, parents who so desired could purchase the "obscene" magazines for their children. Although the primary responsibility for a child's welfare remains with the parents, the Court also noted the state's independent interest in the well-being of its youth. *Id.*

138. Television violence does not have the cultural stigma of offensive speech; violence is a part of life, it is a part of history and it is a part of classic literature. *See, e.g., SURGEON GENERAL'S REPORT, supra* note 1, at 45-46 (quoting from Report of the National Commission on the Causes and Prevention of Violence), 190; *TV on Trial Again*, NEWSWEEK, August 14, 1978, at 41. Although some of these statements could be made for offensive speech, offensive speech does not have the "constructive" aspect that violence does. Offensive speech has always existed, but it has not been an integral part of history or of life, as violence has. One can talk of life or history

protect children from ideas, no matter how offensive they may be to some people,¹³⁹ and violent portrayals have always been one method of communication. The adverse impact of violence can be negated by the parent if he talks to the child and gives him the proper values.¹⁴⁰ Moreover, offensive speech is more likely to recur later in spite of parental admonitions.

The third justification for limiting television violence—that the limited number of available frequencies requires that the industry be regulated in the public interest—is insufficient to support qualifying the first amendment protection given to television violence. The “public interest, convenience and necessity”¹⁴¹ standard has by necessity been used in rulings relating to specific program content—for example, in choosing between competing license applicants.¹⁴² The United States Court of Appeals for the District of Columbia Circuit, in *Citizens Committee to Save WEFM v. FCC*,¹⁴³ held the FCC must regulate programming when a significant segment of the public is threatened with losing a preferred category of programming. As stated in *Banzhaf v. Federal Communications Commission*,¹⁴⁴ however,

[T]here is high risk that such rulings will reflect the Commission's selection among tastes, opinions, and value judgments, rather than a recognizable public interest. Especially with First Amendment issues lurking in the near background, the “public interest” is too vague a criterion for administrative action unless it is narrowed by definable standards.¹⁴⁵

In upholding an FCC ruling that stations carrying cigarette ads must “devote a significant amount of broadcast time to presenting the case against cigarette smoking,” *Banzhaf* used the relatively well-defined public health standard to remove the vagueness and overbreadth

without reference to offensive speech; it would be difficult to do so without reference to violence. Finally, offensive speech is not a part of classic literature. See authorities cited note 70 *supra*.

139. See authorities cited note 135 *supra*. See also Note, *supra* note 47, at 984 (1977) (fact that adoption of FVH to protect children does not remove problems of vagueness and overbreadth).

140. See, e.g., VIOLENCE REPORT, *supra* note 8, at 10-11.

141. 47 U.S.C. § 307 (1976); see, e.g., *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376-77 (1969); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38 (1940).

142. See, e.g., *NBC v. United States*, 319 U.S. 190, 216-17 (1943); *Banzhaf v. FCC*, 405 F.2d 1082, 1093-94 (D.C. Cir. 1968). The Federal Radio Commission originally established the policy of considering program content in a license renewal proceeding. See, e.g., *Trinity Methodist Church, South v. FRC*, 62 F.2d 850 (D.C. Cir. 1932); *KFKB Broadcasting Ass'n v. FRC*, 47 F.2d 670 (D.C. Cir. 1931).

143. 506 F.2d 246 (D.C. Cir. 1974).

144. 405 F.2d 1082 (D.C. Cir. 1968).

145. *Id.* at 1096.

attendant in using the "public interest" standard.¹⁴⁶ The court used the public health standard because of its long history, fairly clear definition and obvious applicability to the case at hand.¹⁴⁷ The court listed four criteria that supported content regulation in the interest of public health: (1) there was an element of danger to life itself; (2) the danger was inherent in the product in normal use; (3) the danger threatened a substantial body of people; and (4) the danger was documented by a compelling cumulation of statistical evidence.¹⁴⁸

These four criteria, however, are not met by televised violence.¹⁴⁹ The effect of violence is dependent on a myriad of intervening variables¹⁵⁰ and does not increase the likelihood of death for viewers because of their use of television. Nor is the danger inherent in normal use because television does not affect all who use it; the danger is rather that someone will use what he has seen against another.¹⁵¹ Further, the danger does not threaten a substantial number of people since television violence affects only some people to some extent some of the time, and their actions against others involve even a smaller number of people.¹⁵² Finally, the conclusions of the studies completed at this time do not amount to a compelling cumulation of statistical evidence.¹⁵³

Even if it could be shown that televised violence does have an adverse effect on the public health, the warning expressed by the *Banzhaf* court would have to be considered.

[W]e are not prepared to say that the Commission is authorized to condemn every broadcast which might, without arbitrariness or caprice, be thought to pose some danger to the public health. . . . [I]n some cases what is concededly optimal health may be a less important public value than other conflicting interests.¹⁵⁴

That warning is well taken in the area of televised violence. The danger to life itself is the closest criterion that applies to television violence.

146. *Id.* at 1096-97. See also *KFKB Broadcasting Ass'n v. FRC*, 47 F.2d 670 (D.C. Cir. 1931).

147. 405 F.2d at 1096-97.

148. *Id.* at 1097.

149. But see Sweeney, *Regulation of Television Program Content by the Federal Communications Commission*, 8 U. RICH. L. REV. 233, 242 (1974); Note, *The FCC as Fairy Godmother: Improving Children's Television*, 21 U.C.L.A. L. REV., 1290, 1300-02 (1974).

150. See text accompanying notes 36-40 *supra*.

151. Cigarettes directly adversely affect the physical health of all users. Television causes some viewers to behave in socially disapproved ways. The differing implications for public health are obvious.

152. See text accompanying note 43 *supra*.

153. The evidence against television violence simply does not rise to the level of the evidence against smoking. Compare the evidence against smoking presented at 405 F.2d at 1097-98 with that against television violence, see text at notes 94-97 *supra*.

154. 405 F.2d at 1097.

The danger, however, occurs only in some circumstances from some people imitating what they see or being desensitized, with the result that others are harmed. This is not a direct and substantial danger to life caused by television alone, and this threat does not outweigh the right to first amendment protection.

