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Warning: Television Violence May Be Harmful to Children; but the First Amendment May Foil Congressional Attempts to Legislate Against It

Laura B. Schneider

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I. INTRODUCTION

[T]he boy looked, wild-eyed, around at him:
 spat in his face; not one word;
 but drew his sword.
 His father dodged and ran back;
 so he missed, then turned on himself,
 curled over the blade and drove it into his side.
 He was still conscious.
 His arms flowed about the girl;
 he held her and tried to breathe
 and breathed out a rush of blood;
 and the red drops were on her white cheek.
 Now the dead lie in the arms of the dead.
 They have been wedded in the house of Death.
 Kreon has shown there is no greater evil
 than men's failure to consult and to consider.¹

Violence in entertainment is not a new phenomenon. Throughout the ages, violence has played a significant role in literary works. Writers as far back as the ancient Greek playwrights incorporated violence in their stories.² Since then, violence has been prevalent in esteemed literature, throughout history from the works of Shakespeare³ to those of Tennessee Williams.⁴ "Violence has always been a part of our life, our history and our culture; and, television programming in a free society

1. SOPHOCLES, *ANTIGONE* 68-69 (Richard E. Braun trans., Oxford Univ. Press 1973). After a war, Kreon, king of Thebes, proclaimed one brother a hero deserving of a traditional burial, and another an enemy deserving to be left to the dogs, unburied. By not reflecting on the consequences of this action, Kreon set in motion a chain of events leading to the suicides of Antigone, his niece, of Haimon, his son, and of Eurydice, his wife.

2. See *The Experts Speak Out: A Panel, in VIOLENCE ON TELEVISION: A SYMPOSIUM AND STUDY SPONSORED BY THE EDITORS OF TV GUIDE* 4, 9 (1992) (comments of Dick Wolf) [hereinafter *Symposium*]. In the ancient Greek theater, however, all violent acts occurred offstage, and a messenger then recounted the violence to the audience. For example, in *Agamemnon*, by Aeschylus, Clytemnestra boasts to the audience how she violently killed her husband Agamemnon. See Simon Goldhill, *Violence in Greek Tragedy*, 13 *THEMES IN DRAMA* 15, 24-25 (1991).

3. Consider, for example, the murder of Desdemona by her husband Othello in *Othello*, the rape and final murder of Lavinia in *Titus Andronicus*, the murder of Cordelia in *King Lear*, and the stabbing and ultimate murder of Caesar in *Julius Caesar*. See DEREK COHEN, *SHAKESPEARE'S CULTURE OF VIOLENCE* (1993), for a discussion of violence in Shakespeare's works.

4. Consider, for example, the violent character Stanley Kowalski in *A Streetcar Named Desire*. See the collection of articles in 13 *THEMES IN DRAMA*, *supra* note 2, for a discussion of violence in plays from ancient Greece to the present.

should not be expected to pretend otherwise.”⁵ Regardless of this historical precedent, America is now in an uproar about violence on television. Similar to Kreon in *Antigone*, who neglected to foresee the tragic results of his actions, television programmers are failing to consider the effects of their programs on the lives of many viewers. Attorney General Janet Reno summarized the status of modern television when she remarked:

[V]iolence has become the salt and pepper of our television diet: fictional shows and movies feature dozens of killings of bad guys or innocents; made-for-TV movies glorify the most sordid examples of human behavior; the local news opens with pieces on violent crimes before proceeding to any other type of story; and so-called “real life” police programs portray the world of law enforcement as nothing but a violent game between America’s police and its citizens.⁶

This Comment explores television violence and its effect on children. It examines the industry’s actions taken thus far to alleviate the violence, impending legislation and its potential conflict with the First Amendment, and alternatives to government action in this delicate area of freedom of speech.

Most people would agree that “[t]he entertainment media play a powerful role in the formation of values.”⁷ Television violence is not discriminating; it affects children of all ages, genders, socioeconomic levels, and levels of intelligence.⁸ Since 1955, researchers and scholars have published about 1000 studies, reports, and commentaries regarding the impact of television violence and “[t]he accumulated research clearly demonstrates a correlation between viewing violence and aggressive behavior.”⁹ Every year children watch over 1000 rapes, murders, armed robberies, and assaults on television,¹⁰ and the portrayals are becoming

5. *Violent Programming on Television: Hearings on S.943, S.973 and S. 1383 Before the Senate Comm. on Commerce, Science and Transp.*, 103d Cong., 1st Sess. 2 (1993) (statement of Janet Reno, U.S. Attorney General) [hereinafter *Hearings*].

6. *Id.*

7. Anastasia Toufexis, *Our Violent Kids: A Rise in Brutal Crimes by the Young Shakes the Soul of Society*, TIME, June 12, 1989, at 52.

8. See *Does TV Violence Cause Real Violence?*, in *Symposium*, *supra* note 2, at 3 (quoting a study conducted by Dr. Leonard D. Evon and others examining the link between frequency of TV viewing and incidence of aggressive behavior among youths in semi-rural New York, Suburban Chicago, Australia, Finland, Israel and Poland).

9. *Symposium*, *supra* note 2, at 4 (quoting a 1992 survey by the American Psychological Association called “Big World, Small Screen”). See MICHAEL J.A. HOWE, TELEVISION AND CHILDREN (1977). But see J. RONALD MILAVSKY ET AL., TELEVISION AND AGGRESSION: A PANEL STUDY (1982) (finding a correlation between violent television and aggressive behavior, but finding no evidence that television is causally related to the development of aggressive behavior in children and adolescents).

10. William H. Dietz & Victor C. Strasburger, *Children, Adolescents, and Television*, CURRENT PROBS. IN PEDIATRICS, Jan. 1991, at 8, 14.

increasingly graphic.¹¹ Violence may be a part of our society, and TV a reflection of it, but when violence is glorified, or depicted as a means to solve problems, it can be harmful to children.¹² "From [their] very first cartoon, all the way through *Lethal Weapon*, [children are] taught that violence is funny, entertaining and successful."¹³ "All television is educational. . . . The question is, what's being taught?"¹⁴

Many people in the television industry claim that children do not watch violent shows designed for adults.¹⁵ For example, NBC President Warren Littlefield asserts that "NBC's highest rated police drama, 'Law & Order', ranks 141st among children."¹⁶ Despite this assertion, television is seen as one of the many factors that contribute to the harmful effects on children and increase violence in our society. One commentator describes it as a "symbolic environment. And what we're dealing with is a kind of pollution, the byproducts of an industrial civilization that we have to understand and take care of"¹⁷

In her testimony before the U.S. Senate Committee hearing concerning Violent Programming on Television, Attorney General Janet Reno proclaimed that she was "tired of the shoulder-shrugging and the finger-pointing. No one ever accused the networks or television violence itself of somehow being solely responsible for violence in America."¹⁸ In order to solve this problem, we must address each ele-

11. See *Violence on Television: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 103d Cong., 1st Sess. 2 (1993) [hereinafter *Hearings II*] (statement of R.E. Turner, President, Turner Broadcasting System, Inc.). But "[t]elevision, which reflects our society and helps us interpret it, cannot and should not avoid the subject." *Id.*

12. *Id.* Television reflects reality but it also shapes reality by glamorizing violence. Senator Paul Simon, Remarks to the Television/Film Meeting on TV Violence 2 (Aug. 2, 1993) (transcript available from the office of Sen. Simon).

13. Diane Goldner, *Can TV Help Save Black Youth?* USA WEEKEND, Oct. 4, 1992, at 4, 5 (quoting Harvard doctor Deborah Prothrow-Stith). For example, Clint Eastwood's phrase "Go ahead, make my day" (popularized in his *Dirty Harry* films) is repeated by children and even quipped by President Bush. "Its message is clear: Give me the pleasure of a violent response." Simon, *supra* note 12, at 6.

14. Susan Balcom, *Children Told There's no Safe Place to Hide*, VANCOUVER SUN, Oct. 22, 1993, at B6 (quoting Canadian education consultant Sandra Campbell).

15. Network programmers schedule shows designed for adults during the later hours of prime-time viewing; for example, NBC's *Law and Order* and ABC's *N.Y.P.D. Blue* air at 10 p.m.

16. *Hearings II*, *supra* note 11, at 5 (statement of Warren Littlefield, President of Entertainment NBC).

17. *Symposium*, *supra* note 2, at 8 (comments of George Gerbner). One network executive argues that it is easier to point a finger at TV rather than deal with the "rampant availability of guns and drugs on our streets, or the overwhelming poverty in which many of our children grow up." *Hearings II*, *supra* note 11, at 3 (statement of Warren Littlefield, President of Entertainment, NBC).

18. *Hearings*, *supra* note 5, at 4 (statement of Janet Reno, U.S. Attorney General). Reno believes that many other institutions also contribute to the development of children. *Id.*

ment individually. Recognizing that television is one factor leading to violence, the question becomes how to "regulate the speech we don't like— . . . especially the T.V. violence aimed at children—without irretrievably harming the speech we do like, as evidenced in the many television shows that entertain, educate and expand our view of the world."¹⁹ Censorship is not a viable alternative if our creative community is to flourish.²⁰

Is government regulation the answer? The First Amendment of the U. S. Constitution may be a brick wall against such an intrusion into the right to freedom of speech and expression.²¹ But allowing the industry to regulate itself may not generate the desired results. "The coming 500-channel universe, high-definition television, . . . and new interactive technology mean 'the industry is going to change dramatically and substantially The power, the influence, the importance of television is only going to increase in the years ahead.'"²²

The sections that follow deal with the cry for help in reducing violence on television. Part II examines the effects of television on children, and compares television violence in America with that seen around the world. Part III analyzes the unsuccessful attempts to hold programmers liable for the effects of mass media violence on children, and the First Amendment reasoning behind this failure. Part IV discusses what the industry has accomplished on its own without government intrusion. Part V examines the proposed congressional legislation to regulate violence on television—its pros and cons and its constitutionality under existing case law. Finally, Part VI explores the alternatives to legislation. It concludes with the realization that although the protection of children is a compelling reason to enact legislation to curb violence on television, such legislation would devastate the freedoms protected by the First Amendment. With pressure from the American people—the government—the entertainment industry must regulate itself, while Americans develop alternate ways of dealing with this problem that do not interfere with freedom of speech and expression.

II. TELEVISION VIOLENCE—CHILDREN WATCH AND LEARN

Television has become an integral part of American life.²³ On the

19. *Hearings II*, *supra* note 11 (statement of Rep. Mike Synar).

20. Simon, *supra* note 12, at 3.

21. "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

22. Greg Kennedy, *Violence on Screen Cultural Pollution, Industry Critic Says*, VANCOUVER SUN, June 8, 1993, at C6 (quoting film critic Michael Medved).

23. Ninety-nine percent of American households own at least one television set and sixty-six

average, children watch 2-4 hours of television a day.²⁴ By the time a child graduates elementary school he has seen approximately 8000 murders and more than 100,000 other violent acts.²⁵ By the time he is eighteen, he will have vicariously witnessed over 200,000 violent acts and 40,000 murders on television.²⁶

In 1992, *TV Guide* analyzed a typical day of television and found that for every hour of programming, there were 10 acts of violence; on Saturday morning programming, which is targeted at children, the figure jumped to 20-25 violent acts per hour.²⁷ Television "expose[s] children to behavior that society and the law condemn and prohibit."²⁸ For children, television can be a form of recreation or even a type of babysitter. "In dangerous neighborhoods, television may be one of the safest forms of recreation left for children—unless it is more violent than the streets they are afraid to walk."²⁹

A. *The Effects*

Television can have profound influences on childhood development. Violent television, however, affects children in various ways. Researchers have delineated at least four major effects that television violence can have on children: the *aggressor effect*, the *victim effect*, the *bystander effect*, and the *self-socialization effect* (including imitation).

1. AGGRESSOR EFFECT

After years of research, accumulated evidence tends to prove "a direct causal link between exposure to televised violence and subsequent aggressive behavior of the viewer."³⁰ Researchers label this the *aggres-*

percent own two. *Hearings II*, *supra* note 11, at 2 (statement of M. Joycelyn Elders, U.S. Surgeon General).

24. *Hearings*, *supra* note 5, at 2 (statement of Dr. Edward Donnerstein).

25. *Id.* Note that these figures "increase with more exposure to Cable Premium channels or VCR use of R-rated films." *Id.*

26. *Id.* at 1 (statement of Janet Reno, U.S. Attorney General).

27. *Id.* at 1-2; *see also* Neil Hickey, *How Much Violence is There?*, in *Symposium*, *supra* note 2, at 2.

28. *Hearings*, *supra* note 5, at 1-2 (statement of Janet Reno, U.S. Attorney General).

29. *Id.* at 2. Reno continues, "[i]ndeed, in high-crime areas, television violence and real violence have become so intertwined that they may well feed on each other." *Id.* at 2-3. Children who dodge bullets in the streets on the way to and from school stay home and watch television because it is safer to be inside their homes than outside on the streets. Leonard D. Eron, *TV Warning on Violence No Cure for Larger Illness*, CHI. TRIB., July 20, 1993, at 13. But when these children watch television, they see more violence, and "[t]his validates their experience." *Id.*

30. *Id.* *See* Brad J. Bushman & Russell G. Green, *Role of Cognitive-Emotional Mediators and Individual Differences in the Effects of Media Violence on Aggression*, 58 J. PERSONALITY & SOC. PSYCHOL. 156 (1990); L. Rowell Heusmann et al., *Mitigating the Imitation of Aggressive*

sor effect.³¹ After viewing repeated violence on television, children begin to believe that "aggression is an appropriate and expected behavior, the norm, the way to solve interpersonal problems, relieve frustrations and obtain material things."³² One study found that the frequency of an eight-year-old's television viewing was related to the seriousness of the crimes for which that person was convicted by the time he was thirty.³³ The continued viewing of television violence became a rehearsal of aggressive sequences.³⁴ "Thus, one who watches more aggressive sequences on television should have more aggressive strategies more strongly encoded and should respond more aggressively when presented with similar or relevant cues."³⁵

Some researchers claim that "reality-based" shows³⁶ and music videos broadcast on such networks as MTV³⁷ contain the most violence.³⁸ These programs portray disobedient and aggressive behaviors,³⁹

Behaviors by Changing Children's Attitudes about Media Violence, 44 J. PERSONALITY SOC. PSYCHOL. 899 (1983); Michael B. Rothenberg, *Effect of Television Violence on Children and Youth*, 234 JAMA 1043 (1975). *But see* Emily Campbell, Comment, *Television Violence: Social Science vs. The Law*, 10 LOY. ENT. L.J. 413, 419-436 (1990) (discussing the problems with the research in this area and criticizing the results).

31. Edward Donnerstein et al., *The Mass Media and Youth Aggression*, in VIOLENCE AND YOUTH, PSYCHOLOGY'S RESPONSE (forthcoming 1994, manuscript on file with author).

32. Eron, *supra* note 29. When children see characters on television solving their problems by behaving aggressively, they identify with the characters, "believe the aggression is realistic, [and] will fantasize about and encode in memory the aggressive solutions they observe." Donnerstein et al., *supra* note 31, at 12.

33. See Leonard D. Eron, *The Development of Aggressive Behavior From the Perspective of a Developing Behaviorism*, 42 AM. PSYCHOLOGIST 435, 440 (1987). Another study, conducted in South Africa after the introduction of television in 1976, revealed that a positive correlation exists between TV viewing and aggression in both girls and boys. L. Rowell Huesmann & Laurie S. Miller, *Long-Term Effects of Repeated Exposure to Media Violence in Childhood* 33-34 (Dec. 3, 1991) (on file with author). See Howe, *supra* note 9, at 71-101 (discussing other studies revealing similar findings).

34. Eron, *supra* note 33, at 440.

35. *Id.* It is important to note, however, that many children who continually watch violent television do not display patterns of aggressive behavior; numerous factors such as environment, culture, family, and cognitive differences mitigate such long-term effects. Huesmann & Miller, *supra* note 33, at 3. A majority of children who are raised in a loving atmosphere turn the aggressive drive into "normal ambition and competitiveness." Carole Lieberman, *Violence: Merely Entertaining or Mainly Evil?*, L.A. TIMES, May 25, 1992, at F3.

36. These shows are "based on actual news events, many of them involving re-enactments of real crimes or replays of actual violence captured on tape by amateur camcorder operators." Charles S. Clark, *TV Violence*, CQ RESEARCHER, March 26, 1993, at 167, 167. Examples of reality-based shows include *Top Cops*, *Hard Copy*, *A Current Affair*, and *I Witness Video*. *Id.*

37. MTV (Music Television) is a cable television network which primarily broadcasts music videos. It displays a variety of music, such as rock 'n roll, rap, heavy metal, pop, and alternative music.

