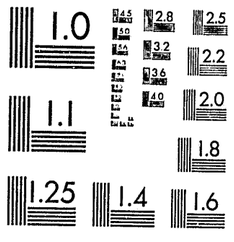

Minutes

WORKSHOP ON
TELEVISION AND VIOLENT BEHAVIOR

December 10, 1982

NATIONAL RESEARCH COUNCIL
COMMISSION ON BEHAVIORAL AND SOCIAL SCIENCES AND EDUCATION
2101 Constitution Avenue Washington, D. C. 20418

COMMITTEE ON RESEARCH
ON LAW ENFORCEMENT AND
THE ADMINISTRATION OF JUSTICE

(202) 334-3577

MINUTES

WORKSHOP ON TELEVISION AND VIOLENT BEHAVIOR
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The workshop on television and violent behavior was convened under the auspices of the Committee on Research on Law Enforcement and the Administration of Justice at the request of the National Institute of Justice (NIJ). As part of an effort to consider a variety of potential program initiatives, NIJ asked the Committee to draw on its interdisciplinary membership and experience to organize and host a small workshop, organized around the recent findings reported in Television and Behavior by the National Institute of Mental Health, to examine research and policy issues related to television violence and aggressive behavior. NIJ wanted an interdisciplinary group of social scientists, legal researchers, and broadcasting practitioners to discuss the report and its implications for further research and public policy in relation to NIJ's concern with crime and criminal justice.

In consultation with NIJ staff and a variety of national experts, the Committee selected the workshop participants to include experts in research design and methodology who were familiar with research on television, criminologists, constitutional lawyers and experts on regulatory issues, and representatives of TV broadcasting interest, concerned citizen groups, and the NIMH advisory committee. The Committee believes that the group of participants reflected the variety of perspectives on the issue while remaining small enough to enable each to actively contribute to the discussion.

The Committee also commissioned three papers (which are appended to the minutes) to examine the validity of existing research findings, the variety of regulatory approaches that might be used to address TV violence, and the constitutional issues related to governmental regulation of television programming. These papers were distributed to participants prior to the workshop and served as the basis for structuring the agenda and discussion. Additional copies may be obtained from the authors.

Norval Morris (workshop chair) and Susan E. Martin (study director) supervised and organized the workshop. The Committee gratefully acknowledges their work and its encouragement of workshop discussion.

The Committee hopes that these minutes, though brief, accurately reflect the diverse views and lively discussion among participants and that this record of the workshop participants' deliberations will be useful to the broader audience concerned with the issues. The Committee is pleased to have been of service to NIJ and hopes that the workshop will help its program priorities for 1983.

Alfred Blumstein
Chair

Participants:

NORVAL MORRIS (Chair)*, Law School, University of Chicago
FLOYD ABRAMS, Cahill, Gordon and Reindel, New York
LEE BOLLINGER, University of Michigan Law School
PEGGY CHARREN, Action for Children's Television, Boston
THOMAS COOK, Department of Psychology, Northwestern University
DOUGLAS GINSBURG, Harvard Law School
RON KESSLER, Institute for Social Research and Department of Sociology, University of Michigan
IRWIN KRASNOW, National Association of Broadcasters, Washington, D.C.
THOMAS KRATTENMAKER, Georgetown University Law Center
DAVID PEARL, Behavioral Sciences Research Branch, National Institute of Mental Health
ELI RUBINSTEIN, School of Journalism, University of North Carolina
LEE SECHREST*, Institute for Social Research, University of Michigan
JAMES UNDERWOOD, University of South Carolina Law School (former Acting Director, National Institute of Justice)
MARVIN WOLFGANG*, Department of Criminology, University of Pennsylvania

Guests:

BERNARD AUCHTER, Community Crime Prevention Division, National Institute of Justice
ALFRED BLUMSTEIN*, School of Urban and Public Affairs, Carnegie-Mellon University
DIANE GOLDMAN, Committee on Research on Law Enforcement and the Administration of Justice, National Research Council
DAVID GOSLIN, Commission on Behavioral and Social Sciences and Education, National Research Council
CHERYL HAYES, Committee on Child Development Research and Public Policy, National Research Council
JACK KATZ, Office of the Director, National Institute of Justice
SUSAN MARTIN, Committee on Research on Law Enforcement and the Administration of Justice, National Research Council
CHERYL MARTORANA, Office of Research Programs, National Institute of Justice
JOANNE MILLER, National Science Foundation
GAIL PORTER, Office of Information, National Research Council
VICKI WEISFELD, Division of Health Promotion and Disease Prevention, Institute of Medicine

*Member, Committee on Research on Law Enforcement and the Administration of Justice

Following introduction of the participants, James Underwood, former director of the National Institute of Justice (NIJ), explained NIJ's purpose in convening the workshop. Three factors--the Attorney General's task force on violent crime, the National Institute of Mental Health's (NIMH) report Television and Behavior, and the findings of several studies indicating extensive public fear of crime--converged to suggest that NIJ might sponsor further research related to television and violent behavior. Prior to committing itself to such a course of action, however, NIJ desired clarification of several issues. It therefore asked the Committee on Research on Law Enforcement and the Administration of Justice to commission three papers and hold a workshop. The papers were to review the NIMH report and other research findings on television and violence, explore options for regulating the viewing of TV violence, and consider the constitutional questions raised by regulatory efforts. The workshop was to determine whether more research on television and violence is needed; if so, what kind of research should be done; and whether the National Institute of Justice should sponsor or support that research.

Thomas Cook, author of "Television Research for Science and Policy," noted that the central theme of the NIMH report is the general impact of television on behavior; only about 10 percent of the NIMH report and 20 percent of the technical papers accompanying the report are devoted to the effects of TV violence. The report's section on TV violence and aggressive behavior, however, concludes that viewing TV violence is associated with aggression in children. This conclusion is based on convergent evidence from four sources: laboratory experiments; cross-sectional surveys; field experiments; and panel studies.

Cook noted that a conclusion based on consistency across studies is logically acceptable if the biases in the various types of studies do not run in the same direction. However, he cited reasons for believing that the bias may predominantly operate in one direction. Consequently, additional evidence is necessary to support the NIMH advisory committee's conclusion. Some additional evidence is provided by the two large parel studies by Milavsky et al. and Huesman et al., each of which uses state-of-the-art methodology. The findings of these studies are quite similar, but their authors draw different conclusions: seeing the glass either half empty or half full. Huesman et al. measured the effects on children's aggressive behavior of their television viewing over the past 2 years, after controlling for differences in underlying aggressiveness in his sample of 700 American and 220 Finnish children. The researchers found that prior television viewing is related to subsequent aggression but that the relationships, while positive, are small and statistically significant only for American girls. Milavsky et al. measured the effect of viewing TV violence on aggressiveness at several subsequent time periods but did not measure the cumulative effect of television on subsequent aggression. They, too, found small but nonsignificant relationships between television viewing and subsequent aggression that seemed to increase with increased time intervals between measures.

Cook concluded from his review of the literature that the research evidence suggests a slight general effect of viewing TV violence on children's behavior, as well as clear but isolated cases of imitative violence. Since, by social science standards, the observed effects are quite small, an important question to be answered is whether viewing the TV violence produces enough of an effect on enough children to be worrisome. Also unknown are the relationship of TV violence to crime, the cumulative effect of exposure to TV violence, and the meaning of the observed associations. Cook noted that none of the studies deals well with measures of criminal or violent behavior as distinct from other types of aggressiveness. Because the studies examined only three years or less of exposure to TV violence, the possible long-term, cumulative effect of exposure to TV violence is unknown. And the broad definitions of both "violence" and "aggressive behavior" fail to link specific behaviors with watching specific actions on television, leaving the meaning of the observed effects unclear.

Lee Sechrest stated that he interprets the data from the panel studies presented in Cook's paper as showing no clear pattern rather than as indicating a clear progression in level of aggression over time. Sechrest suggested several possible interpretations of the small effects reported in the studies: (1) TV violence may have no effect on most children and a large effect on a few; (2) it may have small effects on most children; or (3) it may have large negative or antisocial effects on behavior that are offset by prosocial effects, since such positive behaviors are not measured by the studies concerned with violence. Sechrest questioned the concern with physical violence in contrast to other morally repugnant or socially destructive behaviors (e.g., lying, cheating), pointed to the ambiguity in the meaning and measurement of "violence," and suggested that knowledge is still limited about how children of various ages interpret what they see and hear, including the violence shown on television. Finally, he suggested studying foreign experiences with TV violence and aggressive behavior to examine the mediating effects of national mores. He observed that Japan, for example, has television programming more violent than that found in the United States, but Japan has less crime.

In the general discussion of social science research evidence and the need for further research, workshop participants agreed that the evidence indicates that there is a time-lagged association between viewing violence on television and behaving aggressively, when the initial level of aggression is held constant. However, the magnitude and the exact nature of this association in the general population are unknown. It is uncertain, for example, whether this association is the result of the amount of televised violence or the type of televised violence the viewer watches or a combination of these factors. Furthermore, the aggressive behavioral outcome is not necessarily criminal or delinquent. Indeed, research on TV violence and aggressive behavior has been hindered by an overly broad definition of aggression that fails to adequately distinguish between aggression and assertiveness or limited antisocial behavior. Finally, aggressive behavior changes

with age. The workshop participants agreed that more research on TV and social behavior is needed, but that studying whether viewing TV violence causes aggressive behavior in general--or specifying criminal behavior as the principal outcome measure--would be less useful than studying the complex factors that lead to the selection of particular types of programs and the effect of those programs on viewers of different ages. Such studies must carefully measure the intervening factors between watching at an earlier age and subsequent behavioral outcomes.

Another question for research is how TV communicates ideas. No one fully understands how the complex ideas about right and wrong embedded in plot or characterization are communicated to and interpreted by viewers of various ages. For example, in many shows that include violence, authority is upheld and constructive forms of social solidarity are portrayed.

Floyd Abrams expressed surprise at the agreement among social scientists about evidence regarding TV and violence. He noted that in trying to answer a related question--does TV violence cause crime--he had found no supporting social science evidence and very few criminologists or psychiatrists who suggested television viewing as a major source of crime.