Even if all four of these justifications for regulating television are considered cumulatively, they do not justify limiting the first amendment protection given to television violence. The problems of government censorship outweigh the harm that television violence has been shown to cause. The FCC has properly acknowledged that "provocative programming . . . may offend some listeners. But this does not mean that those offended have the right, through the Commission's licensing power, to rule such programming off the airwaves."¹⁵⁵ Because "[g]overnment censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided,"¹⁵⁶ it is only when public interests outweigh private journalistic interests that government power should be asserted. That point has not been reached with televised violence.¹⁵⁷

B. *Indirect Government Actions*

Some commentators have suggested indirect government action (government involvement in areas other than control of violence in program content) rather than direct government regulation as a means of reducing violence on television while avoiding first amendment problems.¹⁵⁸ Possible methods of indirect control include removing commercialism from programming, suggesting self-regulation to the

155. *In re Pacifica Foundation*, FCC 64-43, No. 45386 at 3-5, *quoted in* *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1148-49 (C.D. Cal. 1976). The FCC has acknowledged that it cannot force a licensee to discontinue program material because it offends some or even a substantial percentage of the audience. *Id.*

156. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 105 (1973). "Government rules could create the risk of improper governmental interference in sensitive, subjective decisions about programming, could tend to freeze present standards and could also discourage creative developments in the medium." FCC REPORT ON THE BROADCAST OF VIOLENT, INDECENT, AND OBSCENE MATERIAL, 51 F.C.C.2d 418, 420 (1975). *But see* Sweeney, *Regulation of Television Program Content by the Federal Communications Commission*, 8 U. RICH. L. REV. 233 (1974).

157. This argument holds even against "time, place and manner" regulations. The Court in *Pacifica Foundation* noted the importance of the time of broadcast in regulating indecent speech. 438 U.S. at 750. But television violence is not equivalent to indecent speech. *See* text accompanying notes 79-83 *supra*. The adverse effects of government control of program content pose too much of a threat to socially desirable speech in the area of television violence to be justified for any time period unless a much stronger relation between television violence and harm to society can be shown. *See generally* text accompanying notes 79-97 *supra*.

158. *See, e.g.*, VIOLENCE REPORT, *supra* note 8, at 13-14.

networks and using the licensing process to require certain categories of programming in the public interest. Suggestions for implementing the last option include the following:

(1) The FCC could develop rules requiring certain types of programming in the public interest, such as public affairs and family shows, and it could enforce these rules through the licensing process.¹⁵⁹

(2) The FCC could require the networks to alternate in presenting at least one children's show every night from seven to nine.¹⁶⁰

(3) The FCC could create a noncommercial network, such as a network that produced only children's shows, and give that network certain hours in which to broadcast over frequencies now allocated to affiliates of the major networks,¹⁶¹ thereby supplementing the activities of the current noncommercial Public Broadcasting Service.

Each of these three options would provide the viewer with more nonviolent programming, thereby defusing the impact of the violent shows.

It has long been acknowledged that the FCC can interest itself in program content in the licensing process. License renewal applications must set forth the amount or percentage of time devoted to categories of programs, such as religious, educational and agricultural.¹⁶² In 1974, the FCC added programming for children to this listing, holding that the public interest required such programming.¹⁶³ Because of first amendment considerations and a desire to "avoid detailed governmental supervision of programming whenever possible," however, no requirements have ever been made concerning the percentage of time that should be devoted to any category.¹⁶⁴

Strong arguments can be made that the FCC has the power to implement any of these suggestions in applying the public interest stan-

159. See generally VIOLENCE REPORT, *supra* note 8, at 24-25 (dissenting views of Rep. Henry A. Waxman); Comment, *The FCC as Fairy Godmother: Improving Children's Television*, 21 U.C.L.A. L. REV. 1290, 1305-06 (1974).

160. See *Sex and Violence on TV*, *supra* note 5, at 148 (statement of Geoffrey Cowan).

161. See generally VIOLENCE REPORT, *supra* note 8, at 13-14; *Sex and Violence on TV*, *supra* note 5, at 148 (statement of Geoffrey Cowan); see also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969) ("There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others . . .").

162. See CHILDREN'S TELEVISION REPORT AND POLICY STATEMENT, 50 F.C.C.2d 1, 4 (1974).

163. *Id.* at 6.

164. *Id.* at 4, 6.

dard pursuant to its licensing powers since each suggestion adds to the public interest by increasing diversity in programming.¹⁶⁵ The problems associated with these suggestions, however, should deter their implementation as long as any other method of dealing with the problem of television violence remains. The foremost problem associated with these suggestions is that of government intervention in entertainment decisionmaking. Harold Mendelsohn¹⁶⁶ sarcastically expressed the basic philosophical problems inherent in such government control: "Because audiences are viewed basically as automation receptacles incompetent to make meaningful judgments in their own behalf, it is recommended that external standards be set by various regulatory elitist bodies outside the domains of audiences."¹⁶⁷ Allowing an independent government agency almost complete discretion to determine what is in the public interest, what violence is acceptable, and at what time, would seriously threaten first amendment freedom. Further, even though these proposals might control violence for a few hours on a few stations, the incentives for violent programming would remain in the uncontrolled times and on the uncontrolled stations.¹⁶⁸

The second option, that of having the FCC suggest self-regulation, has a greater potential for producing less overall violence in all time slots, but it too infringes upon first amendment rights. The FCC, despite its denials to the contrary,¹⁶⁹ can bring about substantial changes in programming simply by suggesting to the industry that changes are needed and by threatening government action rather than by promulgating direct and formal regulations.¹⁷⁰ One notice of apparent liabil-

165. "In the absence of carefully defined categories of speech falling outside First Amendment protections, FCC regulation of program content has been permitted only insofar as it has served to promote greater diversity in the broadcasting medium." *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1147 (C.D. Cal. 1976).

166. Mr. Mendelsohn serves on the faculty of the Department of Communications of Denver University.

167. *Sex and Violence on TV*, *supra* note 5, at 14 (testimony of Harold Mendelsohn).

168. *See, e.g.*, VIOLENCE REPORT, *supra* note 8, at 25 (dissenting views of Rep. Henry A. Waxman) (FVH did not stop violence after 9:00 p.m. and did not work in other time zones); MCCALL'S, August 1976, at 33 (FVH has led to an increase in violence on afternoons and weekends). The problems of different time zones cannot be ignored. The FVH ordinarily ended at 9:00 p.m. in New York and Los Angeles, at 8:00 p.m. in the midwest, and at 7:00 p.m. in the mountain time zone. FCC REPORT ON THE BROADCAST OF VIOLENT, INDECENT, AND OBSCENE MATERIAL, 51 F.C.C.2d 412, 423 (1975).