38. Dietz & Strasburger, *supra* note 10, at 20 (raising concerns about violence in music videos).

39. Marilyn Elias, *Kids' Aggression Linked to TV—'Reality' Shows, MTV Blamed*, USA TODAY, May 24, 1993, at 1D.

that create a "pattern of domination, sexism, and inequality that colors viewers' perceptions of the real world."⁴⁰ A content analysis of music videos revealed that 56% contain violence, and that women comprise a substantial portion of the victims of that violence.⁴¹ Moreover, movies with sexually explicit scenes "may lead young men to reaffirm the all-too-common male attitude that when a woman says no she really means yes. Many experts believe that such films may be a contributing factor in date rape, one of the most common adolescent sexual crimes."⁴² Because they see women as the victims of violence on television so often, youths begin to think that sexual violence is permissible.⁴³

Other researchers assert that cartoons are the most violent programs.⁴⁴ Many low-quality cartoons (most of which promote themes of violence or war) are produced and designed primarily to market toys.⁴⁵ Even movies rated "R" (Restricted) for their violent content become part of children's culture when toy manufacturers market toys for children based on those movies' characters.⁴⁶

In a 1971 study commissioned by the Surgeon General, three-and-one-half- to five-and-one-half-year-old children viewed cartoons con-

40. Elizabeth F. Brown & William R. Hendee, *Adolescents and Their Music; Insights Into the Health of Adolescents*, 262 JAMA 1659, 1661 (1989).

41. Dietz & Strasburger, *supra* note 10, at 20. "To a young adolescent who is searching for information about relationships, sexual violence in popular films may be a potent source of influence on initial attitudes toward sexuality." Donnerstein et al., *supra* note 31, at 9. Throughout the mass media, "the idea that women derive pleasure from sexual abuse is . . . a recurring theme." *Id.*

42. Toufexis, *supra* note 7.

43. *Symposium*, *supra* note 2, at 22 (comments of Neil Hickey, citing research by Dr. Edward Donnerstein). See Donnerstein et al., *supra* note 31, at 9 (discussing the 1988 study of the effects of "slasher films" on young men, finding that those who viewed the films showed callousness towards female victims of violence, especially rape victims). See also GUY CUMBERBATCH & DENNIS HOWITT, A MEASURE OF UNCERTAINTY: THE EFFECTS OF THE MASS MEDIA 61-79 (1989) (discussing the research linking pornography and aggression).

44. One study uncovered 471 scenes of violence on one typical day of television programming. Hickey, *supra* note 27, at 2. Another study revealed that on Saturday morning cartoons, "children are exposed to a violent act every 47 seconds." Study on Television Violence 2 (Dec. 16, 1993) (unpublished Concordia College study, on file with the author) (quoting project coordinator Dr. Mark Covey). The results of this study included the finding that 10 of the top 15 most violent shows were Saturday morning children's programs. *Id.* at 7.

45. Dietz & Strasburger, *supra* note 10, at 12. These are known as "program length commercials" which are "designed to sell a toy rather than to educate or enrich the lives of children." *Id.* some examples are *G.I. Joe* and *The Teenage Mutant Ninja Turtles*.

46. Balcom, *supra* note 14. Examples of this include *Robocop* and *The Terminator*. "It may be artistically valid to make a movie about violent dinosaurs. But it's hypocritical and greedy of them to target young children via product tie-ins." Bernard Weinraub, *Real Danger From Dinosaurs Experts Assail Marketing Ploy Aimed at Children*, CLEVELAND PLAIN DEALER, June 15, 1993, at 11C (quoting Dr. Carole Lieberman). "The 'Jurassic Park' spinoffs include toys, plastic lunch boxes, pajamas, pillowcases, sleeping bags, temporary tattoos, cereals, masks, jawbreakers, stopwatches, underwear, walkie-talkies, 3-D books, paint-by-numbers sets, and gummy dinosaur candies." *Id.*

taining violence for a period of nine weeks.⁴⁷ These children "were subsequently more likely to hit other children, call people names, fail to obey classroom rules, and become impatient when they encountered minor frustrations," than the two other groups of children who watched non-violent cartoons.⁴⁸ These results lead to the conclusion that under some circumstances, exposure to television violence leads to subsequent aggressive behavior.⁴⁹ "The violent scenes that a child observes on television can serve to teach a child to be aggressive through several learning processes as the child not only observes aggressive patterns but also witnesses their acceptance and reinforcement."⁵⁰

2. VICTIM EFFECT

In addition to increasing viewers' violent behavior, television violence also changes viewers' attitudes towards the world.⁵¹ In what is known as the *victim effect*, a child fears becoming a victim of violence and as a result increases self-protective behavior and mistrust of others.⁵² In training children to become victims, television cultivates a sense of vulnerability, dependence, and need for protection.⁵³ Television violence can stimulate children to develop "a sense of pervasive insecurity [known as] 'the mean-world syndrome.'"⁵⁴ This occurs most

47. See SURGEON GENERAL'S SCIENTIFIC ADVISORY COMM. ON TELEVISION AND SOCIAL BEHAVIOR, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, *TELEVISION AND GROWING UP: THE IMPACT OF TELEVIEWED VIOLENCE* 67 (1972).

48. *Id.* at 68 n.1.

49. Donnerstein et al., *supra* note 31, at 4. See also Brandon S. Centerwall, *Television and Violence: The Scale of the Problem and Where to Go From Here*, 267 JAMA 3059, 3060 (1992) (discussing the 1973 study by Drs. Leslie A. Joy, Meredith M. Kimball, and Merle L. Zabrack in "Notel", Canada). In the "Notel" study, the researchers observed first- and second-grade students in a Canadian community (named "Notel" by the researchers), which had just acquired television for the first time, and compared them over a two year period to children of the same grade in two nearby communities that previously had television. *Id.* Rates of physical aggression increased by 160% in "Notel" but did not change significantly among children in the other communities. *Id.* This study suggests that the viewing of televised violence elevates the level of aggression in children.

50. Huesmann & Miller, *supra* note 33, at 35-36. See this article, for a complete analysis of television violence and aggressive behavior.

51. See *Hearings*, *supra* note 5, at 3 (statement of Dr. Edward Donnerstein).

52. *Id.* One teenager, who at 15 years old has already witnessed 3 of his friends' murders on the streets of the Bronx, N.Y., is "afraid of getting close to people . . . [because] they might die, too." Mark Gillispie, *Children Exposed to Violence Often Feel Helpless, Expert Says*, CLEVELAND PLAIN DEALER, Oct. 27, 1993, at 5A. Children exposed to violence "begin to feel they are more easily victimized" or they "become desensitized and mimic what they have seen." *Id.*

53. *Symposium*, *supra* note 2, at 6 (comments of George Gerbner).

54. *Id.* "[T]hose who watch more television are more likely . . . to express a feeling of living in the self-reinforcing cycle of a mean, dangerous, violent, and repressive world." *Hearings II*, *supra* note 11, at 5 (statement of Nancy Signorielli). In one study, researchers found that viewing television can lead to a heightened perception that the world is an evil and frightening place. See

often as a result of watching realistic adult-oriented crime dramas and other "reality-based" shows.⁵⁵ Researchers have found that the societal groups most vulnerable to the "victim effect" are children, old people, women, and some minorities, mainly due to the fact that most "Reality-based" shows portray these groups as the victims of most crimes and assaults.⁵⁶

3. BYSTANDER EFFECT

A third effect of television violence, known as the *bystander effect* or the *desensitization effect*, describes the viewer's increased callousness toward violence directed at others.⁵⁷ This indifference decreases the likelihood that the viewer will take action on behalf of a victim when he witnesses actual violence.⁵⁸ After repeated exposure to graphic media violence, viewers may become "comfortable" with the violent content, thereby reducing their level of anxiety toward it.⁵⁹ This causes viewers to perceive the content as less violent than they would have otherwise noted.⁶⁰ "These altered perceptual and affective reactions may then be carried over into judgments made about victims of violence in other more realistic settings."⁶¹

George Gerbner & Larry Gross, *Living with Television: The Violence Profile*, 26 J. COMM. 173, 193 (1976).

55. Linda Heath et al., *Effects of Media Violence on Children: A Review of the Literature*, 46 ARCH. GEN. PSYCHIATRY 376, 377 (1989). Although the majority of research in this area has been with adults, the research evidence indicates that "media violence frightens the children and distorts their perceptions of the world." *Id.* Studies show that the trauma of witnessing violence sends "powerful messages [to children] that the world is an essentially hostile and unpredictable place." Diane A. Butler, *Children Who Witness Violence*, 270 JAMA 941, 941 (Aug. 1993) (Letter to the Editor).

56. *Id.*

57. See *Hearings*, *supra* note 5, at 3 (statement of Dr. Edward Donnerstein).

58. *Id.* The viewer becomes an apathetic and "passive acceptor of violence." *Symposium*, *supra* note 2, at 6 (comments of Ronald Slaby).

59. Donnerstein et al., *supra* note 31, at 15. "After enough exposures the physiological signs of unpleasant emotions disappear and the viewer becomes relatively unaroused by violence." *Hearings II*, *supra* note 11, at 3 (statement of L. Rowell Huesmann).

60. Donnerstein et al., *supra* note 31, at 15.

61. *Id.* In one study on eight to ten-year-old children, researchers found that after being shown an excerpt from a violent police drama, the children were less aroused by scenes of real aggression than those who had previously watched a non-violent volleyball game. See Margaret H. Thomas et al., *Desensitization to Portrayals of Real-Life Aggression as a Function of Exposure to Television Violence*, 35 J. PERSONALITY SOC. PSYCHOL. 450 (1977); see also Ronald S. Drabman & Margaret H. Thomas, *Does Watching Violence on Television Cause Apathy?*, 57 PEDIATRICS 329 (1976) (showing fifth grade children who previously viewed a violent program were slower to summon help when witnessing actual aggression, than those who previously viewed a non-violent film).

4. SELF-SOCIALIZATION EFFECT AND IMITATION

Another significant effect of television violence is an increased appetite for becoming involved with violence or exposing oneself to the risk of violence. This is known as the *self-socialization effect*.⁶² Imitation violence⁶³ is the most frequent actualization of this effect. Young children perceive television as a "source of entirely factual information regarding how the world works."⁶⁴ As they grow older they begin to realize that television is not a true reflection of reality, but their early impressions of violence remain with them.⁶⁵

American children often identify themselves with television characters and superheroes, especially when they lack a same-sex role model in their lives.⁶⁶ Superheroes in animated cartoons and in action shows give children a sense of immortality because the heroes never die—"they take bullets, knifings, . . . torpedoes, and still stand up, brush themselves off and charge into the next scene."⁶⁷ One adolescent gunshot victim was surprised that his wound actually hurt. Researchers suggest that this "surprise" should be expected, because on television, when the hero gets shot in the arm, "he uses that arm to hold onto a truck going 85 miles an hour around a corner . . . , overcomes the driver, and shoots a couple of hundred people while he's at it."⁶⁸

When a child imitates the violence he sees on television, the consequences can be disastrous. In one case, a 5-year-old boy started a fire in his house, which resulted in the death of his 2-year-old sister. This happened after he repeatedly watched *Beavis and Butt-head*, a cartoon on MTV which features two characters who set things on fire for fun.⁶⁹ *Beavis and Butt-head* resemble everyday teenagers (more than most cartoon characters do) and are therefore, "potentially more influential."⁷⁰ It

62. Donnerstein et al., *supra* note 31, at 17.

63. Imitation violence occurs when one observes a violent act on television or in the movie theater and mimics, or tries to mimic, those actions exactly.

64. Centerwall, *supra* note 49, at 3059. "Whereas infants have an instinctive desire to imitate observed human behavior, they do not possess an instinct for gauging a priori whether a behavior ought to be imitated. They will imitate anything, including behaviors that most adults would regard as destructive and antisocial." *Id.*

65. *Id.*

66. *Hearings II*, *supra* note 11, at 2 (statement of M. Joycelyn Elders, U.S. Surgeon General). "[O]bservational learning is one of the most powerful mechanisms through which children acquire social skills and learn how to behave in society." *Id.* (statement of L. Rowell Huesmann).

67. Connie Schultz Gard, *Heroes Are Hard to Keep: Who Are They, and Why Do We Need Them?*, CLEVELAND PLAIN DEALER, July 4, 1993, at B19.

68. Clark, *supra* note 36, at 167 (quoting Dr. Deborah Prothrow-Stith).

69. Bob Greene, *Viewer See, Viewer Do*, CHI. TRIB., Oct. 24, 1993, at 1C.

70. John C. Bersia, *A Cartoon for Parents to Censor*, CHI. TRIB., Aug. 28, 1993, at 17N. Even though *Beavis and Butt-head* is a show aimed at older teens, pre-teens obviously also watch and their risk of duplication is higher. *Id.*

is difficult for younger children to distinguish between the characters' actions and reality, thus making it more likely that children will imitate them.⁷¹ These characters enjoy such activities as "sniffing paint thinner, tossing bugs and a mouse into a french-fry cooker at a fast food restaurant, calling a medical hotline to report a crack in Butt-head's rear end,"⁷² tossing firecrackers into toilet bowls, and spin-drying smelly dogs in the Maytag.⁷³ Most parents agree that teenage boys do not need this kind of encouragement—the only thing *Beavis and Butt-head* teaches them is how to act "loutish and oafish."⁷⁴

Another example of a child's imitation of media characters involves the Walt Disney Studios movie *The Program*.⁷⁵ In order to prove how tough they were, two teenage boys imitated a scene from the movie in which the football heroes lie down in the middle of a dark and busy roadway at night.⁷⁶ In the movie, the characters survived despite the cars speeding by, but in real life, a pickup truck hit the boys, instantaneously killing one and critically injuring the other.⁷⁷ Even more frightening is another real life story of a 13-year-old boy who murdered his friend's father by kicking, stabbing, beating, and choking him to death. When asked why he poured salt on the victim's wounds, the boy replied, "I just seen it on TV."⁷⁸ Although movies and television programs do not force people to reproduce foolish behavior, the fact remains that young people are inclined to mimic actions that appear "bold, heroic, [and] cool."⁷⁹

71. *See id.*

72. *Id.*

73. Stephen Williams, *Beavis, Butt-head and Beyond*, *NEWSDAY*, Oct. 21, 1993, at 72.

74. *See id.* Because of public outrage over the fire incident, MTV has moved *Beavis and Butt-head* to a later and more appropriate time slot (after 10 p.m.). *See* Brooks Boliek, *Copycat Issue Sure to Fuel Capital Debate*, *HOLLYWOOD REP.*, Oct. 20, 1993, at A6.

75. Touchstone Pictures, a division of the Walt Disney Studios, released this movie in September, 1993.

76. Michael D. Hinds, *Not Like the Movie: A Dare Leads to Death*, *N.Y. TIMES*, Oct. 19, 1993, at A1.

77. *Id.* Touchstone Pictures defended the scene in the film arguing that it "clearly depict[ed] this adolescent action as an irresponsible and dangerous stunt by a troubled and heavily intoxicated individual, and in no way advocates or encourages this type of behavior." *Id.* Disney subsequently excised the scene from the movie. Greene, *supra* note 68.

78. Clark, *supra* note 36, at 168-69. Other fatal imitations include a serial killer who killed his victim in the same manner as that shown in *Robocop*, *see* Karen Freifeld, *Tale of Death Suspect Says 'Robocop' Sparked Spree*, *NEWSDAY*, Aug. 6, 1992, at 3, and the "rash of Russian roulette fatalities . . . spurred by a depiction of the lethal game in the 1978 Vietnam War epic, 'The Deer Hunter,'" Steve Garbarino, *Do Movies, Music Trigger Violent Acts? Imitators Under the Influence of Art*, *NEWSDAY*, Aug. 10, 1992, at 38 (discussing of a variety of violent acts committed in imitation of mass media).

79. *A Make-Believe Prank Produces Tragic Results*, *SEATTLE TIMES*, Oct. 22, 1993, at B6.

B. *Television Violence Around the World*

Despite the tremendous amount of time, money, and effort spent on research and studies which prove the troublesome effects of television violence, the United States, a country which is internationally renowned for its concern for the welfare of its children, has not taken serious steps toward curbing televised violence or its effects. Most other countries carefully monitor the content of children's programming "to limit their exposure to themes felt to have an adverse effect on development."⁸⁰ In Japan,⁸¹ the frequency of televised violence is comparable to that in the United States; however, the Japanese portray the violence more realistically and tend to emphasize its consequences.⁸² The result is that Japanese children develop an aversion to violence, thereby reducing "the likelihood that violence will be the first strategy they adopt to resolve conflict."⁸³

The controversy concerning television violence in the United States has received international attention, and as a result, many other countries are beginning to address the issue. Germany, for example, is confronting the question of the amount of violence shown on its television programs.⁸⁴ In Great Britain, the kidnapping and murder of a 3-year-old by other children sparked a fierce debate over media violence.⁸⁵ A Colombian court recently ruled that "television violence contributes to real-life violence" and "banned graphic murders, armed assaults and car crashes from television programming before 10 p.m."⁸⁶

80. *Hearings II, supra* note 11, at 6 (statement of Dr. William H. Dietz). Canada, for example, restricts gratuitous and glamorized violence and limits violent programs to late evening hours. *TV Violence*, THE LEGAL INTELLIGENCER, Dec. 17, 1993, at 7.

81. Japan is the only country whose citizens watch more television than those of the United States. *Symposium, supra* note 2, at 8 (comments of John Leonard).

82. *See id.* at 9 (comments of George Gerbner). There is a difference between "good violence" (which the Japanese use) and "bad violence." Viewers can learn from "good violence" when "it is embedded in a meaningful context, portrayed as a last resort for heroes who have used their wits when encountering danger, depicted as a socially undesirable and unglamorous option, or when the tragic physical and psychological consequences to the perpetrators, victims and witnesses are shown." Suzanne Stutman, Address to the Industry Presented at The Industry-Wide Leadership Conference on Violence in Television Programming 2 (Aug. 2, 1993) (transcript available from the Institute for Mental Health Initiatives). "Bad violence," on the other hand, does not portray the consequences of violence, and rewards the actor for his effectiveness. *Hearings II, supra* note 11, at 2-3 (statement of Dr. William H. Dietz).