It was noted that although lawyers in arguing cases are concerned with effects on individuals (e.g., in Zamora the defense attorney tried to prove the defendant suffered from "involuntary subliminal TV intoxication"), scientific evidence does not and cannot indicate that a particular individual who watches a given amount of TV will then commit a particular act. Rather, scientific evidence seeks to determine the statistically likely effects of various types of programs on various segments of the population. While evidence relating TV and crime is limited, one study (Belson) has found that antisocial behavior is associated with watching a great deal of TV violence (after controlling for a predisposition to violence in heavy TV watchers), although that study does raise questions about reciprocal causation.

It was agreed by workshop participants that several types of research on TV violence and aggressive behavior would be useful to policy makers:

1. Examination of selection factors, i.e., those factors leading to selection of particular TV shows and, more generally, to children's viewing habits and their social outcomes.

2. Large-scale longitudinal studies examining the cumulative, long-term effects of various amounts of exposure to TV violence as well as to prosocial behaviors on a variety of outcome measures regarded by policy makers as socially relevant.

3. Studies of the manner in which complex sets of ideas are presented on television and interpreted by children of various ages.

Participants agreed to proceed to the next paper on the assumption that research currently provides or will provide sufficient evidence of a link between TV viewing of violence and aggressive behavior to warrant action by the public or by policy makers.

Douglas Ginsburg, author of "Regulating Television Violence," noted that he had been asked to assume the scientific validity of the NIMH study's conclusion that there is a link between viewing TV violence and aggressive behavior and so to consider various policy options for reducing the negative effects of viewing TV violence. Since there has been no prior effort to constrain TV broadcasting because it is harmful, one cannot adopt traditional approaches to broadcast regulation. Instead, Ginsberg examined various techniques used for regulating other kinds of business enterprises in a variety of settings and assessed their applicability to television.

Ginsburg's paper rests on the following assumptions: violence in television programs is valued by viewers and provided by the broadcast industry to meet public demand; viewing television violence and aggression causes children to behave in more violent and aggressive ways than they would otherwise behave; the aggressive behavior induced by TV watching imposes social costs; broadcasters and children cannot practically be made to bear these costs; parental responsibility for controlling children's consumption of TV violence is preferable to governmental assumption of that responsibility; but parents will undercontrol that consumption.

In response to the negative effects of viewing TV violence, four types of regulatory approaches might be considered (in order of increasing government control): (1) consumer information and education; (2) command and control; (3) tax incentives; and (4) market restructuring to decrease the output of TV violence. Consumer information and education (1) might include informing parents of the effects of viewing violent programming, teaching children critical viewing skills, and providing some sort of rating service for programming violence, including warnings given contemporaneously (as in France) or in advance of programs. Command and control (2) would involve binding regulations applicable to broadcasters, such as quotas on the number or quality of violent incidents, zoning violence to restrict it to the times when few children are likely to be in the TV audience, or a ban on violence. Tax incentives (3) would involve taxing broadcasters according to the number of violent acts shown. And market restructuring (4) might involve providing increased alternatives to viewers, prohibiting program export to reduce the incentive to make certain violent programs, reducing competition through cooperative agreements among broadcast networks, and creating a state broadcasting monopoly to eliminate the profit incentive presumably stimulating the industry's competitive pursuit of violence in programming.

Ginsburg stressed that his paper should not be read as advocacy for any regulatory approach. Rather, it represents an effort to describe the

major possible regulatory approaches, each of which might result in undesirable effects, thus suggesting the need for further research prior to adopting any of them. For example, quotas on the number of violent incidents might cause producers to increase the intensity of the violence in each incident permitted. Since it is unclear whether it is the sheer amount of violence or the nature of a particular incident that causes harmful reactions in viewers (quantity or quality), research is needed to answer such questions as: Are there specific acts of violence or particular plot lines that are conducive to imitation? How many children are in the TV audience at various times? What is the market for various types of violence? How available are nonharmful substitutes for violence, and what are their likely effects on viewir behavior? What is the value of violence to TV producers?

Irwin Krasnow commented that Ginsberg's paper is a sterile exercise that is unsatisfying to a practitioner because it overlooks the constitutional and institutional questions that must be addressed. The more imaginative and fanciful the suggested potential regulatory approach, the less related it is to the realities of the current regulatory climate. The FCC is moving away from regulation and the "fairness doctrine," and it is very unlikely to accede to any effort to touch program content or to regulate the alternatives to network television, such as cable. In addition, a recent court ruling that the "family viewing hour" is an illegal limitation of competition makes it impossible for the networks to collaboratively set limits on programming, since their actions are likely to be treated as a violation of antitrust laws. Furthermore, the increasing alternatives to network television are not likely to contribute to solving the problem of TV violence: HBO, now the most popular alternative to regular programming, shows uncensored movies that are often quite violent.

In the general discussion that followed the paper presentation, Peggy Charren agreed with Krasnow in rejecting most of Ginsberg's suggestions as impractical. Other participants agreed that widening the number of television channels and programs would be likely to increase rather than reduce TV violence. However, Charren suggested several alternatives not mentioned by Ginsberg that would not be content sensitive or potentially illegal. First, increased funding for public broadcasting could minimize the need for advertising on PBS and enable that network to produce more programs to meet the varied needs and interests of children, which currently are not met by commercial television. Second, lock boxes could be made available more widely or, like seat belts, could be included as a standard part of a television set. This would enable parents to regulate their children's television viewing without affecting adult viewing. Third, replacement of the current requirement that stations provide public interest programs with a requirement that they provide children's programming. Fourth, consumers, particularly parents dissatisfied with existing programs for children, could be mobilized to act as a pressure group for change and taught how to develop critical viewing skills in their children.

It was suggested that the FCC either does not believe the NIMH report or has chosen to ignore it. If the commissioners were convinced that TV violence has harmful behavioral effects, as the report suggests, they would be obligated to do something and would already have found a legally acceptable way to do so.

Eli Rubinstein suggested that the workshop's focus on TV and violence leads to examination of only the negative effects of TV, whereas TV also is a positive socializing agent. He suggested that policy makers consider the alternatives to existing television programming that can increase those positive socializing effects rather than simply discussing how to reduce TV violence and its negative effects. Thus, research should be focused on shifting programming for children in a positive direction.

Norval Morris agreed that limiting the workshop discussion to the relationship of TV violence and aggressive behavior had shortcomings but that such a limitation was appropriate given the mandate from NIJ. Nevertheless, it was acknowledged that TV is an important aspect of our culture and that the broader question of the effect of television on our culture is an important one for study.

Some participants suggested that concern with the effect of TV violence is the result of a middle-class bias that views violence as a debasing element in the culture and fears that viewing violence on television will have a socially corrosive effect. Abrams cautioned that a recommendation to study TV violence must be based on evidence that programs do harm rather than a personal predilection that much of what is on TV is tasteless. Wolfgang added that without stronger research evidence of the effect of TV violence on behavior, recommendations to regulate TV violence reflect a cultural bias against having children see violence.

Others pointed out that the impact of television on children's attitudes and behavior is not simply a matter of values or taste. Television affects behavior indirectly by shaping a wide range of aspirations and expectations, including sex-role attitudes and career goals. While these are not related to violence, limited existing research has examined the impact of TV violence on children's attitudes toward "normal" and "deviant" behavior and on children's ability to empathize with victims.

Lee Bollinger, author of "The First Amendment and the Regulation of Television Violence," concluded that regulation of either broadcasting or TV violence could be upheld only if existing interpretations of the constitution placed fewer limits on broadcast regulation. Regulation suggests principal areas of constitutional concern. First, because not every depiction of violence on television would bring about undesirable social consequences, the regulatory system would face a dilemma. On the one hand, regulation that attempts to be sensitive to context or the worth of the speech in particular instances, while focusing on speech

that is truly harmful, is virtually unenforceable and risks excessive limitation through self-censorship. On the other hand, a narrowly quantitative regulatory standard would result in more certain enforcement but risks encompassing good speech as well as bad. Thus drafters of any regulatory standard face a choice between vagueness and arbitrariness. Second, regulation implies a more expanded government role over television programming that shifts the government from controlling the offensiveness of speech to curtailing the asserted harmful effects or influence of the speech. Third, regulation of TV violence might so burden the fragile structure of broadcast regulation that the entire regulatory system would topple for lack of internal support. Fourth, if alternative means for dealing with the problem of social violence are available, then regulation is undesirable. Bollinger concluded that even if TV violence causes social harm, the regulation of TV violence would raise nearly insuperable First Amendment issues. Nevertheless if one were defending a regulatory system for TV violence, the best approach would: (1) rest on a theory of broadcast regulation as distinct from broader First Amendment theories; (2) distinguish television entertainment from television's general fare for special constitutional status; (3) seek regulation of the form as distinct from the content of programs; and (4) argue for zoning speech to protect children.

Commenting on the paper, Thomas Krattenmaker asserted that Bollinger was too generous; any type of regulation would be unconstitutional. Addressing each of Bollinger's potential bases for a regulatory scheme, Krattenmaker argued: (1) broadcasting has no separate history of regulation; (2) one cannot separate entertainment from news and other programming; (3) it is impossible to regulate form separately from content; and (4) zoning would impinge on adults' rights. Furthermore, the weakness of the social science evidence of harm from TV violence, the availability of less-intrusive means than regulation for addressing the problem of violence, and the unavoidable issue of vagueness would all contribute to the unconstitutionality of any regulation.

Rubinstein expressed disappointment that the workshop had focused attention on regulation rather than the broader panoply of possible nonregulatory policy options, such as public education, to address the link between televised violence and aggressive behavior in children. He asserted that because research has sufficiently established this link, further research on TV violence and aggressive behavior is not what is necessary to arrive at policy recommendations. The question is largely political: how to mobilize the public to bring about change in programming. However, further research is desirable because many questions remain about the impact of TV on social behavior as well as about some details of the relationship between TV violence and aggression. Nevertheless, NIJ does not appear to be the most appropriate agency to support studies of TV violence and human development. Finally, Rubinstein criticized the broadcast industry's response to the recent NIMH report: either the industry has ignored the report altogether or has focused on the findings on TV violence to the virtual exclusion of the rest of the report. He observed that the industry might have

acknowledged both its shortcomings and the fact that the report indicated broadcasting currently makes a positive contribution to children's social development. In the absence of the political pressure that existed when the 1972 NIMH report was issued, however, the broadcast industry has not responded.