169. *See generally* *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1074 (C.D. Cal. 1976); *In re Sonderling Broadcasting Corp.* 41 F.C.C.2d 777, 783-84 (1973).

170. *See, e.g.*, *Illinois Citizens for Broadcasting v. FCC*, 515 F.2d 397, 414-23 (D.C. Cir. 1975) (Bazelon, J., on granting rehearing *en banc*); *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 603-06 (D.C. Cir. 1973) (Bazelon, J., on granting rehearing *en banc*).

ity and forfeiture,¹⁷¹ for instance, marked the end of all "topless" radio shows,¹⁷² although the FCC characterized their universal death as independent station choice.¹⁷³ This possibility of "self-regulation" by the television industry under direct FCC coercion must be considered a viable type of indirect regulation.¹⁷⁴

The FCC used its power of threatened government action to coerce the television networks into adopting the FVH in 1974.¹⁷⁵ Although this method of coercion was held to be unconstitutional in *Writers Guild of America, West v. FCC*,¹⁷⁶ the court did not preclude all future suggestions by the FCC about proper industry self-regulation.¹⁷⁷ The evidence clearly showed that in forcing adoption of the FVH the FCC used informal coercion, not its formal rulemaking and enforcement authority.¹⁷⁸ The court found that the FCC deliberately set out to suppress and succeeded in suppressing material it considered objectionable¹⁷⁹ without establishing a record to support its action. This action violated both the Administrative Procedure Act¹⁸⁰ and the first amendment, making the FVH unenforceable.¹⁸¹

The history of the FVH as enforced by the networks demonstrates all of the problems of industry self-regulation. The only provision for enforcement is loss of authorization to display the Seal of Good Practice of the National Association of Broadcasters, which, besides being

171. Simply put, a notice of apparent liability and forfeiture is a fine mechanism. The decision can also be used against the station when its license comes up for renewal. *In re Sonderling Broadcasting Corp.*, 41 F.C.C.2d 777, 777-78 (1973).

172. A "topless" radio show is the trade term for a call-in show in which the master of ceremonies discusses intimate sexual topics with his listeners, who are usually women. *In re Sonderling Broadcasting Corp.*, 41 F.C.C.2d 777, 778-79 (1973).

173. *See id.* at 783-84.

174. Past performance by the industry shows that the possibility of self-regulation without government pressure is negligible. *See, e.g.*, EARLY WINDOW, *supra* note 4, at 170 (quoting Congressman John Murphy: "In the face of an 18 year history of failure at self-control, I feel it is safe to conclude that we cannot depend on the TV industry to clean its own house of TV violence."); VIOLENCE REPORT, *supra* note 8, at 11-12 ("The subcommittee . . . is concerned with the results to date of the industry's efforts to regulate itself.").

175. *See Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1142 (C.D. Cal. 1976).

176. 423 F. Supp. 1064 (C.D. Cal. 1976).

177. *Id.* at 1073. The court noted that the FCC can still make suggestions to broadcasters; it simply cannot threaten regulatory action to back up those suggestions. *Id.* at 1150. Thus some form of "raised eyebrows" can be used, although not quite so blatantly. *See generally* Note, *supra* note 47, at 971-73.

178. 423 F. Supp. at 1142, 1149, 1151-52.

179. *Id.* at 1142.

180. 5 U.S.C. § 553 (1976).

181. 423 F. Supp. at 1151-52.

of doubtful coercive effect, has almost never been utilized.¹⁸² Violence has not disappeared from the family hour,¹⁸³ let alone from the rest of the time slots.¹⁸⁴ The industry has consistently promised that it would act to reduce violence,¹⁸⁵ but only direct government threats have forced the networks into action, and even that action has had little impact.

The underlying problem in self-regulation appears to be the structure of the television industry. Local programming accounts for only 15-20% of all programming, and most of that is composed of news shows.¹⁸⁶ There are only three major purchasers and outlets of programs (ABC, CBS, and NBC), and their competition is directed solely to obtaining mass audiences.¹⁸⁷ Many argue that this causes them to produce for the lowest common denominator, avoiding alternatives and innovation in fear that they will not attract enough viewers.¹⁸⁸ "The questions of what the needs of the community are at particular times" may be "peculiarly the province of the licensee,"¹⁸⁹ but he has little choice in what to show.

Some suggest that, because of this domination of the networks, in order to increase the effectiveness of self-regulation of the television industry it is necessary to give the local affiliates more independence from the networks.¹⁹⁰ For instance, local stations have traditionally been given minimal time to pre-screen programs before broadcasting them.¹⁹¹ If the FCC required that this time span be extended, the local stations would be in a better position to switch to other shows and re-

182. NATIONAL ASS'N OF BROADCASTERS CODE AUTHORITY, BROADCAST SELF-REGULATION WORKING MANUAL; EARLY WINDOW, *supra* note 4, at 140.

183. *See, e.g., Sex and Violence on TV, supra* note 5, at 4 (statement of Timothy Wirth) ("The violence index did not come down after the first season of family viewing. In fact, violence in children's programs showed a sharp increase over 1974."); VIOLENCE REPORT, *supra* note 8, at 5 n.25 (28 violent incidents per week during FVH on three networks during 1976-77).

184. *See, e.g., TV's Family Hour One Year Later, McCALL'S*, August 1976, at 33.

185. *See, e.g., VIOLENCE REPORT, supra* note 8, at 11-12.

186. *See VIOLENCE REPORT, supra* note 8, at 8-9. *See also* Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 482-83 (2d Cir. 1971) ("access to network affiliated stations during prime time is virtually impossible for independent producers of syndicated programs").

187. *See VIOLENCE REPORT, supra* note 8, at 23 (dissenting views of Rep. Henry A. Waxman).

188. *See, e.g., id.*

189. Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1134 (C.D. Cal. 1976).