83. *Hearings II, supra* note 11, at 6 (statement of Dr. William H. Dietz). "Japanese violence, unlike ours, is not happy violence; it's painful, it's awful, and it teaches a very different lesson." *Symposium, supra* note 2, at 9 (comments of George Gerbner).

84. *See* Don Groves, *Film Censorship Fades Society's Desire to Make Own Choices Bringing About A General Liberalization*, STAR TRIB., Oct. 30, 1993, at 4E.

85. *Id.*

86. *Violence on TV Enrages Colombians*, CLEVELAND PLAIN DEALER, Aug. 28, 1993, at 4C. A survey conducted by Javeriana University found that "Colombian television portrays 6.7 violent acts an hour, compared to 32 violent acts an hour in the United States." *Id.*

It is important to note that television and film producers market a majority of American television series and motion pictures internationally.⁸⁷ Foreign countries provide more than half of the total revenue from these programs and movies.⁸⁸ Because humor is culture-bound and needs translation, it does not travel as well as violence which needs no explanation.⁸⁹ "It has some kind of inner relevance to human interests, and therefore from the point of view of global marketing, is an excellent commodity and highly profitable."⁹⁰

Apparently, the "specific needs of the child-viewer are being left behind in the wake of technological growth and marketplace demands."⁹¹ During the formative years between birth and age three, a child learns "that every action has a consequence, be it reward or punishment."⁹² Television teaches children that violence is a way to solve problems;⁹³ the effects that this lesson may have on children's mental and physical health are intolerable. In a letter to Attorney General Janet Reno, an elementary school girl pleaded very simply, "Dear Miss Reno, I don't like violence on TV. It makes me feel rotten. How can you help me?"⁹⁴

III. THE FIRST AMENDMENT BARS CIVIL LIABILITY FOR THE ENTERTAINMENT INDUSTRY

Is it reasonable to hold fictional characters responsible for the mishaps which occur when children imitate the behavior and actions they see in a movie or television show? Some victims have attempted to hold the programmers liable by what some call the "blame-the-messenger syndrome" but so far the courts have not allowed it.⁹⁵ Even though the media recognizes its power to influence people, it cannot be held legally liable for "the independent, foolish acts of others."⁹⁶ Nevertheless, plaintiffs continue to sue broadcasters of violence based on negligence

87. *Symposium, supra* note 2, at 13 (comments of George Gerbner).

88. *Id.*

89. *Id.*

90. *Id.*

91. Henry John Uscinski, Comment, *Deregulating Commercial Television: Will the Marketplace Watch Out for Children?*, 34 AM. U. L. REV. 141, 173 (1984).

92. Indira A.R. Lakshmanan, *Programs Teach Morals To Very Young*, BOSTON GLOBE, Aug. 18, 1993, at Metro 1.

93. Sandra Lish, *Bang Bang You're Dead. Is Playtime Over?*, LESLEY MAG., Winter 1993, at 10 (quoting Boston Police Superintendent Joseph Carter).

94. *Hearings, supra* note 5, at 8 (statement of Janet Reno, U.S. Attorney General).

95. See Tony Mauro, *Can't Hold Media Liable, But Litigants Still Trying*, CHI. TRIB., Oct. 21, 1993, at 2A.

96. *Id.* (quoting media lawyer Bruce Sanford).

theories.⁹⁷ Although social scientists' research tends to prove that watching televised violence leads to subsequent violent or imitative acts, the law must take a different view.⁹⁸ "Courts have and should continue to find the results of research to be incompatible with legal concepts of foreseeability and incitement, and should continue to protect the first amendment rights of the broadcasters to transmit such information and the rights of the public to receive that information."⁹⁹

In *Zamora v. CBS*,¹⁰⁰ a fifteen-year-old boy sued CBS, NBC, and ABC for damages, claiming that he became "involuntarily addicted to and 'completely subliminally intoxicated' by the extensive viewing of television violence."¹⁰¹ Zamora maintained that this desensitization to violent behavior led him to murder his 83-year-old neighbor.¹⁰² The court refused to impose liability on the broadcasters because of the negative impact that such an imposition would have on the exercise of their First Amendment rights.¹⁰³ The court recognized that it lacked "the legal and institutional capacity to identify isolated depictions of violence, let alone the ability to set the standard for media dissemination of items containing 'violence' in one form or another."¹⁰⁴

The court also acknowledged that the only way the government will assert power over the First Amendment rights of journalists and broadcasters is if the interests of the public outweigh those rights.¹⁰⁵ The public interest includes the right to receive a variety of programs free of government censorship.¹⁰⁶ The imposition of liability on the broadcasters would place them at risk for televising "Hamlet, Julius Caesar, Grimm's Fairy Tales, . . . The Holocaust, and indeed would render John Wayne a risk not acceptable to any but the boldest broadcasters. . . . The First Amendment casts a 'heavy burden' on those who seek to

97. Campbell, *supra* note 30, at 416. See also *id.* at 441-44 (discussing negligence claims in this area).

98. *Id.* at 416-17.

99. *Id.* at 417. It would be "misleading for juries to have social science experts testify that viewing violence leads to aggressive behavior, when the type of behaviors studied in a controlled environment are different from those in the cases presented before the courts." *Id.* at 449.

100. 480 F. Supp. 199 (S.D. Fla. 1979).

101. *Id.* at 200.

102. *Id.* The criminal court had already convicted Zamora for murder, so his civil complaint included the fact that he was deprived of his liberty and imprisoned. *Id.*

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

104. *Id.* "It was the judgment of the authors of the Constitution that society's best interests would be served by free expression, not limited by punishment or other sanction . . ." *Id.* at 204.

105. *Id.* at 205 (citing *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973)). "[T]he right of the public to have broad access to programming and the right of the broadcaster to disseminate should not be inhibited by those members of the public who are particularly sensitive or insensitive." *Id.*

106. See *id.*

censor."¹⁰⁷

Similarly, in *DeFilippo v. NBC*,¹⁰⁸ the Supreme Court of Rhode Island held that the First Amendment barred suit against the broadcaster when the plaintiff's thirteen-year-old son hanged himself after watching a stuntman "hang" Johnny Carson (who survived) on *The Tonight Show*.¹⁰⁹ Allowing plaintiffs to recover in such actions would have a chilling effect on the First Amendment,¹¹⁰ and would eventually lead broadcasters to self-censor their programs.¹¹¹ This would "depriv[e] both broadcasters and viewers of freedom and choice, for 'above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.'"¹¹²

The Florida Supreme Court likewise held, in *Sakon v. Pepsico, Inc.*,¹¹³ that a television advertiser, whose commercial portrayed people engaging in dangerous sports, could not be liable for the unforeseeable actions of a fourteen-year-old boy who tried to imitate the stunt.¹¹⁴ "The logical corollary to recovery in this case would be that advertisers and broadcasters would be subject to liability because children sought to duplicate acts of violence which they saw on television. There would be a total absence of any standard to measure liability."¹¹⁵ As in *Zamora* and *DeFilippo*, the court noted that recognizing liability against broadcasters would compel courts to examine the content of media broadcasts, implicating First Amendment concerns.¹¹⁶

107. *Id.* at 206.

108. 446 A.2d 1036 (R.I. 1982).

109. *Id.* at 1037. The stuntman explicitly warned the audience not to try the stunt at home. *Id.* No one else besides the DeFilippo's son was alleged to have imitated the stunt performed on the show. *Id.* at 1041.

110. In cases such as this, plaintiffs allege that the broadcaster "should have reasonably known that such imitation would occur, and therefore should never have depicted the act, even when accompanied by an express warning to the speech recipients against imitation." Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting From Media Speech: A Comprehensive First Amendment Approach*, 34 ARIZ. L. REV. 232, 244 (1992).

111. *DeFilippo*, 446 A.2d at 1041. Permitting recovery in cases like this would compel broadcasters to censor themselves, meaning they would delete any matter from a program that could lead to a law suit. *Id.*

112. *Id.* at 1042 (citing *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). Self-censorship deprives broadcasters of their right to make their own broadcasting decisions. *Id.* at 1041 (citing *Writers Guild v. FCC*, 423 F. Supp. 1064, 1154 (C.D. Cal. 1976), *vacated sub nom. Writers Guild v. ABC*, 609 F.2d 355 (9th Cir. 1979)).

113. 553 So. 2d 163 (Fla. 1989).

114. *See id.* at 166. A commercial for Mountain Dew soda portrayed young people "lake jumping" (riding bicycles down an embankment over water, and landing safely in the water). *Id.* at 164. The fourteen-year-old plaintiff who attempted to emulate the commercial landed head first in a three-foot-deep creek, breaking his neck in the fall. *Id.*

115. *Id.* at 166.

116. *See id.* at 165.

A California court, in *Olivia N. v. NBC*,¹¹⁷ reacted similarly to a suit charging NBC with negligence for its broadcast of the film *Born Innocent*.¹¹⁸ A group of girls attacked and forcibly "artificially raped" the nine-year-old plaintiff with a bottle, after viewing and discussing a scene in the film where four girls artificially rape another girl in a shower room using the handle of a plunger.¹¹⁹ In rejecting the plaintiff's negligence theory asserted against the television broadcaster, the court addressed the effects that imposing liability would have on the networks. The fear of damage awards to plaintiffs would lead to self-censorship that "would dampen the vigor and limit the variety of public debate."¹²⁰ It would significantly limit the selection of controversial subjects and materials to be televised.¹²¹ "[T]he effect of the imposition of liability could reduce the U. S. adult population to viewing only what is fit for children."¹²²

The only way courts could hold broadcasters liable for tragedies such as these is if the programs *urged* or *incited* the viewer to imitate the activity. Incitement is an unprotected class of speech¹²³ that a state may punish or prevent. Other types of unprotected speech include obscenity,¹²⁴ fighting words,¹²⁵ profanity, and libel and slander.¹²⁶ While the programs discussed above, including *Beavis and Butthead*¹²⁷ and the scene from *the Program*¹²⁸ exhibit violent acts, none of them, in any way "exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of viewers."¹²⁹ Indeed, the commercial in *Sakon* never suggested that a viewer attempt lake jumping,¹³⁰

117. 178 Cal. Rptr. 888 (Cal. Ct. App. 1981), *cert. denied*, 458 U.S. 1108 (1982).

118. *See id.* at 891.

119. *Id.*

120. *Id.* at 892. A television station could be liable even "when a child imitates activities portrayed in a news program or documentary." *Id.* at 893.

121. *Id.* at 892.

122. *Id.* at 893 (citing *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

123. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"). Speech is not automatically unprotected, however, merely because it has a "tendency to lead to violence." *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (*per curiam*).

124. *See Miller v. California*, 413 U.S. 15, 36 (1973).

125. *See Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

126. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-50 (1974).

127. *See discussion, supra*, text accompanying notes 68-74.

128. *See discussion, supra*, text accompanying notes 75-77.

129. *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989). In *Yakubowicz*, the court denied liability for the wrongful death of a sixteen-year-old boy who was murdered by another teenager who had just seen, and allegedly was imitating, the gang violence in the movie *The Warriors*. *See id.* at 1068-70.

130. *See Sakon v. Pepsico, Inc.*, 553 So. 2d 163, 167 (Fla. 1989).

and in *DeFilippo*, the stuntman explicitly stressed the dangerousness of the stunt.¹³¹ The *DeFilippo* court was especially troubled by the fact that incitement is difficult to measure precisely.¹³² The stuntman's warnings may have deterred others, but the young DeFilippo boy nevertheless attempted the stunt himself.¹³³ Thus, absent an actual call to action, courts will likely continue to reject the incitement theory of liability for broadcasters and publishers under First Amendment principles.¹³⁴

Most courts agree that in a free and democratic society, it is unacceptable

to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. Such a burden would quickly have the effect of reducing and limiting artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense, provocation and controversy.¹³⁵

Unfortunately, some people, notably young children, react violently to television programs, movies, music, or other forms of expression.¹³⁶ It is typically impossible "to predict what particular expression will cause such a reaction, and under what circumstances."¹³⁷ It is therefore unlikely that courts will ever hold broadcasters liable for the valid exercise of their First Amendment rights. The Constitution protects ideas not because they are harmless; "[t]hey may in fact be extremely dangerous, but we put up with them."¹³⁸

131. *DeFilippo v. NBC*, 446 A.2d 1036, 1041 (R.I. 1982).

132. *See id.*

133. *Id.* *See also* *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). In *Herceg*, a fourteen-year-old boy attempted autoerotic asphyxia (hanging oneself while masturbating "to temporarily cut off the blood supply to the brain at the moment of orgasm") after reading a *Hustler* article describing the practice, despite numerous conspicuous warnings in the article. *Id.* at 1018-19. The boy died in the attempt, but the *Herceg* court refused to impose civil liability. The court acknowledged that if the First Amendment's shield "can be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can be identified as 'bad,' all free speech becomes threatened." *Id.* at 1024.

134. *See* *Watters v. TSR, Inc.*, 904 F.2d 378, 382 (6th Cir. 1990) (holding manufacturer of *Dungeons & Dragons* game owed no duty to warn of dangers of the game and was not liable for the unforeseeable suicide of an adolescent who was an avid player and became so absorbed by the game that he lost touch with reality); *McCollum v. CBS*, 249 Cal. Rptr. 187, 188-89, 193 (Cal. Ct. App. 1988) (holding performer and record producer were not liable for nineteen-year-old's suicide committed after listening to *Ozzy Osbourne's* song *Suicide Solution* where the goal of Osbourne's music was not to directly or intentionally bring about the suicide of listeners, nor was it a foreseeable result).

135. *McCollum*, 249 Cal. Rptr. at 197.

136. *See* *Bill v. Superior Ct. for San Francisco*, 187 Cal. Rptr. 625, 629 (Cal. Ct. App. 1982).

137. *Id.*

138. *Mauro*, *supra* note 95 (quoting attorney Jonathan Hoffman).

Nevertheless, many people are refusing to tolerate the results of dangerous speech, particularly the violent effects it is having on the children of America. It is unavailing for citizens to complain about excessive television violence to the FCC because it has no authority to act on these complaints; stated simply, "there is no prohibition against violence."¹³⁹ The FCC, however, may entertain a complaint that a station broadcasts indecent material, because there is a statute prohibiting indecency.¹⁴⁰ Unlike indecency and obscenity, the First Amendment protects violent speech, "as opposed to speech designed to incite violence."¹⁴¹ Because courts continue to refuse to impose liability on broadcasters, and the FCC is powerless to do so, Americans are turning to their legislators to take action. The government, in turn, is looking to the entertainment industry, urging broadcasters either to regulate themselves or face government legislation.¹⁴² Clearly, some method of controlling television violence must be found.¹⁴³

IV. SELF-REGULATION—IS IT WORKING?

A free society should be able to solve its problems without government censorship, thus, industry self-regulation is preferred over any government involvement.¹⁴⁴ The Television Program Improvement Act of 1990,¹⁴⁵ sponsored by Senator Paul Simon, granted the industry a three-year exemption from the antitrust laws to enable networks and other representatives from the industry to get together and establish standards on the broadcast of violence.¹⁴⁶ That exemption expired in December 1993 after the industry accomplished many important goals.

A. *Standards for the Depiction of Violence in Television Programming*

The industry's first undertaking led to the development of joint standards concerning the depiction of television violence, released in December, 1992.¹⁴⁷ These standards stressed each "[n]etwork's long-

139. CONSUMER ASSISTANCE & SMALL BUS. DIV., FCC, FACT SHEET: HOW TO FILE A COMPLAINT AGAINST A BROADCASTER 1 (1990).

140. *Id.*

141. Jack Sweet, *Industry Wins Suit*, VIDEO STORE, Aug. 1991, at 28.

142. *See Hearings II, supra* note 11 (statement of Senator Paul Simon).

143. *See, e.g.,* Olivia N. v. NBC, 178 Cal. Rptr. 888, 894 (Cal. Ct. App. 1981), *cert. denied*, 458 U.S. 1108 (1982).

144. *See Hearings II, supra* note 11 (statement of Sen. Paul Simon).

145. Codified at 47 U.S.C.A. § 303 (West 1994).

146. *Id.* at § 303(c). *See Hearings II, supra* note 11 (statement of Sen. Paul Simon).