In addressing the issues for which the workshop was convened, the participants' consensus was that the National Institute of Justice should not institute a major research initiative on TV violence and criminal behavior at this time. Participants doubted the utility of crime as an organizing principle for the research related to the impact of TV violence on behavior that they viewed as generally desirable. And they agreed that given NIJ's limited financial resources, those critical areas with a higher probability of larger payoffs in reducing crime should be given higher priority than TV and violence. While NIJ should give consideration to imaginative proposals on TV violence that are submitted in its unsolicited research program, it should not actively seek such projects.

There also was agreement that interdisciplinary study of the broadcasting media and social behavior, including but not limited to violence, is desirable. In addition to the priority research issues previously discussed, several participants suggested the need for policy-oriented research on the structure and decision-making processes of the broadcast industry. Such research, by identifying the points of leverage for change, might suggest viable nonregulatory strategies for making the broadcasting media more responsible and responsive to public needs. The prospects of financial support for and broadcast industry cooperation with a broad program of research on television and social behavior, however, are bleak.

In considering the potential role of the National Research Council and its committees with respect to future activities related to television and social behavior, the participants made no recommendation. It was agreed that, given the broad scope of the research issues that might be addressed, the Committee on Research on Law Enforcement and the Administration of Justice was not the appropriate group to initiate activity; however, the Committee on Child Development Research and Public Policy might appropriately consider TV-related issues in the future. It appears that three different perspectives converged to suggest no National Research Council action beyond the workshop. Participants principally concerned with changing policy maintained that existing knowledge about television and social behavior is sufficient to serve as the basis of policy recommendations and political action. Participants representing the broadcast industry opposed further research as a prelude to undesirable regulation. And participants familiar with the National Research Council noted that its committees are often not as well-suited to do original research as to synthesize knowledge. Since the research has recently been synthesized by the NIMH advisory committee, the participants did not suggest any further activity within the National Research Council at this time.

REGULATING TELEVISION VIOLENCE

by

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Harvard Law School

Presented to the

Workshop on Television and Violent Behavior

Sponsored by the

Committee on Research on Law Enforcement

and the

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Douglas H. Ginsburg

This paper analyzes the various policies by which the government and private parties could attempt to lower the level of violence and aggression exhibited on broadcast television in the United States. Part I makes explicit certain basic assumptions and then analyzes the situation underlying the current level of violence on television. Part II examines various regulatory and private actions that could be taken in order to decrease television violence, and analyzes the probable consequences, and the types of costs and benefits to be expected under each approach.

The occasion for this analysis is the 1982 report of the National Institute of Mental Health,[1] which reviews the 1972 Report of the Surgeon General's Advisory Committee on Television and Behavior and the research literature of the intervening decade, and concludes that there is indeed a causal connection between violence shown on television and subsequent aggressive behavior by children. This paper takes the NIMH's conclusion as its starting point, but does not itself reach any firm conclusion about the desirability of the policy options it examines. That would be premature for two reasons.

First, this is virtually the first analytic treatment of the ways in which television violence might be regulated. Until now, social scientists have been pre-occupied with establishing the existence or non-existence of the causal relationship between television violence and later aggressive behavior by child viewers. Lawyers, policy analysts, and

economists have not yet turned their attention to the present question. To be sure, many of the policy options reviewed here have been suggested in one place or another before; but they have not been sifted, compared, and analyzed.[2] Even this first attempt makes no effort to estimate the magnitudes of the costs and benefits involved, as opposed to their incidence. Much is therefore yet to be done before proposals for regulation, legislation, or citizen action can be endorsed.

Second, this paper does not consider the constitutionality of the options under discussion. At this early stage of consideration, I see no reason to bound our consideration only to those options that the experts think would be constitutional. We must let our imaginations roam wide in search of workable policies before we call them home to a constitutional accounting. Only by proceeding in this manner can we minimize the risk of overlooking a policy that would be effective but novel, and that might, despite its novelty, pass constitutional muster either in its original form or with some alteration.

I

Television violence and its control must be analyzed in the context from which it arises. That context can be simply described as follows. First, television broadcasters are in competition with one another for the attention of viewers. Their business depends upon attracting viewers to programs and selling time within and between programs to advertisers who value the attention of those viewers.

Program contents reflect this competition. If broadcasters exhibit violent programs, therefore, it is because they believe that by doing so they can attract an audience that will be more highly valued by advertisers.

An audience may be more highly valued because it is larger or because of its demographic composition. Advertisers are willing to pay more, that is, to reach, say, an urban audience of 18-to-49 year olds than a rural audience or children and elderly people.[3] The reason is simply that the preferred audience has more purchasing power. When it is available, which is for the most part during "prime-time" in the evening, programs will be broadcast to its tastes. The same programs will be watched, however, by non-urbanites, children, and the elderly to the extent that those audiences also derive pleasure from these same shows.

Judging from the results, the most highly-valued audiences want to see violent programs. In addition, however, it seems that violent programs are also broadcast when highly-valued viewers are not in the audience. Thus, programs broadcast on weekend mornings and in the after-school hours of weekdays, and intended for an audience composed primarily of children, also have some violent content. The child audience also, we may infer, wants programs of this sort. This is not to say that the entire child audience, or for that matter that all members of the 18-49 year old urban audience, want only violent programming but merely that enough of these viewers prefer or are willing to spend much

of their time watching violent programs to cause broadcasters to incur the costs of procuring them.

With this understanding, which I will thrice qualify in a moment, we may assert:

Proposition No. 1. Violence in television programs is valued by viewers.

Now for the qualifications. First, viewers cannot express the intensity of their preferences in the absence of a pricing scheme for viewing programs. Broadcasters, accordingly, respond equally to viewers who greatly value and those who only slightly value but will watch a particular program: given equally desirable demographic characteristics, each viewer has one "vote." The broadcasting industry does not necessarily, therefore, maximize consumer welfare. If viewers did pay broadcasters for each program they watched, profit-maximizing braodcasters might show more or less violent programming. Thus understood, it can still be maintained, however, that violence in television programs is valued by viewers.

The second qualification is potentially more significant. Thus far both the reader and I have implicitly assumed that the broadcasters and viewers in question are both located exclusively in the United States. In fact, however, program producers export their programs for exhibition in other countries,[4] which implicates the tastes and values of foreign viewers and the economics of program exportation in the producers' calculus of what constitutes profit-maximizing

programming. Therefore, if foreign viewers had a preference for violent programming, and the domestic audience had a slight distaste for violent programming, program producers could compensate broadcasters for their audience loss by lowering the price of the programming to domestic broadcasters by an amount less than the incremental profit they will make from export markets. It is possible, in other words, that violence in television programs is not valued by viewers in the United States.

Third, there is a subtler but even more powerful version of the prior qualification. It may be that neither domestic nor foreign audiences have a preference for violent programming. Either audience or both may be neutral or even have a slight distaste for violent programming, notwithstanding which program producers might still find it profit-maximizing to produce violent programming. This would be true if violent programming is less culture-bound or for other reasons is more readily translated for use in a foreign market.[5] For example, violence may just be more easily understood than words by a mass audience in any culture, and a violent story more widely appreciated than a story with more dialogue and less action. Or, more mechanically, since dubbing-in a language may dampen a program's appeal, a program with more action may be more appealing to foreign language audiences; and a bias in favor of action may operate to increase the amount of violence, although both audiences regard the violence as lessening the value of the program to them.

The present analysis proceeds, however, on the basis of Proposition No. 1 above. Only a detailed empirical investigation could substantiate either of the alternative hypotheses discussed here, in the absence of which it seems more reasonable to believe that there is a definite preference among domestic viewers for violent television programming.

The occasion for this belabored treatment bears explicit repetition at this point.

> Proposition No. 2. Viewing television violence and aggression causes children to behave in a more violent and aggressive fashion.

This proposition must be read closely for what it does and does not say or imply. First, it says only that children are affected in the asserted way. As I read the NIMH report, there is no warrant for concluding on the basis of current social science evidence that adult viewers are likewise affected.[6] This paper makes no assumption about whether adults are affected, and treats any such effect on adults as beyond the scope of the problem under discussion.

Second, Proposition No. 2 says nothing about the amount of violence that children must view on television before their behavior is affected. It would not be reasonable to think that every display of violence adds incrementally to the violent behavior of each child viewer. At most, the social science evidence seems to support the conclusion that heavy dosages of televised violence increase the probability that any given child viewer will behave aggressively.[7]

Third, the proposition says nothing about the process by which viewing television violence operates to affect children's later behavior. The social science literature cannot yet distinguish among at least these four hypotheses: (1) children imitate what they observe; (2) children's attitudes are changed so that they accept the propriety of what they observe; (3) children are physiologically aroused by violent programs, resulting either in desensitization to violence, or an increased level of aggressiveness, or both; and (4) children who are already aggressive like to see violent programs in order to justify their own behavior to themselves.

Finally, the assumption presupposes a definition of violence. Social scientists and communications analysts have disputed endlessly the question of what constitutes violence for the purpose of measuring its effect on the behavior of child viewers.[8] In fact, because of their inability to agree on a definition, and other methodological inconsistencies, the empirical literature supports Proposition No. 2 only in the sense that the evidence converges to do so. Many tests using different approaches, that is, show positive correlations of varying degrees of strength and significance.

As this point in the present analysis, it is not necessary to define violence -- or to choose between the capacious definition used by Professor Gerbner, which would include comedic pratfalls and acts of God,[9] and the ordinary

language use of the term, which would be roughly equivalent to criminal acts and intentional harms perpetrated against persons or property. The narrower view is not entirely contained within the broader view, since Gerbner's definition does not seem to encompass violence against property (or perhaps animals). Any definition would, however, include murder, mayhem, fist fights, and other forms of physical violence against persons, and that may be taken as the core of the term "violence" as it will be used here until such time as refinements are necessary.