190. *See, e.g., VIOLENCE REPORT, supra* note 8, at 8-10. The FCC has consistently acted to limit network domination of the television industry. For instance, the FCC has promulgated the Chain Broadcasting Rules, FCC Order of May 2, 1941, Docket No. 5060, as amended by FCC Order of Oct. 11, 1941, and the Prime Time Access Rules, 47 C.F.R. § 73.658(k) (1977). *See generally* Note, *Federal Regulation of Television Broadcasting—Are the Prime Time Access Rules and the Family Viewing Hour in the Public Interest?*, 29 RUTGERS L. REV. 902 (1976).

191. *See, e.g., VIOLENCE REPORT, supra* note 8, at 9.

ject violent programs.¹⁹² This argument, however, is premised on the idea that the local stations are more likely to exercise self-regulation than are the networks—a premise that has not been proved. Both levels of the industry are profit-motivated, and violence has been shown to produce profits. Thus it has been suggested that “as long as broadcasters believed that violent programs were the easiest way to get large audiences, the highest share of the ratings, and thus the most advertising dollars, they would continue to schedule violence for children.”¹⁹³ On the basis of the failure of the FVH, the past performance by the industry and the structure of the industry itself, there seems to be little hope that coercion by the FCC will lead to more stringent self-regulation.

Another method of attacking this underlying problem of the structure of the industry is for Congress to act to remove the commercial incentive from television programming by passing legislation changing the nature of television sponsoring. Two options for changing the financial structure of television programming are worth mentioning: (1) to have advertisers pay into a fund for all programming, with their ads being revolved through the total weeks’ programming; and (2) to have the viewers finance the programming.¹⁹⁴ Either of these suggestions should eliminate the need to use violence to obtain viewers in order to obtain advertising dollars.

The first suggestion would mark a radical departure from the American tradition of letting advertisers and those seeking ads work out their own arrangements. It is also questionable how much money advertisers would be willing to put into this type of system, in which they would not know when or on what type show their ads would appear. With program costs rising steadily, this might lead to worse, rather than better, programming,¹⁹⁵ as more violence is used over the entire spectrum in an attempt to draw larger audiences continuously and thus more advertising dollars.

Having viewers finance programming conflicts with the well-established cost-free status of American television.¹⁹⁶ Moreover, since cable

192. See, e.g., *id.*

193. E. KAYE, *supra* note 133, at 66; see, e.g., EARLY WINDOW, *supra* note 4, at 162-65 (alternatives to commercialism).

194. See generally EARLY WINDOW, *supra* note 4, at 164.

195. See generally Comment, *The FCC as Fairy Godmother: Improving Children's Television*, 21 U.C.L.A. L. REV. 1290, 1316-17 (1974).

196. Free television has not always been so well established. Advertiser-financed programs were first introduced systematically by AT & T in 1922, and were met with “widespread indigna-

television already offers a diversity to those wishing to pay for it, the second option of having viewers pay for programming is already being introduced. Therefore, a procedure as radical as the decommercialization of television should be considered only if no other option is available to defuse the impact of television violence.

III. DEREGULATION—RELIANCE ON PUBLIC ACTIVISM AND COMPETITION TO DEFUSE THE IMPACT OF TELEVISION VIOLENCE

The most attractive option to control violence on television is to follow the principles of the proposed Communications Act of 1978¹⁹⁷ and rely on competition in the marketplace and a vocal public to defuse the impact of violence on television. Because of the technological advances made in the broadcast field, a fully competitive system could offer enough options to the viewer that he would not be faced with a predominance of violence wherever he turned. This would in theory reduce the impact of television violence. As the alternatives to violent programming are developed, the outcry against television violence should subside, just as past public demands for government regulation of violence in other forms of media have with time subsided. Until unfettered competition has been given a chance to produce this result, however, public activism, rather than government regulation, should be relied upon to control the networks. Although public activism does, to some degree, infringe freedom of expression,¹⁹⁸ the evils in its use are far less than those involved in government regulation,¹⁹⁹ and the success that it has achieved demonstrates that it is a viable option.

tion." *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194, 201 & n.19 (D.C. Cir. 1969). The FCC has traditionally realized that ads are necessary for broadcasting to exist, but has confined them "so as to preserve the largest possible amount of services for the public." *CHILDREN'S TELEVISION REPORT AND POLICY STATEMENT*, 50 F.C.C.2d 1, 9 (1974).

197. H.R. 13015, 95th Cong., 2d Sess. (1978).

198. See, e.g., note 232 *infra*.

199. The evils inherent in government regulation are obvious, and include a suppression of full and unfettered speech, a desire to preserve the status quo, and a tendency to promote government interests to the exclusion of other interests. See, e.g., *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 105 (1973) (between private and official censorship, "[g]overnment censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided"); *FCC REPORT ON THE BROADCAST OF VIOLENT, INDECENT AND OBSCENE MATERIAL*, 51 F.C.C.2d 418, 420 (1975) ("[g]overnment rules could create the risk of improper governmental interference in sensitive, subjective decisions about programming, could tend to freeze present standards and could also discourage creative developments in the medium").

Thomas Jefferson, in reference to the "malignity, the vulgarity, and mendacious spirit of those who write" the newspapers, said that "[i]t is an evil, however, for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be limited without being lost." T. JEFFERSON, *DEMOCRACY* 150-51 (Padover ed. 1939), *quoted in* 412 U.S. 94, 153 (1973) (Douglas,

Even if competition does not totally eliminate the problem, moreover, public activism ought to be preferred over the more dubious option of government interference.

Just as the public is now clamoring for the regulation of television violence so it has clamored for the regulation of each media form at one time or another.²⁰⁰ "For over 100 years, individuals, citizens groups, and Congress have questioned the role of literature and the mass media in creating a climate which may lead to violent behavior in society."²⁰¹ The concern in the 1930s, for instance, revolved around the interaction between children and horror movies.²⁰² In the 1950s, pressures centered around comic books and the assertion that they were teaching children that violence is a constructive, socially approved form of settling difficulties.²⁰³ In each case, however, with time the clamor subsided without undue infringement on the first amendment and apparently without undue adverse affects on children.²⁰⁴ It there-

J., concurring). Although Jefferson was not referring to violence in the media, the principle is the same. If the government controls program content, there is no one to control the government.