147. ABC, CBS, NBC, and Turner Broadcasting endorsed these joint standards. *See Hearings II, supra* note 11 (statement of Thomas S. Murphy, Chairman of the Board, Capital Cities/ABC, Inc.).

standing pre-existing policies on violence."¹⁴⁸ Each network already has its own self-enforcing standards department which reviews, evaluates, and forms judgments on the acceptability of programming content.¹⁴⁹ The standards provide a broad framework within which each network exercises its own judgment.¹⁵⁰ The industry's standards include: the intolerance for gratuitous or glamorized violence and excessive graphic depictions of violence; a "reasonableness" standard of intensity and frequency of the use of force; the avoidance of instructive or easily imitable scenes (i.e., those describing easily imitated techniques for the commission of a crime or the use of weapons); the portrayal of the consequences of violence to its victims; the avoidance of unduly frightening realistic portrayals of violence in programs designed for children; the humane treatment of real animals; the use of extreme caution in themes or plots which mix sex and violence; and the use of prudence in the scheduling of programs, taking into consideration content and the likely composition of the intended audience.¹⁵¹ These guidelines "perform the function that an air bag does in a car: Reduce the potential impact to the psyches of American youths which scenes of reckless violence might injure."¹⁵²

Unfortunately, only the broadcast networks have endorsed the joint standards. In order for them to be effective, cable television, independent television stations, the Hollywood studios, and the independent production community must all participate as well.¹⁵³ In fact, most cable television broadcasters do not have their own standards and practices departments. Thus, much of the violent programming that appears on these stations is broadcast unedited.¹⁵⁴ One researcher found that cable-oriented dramatic programs are more likely to be violent than prime-

148. *Standards for the Depiction of Violence in Television Programs* 1 (Dec. 1992) [hereinafter *Standards*] (Press Release on file with the author).

149. ABC, for instance, has a special division called the Department of Broadcast Standards and Practices, headed by a Vice President of the Corporation, which employs 21 professionals who work with the production staff to review, evaluate, and edit all entertainment programming, network promotions, and commercials. *Hearings II*, *supra* note 11, at 4 (statement of Thomas S. Murphy, Chairman of the Board, Capital Cities/ABC, Inc.). They evaluate various elements of programs including "language, theme, treatment of racial, ethnic or minority groups, sexuality, gender, general taste and appropriateness, and of course, violence." *Id.*

150. The net effect of the guidelines will be a strengthening of each network's individual standards. *See* PUB. BROADCASTING REP., Dec. 17, 1992 (citing Sen. Paul Simon).

151. *See Standards*, *supra* note 148, at 2-3.

152. Victoria A. Brownworth, *Turn Off TV Violence, Simon Says No: Disputing the Evidence That Youth Crime Is as Epidemic on the Streets as It Is on the Tube*, PHILADELPHIA INQUIRER, Dec. 30, 1992, at A7. These standards have only a slight effect on programming because they merely affirm and uphold the networks' previously instilled regulations from their own standards and practices departments. *See Standards*, *supra* note 147, at 1.

153. *See Hearings II*, *supra* note 11, at 5 (statement of Thomas S. Murphy, Chairman of the Board, Capital Cities/ABC, Inc.).

154. *Symposium*, *supra* note 2, at 8 (comments of Neil Hickey).

time broadcast network programs.¹⁵⁵ Viewers are therefore unprotected from violent television when they stray from the basic network stations. Unless all television stations comply with the standards, they will be only partially effective.

B. *Cable Industry Policy Statement*

After the cable industry recognized its importance in supporting a reduction of television violence, it published a policy statement regarding television violence on January 27, 1993.¹⁵⁶ This statement maintains that the "depiction of violence is a legitimate, dramatic and journalistic representation of an unavoidable part of human existence,"¹⁵⁷ but professes that the use of gratuitous violence is not only harmful to the industry, but to society as well.¹⁵⁸ It therefore discourages gratuitous violence and encourages all members of the industry to "strive to reduce the frequency of such exploitive uses of violence while preserving [the industry's] right to show programs that convey the real meaning and consequences of violent behavior." The practical impact of the cable industry's policy statement was minimal; however, it communicated the cable industry's intention to attempt an improvement.¹⁵⁹

C. *The Advance Parental Advisory Plan*

A significant achievement during the exemption period was the formation of the *Advance Parental Advisory Plan*, on June 30, 1993.¹⁶⁰ The four major networks, ABC, CBS, NBC, and FOX adopted this proposal to increase parents' awareness and to disseminate information regarding the violent content of television programs.¹⁶¹ These networks

155. See George Gerbner, *Violence in Cable-Oriented Television Programs: A Report to the National Cable Television Association 5* (Jan. 27, 1993) (Independent study released by the NCTA). "Cable-oriented children's programs[, however,] were less likely to contain violence than those produced by broadcast networks." *Id.*

156. National Cable Television Association, *Cable Industry Policy Statement Regarding Television Violence* (Jan. 27, 1993) [hereinafter *Cable*] (Press Release available from NCTA).

157. *Id.* Under ABC standards, the "[p]roducers and writers must establish that the depiction of violent acts is essential to illustrate a story theme, to portray a character trait, or to convey the day-to-day experiences of a character, such as a police officer, boxer, or gang member." *Hearings II, supra* note 11, at 2 (statement of Thomas S. Murphy, Chairman of the Board, Capital Cities/ABC, Inc.).

158. *Cable, supra* note 156.

159. *Id.* "Viewers must be shown the detrimental effects of violence — whether through the imprisonment of a violent character, the break-up of a family, or the disruption of a neighborhood, school, or home." *Hearings II, supra* note 11, at 2 (statement of Thomas S. Murphy, Chairman of the Board, Capital Cities/ABC, Inc.).

160. *Advance Parental Advisory Plan: A Four-Network Proposal for a Two-Year Test* (June 30, 1993) [hereinafter *Plan*].

161. *Id.* at 1.

agreed to place cautionary advisories on programs when "the graphic nature of the violent content, or the tone, message or mood of the program make it appropriate."¹⁶² The plan allows each network to use its own discretion in evaluating which programs receive advisories by considering factors such as the "context of the violent depiction, the composition of the intended audience and the time period of broadcast."¹⁶³ By providing parents with adequate and timely information about the violent material in the programs, the advisories allow parents to better supervise their children's television viewing, and to make responsible decisions about programs which may be inappropriate for their children.¹⁶⁴ Thus, the plan recognized the "dual responsibility between program distributors and parents."¹⁶⁵

When a network uses an advisory on a specific program, all promotional material relating to that program, including press releases, on-air promotions, and print advertisements will include the advisory; it may even reappear during the broadcast of the program.¹⁶⁶ To promote consistent television programming, the networks called upon their competitors (broadcast syndicators and cable operators) to adopt the plan, and promised to help anyone with its implementation.¹⁶⁷ The advisory plan became effective starting with the 1993-94 television season.¹⁶⁸ Networks will abide by the plan for two years, at the end of which they will evaluate its effectiveness, consider any proposed changes, and determine whether to continue its use.¹⁶⁹ By the end of July, 1993, fifteen cable networks that produce original programming endorsed the *Advance Parental Advisory Plan*.¹⁷⁰

162. *Id.* at 2. For example, an oral and written advisory appears before the program and during the promotions for ABC's *NYPD Blue*. Because the show contains adult language and violence, the advisory states that viewer discretion is advised.

163. *Id.* at 2.

164. *Id.* at 1. The networks continue to affirm their commitment to the creation of dramatic content and the realistic portrayal of the human condition without the unnecessary insertion of gratuitous violence. *See id.*

165. *Hearings II, supra* note 11, at 6 (statement of Peter Tortorici, Executive Vice President, CBS Entertainment).

166. *See Plan, supra* note 160, at 2. Even *TV Guide* includes a warning in the listing of the program. For example, under the listing for *NYPD Blue* it cautions, "ABC is advising viewer discretion." *See, e.g., TV GUIDE*, Mar. 26-Apr. 1, 1994, at 134.

167. *See Hearings II, supra* note 11, at 4 (statement of Peter Tortorici, Executive Vice President, CBS Entertainment).

168. *Plan, supra* note 160. It began with movies, mini-series, and specials in September 1993, while "[s]eries programs, which involve more difficult production and program review timetables, [were phased] in during the 1993-94 season." *Id.*

169. *See id.* Factors the networks will consider in determining whether to continue its use include the plan's adoption and usage by competing television distributors, and the reactions of viewers, advertisers, producers, and affiliates. *Id.*

170. *Cable, supra* note 156. These networks include Arts and Entertainment, Comedy Central, The Disney Channel, The Family Channel, Home Box Office, Lifetime, Nickelodeon, Nick-at-

Parental advisories will provide concerned parents with a tool they can use to shield children from the violent content of certain programs.¹⁷¹ One broadcaster claims that the advisory plan is superior to other types of rating systems, including the "V" rating system,¹⁷² because it provides parents with more information, and it avoids any "unintended and potentially adverse consequences" associated with a "V" rating system.¹⁷³

The *Advance Parental Advisory Plan* by itself, however, is an "incomplete and ineffective solution to the problem" of television violence.¹⁷⁴ First, each network decides what is or is not violent and each network monitors itself.¹⁷⁵ Second, parents cannot always physically supervise their children, who, when unsupervised, "will frequently do the exact opposite of what their parents would want them to do."¹⁷⁶ Thus, an advisory might be counter-productive and may actually cause the child to sit down and watch the program.¹⁷⁷ Furthermore, while the advisories identify violent programming, they do nothing to reduce the amount of violence on television—which is the heart of the problem.¹⁷⁸ Finally, the advisory plan agreement does not cover children's programming, nor does it affect cable television or independent stations unless they expressly endorse the plan.¹⁷⁹ Therefore, while the industry celebrates the plan as a giant step in the right direction, many commentators

Nite, Showtime, TNT, USA Networks, The Discovery Channel, The Learning Channel, MTV Networks, and all of Turner Entertainment Networks. Letter from Winston H. Cox, Chairman, Satellite Network Programmers Committee, National Cable Television Association, to Sen. Paul Simon (July 28, 1993) (on file with the author).

171. *Hearings II*, *supra* note 11, at 1 (statement of Thomas S. Murphy, Chairman of the Board, Capital Cities/ABC, Inc.).

172. A "V" rating is a general rating for Violence. See discussion *infra* part V.A.3.b.

173. *Hearings II*, *supra* note 11, at 1 (statement of Warren Littlefield, President of Entertainment, NBC).

174. *Id.* at 6 (statement of Robert E. McAfee, President-Elect, American Medical Association).

175. See *id.* "This may or may not prove to yield an appropriate measuring-stick as far as the identification of violent programming is concerned." *Id.*

176. *Id.* "Two income families are now the norm, and more often than not, children watch television when there is no parental supervision available." *Id.* (statement of Representative Dan Glickman). When parents forbid their children from watching certain programs, the children will simply watch them at a friend's house. Diana M. Zuckerman & Barry S. Zuckerman, *Television's Impact on Children*, 75 *PEDIATRICS* 233, 238 (1985).

177. *Hearings II*, *supra* note 11, at 6 (statement of Robert E. McAfee, President-Elect, American Medical Association). The *Advance Parental Advisory Plan* envisions an ideal world where "parents and children . . . sit together and watch TV, with the parent exerting mature and appropriate influence in guiding the child's viewing behaviors. . . ." *Id.* Yet this is not an ideal world, and parents often watch television in one room while the children watch in another. *Id.*

178. *Id.*

179. See *Networks Will Broadcast Parental Advisories Prior to Airing Certain Violent Programs*, 15 *ENT. L. REP.* 27 (1993).

feel it is merely a gesture with no genuine effect.¹⁸⁰ Yet at least one commentator suggests that the industry's voluntary actions in instituting such a plan are still preferable to government-mandated labeling, scheduling, and censoring.¹⁸¹

D. *Independent Monitoring System*

In a monumental and unprecedented decision, ABC, NBC, CBS, FOX, and some cable networks such as HBO and Showtime agreed to sponsor an independent monitor to evaluate and assess the levels of violence in television programming.¹⁸² This monitoring system will not quantify actions as violent without regard to context.¹⁸³ On the contrary, it will use a *qualitative* system, assessing violence within the context of the program.¹⁸⁴ Furthermore, every year the networks will publicly report the assessments, hoping that the threat of negative reactions from advertisers and viewers will keep each network from broadcasting excessive violence.¹⁸⁵

This is an incredible change of attitude on the part of the networks who have strenuously maintained that their own standards and practices departments do the job satisfactorily.¹⁸⁶ The cable industry's initiative goes even further than the broadcast networks' initiative, because the cable industry agreed to rate its programs for violence and to endorse lock-out technology.¹⁸⁷ The networks refuse to accept either a rating system or a blocking system because they fear that advertisers will not

180. See, e.g., Mortimer B. Zuckerman, *The Victims of TV Violence*, U.S. NEWS & WORLD REP., Aug. 2, 1993, at 64.

181. *Fair Warning on Violence*, MIAMI HERALD, July 1, 1993, at A24.

182. Marc Gunther, *Deal Made to Track TV Gore*, MIAMI HERALD, Feb. 1, 1994, at 4A. The broadcast networks have not yet decided who will govern the system and how it will work, but it is not likely they will use the same monitor as the cable industry. Ellen Edwards, *TV Networks Agree to Use of Monitor Outsider to Review Program Violence*, WASH. POST, Jan. 22, 1994, at A1.

183. See Ellen Edwards, *Networks Back Monitor For Violence*, MIAMI HERALD, Jan. 22, 1994, at 14A. In a quantitative system, assessors simply count violent actions, which means that cartoons and police shows are rated equally. *Id.* Thus, in a quantitative system, there is no difference between Jerry dropping a piano on top of Tom in the cartoon *Tom and Jerry* and a burglar shooting an innocent bystander in a police drama.

184. *Id.* Thus, the assessment will "go beyond the highly publicized violence 'counts' that fail to distinguish between gunshots, car crashes, punches, slaps or threats of violence." Gunther, *supra* note 182.

185. See Edwards, *supra* note 183.

186. *Id.*

187. Daniel Cerone & Jube Shiver, Jr., *Cable, Networks Offer Different Violence Plans*, L.A. TIMES, Feb. 2, 1994, at D3. See *infra* part V.A.3. for a complete discussion on the lock-out technology. There is still a dispute about the precise definition of violence, including the question of whether to include cartoons and historical shows in the definition. See Randolph E. Schmid, *TV Industry Takes Steps to Monitor Violence*, BOSTON GLOBE, Feb. 2, 1994, at 68. But once the cable networks establish this rating system, "each channel will apply it to its own programs, with

support programs with high violence ratings.¹⁸⁸ Nevertheless, because the networks have accepted this monitoring system, Senator Paul Simon (who sponsored the industry's three-year antitrust exemption, and has been pushing for legislation in this area) no longer sees the need for legislation.¹⁸⁹ The monitoring system will accomplish the goal of reducing televised violence by providing viewers with information they need to avoid programs which they themselves deem overly violent.¹⁹⁰

E. How "Voluntary" Are These Measures?

Because the networks have taken these steps voluntarily, most people would agree that their First Amendment rights have not been infringed. On the surface, these actions appear to have been initiated, by the industry; in fact, however, Congress has pressured broadcasters into creating these policies. While the monitoring system allows *independent* assessors to evaluate program content, eventually, after the reports are publicized, networks will begin to self-censor violent scenes, or any other scenes the monitor may deem unacceptable or controversial.

In an analogous situation in 1976, a federal court in California put an end to the "Family Viewing Hour"¹⁹¹ which the industry had "voluntarily" implemented because of the public outcry against excessive violence on television.¹⁹² The court held that the FCC exerted improper pressure on the industry which deprived the individual licensees of their right and duty to make independent decisions.¹⁹³ The court realized that the steps taken by the networks were not completely voluntary because of the pressure the FCC had placed on them. Therefore, the Family Viewing Hour was an improper government intrusion into the broadcasters' First Amendment rights.¹⁹⁴

an outside monitoring group periodically reporting on compliance." *Id.* (quoting Winston H. Cox, President of Showtime Network).

188. See Cerone & Shiver, *supra* note 187. The director of research for Mediascope (a non-profit organization working to reduce violent programming) recognized that cable networks can more easily accept a blocking device because "they are narrowcasters and the networks are broadcasting. . . . In other words, the networks want the widest possible audience, so there are financial disincentives to lose any segment of your audience." *Id.* (quoting media researcher Joel Federman).

189. See Gunther, *supra* note 182.

190. See *id.*

191. The purpose of Family Viewing Hour was to "limit the quantity of sex and violence that was aired." Campbell, *supra* note 30, at 458.

192. See *Writers Guild v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated sub nom. Writers Guild v. ABC*, 609 F.2d 355 (9th Cir. 1979). *Writers Guild* was vacated on jurisdictional grounds and remanded to receive review in administrative proceedings before the FCC.

193. *Id.* at 1150. After congressional hearings and public debates on the issue of the impact of sex and violence on television, the FCC pressured the networks to adopt a system of self-regulation. See *id.* at 1095-96.

194. See *id.* at 1150-51.

Currently, Congress is threatening to legislate unless the industry voluntarily implements practices which accomplish the same goals that government mandates would accomplish. Attorney General Janet Reno warned television industry executives that they "must voluntarily reduce violence or 'government action will be imperative.'"¹⁹⁵ Under the threat of legislation, the industry is instituting the monitoring system, which appeases legislators and parents alike. A court today might find that the same unconstitutional government pressure exerted by the FCC with the "Family Viewing Hour" is being applied to the television industry now. Therefore, the government's insistence on voluntary industry action, may be counter-productive because a court can find that the industry did not take the actions voluntarily.

The advisory system meets with the demand for information, but addresses only part of the solution to the problem of televised violence.¹⁹⁶ Many parents want more than promises and are demanding congressional action. The monitoring system may be that answer if it is implemented "voluntarily" and is consistently applied. Another answer may be Representative Edward Markey's proposal to give parents the power to protect their children when they are not home through a computer chip that blocks out designated violent programs installed in their television sets.¹⁹⁷ But government legislation in this area is a delicate matter and requires careful and calculated deliberation. What the public wants and what the First Amendment allows may be two separate things.