Without more, the fact that television violence makes children more aggressive does not tell us that we have a problem on our hands. Making children more aggressive could be a social good, as it was thought to be in ancient Sparta. More aggressive children could be more successful in later life in our less war-like but highly competitive society, which rewards aggressiveness in business, law, politics, and sports. Let us assume, therefore, that the aggressive behavior caused by television viewing takes forms unwanted by society, i.e., it is anti-social.

If the behavior is anti-social, and is directed at strangers, it will ordinarily be regarded as either criminal or tortious behavior, since society will want to deter its occurrence by making the actor liable. There is also some aggression, however, that is neither encouraged, on the one hand, nor made the ocassion for liability, on the other. This includes a wide range of behaviors including conflict

with parents, verbal abusiveness, the physical aggressiveness of the schoolyard bully, and a child's thoughtless abuse of domestic pets. Aggression that does not implicate potential liability will be denoted here by the short-hand "domestic aggression" because much of it takes place within a familial or social setting rather than against strangers.

Whether the aggressiveness induced by television viewing takes the form of criminal violence or domestic aggression, it clearly imposes costs on society. Both pro-social and anti-social aggression impose costs on their specific victims, to be sure. Pro-social aggression, however, injures someone -- a business firm's competitors, a politician's opposing candidate, a lawyer's adversary, or an athlete's opponent -- in a manner that is thought to be beneficial to society at large. Anti-social aggression, however, imposes an injury on its victims without conferring a benefit on society.

Unless we believe that the aggressive behavior induced by viewing television violence is of the anti-social variety, by which we mean that it imposes costs on society, we have no reason to be concerned about controlling it. Hence:

> Proposition No. 3. The aggressive behavior induced by children viewing television violence imposes costs on society.

In economic terms, children's viewing of television violence generates a negative externality -- it imposes costs on strangers to the viewing transaction. The parties to the viewing transaction are the viewer, the broadcaster, and the advertiser for which the broadcaster is an adequate

proxy for analytic purposes. They presumably derive benefits from the transaction, since they consent to it. The viewer -- child or adult -- is amused or entertained, and the broadcaster is given the opportunity to sell moments of the viewer's attention to advertisers with products to offer. The victims of the child viewer's later aggression, however, neither consent to this exchange nor derive any benefit from it. Their interest in the consequences of the viewing transaction are not represented, therefore, as it takes place.

Thus, simply described, the problem of television violence is the result of a clear market failure. The market in which child viewers give their attention to the commercials in exchange for the entertainment that the broadcaster provides does not reflect the cost of the child's aggressive behavior that is a product of that transaction. As a result, we would expect a higher degree of television violence than is socially optimal. The optimal level of violence would be produced if the broadcasters or the children -- it doesn't matter which -- bore the full costs of the child's later aggressiveness. They do not, and it is reasonable to assume that they cannot be made to bear those costs.

First, while it is possible in principle to calibrate criminal penalties and tort liability perfectly so as to deter such later aggression by rational child viewers, this is not possible in practice -- unless children are rational. If children do not appreciate the need to curtail their consumption of violent programs because of their tendency to

cause aggressive behavior later, they will overconsume violence and later incur liability for their aggression. But it is difficult to penalize juvenile offenders adequately to deter them to the optimal extent. They are not typically amenable to large fines, nor frequently are their parents, who could be held vicariously liable if that would be effective. Imprisonment is available, but is widely viewed in our society as producing more harm than good when applied to juveniles, except perhaps in the case of seemingly incorrigible offenders. In addition, liability rules are not responsive to the problem of domestic aggression, where well-calibrated penalties cannot be counted upon and cannot practically be required or imposed.

Second, the alternative of creating broadcaster liability faces insurmountable obstacles in our legal system. Neither causation nor damages could be established sufficiently well to impose liability on broadcasters for harms induced by television violence. While there are a few clear examples of a particular crime having been perpetrated in apparent imitation of a televised crime recently viewed by the juvenile offender, the general increase in violent behavior owing to televised violence is far too uncertain to be assessed against broadcasters. No practical effort at controlled experimentation would enable social scientists to estimate fairly the number of assaults and murders, not to mention the domestic aggression, that would not have taken place in our society but for television violence. Without at least a

rough notion, however, of how much incremental violence might be attributable to television viewing, and its cost to society, society cannot penalize broadcasters in the amount appropriate to reduce television violence to its optimal level. Hence:

> Proposition No.4. Broadcasters and children cannot practically be made to bear the true costs of the aggression caused by their respective production and consumption of televised violence.

Where markets fail to produce an efficient allocation of resources -- in this case an efficient level of television violence taking into account its costs to non-viewers -- government is presented with the question of whether to intervene in order to achieve a more efficient result. The intervention could take any of a number of forms, many of which are discussed in Part II of this paper. In the particular area under discussion, however, it is appropriate to consider another source of potential intervention, namely the child viewer's parents.

In cases of market failure generally, and of a negative externality problem in particular, we usually think only of governmental intervention as a possible source of correction. This simply reflects the fact that the government generally maintains a monopoly on the legitimate use of force, and departure from the pattern of outcomes created by consensual transactions by definition requires force to override private wills -- usually by enactment and enforcement of a law. For

example, since producers and individual consumers have a common interest in avoiding the cost of equipping automobiles with pollution control devices, laws requiring automobile manufacturers to install pollution control devices, and requiring purchasers to leave them in place, were enacted.

The market in which children exchange their attention to commercials for entertainment programming is peculiar in that there are two potential sources of intervention. In addition to the usual governmental source, it is possible (at least in principle) that parents could intervene to regulate their children's consumption. Parents have a miniature monopoly on force within their household, analogous to the government's monopoly on force in society at large. The parental monopoly on force is less than perfect, of course. Many children are left at home alone much of the time,[10] and we all know parents who simply cannot control their children. But the governmental monopoly on force is also less than perfect; too many crimes are committed in spite of the government's laws.[11]

In regulating children's television consumption, the governmental monopoly may be more or less effective than the parental monopoly on force. The governmental monopoly may also be more or less costly to use than the parental monopoly. If cost and efficacy were equal, however, we would surely prefer to rely upon the parental monopoly because it is capable of being more discriminating. If the government suppresses violence on television, children and adults are

affected uniformly. Parents, on the other hand, are able to regulate their children's exposure to television violence on an individualized basis. Thus, parents might distinguish children from themselves, and distinguish among children on the basis of their susceptability to the anti-social influence of television violence, allowing themselves and those children who are relatively immune to enjoy violent programming while preventing those children who are vulnerable to its effects from consuming it. Thus:

> Proposition No. 5. Other things being equal, parental responsibility for controlling children's consumption of television violence would be preferable to governmental assumption of that responsibility.

The relevance of parental responsibility as a possible source of regulation of the market in which broadcasters sell and children purchase violent programming reflects another peculiarity of that market. It is the only market in which children are autonomous transactors. They do not need money in order to transact, since broadcasters value their attention to commercials. The children do not even have to leave their home in order to consummate the transaction, but merely need to turn on the television set.

These features of the market also make its regulation by parents problematic. Parental regulation cannot be accomplished by withholding funds. It can only be accomplished by direct intervention to prevent the child from

consuming the violent programming, either by preventing the consumption of any programming or, more realistically, by policing the child's viewing behavior.

This type of policing is expensive for parents and often impractical .[12] Parents are often the beneficiaries in one respect of their childrens' television watching, precisely because it frees the parents from the necessity to monitor their children continuously. To the extent that the television serves parents as a babysitter, however, its value would be diminished by their having to police what their children watch.

In addition, it is significant that parents are not the only, or perhaps even the principal, victims of the aggression that their children will practice as a result of watching violent programs. To the extent that the aggression takes the form of crimes against others, rather than domestic aggression, some of its costs are external to the parents' welfare calculus. By allowing their children to watch violent programs, the parents in effect are parties to a babysitting transaction of which violence against strangers is a negative externality. Their incentive to take the cost of that violence into account is therefore limited.

Taking account of the costs of policing, and the fact that parents do not bear the full costs of their children's aggressive behavior, we come to:

> Proposition No. 6. Parents will systematically under-police their children's viewing behavior.

The result will be that a higher than optimal level of violence will be consumed by children viewing television unless parental efforts are supplemented by governmental or other forces to regulate the amount of television violence that is broadcast. This is not to say that parental regulation should not be encouraged -- ways in which it might be enocuraged are considered below -- but only that it is unlikely to prove sufficient to reduce children's consumption of violent television programs to the efficient level. Whether parental regulation should be used insofar as it can be effective depends upon its costs compared to the cost of an equal degree of control achieved by governmental regulation or other available means.

In closing this introductory analysis of the problem of television violence, it may be useful to advert to an analogy. Because the problem revolves around the peculiarity of children acting in the capacity of consumers, there are not many close analogies available. An instructive analogy may be found, however, when one considers the consumption of cigarettes by children.

Like television violence, cigarettes have been identified by the Surgeon General as detrimental to the health of the consumer, including, of course, children who smoke them.[13] Cigarettes continue to be manufactured by profit-maximizing firms, and continue to be purchased by adults and children who apparently enjoy their consumption. Society is understandably concerned, however, with children's consumption of

cigarettes on the ground that children are less likely to appreciate the long-run health risks involved in smoking and developing the habit of smoking. In addition, smokers of all ages impose external costs on non-smokers by polluting the air.

In response to the problems created by cigarette smoking -- for smokers and non-smokers alike -- governments at all levels have taken several steps. First, they have increasingly moved to "zone" or segregate smokers from non-smokers in order to limit the externalization of costs to non-smokers.[14] Second, the federal government has undertaken to advise the public on the health hazards of smoking.[15] Third, most states have prohibited the sale of cigarettes to minors,[16] even though cigarette sales are an important source of tax revenue for many of them.[17] At the same time, it is perhaps significant that no government has attempted to supplant parents in exercising primary responsibility for children's consumption of cigarettes. Parents retain the right to give their children cigarettes but, it is officially hoped, will persuade or prevent their children from smoking cigarettes.

II

There are four types of regulatory tools that could be used to reduce the level of television violence to which children are exposed. I examine them below in a sequence that reflects an increasing degree of governmental intervention in the marketplace populated by children and broadcasters.