200. The courts have consistently noted that different media are entitled to different amounts of first amendment protection. *See, e.g.*, *Southwestern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975) (live drama); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 101-02 (1973) (broadcasting); *Red Lion Broadcasting Co. v. FCC*, 396 U.S. 367, 386 (1969) (broadcasting); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952) (motion pictures). In *Burstyn*, the Court noted that the argument that motion pictures pose a greater capacity for evil, particularly among youngsters, than other modes of expression may be "relevant in determining the permissible scope of community control." *Id.* at 502. *See generally* Winick, *Censor and Sensibility: A Content Analysis of the Television Censor's Comments*, in *VIOLENCE AND THE MASS MEDIA* 252, 255 (O. Larsen ed. 1968) (comparison of radio, television and movie codes).

201. *VIOLENCE REPORT*, *supra* note 8, at 1. Laws prohibiting the distribution of magazines primarily devoted to crime and horror stories began appearing in the 1880s. *E.g.*, Law of May 28, 1884, ch. 380, 1884 N.Y. Laws 464; Law of Apr. 13, 1886, ch. 177, § 4, 1886 Iowa Laws 217; Law of Mar. 6, 1885, ch. 348, 1885 Maine Laws 291; Law of May 28, 1884, ch. 380, 1884 N.Y. Laws 464. *See also* Law of Apr. 29, 1955, ch. 836, § 541, 1955 N.Y. Laws 1988 (misdemeanor to sell a comic book with a title containing the words "crime, sex, horror or terror or the content of which is devoted to or principally made up of pictures or accounts of methods of crime, of illicit sex, horror, terror, physical torture, brutality or physical violence").

202. *See, e.g.*, M. HELLER & S. POLSKY, *STUDIES IN VIOLENCE* 2 (1976).

203. *See, e.g.*, SENATE COMM. ON THE JUDICIARY, 85TH CONG., 1ST SESS., *REPORT ON COMIC BOOKS AND JUVENILE DELINQUENCY* (Comm. Print 1955).

[T]his country cannot afford the calculated risk involved in feeding its children, through comic books, a concentrated diet of crime, horror, and violence. There was substantial, although not unanimous, agreement among the experts that there may be detrimental and delinquency-producing effects upon both the emotionally disturbed child and the emotionally normal delinquent. Children of either type may gain suggestion, support, and sanction from reading crime and horror comics.

Id. at 32. Yet the Committee flatly rejected the idea of government censorship, relying instead on self-regulation. *Id.* at 23. *See generally* Larsen, *Controversies About the Mass Communication of Violence*, in *VIOLENCE AND THE MASS MEDIA*, *supra* note 201, at 21-23; Twomey, *New Forms of Social Control over Mass Media Content*, in *VIOLENCE AND THE MASS MEDIA*, *supra* note 201, at 176-77.

204. The debate over comic books in the 1950s, for instance, showed a marked similarity to

fore appears that letting television develop, as these other forms have developed, could lead to an acceptable result without government censorship.

The degree to which innovations have broadened the communications spectrum²⁰⁵ and the degree to which these innovations have been accepted support the conclusion that, if given the time and the freedom to develop, these innovations will dissipate the impact of television violence.²⁰⁶ Cable television, for instance, currently offers over thirty-five channels, with a potential for handling at least eighty,²⁰⁷ and has grown

the present public outcry with respect to television. Yet little is heard today. Frederick Wertham, who now denounces television violence, formerly argued that comics had to be controlled because they taught children that violence is a constructive, socially approved form of settling difficulties. Larsen, *Controversies About the Mass Communication of Violence*, in *VIOLENCE AND THE MASS MEDIA*, *supra* note 201, at 22-23.

The result of this crusade against comic books was the establishment of a Code for the Comics Magazine Association of America and a Code Administrator who pre-screened all comics and gave them a stamp of approval if they did not, for instance, use scenes of excessive violence or present the unique details and methods of a crime. Larsen, *Controversies About the Mass Communication of Violence*, in *VIOLENCE AND THE MASS MEDIA*, *supra* note 201, at 21. The only coercion was supplied by the public, however, and only if the public refused to buy unapproved comics would the comic producers feel compelled to seek approval. Address by the Code Administrator, Comics Magazine Ass'n of America to the Annual Meeting of the Association of Towns of the State of New York (Feb. 9, 1956), *reprinted in VIOLENCE AND THE MASS MEDIA*, *supra* note 201, at 244.

The current relaxation of public clamor against comics (or replacement by clamor against television) is demonstrated by the number of horror comics now being sold and by the violence in many comics. For an example of the changing mores with respect to comics, compare the cover that practically initiated a Congressional hearing in the 1950s, depicted in *VIOLENCE AND THE MASS MEDIA*, *supra* note 201, at 215 (man with ax holding woman's head with blood dripping in foreground, decapitated body in background) with the Nov. 1978 *The Savage Sword of Conan the Barbarian* (man with sword dripping blood holding man's head dripping with blood in foreground, decapitated body and terrified woman in background).

205. See, e.g., SURGEON GENERAL'S REPORT, *supra* note 1, at 4 ("New developments—UHF, public television, cable, cassettes, portable minisets—suggest that in the future the programming available may become increasingly varied and that the mass audience may become a diversity of smaller segments, each with its special interests. Newspapers, magazines, and radio provide examples of similar evolution."); *Television Broadcast Policies, Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 1st Sess. 54-64 (Comm. Print 1977) (statement of Glen Robinson); White, *What Can Parents Do About Unsavory TV Shows?*, U.S. NEWS & WORLD REPORT, June 19, 1978, at 83 ("videocassettes, videodiscs, pay TV, cable TV, pay cable and satellite distribution systems . . . threaten to make obsolete the local broadcaster whose outlook is limited to ratings").

206. The recent decision by Warner Cable to use satellite broadcasting to offer thirteen hours a day of nonviolent children's programming to local systems illustrates this potential to dampen the impact of any remaining violence through offering nonviolent alternatives. See Wicklein, *Wired City, U.S.A.*, THE ATLANTIC MONTHLY, February 1979, at 35, 38.

207. Note, *Communications Law—FCC Lacks Authority to Promulgate Rules Controlling Content of Cablecast Programming Unless Such Regulations Promote Objectives Previously Held Valid in the Regulation of Broadcast Programming*, 27 CATH. U.L. REV. 432, 432 n.2 (1978). See generally *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 24 (D.C. Cir. 1977).