V. IS LEGISLATION AN ACCEPTABLE SOLUTION?

A. *The Proposals and Their Pros and Cons*

Members of both houses of the U. S. Congress have introduced numerous bills attempting to reduce television violence in various ways. All of these legislative measures require FCC involvement. Many aspects of the legislative proposals are sound in theory, but their likely effects, if made into law, are unclear. Some fear the possible devastating effects on the freedoms protected by the First Amendment. Others claim that these laws would benefit children by making the industry, parents,

195. Robert L. Jackson, *Cable Networks To Unveil Plan on Violent Programs*, L.A. TIMES, Feb. 1, 1994, at A3 (quoting Janet Reno). Reno maintains that the Administration is "prepared to support pending Senate legislation to deal with the problem." Robert L. Jackson & Jane Hall, *Reno Warns TV Industry: Cut Violence*, L.A. TIMES, Oct. 21, 1993, at A2. President Clinton, however, "would prefer that [the industry does] it voluntarily, as a national cause, without legislation." Neil Hickey & Peter Ross Range, *Clinton On TV's Clout*, TV GUIDE, Mar. 26-Apr. 1, 1994, at 16, 17 (quoting President Bill Clinton).

196. *Where To Next on TV Violence?*, CHI. TRIB., July 6, 1993, at B4.

197. Rep. Markey's bill was introduced as H.R. 2888, 103d Cong., 1st Sess. (1993). See *infra* part V.A.3. for a complete discussion of this bill.

and society more responsive to their needs for positive change.¹⁹⁸

1. LEGISLATION INVOLVING ADVISORIES AND RATINGS

Many Americans, including Attorney General Janet Reno, believe that the parental advisories which the industry has voluntarily established are not enough.¹⁹⁹ Parents need more information about the violent content of programming before it is broadcast.²⁰⁰ Many suggest imposing motion picture style ratings based on the amount of violence in a program.²⁰¹ Such a violence rating would notify viewers of program contents in advance and allow them to decide whether the program is suitable for their children.²⁰²

a. Senate Bill 943—Children's Television Violence Protection Act of 1993

Senator David Durenberger (R-Minn.) introduced Senate Bill 943 on May 12, 1993.²⁰³ The bill directs the FCC to establish rules requiring broadcast licensees and cable operators, including cable programmers, to give audio and visual warnings for television programs depicting violence or unsafe gun practices and airing between the hours of 6 a.m. and 11 p.m.²⁰⁴ The advisory should caution viewers that the violence or unsafe gun practice "may adversely affect the mental or physical health, or both, of a child, and may, if the events portrayed in such programming occur in real life, warrant the imposition of criminal penalties."²⁰⁵ Violations will result in a maximum fine of \$5000, or for intentional violations, a \$10,000 minimum and a \$25,000 maximum fine.²⁰⁶ Under the bill, when a broadcaster applies for a renewal of its license, the FCC must consider whether the licensee has complied with the prescribed standards under the act.²⁰⁷ The FCC may, however, exempt news broadcasts, sporting events, educational programming, and documentaries

198. *A Gun To TV's Head: Public is Clamoring For Regulation of Violent Shows*, SAN JOSE MERCURY NEWS, Jan. 27, 1994, at 6B. Fifty-four percent of Americans want the government to regulate violence on television. *Id.*

199. *See Hearings, supra* note 5, at 5 (statement of Janet Reno, U.S. Attorney General). Seventy-one percent of Americans strongly favor instituting a system of ratings and advisories. Centerwall, *supra* note 49, at 3063 (citing an *L.A. Times* poll on TV sex and violence conducted in 1989).

200. *Hearings, supra* note 5, at 5 (statement of Janet Reno, U.S. Attorney General).

201. *See id.*

202. *Hearings, supra* note 5, at 4 (statement of Dr. Paul Dove, President, Concordia College).

203. S. 943, 103d Cong., 1st Sess. (1993). This bill is currently pending before Congress.

204. *See id.* § 3.

205. *Id.*

206. *Id.* § 4. Note that "each day of violation constitutes a separate violation." *Id.*

207. *Id.* § 6.

from the requirements.²⁰⁸

b. Senate Bill 973—Television Violence Report Card Act of 1993

Senator Byron Dorgan (D-N.D.) introduced Senate Bill 973 on May 18, 1993.²⁰⁹ The bill would require the FCC to establish a program to: (1) evaluate and rate television programs with respect to the extent of violence contained in those programs, and rate the sponsors in terms of the extent to which they sponsor violent programs; and (2) publish the ratings in a "Television Violence Report Card" each quarter in the Federal Register.²¹⁰ The FCC would evaluate programs carried on the national broadcast networks and the cable television systems.²¹¹ The evaluations would take place one week every quarter (four times a year) during that week's prime-time and Saturday morning time slots, including at least one "sweeps week."²¹² The bill's cosponsor, Representative Durbin, believes that a quarterly report informing viewers "where the violence is and who sponsors it would be a constructive step in exposing those who are feeding us this dangerous diet of increasingly violent television."²¹³

c. Analysis

A network-wide rating system must "be quantitative and preferably numerical, leaving aesthetic and social judgments to the viewers."²¹⁴ Such a rating and advisory system will have a substantial impact if it is consistently applied.²¹⁵ Supporters of a ratings system claim that ratings do not censor, nor do they infringe on broadcasters' rights of free expression. On the contrary, they claim that ratings actually extend this freedom by permitting adults to watch whichever programs they wish, "while effectively eliminating children from the audience."²¹⁶ The purpose of ratings and advisories is to notify parents that the programs will contain violence; after notification, it is the parent's responsibility to take action. Whether the parent allows his child to watch a program is a

208. *Id.* § 5.

209. S. 973, 103d Cong., 1st Sess. (1993). This bill is currently pending before Congress.

210. *Id.* § 3.

211. *Id.* § 3(b)(1).

212. *Id.* § 3(b). "During sweep weeks of the TV local market surveys, TV networks frequently schedule special programming, just as their affiliates launch provocative news series. Both put on their stronger movies and advertising and on-air promotions are stepped up." HUGH M. BEVILLE, JR., AUDIENCE RATINGS: RADIO, TELEVISION, AND CABLE 229 (1985). This is all done in an attempt to achieve the best local rating result. *Id.*

213. Boliek, *supra* note 74.

214. Centerwall, *supra* note 49, at 3063.

215. *See id.*

216. Newton N. Minow, *How to Zap TV Violence*, WALL ST. J., Aug. 3, 1993, at C2.

private and individual decision. Advisories and ratings only assist parents in making these decisions.

On the other hand, there are many arguments against government-mandated advisories and ratings. First, the industry has already instituted its own system of advisories under the *Advance Parental Advisory Plan*.²¹⁷ Not only are the four major networks²¹⁸ adhering to these guidelines, but many cable stations and independent stations have also voluntarily adopted this system.²¹⁹ Most broadcast stations are increasingly sensitive towards the issue of television violence. For example, many have rearranged program time slots, edited violent scenes, and provided advisories before and during certain programs.²²⁰

These actions are significant in that the industry has "voluntarily" chosen to execute them.²²¹ According to one industry executive, a law forcing television broadcasters to implement advisories and ratings may have the effect of undermining the industry's efforts.²²² If one television station, cable operator, or programmer decided to file suit seeking to enjoin the mandatory use of advisories and ratings, it would "tie up the new regulations in court for years."²²³ The system of self-administration is an appropriate method for the networks to use and the marketplace will ensure that each network does in fact adhere to its own guidelines.²²⁴

Moreover, because so many different types of broadcast stations exist, a single standardized system is impractical and unworkable.²²⁵ The Motion Picture Association of America ("MPAA") currently employs a voluntary rating system similar to the system that legislators propose to enforce on the television industry. Contrasted with the MPAA, which in 1992 rated 616 films (about 1,200 hours of film that year), a uniform television rating system would require rating 75,000 hours of programming *every day* (on broadcast and cable combined).²²⁶

217. See discussion *infra* part IV.C.

218. ABC, CBS, NBC, and FOX.

219. *Hearings*, *supra* note 5, at 5 (statement of Al Devaney, Chairman of the Board, INTV). All of the members of INTV (a non-profit trade association representing local television stations not affiliated with ABC, NBC, or CBS) employ an advisory system and more than fifty non-member stations as well. *Id.*

220. *Id.* at 6-7.

221. See *id.* Because these actions are working, industry representatives argue that "[t]here is no need to move forward with legislation at this time." *Id.* at 1.

222. See *id.* at 13.

223. *Id.*

224. See *Hearings II*, *supra* note 11, at 11 (statement of Winston H. Cox, Chairman and Chief Executive Officer, Showtime Networks, Inc.).

225. See *id.* at 10.

226. *Hearings*, *supra* note 5, at 2 (statement of Jack Valenti, President, MPAA). Within that mass of hours of programming exists a "formidable difference in how each hour of programming

In addition, such a rating system would need to meet the specific demands of television, which include time constraints, constant last minute changes, and substantial volume of product.²²⁷ And "[w]hat about the thousands of episodes of existing program series such as . . . the original 'Star Trek'? A centralized board could be tied up for years simply rating programming that is already on the air."²²⁸ The entire process would be ineffective and burdensome.

Another problem with a uniform system of advisories and ratings involves determining the definition of "violence."²²⁹ "[W]hat is 'acceptable' to some is 'unsuitable' to others. What is gauged as 'reasonable' by some, is judged to be 'unreasonable' by others."²³⁰ For example, in her congressional hearing testimony, Professor Signorielli recounted the results of a television violence study which found that variety shows were the most violent genre in the sample, including specials such as *Television's Greatest Moments*, *TV's Funniest Commercials*, and the *25th Anniversary of Rowan and Martin's Laugh In*.²³¹ It seems ridiculous to give the slapstick antics of Rowan and Martin a violent rating.²³² Such a system does not account for context, and thus fails to distinguish, for example, between the violent acts reported in documentaries about war and the dramatic portrayal of violent acts associated with urban crime.²³³

Advisories and ratings may have the opposite of their intended effect by serving as a "road map" and leading children to the violent shows.²³⁴ Some argue that "a violence rating scheme would actually attract younger viewers to such programming under a forbidden fruit theory."²³⁵ Knowing they should not be watching these programs, youngsters, especially older children and younger teens, may be lured by a show with a high violence rating.²³⁶

depicts and presents violence, non-violence, romance, action, comedy, passions, poignancy, and the conflict of good and evil, the core of plotting since the beginning of the stage and screen." *Id.* at 2-3.

227. *Hearings II*, *supra* note 11, at 7 (statement of Thomas S. Murphy, Chairman of the Board, Capital Cities/ABC, Inc.).

228. *Id.* at 19 (statement of James B. Hedlund, President, INTV).

229. *See also infra* part V.B.1., for a discussion on overbreadth and vagueness.

230. *Hearings*, *supra* note 5, at 3 (statement of Jack Valenti, President, MPAA).

231. *Hearings II*, *supra* note 11, at 3 (statement of Nancy Signorielli).

232. *See id.* at 17 (statement of James B. Hedlund, President, INTV). Some predict that warnings on slapstick comedy and cartoons will not help parents. *Id.* at 7 (statement of R.E. Turner, President Turner Broadcasting System, Inc.).

233. *See id.* at 17 (statement of James B. Hedlund, President, INTV).

234. Kevin Goldman, *Networks' Plan for TV Program Warnings May Backfire*, WALL ST. J., July 1, 1993, at B1.

235. *Hearings II*, *supra* note 11, at 19 (statement of James B. Hedlund, President, INTV).

236. *See id.*

Although parental monitoring can be highly effective, parents cannot monitor their children's viewing habits all the time, even with a lock-out device. This is particularly true where both parents are working, or in single-parent families, or in households where parents are unconcerned about what their children watch.²³⁷ The only realistic solution, therefore, is maintaining and improving the industry's voluntary advisory system and process of self-regulation. Certainly, the independent monitoring system is a step in that direction.

2. LEGISLATION INVOLVING SAFE HARBOR HOURS

One method of "cleaning up" the airwaves is eliminating all violent programming during those times of the day when children are most likely watching television. This would shield a majority of children from the detrimental effects of viewing televised violence. Basically, such legislation would treat violent programming in the same manner that indecent programming is treated now—shunting it off to the late-night hours.²³⁸

a. Senate Bill 1383—Children's Protection from Violent Programming Act of 1993

On August 5, 1993, Senator Hollings (D-S.C.) introduced Senate Bill 1383, which would amend the Communications Act of 1934 to prohibit the public distribution "of violent video programming during hours when children are reasonably likely to comprise a substantial portion of the audience."²³⁹ The FCC would define these hours as well as the term "violent programming."²⁴⁰ The bill exempts premium and pay-per-view cable programming and authorizes the FCC to exempt news programs, documentaries, educational programs, and sporting events.²⁴¹ Moreover, the FCC would consider compliance with the act when renewing licenses, and would repeal the licenses of repeat violators.²⁴²

b. Analysis

The idea of providing "safe harbor hours" when certain programming could not be broadcast is troubling because of First Amendment concerns. The effect of channeling violent material to later hours may

237. Eron, *supra* note 29.

238. Boliek, *supra* note 74.

239. S. 1383, 103d Cong., 1st Sess. (1993).

240. *Id.* § 3(b)(3).

241. *Id.* § 3(b)(1), (2).

242. *Id.* § 3(c), (d).

cause programmers to forego broadcasting such speech altogether.²⁴³ “[A]ny restriction on speech, the application of which turns on the content of the speech, is a content-based restriction regardless of the motivation that lies behind it.”²⁴⁴

In an analogous situation, the FCC restricted *indecent* programming to later hours of the day when children would not be watching. The Court of Appeals for the District of Columbia Circuit concluded that the FCC’s safe harbor rule must be precise and carefully tailored to give broadcasters clear notice of the times of day during which they can safely air indecent material.²⁴⁵ The court accepted as compelling interests the interest of the government in protecting children from indecent material, the interest of parents in deciding whether to expose their children to such material, the interest of broadcasters in airing speech at times of day when children are not likely to be in the audience, and the interest of adults in exercising their rights to see and hear programming which may be inappropriate for children, although not obscene.²⁴⁶

In *Gillett Communications v. Becker*,²⁴⁷ a federal district court in Georgia upheld FCC regulations designating the hours between 12:00 midnight and 6:00 a.m. as safe harbor hours.²⁴⁸ In this case, the court ruled that a videotape containing graphic depictions and descriptions of the surgical procedure for abortion would have a negative impact on children in the viewing audience; therefore, the tape should be aired during a time when children are unlikely to comprise a substantial portion of the audience.²⁴⁹ The court emphasized that the political advertiser was not denied his right to air the videotape, only that the times he could air the tape were limited, thereby reducing the “chances of injury to the ‘psychological well-being’ of minors in the community.”²⁵⁰

Many argue that channeling speech is unconstitutional because it prevents artists and other media players from “‘speaking’ during those times” and also prevents “those who wished to hear, and were unlikely to be adversely affected by” the speech from hearing the message.²⁵¹ On

243. See *Action for Children’s Tel. v. FCC*, 852 F.2d 1332, 1342 (D.C. Cir. 1988). “Channeling is designed to protect unsupervised children.” *Id.* at 1340.

244. *Renton v. Playtime Theatres*, 475 U.S. 41 (1986) (Brennan, J., concurring).

245. *Action*, 852 F.2d at 1343 n.18.

246. *Id.* at 1343; see also *Action for Children’s Tel. v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1282 (1992) (reaffirming the need for safe harbor hours during which broadcasters may air indecent material, but striking down a total ban on “indecent” material).

247. 807 F. Supp. 757 (N.D. Ga. 1992).

248. *Id.* at 762.

249. *Id.* at 763.

250. *Id.* at 764 (tracking language from *New York v. Ferber*, 458 U.S. 747, 756-57 (1982)).

251. Peter Alan Block, Note, *Modern-Day Sirens: Rock Lyrics and the First Amendment*, 63 S. CAL. L. REV. 777, 813 (1990).

the other hand, supporters of safe harbor hours legislation insist that a compelling governmental interest exists "in limiting the negative influences of violent video programming on children."²⁵² These supporters contend that channeling is "the least restrictive and most narrowly tailored means to achieve that compelling governmental interest."²⁵³ Just as Congress can restrict indecency over the public airwaves, advocates of safe harbor hours legislation are attempting to give the FCC power to enforce restrictions on televised violence.²⁵⁴

The Court of Appeals for the District of Columbia Circuit recently addressed the issue of safe harbor hour regulations in *Action for Children's Television v. FCC*,²⁵⁵ and held that, despite compelling interests in protecting children from indecent material, the statute was not sufficiently narrow to meet constitutional requirements.²⁵⁶ In this case, "the government has not demonstrated that its independent interest in shielding children from indecent broadcasts automatically outweighs the child's own First Amendment rights up to her eighteenth birthday."²⁵⁷ The court stated that when legislation involves the First Amendment rights of adults, the government cannot argue that

"there is a reasonable risk that significant numbers of children ages 17 and under" are in the listening and viewing audience The government must adduce data which permits a more finely tuned trade-off between adults' First Amendment rights and the government's interest in protecting children from indecent material as that interest varies in importance with their age.²⁵⁸

On the FCC's petition, however, the panel's judgment was vacated and rehearing en banc ordered.²⁵⁹ Nevertheless, the panel's decision is noteworthy for its balancing of interests in this controversial area.