A. Consumer education and information. The model of an efficient market presupposes a perfectly informed group of consumers. They would be fully aware of all the choices they have and of all the costs and benefits associated with each. In practice, however, consumers must operate on the basis of more or less imperfect information, if only because information is costly. In addition, however, information is often under-produced because of the difficulties entailed in profiting from its production and dissemination. Consequently, government frequently serves as a source of additional information to improve the performance of markets. Examples include the extensive financial, industrial, and agricultural information that governments generate for use by traders,[18] and the labelling requirements that governments impose in order to assure that consumers are aware of the contents, side effects, or maintenance requirements of the food, drugs, and cosmetics they buy.[19] To take a familiar example from this genre, consider the federal labelling requirements applicable to many foods; they must give the ingredients in the order of their weight in the product, as well as a nutritional analysis of the product,[20] plus the requirements in some locales that the products bear "unit" prices in order to facilitate price comparison by shoppers.[21]

In the context of television violence, there are two principle respects in which the provision of consumer information could help to improve consumer decision-making and lower the amount of violence viewed by children. First,

parents may not be well-informed about the causal connection between children's consumption of violent television programs and their later anti-social aggression. Some parents would not realize by themselves the degree to which allowing their children to view violent programming imposes costs on their children and on themselves, and that they could avoid these costs if they were willing to take the steps necessary to reduce their children's consumption of violent programs.

Perhaps many children could themselves be educated to recognize the distinction between violent and non-violent programs, and to understand that violent programs may be enjoyed but are not to be mimicked. This may require little more than making it clear that the programs involve actors portraying fictional roles in fictional situations, and are not films of actual events involving the rather casual infliction of real violence that they might appear to be to a young child. Older children might appreciate the social and personal effects of viewing such programs, and come to appreciate the availability and desirability of alternative entertainments both on and off television.

Second, parents and children informed about the problem of television violence will also need information on which to act in their self-interest, to distinguish violent programs from non-violent programs at a reasonable cost to themselves. This could be accomplished either by giving them the means with which to evaluate programs for themselves, including a useable definition of violence, or by giving them the results of someone else's evaluation process.

In the latter vein, individual programs or program series might be the subject of a ratings service that distinguished any number of violence categories. The practicality of this approach has not yet been demonstrated, however. One major difficulty is in devising a practical means by which someone independent of broadcasters can rate a program long enough before it is to be broadcast to disseminate the ratings in advance. If this cannot be done, it may be necessary to rate a series rather than individual episodes in it.

Ratings are used, however imperfectly, by the Motion Picture Association of America, which screens films before their release, but the ratings are geared to the use of vulgar language and the depiction of sexual activity rather than to the violent or non-violent character of a film.[22] Various violence indices for both films and television programs do exist.[23] They are published by academics or by concerned citizen groups. They are not widely disseminated or used, however, and it is not clear whether they would lend themselves to establishing a few relatively clear categories, which may be necessary if they are to be useful to the public. The improvement of these indices or their adaptation to generate ratings, and their general distribution, could be encouraged either by private or public efforts in order to assure a more informed consuming public.

Television broadcasters could also be required to disseminate the ratings. Each program's rating could be

required in the schedules broadcasters release to the newspapers, in printed and televised advertisements, in announcements over the air just before the broadcast begins, and during commercial interruptions that occur before the violent conduct is televised.

Even now broadcasters occasionally issue warnings -- without compulsion, in the interest of good public relations -- but only with respect to egregiously violent or otherwise potentially offensive programming. Warnings could be required with respect to even the ordinarily violent programs, however. Indeed, the precise wording of the warning could be specified, if it were thought that standardization was important -- as has been done with respect to the health warning required on cigarette advertising packages.[24] Paraphrasing a recent cartoon in the Wall Street Journal, for example, one might require a warning that "The following program contains numerous instances of violence. Mature viewers may want to change the channel."[25] Of course, one could only hope that mature viewers would be in charge of program selection in each household.[26]

Even from the foregoing examples, it is clear that notices -- ratings or warnings -- may be given either in advance or contemporaneously with the program, or both. One other means of giving contemporaneous and indeed continuous warning is in use in France. There, programming intended only for adult audiences appears with an unobstrusive white dot in a corner of the screen throughout the broadcast.[27]

In this way, viewers who tune the program in after it has begun and the verbal warning issued would still be put on notice about the program's violent nature.

Warnings could probably not be used to make distinctions of degree among programs. Indeed, I have assumed a dichotomous approach, under which programming would be categorized as either non-violent or violent and therefore subject to warning requirements. A ratings approach, however, could be made to convey more information -- as much as consumers want and will use in selecting their programs. To take a somewhat extreme example, a single letter code could be used to convey 26 different gradations or qualitative variations in the violence that a show contains, ranging from none (A), to slapstick comedy-type violence (B), and on through intentional homicides (X), intentional homocides with excessive blood (Y), and perhaps finally chain saw massacres (Z).

Consumer education and information-oriented policies such as these may significantly abate the problem created by children's excessive consumption of television violence, but it may not solve the problem completely. Because of the divergence between the private and social optimum level of consumption, parents cannot be expected to reduce children's consumption to the efficient level. Correctly informed parents would continue to allow their children to view a certain amount of television violence, the prevention of which would cost the parents more in policing efforts than they would gain in reducing their children's later aggression,

taking into account the fact that some of that aggression against others will have no cost to the parents. At the same time, however, because programs may be cancelled if their ratings decline even slightly below a threshold, it is possible that informed consumers reduced viewing of violent programs would be enough to cause broadcasters to cancel such programs.

With respect to the children themselves, it is simply doubtful that small children could be made to appreciate fully the abstract concept that over-consumption of television violence will have adverse consequences to themselves later. Even if they were to understand that, however, they would, like their parents, have no incentive to reduce their consumption below the point at which the benefits and costs to themselves are equal, although additional costs would still be imposed on the victims of their later aggression.

It is nonetheless possible that reasonably well-informed parents and children would reduce their consumption of television violence to a level that, while still above the social optimum, could not be reduced further by cost-justified regulatory techniques. Consideration should be given to the cost and the potential benefits to be derived from an extensive consumer education and information program paid for by government. Further consideration needs to be given to whether such an educational program should be undertaken by the federal government or by the various states and localities; how best to reach consumers; and whether existing educational

institutions should be the preferred vehicle for implementation.

In order to leave the reader with one concrete version of what a modest consumer education and information program might look like, I suggest the following four-part program as an example only. (1) The federal government could purchase spot advertisements on network television urging parents to prevent their children from watching violent programs and encouraging them to contact a designated local institution, such as a public school system or teachers college, for more information on how to protect their children and themselves from the effects of television violence. (2) The local educational institution could conduct workshops to aid parents in evaluating television programs. (3) Elementary schools could be enlisted to advise children about the undesirability of certain types of programming, and how to identify it and put it into a proper perspective. The educational materials needed for all of these efforts could be produced centrally or in diverse locales in order to benefit from experience with a diversity of approaches. (4) Finally, broadcasters could be required to advise viewers that a particular program or series has received a high violence rating from some independent source, such as the National Parents and Teachers Association.

B. Command and control regulation. Whereas the educational and informational approaches described above depend upon the voluntary response of educated and informed consumers to limit children's viewing of violence, practical command

and control techniques would involve binding regulations applicable to broadcasters; it would be impractical for government to regulate the viewing activities of children directly. This section deals with three possible command and control approaches, in increasing order of coerciveness.

1. Quotas. The general idea of a quota system is to assign each broadcaster a maximum output of violent programming that it may permissibly broadcast. There are both quantitative and qualitative ways in which to establish a violence quota, each of which entails a different approach to measuring violence.

a. Number of violent incidents. One approach is to limit the number of violent incidents that a broadcaster may exhibit in a given unit of time, whether it be a half-hour, hour, day, week, or month. Each choice of an allottment time period would induce a somewhat different strategic response from broadcasters bent on maximizing the profitability of such violence as they are allowed to broadcast.

For example, if violence is limited on a per/hour basis, broadcasters may find that they can derive the highest utility from their quota by increasing the intensity of the violence. Thus, assuming that many shows now have five violent incidents per hour, a broadcaster allowed only, say, three violent incidents per hour might find it necessary to make at least some of them particularly gruesome, graphic, or otherwise intensive in order to retain viewer interest. It is not clear from the social science literature whether

the impact on children would be correspondingly magnified, but there are instances where some particularly horrible crime shown on television has been imitated by some children who saw it.

If the same broadcaster were allowed to exhibit the same number of violent incidents per day, but to distribute them as it wished throughout the day, it would have less incentive to increase their intensity. It would presumably concentrate them in the hours when they would do the most good, however, which we can infer from current practice would still be the daytime hours most viewed by children and the early evening hours when both adults and children are watching. Thus, assuming that a typical broadcast day is 10 hours long and now shows 50 violent incidents, a broadcaster with only 30 permissible acts of violence per day might use a few for programs in the after-school hours and reserve the rest in order to be able to put on a couple of particularly violent police dramas in the early evening. Of course, if a consumer education program were in place and had an effect on parents' willingness to let children watch violent programs, the same broadcaster might use its daily allottment in the latter part of the evening when the audience is dominated by adults, since it would loose its audience if it broadcast violent programs in the early evening when children are watching.

To the extent that this kind of quantitative limit on the number of violent incidents increases the intensity of

the most violent incidents, it could aggravate the anti-social effect of violent television on children. To the extent that it lowers the overall level of violence on television, or channels it into hours that are less accessible to adults -- for example, because they are too late in the evening for many people -- the regulation imposes a cost on many adults by depriving them of their favorite programming. To the extent that such persons curtail their viewing of television rather than watch the less violent fare offered under regulation, broadcasters, advertisers and program producers (hereafter usually referred to just as broadcasters) will also bear some of the cost of regulation. Losses to both adult viewers and broadcasters will be incurred under each of the subsequently examined coercive regulatory approaches as well.

b. Quality of violent incidents. The quota approach can be refined by distinguishing among different degrees of violence, and assessing a broadcaster more "violence quality points" (VQPs) for certain types of violent incidents than others. A VQP system therefore requires a typology of violent activities, and an assessment of their relative contributions to later aggression, which may presuppose more knowledge than social scientists have at present.