In Columbus, Ohio, for instance, cable television offers ten regular and public-broadcast channels, ten community channels and ten "premium" channels (which include educational and

from 70 systems and 14,000 subscribers in 1952 to 3,801 systems and 11,900,000 subscribers in 1977.²⁰⁸ Because cable television is funded by subscriptions, there is no need to try to gain a large share of the audience for any single show, nor is there any need for individual shows to compete. Thus, there is no inducement to use violence on shows just to draw an audience. More channels plus lower costs of transmission make it possible for a wide spectrum of interests to broadcast, regardless of the size of the audience, again providing alternatives to violent programming.²⁰⁹

This method of defusing the impact of television violence through creating as wide a diversity as possible in the available forums, rather than through controlling the content of speech, conflicts less with the first amendment than any other method of controlling violence on television. This fundamental belief in the advantages of a diversity of viewpoints underscored the original Communications Act,²¹⁰ in which

entertainment channels). It also offers a two-way system that allows viewers to vote yes or no or make multiple selections immediately with regard to what they see on TV. In one instance, during a blizzard the mayor appeared on television and asked whether he should seek higher assessments to clean the streets sooner. The viewers immediately pushed their buttons and answered no. Thirteen thousand households in Columbus presently subscribe for a flat rate of \$10.95 per month. See Wicklein, *supra* note 206, at 35-42.

208. Home Box Office, Inc. v. FCC, 567 F.2d 9, 22 (D.C. Cir. 1977). See also *Banzhaf v. FCC*, 405 F.2d 1082, 1099-1100 (D.C. Cir. 1968) ("It may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets."). Although it may be argued that despite this increase in the number of outlets, control of television remains more restricted than other media forms, it can also be argued that, in practical terms, the forum of newspapers and magazines are available to only a select few. Few people "have the folly to think [they] could combat the New York Times or Denver Post by building a new plant and becoming a competitor." *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 159 (1973) (Douglas, J., concurring). This adds even more support to the argument that little weight should be given to the limited number of television frequencies. Cf. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 (D.C. Cir. 1977) (considering the number of potential cable television operations, "there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers"). *But cf. Banzhaf v. FCC*, 405 F.2d 1082, 1100 ("Unlike broadcasting, the written press includes a rich variety of outlets for expression . . . which are available to those without technical skills or deep pockets.").

209. There are, however, potential problems with deregulation. It can be argued that without government control, the airwaves will be flooded with obscenity and other objectionable materials. Criminal liability would still remain for fraud in broadcasting under 18 U.S.C. § 1343 (1970), however, as it would for the broadcast of "obscene, indecent, or profane language" under 18 U.S.C. § 1464 (1970). Further, the viewer still has the very real power to discontinue the service, and with at least some systems premium channels are controlled by a key that presumably can be kept away from children. See Wicklein, *supra* note 206, at 35, 36.

Another potential argument is that this growth of alternatives will mean the end of free television. This, however, does not seem to be the case. No evidence has been produced to show that cable and broadcast television, for instance, cannot profit side by side, or that cable siphons shows away from broadcast television. See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 24, 33, 37, 40 (D.C. Cir. 1977) (no evidence of harm to poor, siphoning or loss of broadcast services).

210. Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162; see text accompanying notes 98-103 *supra*.

individual station licensees were given the ultimate choice of programming²¹¹ and monopolistic power was viewed as the enemy.²¹² The reasoning behind that fear of monopoly applies to governmental as well as private power: both inhibit the free exchange of ideas, and both limit the potential for innovation and diversity. As the courts have long held, it is the first amendment right of the audience "to receive suitable access to social, political, esthetic, moral, and other ideas" that is paramount, and that right may not be abridged by either the government or the broadcasters.²¹³ Thus, although government interference with that right in the area of television violence could lead to a substantial reduction in violence on television, the cure may prove worse than the disease.

The obvious answer to this fear of monopolistic (or the present oligopolistic) power is to foster unfettered competition; not only would this advance the principles of the first amendment, but it should also reduce the impact of televised violence. This conclusion underlies the proposal introduced by Congressman Lionel Van Deerlin to replace the Communications Act of 1934 with the Communications Act of 1978.²¹⁴ This bill is the product of twenty months of hearings and research and completely revises the former Act, which Congressman Van Deerlin deemed "as outmoded as the horse-and-buggy."²¹⁵ The Subcommittee on Communications of the House Commerce Committee is seeking House passage in 1979 and Senate passage before the end of the Ninety-Sixth Congress.²¹⁶

The major innovation of this bill is that it provides for federal regulation of telecommunications only "to the extent marketplace forces are deficient."²¹⁷ The "public interest" standard is no longer to apply,

211. See text accompanying note 104 *supra*.

212. See, e.g., *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940); *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1123 (C.D. Cal. 1976). "We can not allow any single person or group to place themselves in [a] position where they can censor the material which shall be broadcasted to the public, nor do I believe that the Government should ever be placed in the position of censoring this material." *Hearings Before the House Committee on the Merchant Marine & Fisheries*, 68th Cong., 1st Sess. 8 (1924) (testimony of Herbert Hoover, then Secretary of Commerce, on H.R. 7357), *reprinted in CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 104 (1973).

213. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

214. H.R. 13015, 95th Cong., 2d Sess. (1978); see 124 CONG. REC. H5231 (daily ed. June 8, 1978) (remarks of Rep. Van Deerlin).

215. 24 CONG. REC. H5231 (daily ed. June 8, 1978) (remarks of Rep. Van Deerlin).

216. *Id.*; 36 CONG. Q. WEEKLY REP. 1547 (1978).

217. Proposed Communications Act of 1978, H.R. 13015, § 101. As expressed by Congressman Van Deerlin: "Where possible, we're going to be trying to get the federal government out of the business of regulation." 36 CONG. Q. WEEKLY REP. 1547 (1978).

and only the technical requirements of television, such as frequency assignment, are to be subjected to regulation.²¹⁸ Because technological innovations have broadened the communications spectrum, it is thought that free competition can better serve the public needs than can federal regulation in the "public interest,"²¹⁹ and the wider range of offerings will also theoretically defuse the impact of televised violence.