While some courts are willing to uphold safe harbor hour legislation for broadcasts of indecency, many others may be reluctant to do so based on First Amendment concerns. The Supreme Court has yet to address this issue, but because these regulations are content-based the Court would likely strike them down on First Amendment grounds.²⁶⁰

252. S. 1383, 103d Cong., 1st Sess. (1993).

253. *Id.* § 2(7).

254. See *Hearings II*, *supra* note 11, at 2 (statement of Terry Rakolta, Director, Americans for Responsible Television).

255. 11 F.3d 170 (D.C. Cir. 1993), *vacated*, 15 F.3d 186 (1994) (en banc) (per curiam).

256. *Id.* at 180. The statute banned indecent material from being broadcast during the hours of 6 a.m. to midnight. *Id.*

257. *Id.*

258. *Id.*

259. *Action*, 15 F.3d 186 (1994) (en banc) (per curiam).

260. See Jessalyn Hershinger, *State Restrictions on Violent Expression: The Impropriety of Extending an Obscenity Analysis*, 46 *VAND. L. REV.* 473, 500 (1993).

Similar regulations restricting violent content are apt to be judged with the same standard. It is extremely difficult to limit speech reaching children while preserving the rights of the rest of the population to see or hear that speech. The viewers' rights are paramount. "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."²⁶¹ Adult viewers have the right to watch violent programs at any time of the day and Congress should not be capable of restricting that right. Therefore, a government mandate such as Senate Bill 1383, which channels programs containing violent content to late night hours, would have a chilling effect on freedom of speech and expression.

3. LEGISLATION INVOLVING A PARENTAL LOCK-OUT DEVICE

In today's society, parents cannot always police their children's television viewing. New technology in the form of electronic lock-out devices enables parents to control what enters their homes and what their children can view on television.

a. House Bill 2888—Television Violence Reduction Through Parental Empowerment Act of 1993

Representative Markey (D-Mass.) introduced House Bill 2888 on August 5, 1993. It would require manufacturers to outfit all new television sets larger than thirteen inches with a computer chip (the "V-chip") that would allow parents to block channels, programs, and time slots, or all programs with a common violent content rating (a "V" rating).²⁶² This bill would require the FCC to promulgate rules providing performance and display standards for such blocking technology and would prohibit shipping in interstate commerce, manufacturing, assembling, or importing any covered television sets that do not contain the "V-chip".²⁶³ Moreover, the FCC must ensure that the blocking service continues to be available to consumers as new video technology develops.²⁶⁴

b. Analysis

This bill would enhance parents' knowledge by providing them with more information about the violent content of programs. It would

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

262. H.R. 2888, 103d Cong., 1st Sess. § 3 (1993). This bill is currently pending before Congress.

263. *Id.* § 4(c).

264. *Id.*

also enable them to better perform their parental roles by allowing them to choose what they feel is suitable programming for their children.²⁶⁵ To transmit information about program content, manufacturers will employ the same technology they use to transmit closed-caption information to deaf viewers; manufacturers have reserved space on the broadcast signal which they can use to transmit a special rating code on violent programs.²⁶⁶ The lock-out device would read the violence rating, and parents would be able to block certain shows, all programs with a "V" rating, or even entire channels.²⁶⁷ The "V-Chip" is inexpensive (as cheap as \$5 per TV set) and it poses few technical challenges for manufacturers or parents.²⁶⁸

Market forces alone will not make this technology available to more than a fraction of households with children and will exclude poor families If we can make television technology available that will benefit 24 million deaf and hard-of-hearing Americans, surely we can do no less for the benefit of 50 million American children.²⁶⁹

A lock-out device reinforces parental authority and control because it operates even when parents are not home.²⁷⁰ Thus, when parents use the television as an electronic babysitter, they can maintain some modicum of control over what their children watch. Concerned parents will sit down with their children and the weekly television schedule, and program the television to block out the undesirable shows.²⁷¹ Supporters of this legislation hope that a mandated installation of the "V-Chip" would be enough to cause changes in programming for the benefit of all viewers.²⁷²

Advocates of the proposal further claim that it protects the First Amendment rights of television producers and broadcasters because the parents, not the government, are the censors.²⁷³ The government is not involved in the decision to block programs or channels, it simply provides parents with that power. Therefore, supporters assert that it should

265. See *Hearings II*, *supra* note 11 (statement of Rep. Edward J. Markey).

266. Edmund L. Andrews, *A Chip That Allows Parents to Censor TV Sex and Violence*, N.Y. TIMES, July 18, 1993, at 14.

267. See *Hearings II*, *supra* note 11, at 4 (statement of Joseph N. Jackson, Chairman of the Board, Protelcon, Inc.).

268. Andrews, *supra* note 266.

269. Centerwall, *supra* note 49, at 3062-63.

270. *Id.* at 3062.

271. *Hearings II*, *supra* note 11, at 2 (statement of Joseph N. Jackson, Chairman of the Board, Protelcon, Inc.).

272. See *id.* at 6 (statement of R.E. Turner, Chairman & President, Turner Broadcasting System, Inc.). A *U.S.A. Today* survey reveals that 68% of viewers support the V-Block requirement. *Id.* (statement of Rep. Edward J. Markey).

273. See 139 CONG. REC. H113,1 (daily ed. Aug. 5, 1993) (statement of Rep. Edward J. Markey).

pass constitutional muster.²⁷⁴ "Only by empowering parents . . . can we realistically expect to reduce the amount of violence to which *children* are exposed as well as the overall level of graphic and gratuitous violence on TV."²⁷⁵

On the other hand, a government mandated lock-out device raises many concerns. First, while technologically possible, it will only succeed to the extent actually utilized by parents.²⁷⁶ Many technologically inept parents may shy away from such a mechanism.²⁷⁷ A complex parental control device which may intimidate a parent, could attract a child to the idea of "hacking" to decode the lock.²⁷⁸ One young girl remarked that she does not fear the consequences of a lock-out device because she and her ten-year-old sister would be smart enough to find where her parents hid the mechanism's access code or simply go to a friend's house to watch television.²⁷⁹ Consumers may resent a device that tempts their children to disobey, sneak around, and find ways to watch the violence anyway.

Moreover, many cable subscribers already have the ability to block out selected cable channels. These consumers need only ask their cable operator for a "parental control device" which they may activate upon request.²⁸⁰ Many cable companies' experience with this parental control device is that parents are uninterested and seldom use this option.²⁸¹ If cable customers who already pay for this service are not taking advantage of the blocking option, then network viewers surely would be less inclined to deal with the inconvenience.

274. Jeannine Aversa, *Congress Preps Violence Bill to Block Programming*, MULTICHANNEL NEWS, Aug. 9, 1993, at 51.

275. *Hearings II*, *supra* note 11 (statement of Rep. Edward J. Markey).

276. *Id.* at 3 (July 1, 1993) (statement of John S. Hendricks, Chairman & Chief Executive Officer, Discovery Communications, Inc.).

277. "They have had bad enough experiences with VCR's, home computers, fax machines and other technological devices." Amy Wu, *Youth Against Censorship*, N.Y. TIMES, Aug. 1, 1993, at A11 (Letter to the Editor). "A majority of Americans cannot program their VCRs, even though manufacturers have assiduously tried to make them easy to use." *Hearings II*, *supra* note 11, at 8 (statement of Gary J. Shapiro, Group Vice President, Consumer Electronics Group of the Electronic Industries Association).

278. *See Hearings II*, *supra* note 11, at 8 (statement of Gary J. Shapiro, Group Vice President, Consumer Electronics Group of the Electronic Industries Association).

279. Wu, *supra* note 277.

280. *Hearings II*, *supra* note 11, at 13 (statement of Winston H. Cox, Chairman and Chief Executive Officer, Showtime Networks, Inc.).

281. *Id.* at 14. Showtime conducted a test before the new Cable Act (which compelled cable operators to notify subscribers in advance of any free preview that includes "R"-rated programs and advise them of their right to block that preview) went into effect. They notified 70,000 subscribers that they would be showing an "R"-rated preview and gave them an opportunity to exercise their blocking rights. Of those 70,000 homes, only *four* asked to block the preview. "It would seem that the 'V-Chip' may not be an effective solution, if people are not interested in taking advantage of these blocking opportunities." *Id.* at 14-15.

In addition, existing television sets would not be equipped with the "V-chip" and it would take about two decades for all pre-existing sets to be replaced with new ones furnished with this device.²⁸² Most houses already have two televisions, so if one has a lock-out-system, a child will know which television he needs to turn on to watch the blocked-out programs.

The use of a "V-Chip" is inflexible as compared with many other similar, yet more attractive blocking systems.²⁸³ The "V-chip" employs an all-or-nothing approach, without allowing a parent to consider the program's content, context, or dramatic or comedic merit.²⁸⁴ This deprives the parent of the option of making a decision. Program-by-program. "It amounts to indictment without appraisal, and is not an exercise of parental judgment."²⁸⁵ "Of particular concern is the prospect that this new technology could be used or could have the effect of suppressing all programs expressing controversial or unconventional ideas."²⁸⁶ Just as codes for violence can screen out all "violent" programming, codes could be developed to block other types of program content such as political speech, language, sexual content, or even educational programs regarding public health issues.²⁸⁷ Broadcasters contend that this possibility frustrates the purposes of free speech under the First Amendment and undermines a "goal of all broadcasters — providing a diversity of voices to the American people."²⁸⁸

Representative Markey claims his bill is constitutional because the government is simply empowering parents by giving them the tools they need to raise their children in an atmosphere of their own choosing. The actual decision whether to block any program is left to individual parents. The "V-Chip", however, is an impractical solution as evidenced by the fact that very few parents actually use the blocking power which is

282. *Id.* at 10 (statement of Gary J. Shapiro, Group Vice President, Consumer Electronics Groups of the Electronic Industry Association).

283. *See infra* part VI.B. discussing the various new technologies.

284. *Hearings II, supra* note 11, at 5 (statement of George Vradenburg III, Executive Vice President, Fox, Inc.).

285. *Id.* at 2 (statement of Jack Valenti, President and CEO, MPAA). "Parents should be able to blot out any *individual* program they believe might be unsuitable for their young children. . . [but] we do not support . . . a chip, that with one press of a button could exile a whole day's programming." Jack Valenti, Remarks before *Town Hall 2* (July 29, 1993) (transcript available from MPAA). For instance, in his study of television violence, Dr. George Gerbner found that one of the most violent programs was the *25th Anniversary of Rowan & Martin's Laugh-In*. If "violence" were defined in these terms, a "V-Chip" would block out *The Ten Commandments*, *The Simpsons*, and *Murder in the Heartland* in one fell swoop. *See id.* at 6 (statement of George Vradenburg III, Executive Vice President, Fox, Inc.).

286. *Id.* at 16 (statement of Warren Littlefield, President, National Broadcasting Company, Inc.).

287. *Id.*

288. *Id.*

already available to them.²⁸⁹ Furthermore, there are significant First Amendment concerns with blocking whole sets of programs without regard to the context in which the rated violence occurs, rendering this bill dangerously close to, if not over, the line separating freedom of speech from censorship. A better solution than House Bill 2888 would be a similar, yet not as overpowering a device, such as TV Guide On Screen.²⁹⁰

4. LEGISLATION INVOLVING ADVERTISERS

Unlike cable television, which receives income through subscriptions, broadcast television depends entirely on advertising revenue to support the programming it airs.²⁹¹ One advertising company estimated that in one recent year advertisers spent over \$11 billion on ABC, CBS, NBC, and FOX, which was 35% of the \$32 billion spent on advertising for all television.²⁹² Therefore, advertisers have the power to exert a tremendous influence on television programming.²⁹³ In fact, during the mid-1970s, advertisers played a significant role in temporarily reducing television violence.²⁹⁴ More recently, they have contributed "to the campaigns to reduce glamorized images of alcohol abuse, illegal drug use and other forms of destructive behavior."²⁹⁵ During the late 1970s, advertisers who reduced their support of violent programs received substantial support from consumers and viewers.²⁹⁶ Because of the public scrutiny, many advertisers refused to buy time in violent programs and even hired "special screening companies to ensure that their ads did not appear in violent programs."²⁹⁷ Current legislation focuses on advertisers' attempts to use their influence to reduce the violence on television.

a. Senate Bill 1556—Bill Requiring Record Maintenance of Television Commercials, Promotions and Complaints

Senator Carl M. Levin (D-Mich.) introduced the most recent legis-

289. Although it is only cable subscribers who currently have this power, the nonuse of this device is indicative of its future. See discussion, *supra* note 281.

290. See discussion *infra* note 405 and accompanying text.

291. *Hearings*, *supra* note 5, at 6 (statement of Howard Stringer, President, CBS Broadcast Group).

292. *Hearings II*, *supra* note 11, at 1 (statement of Betsy Frank, Senior Vice President, Director of TV Information and New Media, Saatchi & Saatchi Advertising).

293. See *id.* at 2 (statement of William S. Abbott, President, National Foundation To Improve Television).

294. *Id.*

295. *Id.*

296. *Id.* at 4.

297. *Id.*

lation, Senate Bill 1556, on October 18, 1993.²⁹⁸ It instructs the FCC to require broadcast station licensees and cable operators to preserve copies of all commercials and program promotions for 30 days after airing, and to provide copies to the public upon request for a reasonable fee.²⁹⁹ The FCC must also require the broadcaster to maintain copies of all complaints regarding violent commercials or promotions for one year after the broadcaster receives the complaint, and to compile public records of them.³⁰⁰ Senator Levin expects that "increased attention to violent commercial programming will persuade broadcasters to take their promises and this issue seriously."³⁰¹

b. Analysis

Legislation such as Senate Bill 973³⁰² and Senate Bill 1556 will force advertisers to be wary of what shows they sponsor. Supporters contend that the regulations will force advertisers to use their power to benefit children and society by ensuring that the programs which they sponsor are not excessively violent.³⁰³ When considering a purchase of commercial time, most advertising companies already preview every prime-time program, and screen several episodes of day-time programs.³⁰⁴ An example of the importance of advertising to the networks was ABC's loss of \$2 million in advertising revenues after telecasting *Murder in the Heartland* in May 1993. The loss occurred because "sponsors were unwilling to be associated with such a violent program."³⁰⁵ Thus, the pending legislation would have the effect of driving the advertisers to clean up the airwaves.

Many consumer groups have unsuccessfully attempted to boycott advertisers who sponsor violent programs.³⁰⁶ The legislation effectively reduces the work of such groups by publishing the names and sponsors of violent programs. This in turn will compel the advertisers to decrease

298. S. 1556, 103d Cong., 1st Sess., (1993). This bill is currently pending before Congress.

299. *Id.* § 1(1)-(2).

300. *Id.* § 1(4)-(5).

301. 139 CONG. REC. S13,834 (1993) (statement of Sen. Levin).

302. See discussion *supra* part V.A.1.b. Senate Bill 973 instructs the FCC to rate the sponsors of programs which contain violence and publishes public reports in a Television Report Card. S. 973, 103d Cong., 1st Sess. (1993) § 3(c).

303. "For advertisers not to do so is nothing short of reckless abandonment of their corporate and social responsibilities. . . . [A]dvertisers [who] claim ignorance of the violent content of programs are clearly guilty of complicity, along with all the other purveyors of media violence, for the harm being caused to this nation's children." *Hearings II, supra* note 11, at 1 (statement of William S. Abbott, President, National Foundation To Improve Television).

304. *Id.* at 5.

305. *Id.* Likewise, many advertisers refused to sponsor ABC's *NYPD Blue* because of its violence and other objectionable content. *Id.*

306. See Goldman, *supra* note 234.

their support of violent programs.³⁰⁷ The current use of advisories and ratings that call attention to the violent content already force advertisers to think carefully about which programs they sponsor. But with the threat of having their names published as a sponsor of violent television, advertising companies may withhold support from controversial programs so that they do not lose consumer patronage. Because of the decline in advertising support, networks will lose money and begin to replace violent shows with less violent types, which advertisers readily sponsor.

Recognizing their power, many major advertisers have established their own internal guidelines and policies which forbid them from spending advertising resources on violent programs.³⁰⁸ AT&T, for example, selects the programs during which it advertises based on their content.³⁰⁹ According to its own guidelines, AT&T will avoid advertising on any network programs that contain "vulgar language, acts of excessive violence, sexual conduct judged too explicit for total family viewing, or inflammatory or demeaning portrayals of any individual or group's religion, political affiliation, ethnicity or gender."³¹⁰ For the many advertisers who have no such guidelines, the legislation will cause them both to reevaluate what programs they spend their money on, and to become more responsive to their consumers.

Opponents of the legislation warn that it will have a chilling effect on freedom of speech. While it may be acceptable for consumer groups to target advertisers, opponents feel that actions by the government to intimidate or penalize advertisers for supporting "violent" programs stretch the line too far.³¹¹ Broadcasters fear that once the government sets a precedent by targeting advertisers to reduce televised violence, other pressure groups will be emboldened to seek similar government action with other types of controversial programming.³¹² This could lead to a decline in the creation and broadcast of programs with contro-

307. This type of work includes researching which companies advertise for which programs. See S. 1556, 103d Cong., 1st Sess. (1993).