For simplicity of illustration, I will assume that acts of television violence are more likely to have significant anti-social consequences in proportion to their seriousness, viciousness, and maliciousness. (At the same time, I understand the arguments that violent displays are more likely to

be imitated if they are portrayed in a casual and sanitized fashion.[28] I do not believe that either hypothesis has been disconfirmed in the social science literature, so I have chosen the intuitively appealing version only for exemplary purposes.)

To apply this approach, suppose that violent destruction of property is rated at 1 VQP; intentional cruelty to animals rates 2 VQPs; and assault with a weapon of any sort rates 3 VQPs. A broadcaster could then choose to expend its quota of VQPs in the manner best calculated to attract and please an audience. The regulatory rating system just hypothesized would make a broadcaster indifferent between a western drama involving a barn-burning (1 VQP) and an incident of sheepmen poisoning cattle (2 VQPs), and a police drama involving a murder committed with a weapon (3 VQPs) and the authorities' apprehension of the criminal without having to use their weapons (0 VQPs). The broadcaster would choose between these two programs on the basis of their audience appeal and cost, much as it does now. If there were a daily quota of VQPs, in addition to or instead of an hourly quota, however, the broadcaster would have to include in the cost of using either program the value of the audience it would lose by reason of programming less violent shows during the rest of the day.

If the violence quota is expressed only on a per/hour basis, the broadcaster might obtain the greatest utility by making each show as violent as the hourly quota will allow,

resulting in an increase in the violent programming broadcast during the day, when pre-school children are at home. This could only happen if some current daytime programs are not already as violent as the maximum VQP per/hour would allow, which is quite possible in the cases of game shows and soap operas, and if the constriction of supply in prime time shifted some children's demand for violence into the hours previously used for less-violent programs.

Adult viewers and broadcasters would each bear some of the burden of this type of regulation. Whether overall violence viewing by children would decrease, however, or would simply shift into daytime would depend upon the precision with which the regulation could be crafted and administered. And, of course, the whole approach depends upon having a correct lexicography for assigning VQP's to types of incidents.

2. Zoning. A zoning approach to regulation would require broadcasters to remove violence from time periods when more children are viewing television without preventing its broadcast in time periods, presumably late in the evening, when there are fewer child viewers. This could be done by either banning or limiting violence in the child-intensive early hours, while placing a higher limit or no limit whatsoever on violence in the later hours. The issues raised by an attempt to limit violence were discussed in section B.1 on "command and control regulation." The issues raised by a ban on violence, such as zoning might entail, are considered in section B.3 below.

Under a zoning regulation, broadcasters might experience a loss of both adult and child viewers in the early hours, but they might also be able to recoup their losses by increasing the level of violence on display in the late hours, even above that which is now offered. This response would confer a benefit on some late-night viewers, but impose a cost on society insofar as some children also see these programs. It would also, of course, impose a burden on adults who prefer violent programs but are unable to view them late at night.

3. Ban on violence. Assuming that a reasonably clear definition could be formulated, "violence" generally could be banned on television. In order to achieve clarity of definition, however, it might be necessary to narrow the "violence" subject to the ban, and prohibit only certain specific types of violent incidents. A list of such specific prohibitions could be devised easily enough, but it would inevitably leave broadcasters with ample opportunities to display aggression that could have anti-social consequences. For example, it would be easy enough to ban the use of weapons to commit a homicide on television, but if their storyline requires a violent confrontation that effectively removes one character from the action, broadcasters might just subsbitute hand-to-hand combat for weapons and comas or paralysis for death. A judgment would still have to be made whether the type of violence that eludes clear prohibition would pose enough of a problem of later aggression by child

viewers that the ban on specific acts of violence is not worthwhile.

A ban on violence, even narrowly defined, could significantly reduce the value of television to consumers and induce them to turn en masse to other forms of amusement. Insofar as they switch to non-violent and less-preferred alternatives, the problem of children's later aggression might be resolved, but only at what could be a high price to adult and child viewers alike. Worse, insofar as violence-preferring viewers switch to other sources of violent entertainment, such as video cassettes of movies that can be shown on home television screens, consumers will be remitted to a second-best alternative and the problem of children's later aggression will not have been solved -- unless the ban on violence is extended to video cassettes (or what have you) as well. Indeed, it would not make sense to ban violence on television unless one were prepared to ban it also in any good substitute medium.

Of course, in order to avoid the massive loss of their audience, broadcasters may strive to persuade the public of the merits of non-violent programming, and to increase the quality of that programming in order to compete effectively with alternative amusements, including violent programs from other sources. This may prove difficult, however. The difficulty will be even greater if advertisers are able to switch their allegiance to those other sources. The result, that is, could be advertiser-supported video cassettes and

video games and other diversions yet to be invented, each of which is at least as violent as television currently is. Indeed, advertiser-supported programs in other media might be even more violent than current television fare, at least if television broadcasters are now somewhat inhibited by the fear of public and governmental reaction and so restrain themselves somewhat in their competition for viewers through violence.[29]

C. Tax Incentives. An appropriate tax on television violence would lower the level of violence to the social optimum, taking account of both the benefits derived by viewers from violent programming and the costs imposed on non-viewers by children's later aggression. Unfortunately, however, since the optimal amount of television violence cannot be determined with any precision, one can have no confidence that a particular tax brings about the optimum. Still, one could achieve any desired degree of reduction by taxing television violence. Like a quota on violent incidents, a tax approach would give broadcasters an incentive to eliminate the violence that contributes least to their profits and retain the violence that contributes most. Consider, for example, a tax of $10,000 for each homicide shown. Homicides that increase a program's dramatic appeal, and hence its marketability to advertisers, by more than $10,000 would remain in the show, while homicides that contribute less than $10,000 to value would be dropped.

Like the ban on specific acts of violence discussed above, taxes could also be targeted to specific acts that are thought to contribute relatively more toward children's later aggression. While one could imagine an extensive menu of user taxes, placing an explicit cost on each type of violent portrayal, consideration should also be given to a simplified approach in which special taxes are levied on particular acts that can with some confidence be thought -- if only intuitively -- to contribute more to children's later anti-social aggression and that can be defined with reasonable clarity. Consider, for example, a tax of $10,000 on the use of a hand gun shown on television. In that circumstance, a producer of programs could determine whether the dramatic value of showing a hand gun being used is worth $10,000 to the commercial value of the program. The same producer has to make this calculation now in deciding whether to wreck a car. Presumably producers do not wreck cars when they believe that doing so will contribute less to the value of the program than the cost of the car. But no cost is associated with their use of the gun, or of other acts of violence. In other words, there is presently an economic incentive for producers to substitute certain types of violence, such as the use of guns and physical force, for other types of violence, such as auto crashes, because the former are costless to them. A tax would change that without depriving the program producer of the ability to use such violence as is dramatically justifiable in light of the tax.

At the same time, it must be recognized that such a selective tax would increase the relative value of good untaxed substitute forms of violence. Thus, if a tax were laid on the use of guns, one would expect more of an increase in the use of knives than of car crashes. The tax would have to be formulated, therefore, to apply to other close substitutes, such as stabbings, unless social scientists can tell us that the portrayal of a stabbing contributes less to children's later aggressiveness than the portrayal of a shooting.

The tax might be levied on violence only during certain time periods, in order to achieve the zoning effect described earlier. Broadcasters would then have to choose between showing a violent show during the taxable hours, achieving a larger audience but paying the tax, on the one hand, and showing the violent program in the non-taxable time periods to a smaller audience, on the other. Broadcasters' choices would depend upon the different audiences' value to advertisers. Again, only the violence that was not worth the tax would be eliminated -- or in this case, postponed until later hours. A broadcaster's strategy might then include both a reduction in the number of violent programs shown during the taxable hours and an emphasis on increasing the appeal of non-violent programs that could be shown in their stead. In markets with several television stations, this could result in a mix of violent and improved (i.e., more appealing) non-violent programming during the early

hours, rather than the uniformity that could be expected if violence were subject to a quota or, especially, a ban during the early hours.

The tax approach might be applied to advertisers instead of broadcasters. In their case, it might entail denying the full business expense deduction for advertising on violent programs generally or during taxable hours. In general, the results should be similar. An advertiser that highly valued violence-preferring viewers would still be able and willing to support violent programming in taxable hours, notwithstanding the increased cost of doing so without a tax deduction. For many advertisers, however, non-violent programming might become the preferred medium for reaching potential buyers. This is not an attractive strategy now because an advertiser that wants to sponsor a non-violent program in competition with violent programs has to pay the broadcaster the opportunity cost it incurs by foregoing the broadcast of a violent program to an audience that is more highly valued by other advertisers.

D. Market restructuring. When a market failure causes a social problem such as later aggression in children who view television violence, regulatory responses of the sort discussed above alter the incentives of the participants in that market in order to effect a beneficial change in the market's performance. Thus, consumer education leads to a more informed demand for television programs, which in turn elicits a supply of television programs that are less costly

to society. Legal restrictions of the command and control variety, backed up with penalties, alter the incentives facing broadcasters and again increase the social product of their industry. Taxes calculated to produce desired outcomes most explictly alter economic incentives to achieve their results.

A more drastic alternative to regulation that alters market incentives is to restructure the marketplace itself. To draw upon familiar examples, law has been used to monopolize some markets in which it was thought that competition was socially wasteful; examples include local public utilities and the postal service, each of which is legally protected from competition. In other markets, where competition is thought to be the most beneficial market structure, monopolization and cartelization have been prohibited by the antitrust laws.

The structure of the markets -- both local and national -- in which television violence is purchased by children can be described again briefly as follows. A small number of profit-maximizing broadcasters exhibit programs with which to compete for the attention of children and other viewers, which enables them to sell advertising to a large number of profit-maximizing advertisers. Advertisers, broadcasters, and program producers act jointly to fulfill the public demand for violent programs. This section considers four ways, in order increasingly drastic, in which this market might be restructured.