This theory of protection from excessive television violence through diversity rests, of course, on the assumption underlying the proposed Communications Act that the requisite innovations needed to broaden the spectrum are currently available on a large enough scale to have an impact on the broadcasts available to the viewing public.²²⁰

The Act restricts total ownership by the same individual to five radio and five television stations, provides that no individual may own more than three television stations in the top fifty market, and restricts ownership of broadcast stations to one per market. Proposed Communications Act of 1978, H.R. 13015, *supra*. Under present law, an individual may hold up to twenty-one stations—seven TV (no more than five of which can be VHF), seven AM radio, and seven FM radio.

The FCC has long tried to increase competitive forces. *See, e.g.*, *NBC v. United States*, 319 U.S. 190, 218 (1943) (upholding Chain Broadcasting Regulations promulgated by FCC to increase free competition in order to encourage "the larger and more effective use of radio in the public interest"); *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 483 (2d Cir. 1971) (upholding Prime Time Access Rules as a reasonable attempt to diversify programming by controlling network domination of prime time shows which made access "to network affiliated stations during prime time . . . virtually impossible for independent producers of syndicated programs").

218. Proposed Communications Act of 1978, H.R. 13015, § 417. Licenses for radio stations are to be for indefinite duration, while those for television stations are initially for five years, followed by a five-year renewal and then an indefinite renewal. *Id.* § 431. License fees are set according to the value of the spectrum, considering, for instance, the number of frequencies assigned to the market and the number of prime time TV households in such market. *Id.* § 413. The Telecommunications Fund receives a percentage of the licensing fees. This fund will be used to support the Regulatory Commission and to support new programs to aid public interest programming, as well as to encourage minority ownership and the development of services in rural areas. *Id.* Selections for new allocations are to be made by random lottery among the acceptable candidates. *Id.* § 414. The fairness doctrine and equal access rules are modified into an equity principle for television. *Id.* §§ 434, 439. Cable TV is completely deregulated. CONG. REC. H5231 (daily ed. June 8, 1978) (highlights of proposed Communications Act of 1978). Finally, a Public Television Programming Endowment is established to further public broadcasting, Proposed Communications Act of 1978, H.R. 13015, § 611, and the FCC is replaced by the Communications Regulatory Commission, *id.* § 211.

219. Section 101 of the proposed Act specifically finds that regulation is needed only "to the extent marketplace forces are deficient." The Act does not mention the "public interest." See authorities cited note 200 *supra* for a discussion of technical innovations. The cable industry has subsequently asked for some form of federal protection so that it will not be inundated with fifty different sets of state regulations. *See* Wicklein, *supra* note 206, at 41.

220. In the report of the Subcommittee on Communications on Television Violence in 1977, the majority, including Chairman Van Deerlin, who introduced the 1978 Act, concluded as follows:

[T]o the extent that current problems are a function of the limited number of communications outlets now available, it is likely that the growth of new technologies will bring about a more long-term solution. . . . In an environment of programming abundance, we may find that violent content represents only a small fraction of the total material available, and its impact may diminish accordingly.

Although the technology may exist,²²¹ however, these innovations may not be sufficiently pervasive for some time to come.²²² Furthermore, even if they do spread to the extent necessary, the thesis that a profusion of frequencies will promote healthful diversity may simply be untrue.²²³ In neither event, however, does it appear that government regulation is the necessary alternative; rather, the proper agent to control the content of the airwaves is the public.²²⁴ For although the FCC in theory speaks for the people, this is not always the case in practice.²²⁵ A vocal public is in truth the best protector of its own interests.

Recent examples show that a number of methods are available for citizens to make themselves heard with respect to television violence. They can write their local stations, the networks, the sponsors, the FCC, the press or their congressmen. Campaigns against violence by groups such as the American Medical Association and the Parent Teachers Association have led to a reduction in the number of violent shows on television.²²⁶ Public threats to boycott sponsors' products have caused many sponsors to become more watchful over the violent

VIOLENCE REPORT, *supra* note 8, at 14. Congressman Van Deerlin obviously incorporated this belief—that the technology will develop if regulatory barriers are removed—into the proposed 1978 Act.

221. Cable television, for instance, is a reality, as is satellite broadcasting, whereby a single local station can practically become a fourth network by beaming its shows to existing cable systems around the country. See NEWSWEEK, January 1, 1979, at 61.

222. Although the growth of cable, for instance, has been phenomenal, the monthly service charge may stop its growth after it reaches a certain point, and financing may not be sufficient to pay for a wide range of viewing options. Atlanta-based WTCG, for example, is considering a 24 hour a day news service channel for its cable customers, but to obtain enough advertising dollars it would have to double the number of cable subscribers it currently reaches. See NEWSWEEK, Jan. 1, 1979, at 61.

223. It can be theorized that violence will actually increase as the major networks fight to maintain their audiences and their advertising revenues.

224. The FCC has traditionally relied on public reaction rather than government supervision as the most reliable test of ideas and performance in broadcasting. Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966). Further, the primary responsibility for raising children remains with the parents, not the government. See White, *What Can Parents Do About Unsavory TV Shows?*, U.S. NEWS & WORLD REP., June 19, 1978, at 83; REPORT ON THE BROADCAST OF VIOLENT, INDECENT, AND OBSCENE MATERIALS, 51 F.C.C.2d 418, 423 (1975). See also *Sex and Violence on TV*, *supra* note 5, at 15 (statement of Harold Mendelsohn).

225. "Because the communications industries that grew up under the 1934 law went on to flourish under the FCC's regulation, a cozy relationship was maintained for several decades between the regulatory agency and the industries it regulated." *House Panel Offers Plan to Deregulate Communications*, CONG. Q. WEEKLY, June 17, 1978, at 1547.

226. See, e.g., *New TV Season: Less Sex, Less Violence*, U.S. NEWS & WORLD REP., September 11, 1978, at 32-33 (threat of public pressure leading to government involvement in programming led networks to tone down their shows); *TV's New Pitch*, U.S. NEWS & WORLD REP., September 12, 1977, at 20, 23 (violence being replaced with sex).

content of shows that they sponsor,²²⁷ again leading to a reduction in the level of violence.²²⁸ Citizens can also organize and negotiate with local stations,²²⁹ and they can give their business to those that serve their interests. Experience has shown that the networks depend on large audiences to bring in their advertising revenues, and if the audience reaction to a particular program is loud enough, it will be heard.²³⁰

There are, of course, problems with public activism. Some fear a return to a McCarthy-like era in which a few impose their paranoias on the rest,²³¹ and questions exist about the propriety of sponsor censorship.²³² "Public interest" groups could well represent their own interests rather than the general public's interests. Still, the voice of public outcry holds fewer fears than regulation by an independent government agency staffed by unelected officials.²³³

There is little dispute that something should be done about the problem of television violence. Although government control could ef-

227. See, e.g., *The War Against Television Violence*, BUS. & SOC'Y REV., Fall 1977, at 25, 31-34 (policy statements by various sponsors); Adler, *TV: Concern About Violence*, WALL ST. J., Mar. 18, 1977, at 8, col. 4-5 (Eastman Kodak, Colgate-Palmolive, Sears, Gillette and others have announced they will not advertise on programs that use violence for its own sake).