308. *Hearings II*, *supra* note 11 (statement of Rep. Edward J. Markey).

309. *Id.* at 3 (statement of Richard Martin, Vice President of Public Relations and Advertising, AT&T).

310. *Id.* AT&T's professional screening service pre-screens every episode of every network program during which it will advertise. If there is a question as to the acceptability of an action in an episode, AT&T "err[s] on the side of caution, and do[es] not advertise." *Id.* "[A]dvertising on a show that is likely to offend potential customers just isn't good business." *Id.*

311. Advertising companies do not agree that pressure groups should clean up television, rather, they believe that viewers should make their own decisions. See *id.* at 6 (statement of Betsy Frank, Senior Vice President, TV Information and New Media, Snatchi & Snatchi Advertising). Most importantly they do not believe that advertisers should consider themselves as censors. *Id.*

312. See *Hearings*, *supra* note 5, at 6 (statement of Howard Stringer, President, CBS Broadcast Group).

versial themes. Critics of the legislation note that made-for-television movies and specials have enlightened viewers about such issues as child and spousal abuse, sexual harassment, date rape, and AIDS prevention.³¹³

Advertisers are already reluctant to support programs with controversial themes, but with the added pressure, very few will maintain support. Thus, the suppression of many important issues will "deprive mature viewers of thoughtful treatments of serious subjects. Such threats to program diversity are very real and should be resisted by all of us who support individual choice, the fullest range of creative expression, and the preservation of quality, free and universal television."³¹⁴ Advertisers must continue to use their discretion as to what programs they sponsor. Legislation, however, will cause a decline in some of the most beneficial kinds of television programming. The best method to employ is to leave the techniques of persuasion to the consumers and the judgment with the advertisers themselves.

5. OTHER LEGISLATIVE MEASURES

Congressmen have introduced other less controversial bills involving the issue of television violence. Representative Charles Schumer (D-N.Y.) introduced House Bill 2609, the Presidential Commission on TV Violence and Children Act, which would establish a presidential commission responsible for investigating television violence and proposing solutions that would reduce such violence.³¹⁵ The commission would consist of the Surgeon General, the Attorney General, and twenty-six presidential appointees from the television industry, the public, and experts on television violence.³¹⁶

This bill directs the commission to solicit opinions concerning television violence from children, parents, experts in public health, crime, and education, and members of the broadcast, cable, film, and advertising industries. The commission would then compile its recommendations for decreasing the negative effects of television violence.³¹⁷ After reviewing findings linking television violence with violence in children and society, the commission must present a final report and recommend comprehensive strategies and solutions to alleviate the harmful effects of

313. *See id.* at 7. For example, on March 28, 1994, NBC aired its made-for-TV-movie *And the Band Played On*, which featured an all-star cast and involved a story about the battle against AIDS. *See TV GUIDE*, Mar. 26 - Apr. 1, 1994, at 101.

314. *Hearings, supra* note 5, at 7 (statement of Howard Stringer, President, CBS Broadcast Group).

315. H.R. 2609, 103d Cong., 1st Sess. (1993). This bill is currently pending before Congress.

316. *Id.*

317. *Id.*

television violence while preserving our tradition of free expression.³¹⁸ This is the most appropriate approach to television violence because the commission would represent all viewpoints of the problem. It would not hold any other powers except to propose strategies and solutions.

Representative Joseph Kennedy introduced House Bill 2756, the Parents Television Empowerment Act of 1993, which would establish a toll-free telephone number for the collection of complaints concerning televised violence.³¹⁹ This 1-800 number would allow viewers to record their complaints, which the FCC would publish quarterly. The FCC would consider this record when stations seek re-licensing.³²⁰ This bill would apply to both broadcast and cable networks. One disturbing part of this legislation is the provision directing the FCC to consider the complaint record of a station when granting license renewals. This may cause some stations to self-censor their programs, thus creating a chilling effect on the First Amendment.

6. EXEMPTIONS

At least two of the bills, Senate Bill 943³²¹ and Senate Bill 1383³²² provide exemptions for news, sports, educational programming, documentaries, and even cable television (only Senate Bill 1383). These exemptions undermine the legislative intent because some of the most violent material is contained in news broadcasts, and on cable television. If cable television is exempted from regulations, the violent programming "will simply shift to basic cable channels or to pay cable channels . . . [which] are not totally dependent on advertising revenue."³²³ In the end, children will be protected only from the violence on the broadcast networks. Because a majority of households subscribe to cable systems, and because news programs air in the morning, early evening, and during prime-time hours, the legislation is underinclusive and will not accomplish its goals.

B. *First Amendment Concerns*

1. OVERBREADTH AND VAGUENESS

Another potential challenge to all of this legislation is that it is unconstitutional on its face because it is overbroad or vague. A law regulating speech is overbroad when it proscribes conduct which is pro-

318. *Id.*

319. H.R. 2756, 103d Cong., 1st Sess., (1993). This bill is currently pending before Congress.

320. *Id.* See also Simon, *supra* note 12, at 3.

321. See *supra* part V.A.1.a.

322. See *supra* part V.A.2.a.

323. *Hearings II, supra* note 11, at 24 (statement of James B. Hedlund, President, INTV).

tected by the guarantees of free speech.³²⁴ A primary rationale for employing the overbreadth doctrine is that overinclusive laws have a chilling effect on free speech. When a statute overreaches and prohibits some protected speech, a person may be unsure whether his conduct falls under that prohibition. Thus, even if his speech is protected, he might be intimidated and not exercise his right to speak at all.³²⁵ Moreover, overbroad statutes are susceptible to selective enforcement by the authorities.

Similarly, the vagueness doctrine strikes down a statute which is so unclearly defined that it does not inform people of common intelligence precisely what conduct is forbidden so they "must necessarily guess at its meaning and differ as to its application."³²⁶ The First Amendment rationale for the overbreadth doctrine similarly applies to an unduly vague statute in that vague laws have a chilling effect on free speech. Due process requires that laws give citizens fair notice of prohibited conduct.³²⁷

The Supreme Court's use of the overbreadth and vagueness doctrines is evidence of its concern about protecting freedom of speech, while avoiding any possible chilling effect that restrictive laws may have on the First Amendment.³²⁸ In *Miller v. California*,³²⁹ the Court required that the "offensive" action prohibited by a FCC regulation against "patently offensive" speech be clearly defined by law. The Court "attempted to . . . clarify the definition of obscenity by requiring that state statutes be 'carefully limited,' so as not to intrude upon legitimate expression."³³⁰

Courts would likely find an overbreadth problem similar to that found in *Miller* with legislation that simplistically rates violence on one level without applying different standards for different types of vio-

324. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

325. See *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting). An overly broad statute "hangs over [people's] heads like a sword of Damocles. . . . That this Court will ultimately vindicate [a person] if his speech is constitutionally protected is of little consequence—for the value of a sword of Damocles is that it hangs—not that it drops." *Id.* The overbreadth doctrine focuses not on individuals, but those "who may forgo protected activity rather than run afoul of the statute's proscriptions." *Id.* at 229.

326. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

327. See *Stromberg v. California*, 283 U.S. 359 (1931) (holding that the statute condemning public display of red flags was vague because it was unclear whether it applied to peaceful displays of opposition to the political party in power, or to other constitutionally-protected expressions of political opposition).

328. Jay A. Gayoso, Comment, *The FCC's Regulation of Broadcast Indecency: A Broadened Approach For Removing Immorality From The Airwaves*, 43 U. MIAMI L. REV. 871, 913 (1989).

329. 413 U.S. 15 (1973).

330. Gayoso, *supra* note 328, at 913. See also Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852-58 (1970).

lence.³³¹ Legislation such as Senate Bill 1383 (regarding safe harbor hours) will be problematic when the government attempts to define what is and what is not violent.³³² "Definitional problems are compounded by the fact that most legislative measures attempt to draw distinctions between 'good' violence and 'bad' violence."³³³ If the definition of violence encompasses too much activity that viewers do not consider violent, "[the] rating system will lose credibility and ultimately be ignored."³³⁴ If most programs receive a violence rating, the system will become meaningless.³³⁵ Furthermore, the "use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted."³³⁶ Thus, programmers will be so concerned with avoiding violence ratings that they will refrain from exercising their rights to freedom of expression.

Legislative measures such as Senate Bills 943 and 973, and House Bill 2609 either impose fines for violations or require the FCC to review a network's record of broadcasting violent material while considering its license renewal; these measures should be adjudged void for vagueness. Because the definition of violence is so subjective, broadcasters will be unsure if certain actions will be deemed "violent." The pending legislation does not distinguish between slapstick comedy containing violence or reality-based shows containing violence. This uncertainty as to what constitutes a violation of the law would lead programmers to self-censorship. Therefore, government regulations in this area will most likely be found overbroad and vague, and consequently will have a "profound chilling effect on programs that most Senators would find perfectly acceptable."³³⁷

2. CHILDREN—A COMPELLING INTEREST?

There are many differences between the numerous bills pending in Congress, but one continuous theme throughout all of the proposals is the attempt to protect children while refraining from respecting the First Amendment. There are many strong arguments for enacting regulations which will protect the interests of the public and the children.³³⁸ In fact,

331. See *Hearings II*, *supra* note 11, at 17 (statement of James B. Hedlund, President, INTV).

332. See *Hearings*, *supra* note 5, at 13 (statement of Al Devaney, Chairman of the Board, INTV).

333. *Id.* at 14.

334. *Hearings II*, *supra* note 11, at 17-18 (statement of James B. Hedlund, President, INTV).

335. *Id.* at 18.

336. *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977).

337. *Hearings*, *supra* note 5, at 15 (statement of Al Devaney, Chairman of the Board, INTV).

338. See *id.* at 10 (statement of Catherine A. Belter, Vice President for Legislative Activity, National PTA).

the Communications Act of 1934³³⁹ stipulates that the network airwaves belong to the public and that the FCC must serve the public interest, convenience, and necessity.³⁴⁰ When a conflict arises between the First Amendment and the public interest, the FCC must submit to the public interest.³⁴¹ Even former FCC chairman Newton Minow agrees that “[i]t is time we used the First Amendment to protect and nurture our children, rather than as an excuse to ignore them.”³⁴²

Courts recognize that the protection of children is a significant and compelling reason to legislate in areas otherwise protected.³⁴³ For instance, as early as 1974, the Supreme Court held that the government has the right to adopt more stringent controls on communicative materials available to youths than on those primarily available to adults.³⁴⁴ Similarly, in *Ginsberg v. New York*,³⁴⁵ the Court recognized that it was within the state’s constitutional power to enact laws designed to aid parents and teachers in discharging their responsibility to provide for their children’s well-being.³⁴⁶ In *Ginsberg*, the Court upheld a law that limited the availability of pornographic magazines to minors under seventeen because of the harmful effects exposure might cause to them.³⁴⁷

Although television broadcasters enjoy First Amendment rights, the broadcast medium is particularly susceptible to regulation because of its pervasive presence in society and its accessibility to children.³⁴⁸ “Broadcasting companies are not in business to serve First Amendment principles. They are profit making businesses. . . . Yet these firms market an unusually important commodity, communication, and are therefore subject to standards different from those applied to other

339. Codified as amended at 47 U.S.C.A. § 151 *et. seq.* (West 1994).

340. *See id.* Note that broadcast television is often considered a “government licensed trusteeship.” *See* Gerbner, *supra* note 155, at 2.

341. *See* Doug Halonen, *Quello Joins Fight Against TV Violence*, ELECTRONIC MEDIA, Mar. 22, 1993, at 3 (quoting Jim Quello, FCC Chairman).

342. Minow, *supra* note 215.

343. Courts use a strict scrutiny analysis of any regulation which is content-based, and thus may restrict expression because of its subject matter. *See* Dabney Elizabeth Bragg, Note, *Regulation of Programming Content to Protect Children After Pacifica*, 32 VAND. L. REV. 1377, 1382 (1979). This requires a compelling state interest and that the regulation be “tailored to the permissible state objective such that no reasonable alternative would have a less onerous impact on fundamental rights.” *Id.* at 1383.

344. *See* *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975). For example, courts have permitted the government to legislate in the area of child pornography, and to restrict “advertisements directed at children which are deceptive and unfair, and the broadcast of vulgar language, nudity and sexual descriptions.” *Hearings, supra* note 5, at 10 (statement of Catherine A. Belter, Vice President for Legislative Activity, National PTA).

345. 390 U.S. 629 (1968).

346. *Id.* at 639.

347. *Id.*

348. *See* *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978).

industries."³⁴⁹ In *FCC v. Pacifica Foundation*,³⁵⁰ the Court acknowledged that "broadcasting is uniquely accessible to children, even those too young to read."³⁵¹ Furthermore, media broadcasts confront the citizen "in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."³⁵² Unlike adults, who can protect themselves from unwanted, harmful speech, children are incapable of knowing what is good or bad for them.³⁵³ Thus, "society may prevent the general dissemination of such speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat."³⁵⁴ In upholding the sanctity of the home, the *Pacifica* Court held that the FCC could impose sanctions on licensees who broadcast anything "obscene, indecent, or profane."³⁵⁵

The Court focused on specific variables such as the time of day of the broadcast, the content of the program, and the composition of the intended audience. It emphasized that its holding was narrow, and rested entirely on a nuisance rationale wherein context is "all-important."³⁵⁶ The main difference between broadcast media and other types of media is that it is impossible to physically separate the broadcast from the audience, whereas it is simple to limit access to other kinds of speech such as printed and recorded matter, motion pictures, and live performances.³⁵⁷ In Justice Powell's concurrence, he stressed that this distinction justified different treatment of broadcasters for First Amendment purposes.³⁵⁸

These cases seem to indicate the acceptability and constitutionality of the pending legislation in the area of television violence because of the purported compelling interest in protecting children. The cases following *Pacifica*, however, have not been able to get around the brick wall that the First Amendment erects in protecting freedom of speech and expression.³⁵⁹

349. RICHARD E. LABUNSKI, *THE FIRST AMENDMENT UNDER SIEGE: THE POLITICS OF BROADCAST REGULATION* 117 (1981).

350. 438 U.S. 726 (1978).

351. *Id.* at 749. This case involved the daytime radio broadcast of comedian George Carlin's monologue entitled, *Filthy Words* which contained a list of words and phrases " 'you couldn't say on the public . . . airwaves.' " *Id.* at 729.

352. *Id.* at 748.

353. See Centerwall, *supra* note 49, at 3059.

354. *Pacifica*, 438 U.S. at 758 (Powell, J., concurring).

355. *Id.* at 738.

356. See *id.* at 750.

357. *Id.* at 758 (Powell, J., concurring).

358. See *id.* at 759 (Powell, J., concurring).

359. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding a public official cannot recover for defamatory falsehoods relating to his official conduct unless he proves that the

In *Home Box Office v. Wilkinson*,³⁶⁰ a federal district court found a statute that made it a misdemeanor to distribute indecent material by wire or cable unconstitutional because it was overbroad and encroached upon protected expression.³⁶¹ The court stated that “[f]ree expression is so important to the well being of our whole social structure that any limitation must be viewed by the most critical of legislative eyes.”³⁶² Although the state’s interest in protecting its children is a compelling reason to legislate, the statute in this case was so overbroad that it would apply to all cable TV programming without regard to whether receiving homes had any children at all.³⁶³ “The incidence of this enactment is to reduce the adult population . . . to reading only what is fit for children.”³⁶⁴

Another court distinguished cable television from broadcast television by noting that cable has more “[l]evels and degrees of choice.”³⁶⁵ Moreover, viewers make an affirmative decision when they subscribe to cable television.³⁶⁶ Additionally, most cable services provide a “lock-box” or “parental key” to protect children from watching certain programs or channels.³⁶⁷ In *Cruz v. Ferre*,³⁶⁸ the Eleventh Circuit held that a Miami ordinance regulating the distribution of indecent material through cable television was overbroad and unconstitutional.³⁶⁹ The court agreed that the interest in aiding “parents’ efforts to control the manner in which their children become informed about sensitive and important subjects such as birth control . . . was ‘undoubtedly substantial’”³⁷⁰ But again, the means of accomplishing the goal was, in this case, too overbroad and much more extensive than the Constitution permits.³⁷¹ “No police power or censorship power can be a substitute for

statements were made with *actual malice*); *United States v. Eichman*, 496 U.S. 310 (1990) (holding that a Texas law that made defiling or burning the American flag a criminal act was unconstitutional because it suppressed freedom of expression).

360. 531 F. Supp. 987 (D. Utah 1982).

361. *See id.* at 995-96.

362. *Id.* at 995.

363. *Id.* at 997. *See also* *Butler v. Michigan*, 352 U.S. 380 (1957) (invalidating laws which prohibited the dissemination of obscene, immoral, lewd or lascivious printed materials under the guise of protecting minors).

364. *Wilkinson*, 531 F. Supp. at 997 (citing *Butler*, 352 U.S. at 383).

365. *Community Television v. Roy City*, 555 F. Supp. 1164, 1170 (D. Utah 1982). As in *Wilkinson*, the court found an ordinance directed at “indecent” programs on cable television unconstitutional. *Id.* at 1172-73.

366. *See Cruz v. Ferre*, 755 F.2d 1415, 1419 (11th Cir. 1985).

367. *See id.*

368. 755 F.2d 1415 (11th Cir. 1985).