1. Increasing alternatives for viewers. Television broadcasters do not typically differentiate themselves in their appeal to viewers. While they do strive for a distinctive following for their informational programs, particularly news, few of them specialize to any degree in one type of entertainment fare or another. Only in markets with a large number of television stations are there any broadcasters -- and they are usually on the technically inferior UHF band -- that specialize; they typically concentrate on movies, sports, or religious programming, rather than the dramatic programs that are made for television and that are most violent.

In markets where there are only a few broadcasters, each one finds it more advantageous to attract even a proportionate share (i.e., 33% in a 3-firm market) of the general audience than to offer programs that will attract the whole of a specialized audience. Thus, in a market where two of the three television broadcasters are offering police dramas in a given hour, the third is more likely to offer yet another police drama, or at least another program aimed at a general audience, such as a situation comedy, than to offer a children's show or a non-fiction program about science, for example. As the number of competing television outlets increases, however, ever-smaller, more specialized audiences become more attractive than a small share of the audience for mass entertainment; in a market of 10 channels, an audience of anything more than 10% would be more attractive than a proportionate share of the general audience.

Accordingly, government policies that increase the number of programs in competition at any one time will be more likely to assure the presence of some non-violent programs at all times. The Federal Communications Commission (FCC) has long purported to pursue a policy of maximizing the number of broadcast outlets in each community, through steps taken to promote UHF broadcasting and so on, but most television markets still have only a handful of television stations. Cable television offers the most significant possibility of greatly increasing the number of program alternatives, and the FCC has recently and at long last removed itself as an obstacle to cable's development.[30] The cable industry is now growing apace; about 48 million people had cable service in their homes at the end of 1981.[31] Government policies that foster the development of cable, and of other broadcast and non-broadcast sources of programs, will further contribute to ensuring the availability of non-violent programs to all viewers at all times.

The FCC's actions in the last two years to encourage new program sources other than cable should begin to bear fruit soon. Low power television,[32] multipoint distribution systems,[33] or direct broadcast satellites[34] will bring at least a few additional channels to almost every home, including those that will never be reached by cable television.

When these services are fully operational, the absolute amount of violence on television may be no less but there will almost certainly be more non-violence from which to

choose. This is predictable because the new outlets for programming will have to find new types of programs, appealing to ever more specialized audiences, in order to compete. It is conceivable, of course, that the result will be only to specialize the types of violence offered, so that one may choose among equally violent westerns, cops-and-robbers, space conflicts, martial arts programs, and so on. But it seems far more likely that even a modest increase in the number of channels, and surely a great increase such as cable can bring about, would induce an increase in the supply of non-violent programs (whether the supply of violent programs increases or decreases).

This is not inconsistent with my earlier assumption that broadcasters currently are programming violence in response to market demand. It is simply to observe that broadcasters currently operate in a context where there are only a few competitors, whereas in a market characterized by a large number of programmers, different techniques for serving consumer demand will be necessary in order to maximize profits. The additional assumption implicitly being made here is that some viewers who now watch violent programs would rather watch non-violent programs which are not available now because they are of interest only to a narrow audience. With more channels in competition, the narrower audiences for non-violent programs will be worth serving.

Experience with the development of FM radio is consistent with this analysis. When FM greatly increased the

number of stations in each large radio market, the result wasnot simply an increase in the supply of mass audience programming already available on the AM band, but specialization to serve minority tastes -- for classical music, jazz, all news, etc. Listeners who would tune in the mass programs before could now be served at a higher preference level. In the context of television instance, this could, of course, also mean that some programs would be more violent than anything shown today, in order to cater to the audience that most prefers violence. Then the need to screen children from violent television programs will not go away, but the availability of more alternatives should make the task easier.

2. Export prohibition. Insofar as the market demand for violent programs originates abroad, a prohibition on the exportation of violent programs that have been broadcast in the United States would remove an incentive to make violent programs for domestic television. Indeed, even if violent programs are produced in part because they "translate" well, rather than because of any inherent foreign demand for violence, an export prohibition would constrain the production of violent programs. Non-violent programs and violent programs not released for broadcast in the United States -- including special violent versions of domestic programs -- could continue to be sold abroad. (We ignore here the independent question whether such exports are prejudiced to the United States because they portray our society in an

unrealistic and undesireable way.) Producers of violent programs for domestic consumption would then have to recoup all of their costs from domestic broadcasts. Holding the cost of a violent production constant, this would mean that violent programs would be offered to broadcasters at a higher price, and the quantity of violent programs broadcast would decline as a function of advertisers' diminished demand for them at the higher price.

If the domestic demand for violent programs is sufficiently inelastic, however, then curtailing their export will not reduce domestic consumption much but will increase the cost to advertisers, and thus to consumers, in the domestic market. If, on the other hand, foreign demand or "translatability" are driving the program producers to offer violent programs to a relatively indifferent domestic audience, prohibiting their export will redirect the domestic industry's efforts towards satisfaction of the uniquely domestic demand. For all one knows, program producers maximizing their profits in a context where they must look only to domestic sales might produce a very different product. The result could be an increase in domestic consumer welfare far in excess of any increase in the cost to advertisers and consumers. It would be accompanied by a decrease in the size of the program production industry and a loss of welfare to foreign consumers of American television programs (since they would have to pay the full costs of the violent programs they prefer).

3. Abating competition. If competitive pressure now drives broadcasters to use violence as a means of attracting audiences, then creating a cartel under which broadcasters fixed prices could relieve them of this pressure. This would also, however, relieve broadcasters of the competitive pressure that now drives them to satisfy audiences in a myriad of ways that do not have anti-social consequences. Indeed, even if broadcasters could fix the prices they charge advertisers, there is no assurance that they would lower the violent content of their programs. They would eliminate those aspects of their present competition that contribute least to their profits. Thus, they might eliminate high-priced stars rather than violence, to the detriment of viewers and with no benefit to society.

An antitrust exemption for broadcasters that entered into an industry-wide agreement to limit violent programming would provide a more focused and limited relaxation of current competitive rigors. It would constitute a departure from current government antitrust policy toward the broadcasting industry, however. The Department of Justice has only recently, for example, sought an injunction against the National Association of Broadcasters' advertising practices code, which limits the number of commercial minutes per hour, on the ground that it limits competition by broadcasters to sell advertising. There is no inconsistency, however, between a pro-competitive policy with respect to the market for advertising and an anti-competitive policy with respect

to the market for violence in programs. The difference is that ending violence as a term of competition increases the industry's social product, whereas limiting competition in advertising sales decreases its social product.

There are two dangers to be expected from allowing broadcasters to agree to limit violence as a means of competition. First, there is the problem of limiting their agreement to that subject. Antitrust enforcement authorities are properly skeptical about even limited departures from the competitive norm. The necessity for representatives from competing firms to meet in order to reach and then police an anti-violence agreement could be the predicate for their collusion with respect to other terms of competition.

Second, an industry agreement limiting violence could be devised, and more certainly administered, so as intentionally to favor certain competitors over others. This is inherent in industry-wide standard setting, which can be abused in ways too subtle to be detected.[35] For example, if one of the three major broadcast television networks has a martial arts program, an "industry-wide" standard reached by a majority vote might then hold that such programs are impermissibly violent. It would be very difficult for any reviewing authority, such as an agency or court, to distinguish a legitimate attempt to eliminate excessive violence from a self-interested attempt to suppress a competitor's advantage.

4. State monopoly. A state monopoly on broadcasting would presumably eliminate the profit incentive now driving the private industry to pursue violence as a term of competition. Even a profit-making state monopoly would not be a profit-maximizing enterprise. In order to maximize overall social welfare, a state monopoly would not broadcast more television violence than the socially optimum level, taking account of the externality it produces.

This is consistent with experience abroad. The private and competitive organization of the broadcasting industry in the United States is unique. In most advanced countries, and all of the backward countries, the state has a monopoly on television broadcasting. In a few of the industrial nations, such as the United Kingdom, the state operates a broadcasting system but allows a limited degree of competition from commercial broadcasters. In none of these countries is television as violent as in the United States and, indeed, the most violent programs shown on foreign television systems are usually made in America.

Of course, state enterprise has its own unique drawbacks. Even a profit-making (but not profit-maximizing) state enterprise may be less attentive to cost control than a competitive enterprise. More assuredly, it will be less oriented toward consumer satisfaction; while that would be part of its mission insofar as violence is concerned, it is difficult to imagine that a state enterprise would not become disregardful of consumer welfare in other ways as

well. Finally, there are special problems where state enterprise is introduced into a medium of information as well as entertainment. One would have to be trusting indeed to expect that a state enterprise could engage in just a little bit of censorship -- suppressing excessive violence -- without yielding to the temptation to suppress a wider array of portrayals and ideas that might also be viewed, even by a well-intentioned official, as anti-social if only because they are anti-government.

III

This review of the options potentially available in order to control the problems created by television violence as it affects children has not dealt at all with the institutional questions that any regulatory program poses. Who is to devise the norms required under any approach? How are they to be enforced? Whether Congress or the FCC devise norms, and whether they are enforced by fines, or in the context of license renewal proceedings, or otherwise, are details at this stage of our consideration, however. These would become important questions before any particular regulatory approach could be adopted, because the practicalities of administration are as much a feature of any program as is its substance. But wer are far from that point.

The analysis begun in this paper does not suggest any one naturally superior technique, or even that something should be done about violence on television. It does seem

likely that consumer education and information efforts would be most cost-effective policy response to the problem, if only because they would be least coercive. But as with the other options under discussion, one needs to know more about the market in which television programs are viewed in order to reach any firm conclusions. How much of the demand for television violence is domestic, and how much foreign? How much comes from adults, and how much from children? Are there hours when adult demand for television violence could be satisfied with significantly diminished effects on children? Are there specific acts of violence that are contributing disproportionately to the problem and that could be identified, defined clearly, and then curtailed? Will the increased alternatives to conventional broadcast television, which are imminent, diminish or solve the problem without any intervention directed specifically at violence?

Inevitably, a high degree of uncertainty about many of these questions will persist even when all of the social science and economics research has been done. These and other questions should be addressed expressly, however, as best they can be, before any regulatory option is pursued. Otherwise, the unwanted and the unanticipated effects that any regulation is sure to have could dominate the desired effects it produces, and the cost to some groups could be substantially higher than necessary, and could even outweigh the benefits to society as a whole.