228. See generally E. KAYE, *supra* note 148, at 114-15 (1974).

229. Community efforts in Dallas, Atlanta, Chicago and Nashville, for example, have brought about the institution of policies "to screen advertising for demeaning references to ethnic and racial groups, development of programming of special interest to the black community, additional children's programs, public affairs and consumer information programs and announcements." *Id.* at 138. See *id.* at 166-68 for an example of an agreement that was obtained. See generally VIOLENCE REPORT, *supra* note 8, at 13; *TV's New Pitch*, U.S. NEWS & WORLD REP., September 12, 1977, at 20 (replacing violence with sex). See also THE RALEIGH TIMES, Nov. 23, 1978, at 31-A, col. 1-2 (PTA is teaching parents how to challenge licenses of network-owned television stations).

230. See, e.g., E. KAYE, *supra* note 133, at 140.

231. See *TV's New Pitch*, U.S. NEWS & WORLD REP., September 12, 1977, at 23 ("Many broadcasters, however, are worried that pressure tactics are becoming standard and could lead to censorship or purges of TV officials and entertainers in a manner reminiscent of the Communist hunts of the early 1950s."); Valenti, *An Outlet for Artists in The War Against Television Violence*, BUS. & SOC'Y REV., Fall 1977, at 35 ("If we allow groups of self-appointed people, no matter how well-meaning, to become the arbiters of TV programming, how can we be certain their creative perspective matches what is reasonable and right?").

232. "It is a very unhealthy situation when special-interest groups, stimulated by hearsay before a program goes on the air, determine what is right and what isn't for the viewing public." Fred Pierce, ABC President, on inability to find sponsors for "Soap," in *TV's New Pitch*, U.S. NEWS & WORLD REP., September 12, 1977, at 21; cf. *Early Window*, *supra* note 4, at 120 (sponsors forced TV to become mediocre many years ago so the contrast in quality between the shows and the ads wouldn't be so great). See also *The Clamor Against Television Violence Gets Results*, BUS. WEEK, January 10, 1977, at 68-69.

233. The seven members of the FCC are appointed by the President with the advice and consent of the Senate. 47 U.S.C. § 154 (1976). See also *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1133 (C.D. Cal. 1976) ("If a government body, insulated from the political process, were given the power of individual ad hoc decisionmaking as to programming, the potential for abuse would be manifest.").

fectively eliminate violence from the airwaves, it would also eliminate much valuable communication. Deregulation is therefore to be preferred because it accommodates the need to reduce the impact of televised violence with the need to preserve first amendment rights. Finally, even if deregulation does not solve the problem of televised violence, public activism balances effectiveness and infringements of the first amendment much better than government regulation and is, therefore, the best current method of controlling the amount of violence broadcast by the networks.

IV. CONCLUSION

The portrayal of violence on television is an effective form of communication; as such, it is entitled to first amendment protection. Moreover, because the contours of violence are so indefinite, even if some violence is used purely for its appeal to mass audiences and not for the purpose of conveying some message of social value, it cannot be controlled without seriously curtailing all portrayals of violence and thus conflicting with the first amendment. Nonetheless, the portrayal of violence on television may be excessive, and it does cause significant harm in some instances. Some action should therefore be taken to minimize the abuses of television violence.

Of the four options currently available to deal with the problem of television violence, deregulation, with reliance on public activism, offers the best opportunity for lessening the impact of televised violence without violating the first amendment. Current psychological evidence does not justify the infringement on the first amendment that would occur with any of the other options. Evidence, both with respect to which types of violence cause harm and with respect to whether cause and effect relationships exist in particular cases, is too speculative to hold the networks responsible in court, and the overall damage caused by television violence has not been shown to be substantial enough to justify direct government intervention in program content. Although both judicial sanctions and direct government regulation could effectively end the problem of television violence, they would also end all uses of violence on television. This total ban of a type of socially justified speech cannot be tolerated absent a much more substantial showing of harm from television violence.

It can be argued, nonetheless, that the FCC has the power to reduce television violence through indirect regulation, for example, by enforcing percentage program category requirements. This remedy,

however, ignores the underlying causes of violence on television, and it may, therefore, simply shift violence from one time period to another. It also entails an unacceptable infringement on freedom of expression: the first amendment prevents independent government agencies, such as the FCC, from deciding either which portrayals of violence can be used for communication or at what time this communication is to be allowed.

The option of decontrol, on the other hand, recognizes implicitly that the former justifications for regulation of television violence are no longer as persuasive as they once were. Technical innovations are removing the limits on the number of available frequencies, thereby potentially offering enough diversity of programming to defuse the impact of television violence. Just as each form of media has with time survived complaints about its adverse impact without infringements of the first amendment, television, in expanding its spectrum, may solve its own violence problem by providing the viewer with enough alternatives to violent programming to substantially reduce the impact of whatever violence remains.

Even if this growing diversity does not solve the problem of television violence, however, the optimal solution is not to put aside the first amendment and rely on government action, through the courts or otherwise, to limit what can be shown on television. An active, free, pluralistic society can best serve itself, not by relying on government agencies to act in its behalf, but rather by making its needs and desires known in a marketplace of unfettered competition. This is the conclusion inherent in the proposed Communications Act of 1978, which would deregulate the television industry and provide such unencumbered competition. Increased competition would allow public activism, which has shown itself to be an effective means of limiting television violence, to become even more effective as the available program options increased. Although public activism does infringe on the first amendment to some extent, it does so to a much lesser degree than any of the other options. Deregulation and reliance on public activism is the only option that properly balances the need to curtail the abuses of television violence with the need to maintain freedom of speech.

RICHARD P. LEVI