369. *See id.* at 1422.

370. *Id.* at 1421.

371. *See id.*

the moral function of the parent and the family."³⁷²

Courts continuously find these types of statutes overbroad because they have no well-defined limits. They accept the government's asserted interest in protecting children as compelling, but that interest is often overwhelmed by the flaws in the statutes themselves. Many courts suggest that a restriction of hours where indecent, or in this case violent, programming can be broadcast might be constitutional.³⁷³ The Court in *Pacifica*, for example, noted that the station had aired the indecent material in the early afternoon. A concurring opinion suggested that had the station waited until late in the evening, when fewer children were likely to be in the audience, there would have been no violation.³⁷⁴ Ordinances such as the one in *Cruz* prohibit more speech than is necessary to serve the public interest because they disregard factors such as time of day.³⁷⁵

The sponsoring congressmen claim that their pending legislation does not contain the flaws inherent in the laws invalidated in *Cruz* and *Wilkinson*. They believe that their proposals are not censorship of any sort and that they are specific enough to overcome overbreadth or vagueness claims. The goal of their proposals is to protect children by providing parents with as much information and technology as possible, so that individual families can make private informed decisions about what television shows to watch. Senate Bill 973 explicitly states, "[i]t is not the role of government to tell people what to watch or broadcasters what to show, but the Federal Government should bolster the ability of families and communities to make these decisions themselves."³⁷⁶

Broadcasters argue that the fear of sanctions such as fines or non-renewal of licenses will force them to completely censor their own programs of all forms of violence.³⁷⁷ Because the FCC cannot pre-screen all of the programs in advance, networks may not know that they have violated the law until after televising several episodes or movies.³⁷⁸ In fact, the FCC only has the power "to review the content of *completed* broadcasts."³⁷⁹ This is extremely troubling, especially under Senate Bill 1383 which sanctions repeat offenders by revoking their licenses. Thus, broadcasters will be forced to eliminate from their programming most

372. *Community Television v. Roy City*, 555 F. Supp. 1164, 1172 (D. Utah 1982) (quoting SYDNEY J. HARRIS, *Anti-Smut Weapon: A Happy Home*, in *THE BEST OF SYDNEY J. HARRIS* 194, 194 (1976)).

373. See *infra* part V.A.2. discussing safe harbor hours.

374. *FCC v. Pacifica Found.*, 438 U.S. 726, 760 (1978) (Powell, J., concurring).

375. *Cruz*, 755 F.2d at 1421.

376. S. 973, 103d Cong., 1st Sess. § 2(7) (1993).

377. See *Hearings*, *supra* note 5, at 18 (statement of Al Devaney, Chairman of the Board, INTV).

378. *Id.*

379. *FCC v. Pacifica Found.*, 438 U.S. 726, 735 (1978) (emphasis added).

depictions of violence, turning "television into an antiseptic 'Brady Bunch' fantasy world where conflict and confrontation are absent."³⁸⁰

Violence has its place in entertainment. Programmers can use violence appropriately in both fiction and nonfiction to dramatize human emotions, behaviors, and conflicts, and to enhance storytelling.³⁸¹ In addition, including violence is proper when it is essential to the comedic value of the program, as in shows like *The Simpsons* and *The Three Stooges*, and in the movie *Home Alone*. Moreover, controversial programs have consistently provided invaluable social benefits by concentrating on important issues such as AIDS and child abuse, which the networks may hesitate to air if there is a possibility of sanctions because of violent content.³⁸² Despite the government's compelling interest in protecting children, producers are justified in worrying about the chilling effect that legislation may have on provocative programming, as well as all other programming.³⁸³

VI. ALTERNATIVES TO LEGISLATION

Although television may merely be a symptom of our violent society, it can still be used as a "powerful influence for positive change."³⁸⁴ Government legislation may be inappropriate and even unconstitutional, but other options exist which would serve the public's interest in reducing television violence and its after-effects.

A. Public Health Strategy

If we treat television violence as a public health issue, the main focus would be on the creation of programs and policies designed to prevent violence from occurring in the first place.³⁸⁵ Attorney General Janet Reno argues that "[w]hen television characters began buckling their seat belts, and TV smoking and drinking became less glamorous, the industry demonstrated its willingness to bring their [sic] enormous

380. *Hearings II*, *supra* note 11, at 3 (statement of George Vradenburg III, Executive Vice President, Fox, Inc.).

381. *See id.*

382. *See id.* at 6 (statement of Peter Tortorici, Executive Vice President, CBS Entertainment). "[P]rime-time commercial television has been more responsible than any other part of this culture on precisely these matters." *Symposium*, *supra* note 2, at 21 (comments of television critic John Leonard).

383. *See* Richard Zoglin, *The Networks Run for Cover*, *TIME*, Aug. 2, 1993, at 52, 53.

384. *A Gun to TV's Head—Public is Clamoring for Regulation of Violent Shows*, *SAN JOSE MERCURY NEWS*, Jan. 27, 1994, at 6B.

385. *See Hearings II*, *supra* note 11, at 3 (statement of M. Joycelyn Elders, Surgeon General). "Public health works in partnership with communities to design programs that fit their unique problems and culture." *Id.* at 4.

power to bear on behalf of societal needs."³⁸⁶ Likewise, Surgeon General Joycelyn Elders reasoned that, "[r]ecent successes with public health information and education campaigns for smoking reduction, cardiovascular disease reduction, and AIDS prevention suggest that similar efforts can be important parts of the public health approach to violence prevention."³⁸⁷

1. EDUCATION AND CRITICAL VIEWING SKILLS

Because violence is a learned behavior, we can teach alternatives.³⁸⁸ The American Psychological Association's Commission on Violence and Youth recommends intervention at an early age (between the ages of four and eight years), before a child's aggressive habits become permanently fixed.³⁸⁹ One effective solution involves school programs that "teach social and emotional skills like managing anger, negotiating, adopting another child's perspective, and thinking of alternative solutions to disagreements."³⁹⁰ Schools must adopt curricula which educate children of all ages about the effects of television violence and teach them how to develop critical viewing skills.³⁹¹ The goals of these programs should be:

to reduce the belief that the [television] programs represent reality, to increase the ability of children to compare what they see with their impressions derived from other sources of information, to decrease the veracity of television by an improved understanding of its mechanics, and to evaluate television's content by making use of these skills.³⁹²

By employing programs with objectives such as these, many schools have already successfully and significantly reduced children's aggressive behavior and changed children's attitudes toward violence.³⁹³

2. EDUCATIONAL PROGRAMMING

Another facet of the public health approach involves the use of tele-

386. *Hearings*, *supra* note 5, at 7 (statement of Janet Reno, U.S. Attorney General).

387. *Hearings II*, *supra* note 11, at 5 (statement of M. Joycelyn Elders, Surgeon General).

388. Daniel Goleman, *Hope Seen for Curbing Youth Violence*, N.Y. TIMES, Aug. 11, 1993, at A10 (quoting Harvard University psychologist Dr. Ronald G. Slaby).

389. *Id.*

390. *Id.*

391. "Media literacy teaches children to understand and evaluate the content in media, the techniques they use and the potential impact of those techniques on the mind." Marsha King, *Fighting TV Violence With Literacy*, PHILADELPHIA INQUIRER, June 30, 1993, at G1. See DAVID BIANCULLI, *TELELITERACY: TAKING TELEVISION SERIOUSLY* (1992), for an in depth analysis of television and teleliteracy.

392. Dietz & Strasburger, *supra* note 10, at 23.

393. See Goleman, *supra* note 388.

vision's power to affect social behavior.³⁹⁴ Supporters of this agenda believe that "[t]elevision has great teaching potential. . . . It's just been teaching the wrong things."³⁹⁵ By incorporating anger management skills into the personalities of television characters, viewers, especially children, can learn various ways to control their anger, as well as alternative solutions to violence.³⁹⁶ Programmers and broadcasters should incorporate the following suggestions into their programs:

- (1) Show a variety of constructive anger management behaviors that serve to empower both the characters and the viewers.
- (2) Depict violence as a last resort for heroes, who have used their wits in encountering danger.
- (3) Depict the perpetrators of "thoughtless" violence as villains and their use of weapons as weak and foolish.
- (4) Portray the devastating emotional consequences and impact of violence on the perpetrators, the victims and witnesses.³⁹⁷

Children must learn that violence should be the exception rather than the solution to problems. Increasing the viewer's repertoire of responses to stimuli that provoke anger and violence achieves multiple goals: reducing the need to resort to violence and enhancing mental health and emotional well-being.³⁹⁸

Many programs are following these principles and the results with child viewers have been beneficial and positive. In one instance, a four-year-old girl saved her family when she alerted them that a fire had started in their apartment in the middle of the night; the girl credited a popular television dinosaur named "Barney" for teaching her to get her mother when she smelled smoke.³⁹⁹ Another example is a cartoon called *Captain Planet* which teaches environmental awareness through the actions of its heroes—a group of five boys and girls from around the world "who unite to solve problems nonviolently."⁴⁰⁰ More and more television programs are tackling America's most difficult societal problems: "poverty, violence, gangs, broken homes, [and] disillusionment."⁴⁰¹

394. See *Hearings II, supra* note 11, at 3 (statement of Suzanne Stutman, Executive Director Institute for Mental Health Initiatives).

395. Goleman, *supra* note 388 (quoting University of Michigan psychologist Dr. Leonard Eron).

396. See *Hearings II, supra* note 11, at 3 (statement of Suzanne Stutman). In a 1989 study by the Institute for Mental Health Initiatives, an analysis showed that the integration of anger management skills into entertainment programs did not adversely affect the Nielsen ratings in those programs. In fact, those programs attracted more viewers. See *id.* at 5.

397. *Id.* at 6-7.

398. *Id.* at 3.

399. Greene, *supra* note 69.

400. *Hearings II, supra* note 11, at 4 (statement of Scott Sassa, President, Turner Entertainment Group, Turner Broadcasting System, Inc.).

401. Goldner, *supra* note 13, at 4. It is important to note, however, that viewer reaction is not

3. PARENTS AND PRESSURE GROUPS

The American Psychological Association suggests that parents take an active role in their children's television viewing. It advises parents to do the following:

(1) Watch at least one episode of programs the child watches to know how violent they are. (2) When viewing together, discuss the violence with the child: why the violence happened and how painful it is. Ask the child how the conflict could have been solved without violence. (3) Explain to the child how violence in entertainment is "faked" and not real. (4) Encourage children to watch programs with characters that cooperate, help, and care for each other.⁴⁰²

Furthermore, consumers have the power to influence advertisers and broadcasters and to pressure them into responding to their needs.⁴⁰³ Pressure groups have succeeded in forcing advertisers to pull advertising from violent programs and in persuading networks to decrease violence and increase children's programming.⁴⁰⁴ A public health campaign against television violence will only succeed if the citizenry and the industry combine their efforts and work together.

B. *New Technology*

A number of new and advanced alternatives to a government-implemented "V-Chip" are emerging. One system, called TV Guide On Screen,⁴⁰⁵ surpasses all of the other technological solutions. It is an interactive on-screen programming guide which provides viewers with full program information, editorial coverage, and other features of *TV Guide*. It also features two-way viewer participation and a variety of menu options.⁴⁰⁶ It contains a "lock-out" feature which allows parents to block out specific programs or entire channels.⁴⁰⁷ Unlike a hardware solution such as the "V-Chip," TV Guide On Screen can be instantly and inexpensively upgraded.⁴⁰⁸ Moreover, the system does not encroach

always positive. At the opening of the movie *Boyz 'N the Hood*, for example, gang violence erupted in at least twenty of the nine hundred theatres showing the film, despite its anti-gang message. Sims, *supra* note 110, at 248.

402. *Summing Up: What We Can Do*, in *Symposium, supra* note 2, at 24.

403. See Campbell, *supra* note 30, at 461.

404. See *id.* at 461-62.

405. TV Guide On Screen is a software-based solution which allows parents to control programming in their homes "while providing them with more information about available viewing options." News Release from TV Guide On Screen 1 (June 25, 1993) (available from TV Guide On Screen).

406. News Release from TV Guide On Screen (Oct. 15, 1993) (available from TV Guide On Screen).

407. *Id.*

408. Letter from Beverly Voelz, Marketing Manager, TV Guide On Screen, to Laura Schneider (Dec. 7, 1993) (on file with the author).

upon broadcasters' freedom of speech rights because families subscribe to TV Guide On Screen by choice. Thus, the government does not become "the conscience of the American people and assume the role of censor."⁴⁰⁹

Other new technologies include: (1) the Direct Broadcast Satellite system, which is menu-driven, provides on-screen information to viewers, and employs parental control features with a password;⁴¹⁰ (2) the "Yes-Chip," which relies on speaker identification, voice recognition, and on-screen displays to facilitate program choices by either parent;⁴¹¹ and (3) Video Freedom, which allows viewers to blur (or de-blur) selected audio and visual elements that they may find objectionable.⁴¹² All these alternatives are preferable to government-mandated lock-out-systems in television sets. Furthermore, the First Amendment is not implicated because the censorship and control is in the hands of the parents who choose to install and use the systems, rather than a government agency.

VII. CONCLUSION

To be sensible and to be pious
are the first and last of happiness. . . .
For their grand schemes or bold words
the proud pay with great wounds. . . .
And great wounds before today
have taught sense even to the aged. . . .⁴¹³

There is no doubt that television violence yields damaging effects on many children. The time has come for programmers to act sensibly and to realize the consequences their choices may have on young view-

409. News Release from TV Guide On Screen (Oct. 15, 1993) (available from TV Guide On Screen).

410. See *Hearings II*, *supra* note 11, at 2-5 (statement of Charles C. Hewitt, President, Satellite Broadcasting & Communications Association of America). This system uses receiver decoder technology which only works when the program signals have been encoded with a rating code for the decoder to act on. *Id.*

411. Publicity Release from Yellowstone Environmental Science, Inc. (July 30, 1993) (on file with the author). This multi-chip "device relies on pattern-recognition technology to allow parents to unlock (unblock) individual television programs and [it] can be used to unlock channels, series, episodes, or individual performers or performances, e.g., music videos." *Id.* at 1. Moreover, it does not require families to subscribe to a cable or satellite service. *Id.*

412. *Viewing Sex, Violence and Obscenity, New Technology Makes it Each Individual's Choice*, News Release from the Townsend Agency (Aug. 30, 1993) (on file with the author). Each video frame is encoded before it is broadcast to viewers, who select the amount and type of blurring that they want. *Id.* at 1. "In addition, most viewers would not be unduly disturbed by the esthetics effects of blurring. . . ." *Id.* at 3. This technology requires no immediate change to current television sets, and the manufacturer claims it is cost-effective. *Id.* at 1-2.

413. SOPHOCLES, *supra* note 1, at 72.

ers. Legislation might curb some negative effects, but the First Amendment repercussions could be even more devastating. Legislation which restricts television violence will ultimately restrict freedom of speech and expression. In fact, the reduction of the level of violence may be counterproductive because the result may be "sanitized" violence where tragic consequences are not shown.⁴¹⁴ Moreover, "[t]he definition of violence 'will always be a subjective judgment based on individual perceptions and sensibilities.'"⁴¹⁵ If television broadcast becomes too restricted, viewers will be left with a lifeless blank screen.

Currently, the television industry is addressing this problem in an effective manner. Yet, it is still unclear just how "voluntary" the networks' actions are, and whether any regulations they create themselves will survive judicial scrutiny. The television industry "possesses enormous power in a free society—power that can lead to significant unintentional side effects. Advertisers must reevaluate the nature of the messages they wish to subsidize, since each commercial minute they buy pays for the transmission of certain values to our children."⁴¹⁶ What television needs is not censorship, but a greater awareness and sensitivity on the part of broadcasters and viewers alike.⁴¹⁷ Television has the potential to be a powerful influence for positive and beneficial change.

The American people must realize that *they* own the airwaves. Censorship of these airwaves restricts their rights to send and receive messages and ideas. Justice Brennan feared that society's dominant culture could force its values on the minority through censorship, and those fears are distressingly valid today.⁴¹⁸ The public cannot "'permit a few groups of individuals to determine what art and entertainment will be'" broadcast.⁴¹⁹

We must turn to alternative choices, such as education and new technology, rather than let the government intrude on the dissemination of ideas. Ultimately, parents are responsible for their children, but the industry must also continue its self-regulation efforts in order for the problem of television violence to be cured.

LAURA B. SCHNEIDER

414. See *Hearings II*, *supra* note 11, at 2 (statement of Suzanne Stutman, Executive Director, Institute for Mental Health Initiatives).

415. Clark, *supra* note 36, at 170 (quoting Beth Waxman Bressan, Vice President, CBS Broadcast Group).

416. *Hearings*, *supra* note 5, at 5 (statement of Janet Reno, Attorney General).

417. Kim Mitchell, *NCTA Studies Violence on TV*, MULTICHANNEL NEWS, Jan. 25, 1993, at 2 (quoting Winston H. Cox, Chairman and CEO, Showtime Networks).

418. See *Hearings II*, *supra* note 11 (statement of Rep. Mike Synar).

419. R. Thomas Umstead, *ACLU Charges Bravo With Censorship*, MULTICHANNEL NEWS, Aug. 19, 1991, at 40 (quoting Marjorie Heins, Director of the ACLU's Arts Censorship Project).