In other words, now that we know that television violence later causes children to behave violently, we must be sure still to appreciate how much more we do not know.

* Professor of Law, Harvard Law School. Helpful comments on an earlier draft were received from my colleagues, Charles Nesson, Hal Scott, and Steven Shavell.

1. National Institute of Mental Health, U.S. Dep't. of Health and Human Services, Pub. No. (ADM) 82-1195, 1 & 2 Television and Behavior: Ten Years of Scientific Progress and Implications for the Eighties, (1982) (hereinafter NIMH Report).

2. See, e.g., id., at 79-86; Social/Behavorial Effects of Violence on Television: Hearing Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 97th Cong., 1st Sess. 190 (1981); Federal Communications Commission, Report on the Broadcast of Violent, Indecent and Obscene Material 3-10 (Pub. No. FCC 75-202, 1975) (hereinafter FCC Report); Krattenmaker and Powe, Televised Violence: First Amendment Principles and Social Science Theory, 64 Va. L. Rev. 1123, 1260-79 (1978); Albert, Constitutional Regulation of Television Violence, 64 Va. L. Rev. 1299, 1317-45 (1978); Charren and Alperowicz, T.V. Violence Breeds Violent Children, Newsday 23 (May 27, 1982).

3. Brown, Same Flavor to New Prime-Time Shows, N.Y. Times, Jan. 1, 1976, at 74, col. 1, reprinted in D. Ginsburg, Regulation of Broadcasting 308 (1979).

4. Industry sources report that in 1981 revenues from the export of all programming were just under $500 million. This includes all telefilm, that is, programs made specifically for television, cartoons and feature films shown on television, and an occasional live sports or news broadcast.

5. Coffin and Tuchman, Rating Television Programs for Violence: A Comparison of Five Surveys, 17 J. Broadcasting 1 (1972).

6. See 1 NIMH Report, supra note 1, at 37.

7. See id.

8. Compare Blank, The Gerbner Violence Profile, 22 J. Broadcasting 273 (1977), with Cultural Indicators Research Team, "The Gerbner Violence Profile" -- An Analysis of the C.B.S. Report, 22 J. Broadcasting, 280 (1977), and Blank, Final Comments on the Violence Profile, 22 J. Broadcasting 287 (1977), with Gerbner, Gross, Jackson-Beeck, Jeffries-Fox, and Signorielli, One More Time: An Analysis of the C.B.S. "Final Comments on the Violence Profile," 22 J. Broadcasting 297 (1977); see also Hearing, supra note 2, at 53.

9. Gerbner's definition of violence is: "The overt expression of physical force against self or other, compelling action against one's will on pain of being hurt or killed, or actually hurting or killing." Gerbner and Gross, Living with Television: The Violence Profile, 26 J. Com. 173, 174 (1976), see also Gerbner, Gross, Eleey, Jackson-Beeck, Jeffries-Fox, and Signorielli, Violence Profiles Nos. 1-10, Trends in Network Drama and Viewer Conceptions of Social Reality (1967-1976).

10. "Today, a majority of families with school-age children have working mothers, and one out of five children in the United States live with only one parent, so that many children are at home unsupervised during part of the day." Pacifica Foundation v. FCC, 556 F.2d 9, 34 (D.C. Cir. 1977) (Leventhal, J., dissenting), reversed, 438 U.S. 726 (1978).

11. By "too many" crimes I mean more than the optimal number, which is not necessarily zero. See R. Posner, Economic Analysis of Law, 166 (2d ed. 1977).

12. For $199 parents can purchase "Censorview", a programmable locking device attachment for television sets. See The Sharper Image Holiday 1982 (Catalogue) 4.

13. U.S. Department of Health, Education and Welfare, "Smoking and Health": A Report of the Surgeon General, (Pub. No. 79-50066, 1979).

14. See e.g., Smoking Aboard Aircraft, 14 C.F.R. 252 (1982) (air carriers must provide a no smoking seat in a no smoking area upon request); Cal. Penal Code §640 (1982) (Deering) (offense to smoke in a transit facility).

15. See Cigarette Labeling and Advertising Act, 15 U.S.C. §§1331 et seq. (1982) (policy of Congress that the public "be adequately informed that cigarette smoking may be hazardous to health").

16. See, e.g., Cal. Penal Code §308 (West 1982 Supp.); Mass. Gen. Laws Ann. ch. 270, §6 (West 1970).

17. In 1980 state cigarette taxes revenues totaled $3.8 billion or about $76 million per state. Tobacco Institute of America, Tobacco Industry Profile (1981).

18. See, e.g., Board of Governors of the Federal Reserve System, Financial and Business Statistics, 68 Fed. Res. Bull. A3-35 (Oct. 1982).

19. See, e.g., Federal Food Drug and Cosmetic Act, 21 U.S.C §301 (1970); 15 U.S.C. §1262 (1982) (hazardous substance label requirements); Fur Products Labeling Act, 15 U.S.C. §69b (1973).

20. See, e.g., Fair Packaging and Labeling Program, 15 U.S.C., §§1451 et seq. (1982).

21. See, e.g., Cal. Bus. & Prof. Code §§12655-56 (1982) (adoption of standardized format for unit pricing including brand name, total price, volume, weight, or number of units and price per unit).

22. Valenti, The Movie Rating System, (Motion Picture Association of America, 1968).

23. See e.g., National Coalition on Television Violence, NCTV News, Vol. 3 No.1, at 4 (Dec.-Feb. 1982); Christian Science Monitor Index, Christian Science Monitor, Oct. 14, 1960, at 3, cited in Coffin and Tuchman, supra note 5, at 8.

24. See Cigarette Labeling and Advertising Act, 15 U.S.C. §1333 (1982), requiring that packages bear the following statement: "Warning: The Surgeon General Has Determined That Cigarette Smoking is Dangerous to Your Health," and 21 U.S.C. §343 (0)(1), requiring a similar warning on products containing saccharine and compare Truth in

Lending Act, 15 U.S.C. §1632 (1982) providing: "The terms 'annual percentage rate' and 'finance charge' shall be disclosed more conspicuously than other terms, data or information provided in connection with a transaction ...", and 12 C.F.R. §226.6(a) (requiring such terms to be "printed in not less than the equivalent of 10 point type"), with Electronic Funds Transfer Act, 15 U.S.C. 1693c(a) (1982) requiring disclosure of certain terms and conditons involving a consumer's account in "readily understandable language."

25. Wall Street Journal, Nov. 4, 1982 at 31, col. 2.

26. Pacifica Foundation v. FCC, 556 F.2d 9, at 36 (D.C. Cir. 1977) (Leventhal, J., dissenting), reversed, 438 U.S. 726 (1978).

27. FCC Report, supra note 2 at 27.

28. Coffin and Tuchman, supra note 5, at 17.

29. Rational broadcasters probably are somewhat self-restrained; they have experience with both FCC and private efforts to sanction their displaying "objectionable" programming. See, e.g., FCC v. Pacifica Foundation, 438 U.S. 726 (1978) ("filthy words" may be banned on radio); Writers Guild of America, West, Inc. v. American Broadcasting Co.,

Inc., 609 F.2d 355 (1979) (challenge to FCC-inspired adoption of the "family viewing policy"--which curtailed sex and violence before 9:00 p.m. (E.T.)--as an amendment to the NAB Television Code); Illinois Citizens Committee For Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975), (upholds fine for broadcast of sex-oriented call-in radio program); Yale Broadcasting v. FCC, 478 F.2d 594 (D.C. Cir.), cert. denied, 414 U.S. 914 (1973) (FCC warning to broadcasters playing "drug oriented" songs upheld); N.Y. Times, Jan. 17, 1981, § 3 at 30, col. 5 (Procter & Gamble, in response to organized consumer pressure, refuses to sponsor 50 shows it regards as containing excessive sex, violence, and profanity).

30. See, e.g., D. Ginsburg & M. Director, Regulation of Broadcasting, Supplement (forthcoming 1983).

31. 1981 Broadcasting-Cable Yearbook, at G3; id. 1980, at G3. From 1980 to 1981, the only two years for which reliable data on cable penetration have been reported, the number of homes with cable increased from 15.1 to 17.2 million, or to about 22% of all TV households. 1980 & 1981 Broadcasting-Cable Yearbooks, at G3.

32. 47 Fed. Reg. 21468 (May 18, 1982); see 47 Fed. Reg. 45046 (Oct. 13, 1982) (selection of licensees by lottery).

33. Report and Order, Dkt. No. 19493, 45 FCC 2d 616 (1974).

34. Report and Order, Gen. Dkt. No. 80-603, 90 FCC 2d 676 (1982).

35. See, e.g., American Society of Mechanical Engineers v. Hydrolevel Corp., ___ U.S. ___, 102 S.Ct. 1935, 1941, 72 L.Ed.2d 330 (1982).

The First Amendment and the Regulation of Television Violence

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The report of the National Institute of Mental Health entitled "Television and Behavior: Ten Years of Scientific Progress and Implications for the Eighties" asserts that, while no single empirical study conclusively establishes that violence in television programming causes violent, anti-social, behavior, the data gathered over the last two decades nevertheless "converges" to support that conclusion. This notable report provokes a number of highly important questions, the most significant of which are: Does the data indeed support such an inference? And, if so, what if anything can the law do about the problem?

This paper addresses a subsidiary issue contained within the second question -- namely, whether the constitution would permit any form of legal regulation directed at severing the link between television violence and violent behavior. It proceeds on the assumption that the available data establish a cause and effect relationship between television violence and aggressive, anti-social behavior, though it must be kept in mind that the nature and degree of that asserted causal relationship will constitute a critical factor in any complete analysis of the constitutionality of regulation of television violence. The less strong the case for the proposition that television violence causes social harm, in other words, the less weighty will be any regulation's claim to constitutionality.

Space limits necessitate, however, that comments on such an issue be kept to a minimum in order to make way for a decently sophisticated analysis of the other constitutional factors. The reader should also be cautioned against drawing the inference from the constitutional analysis that follows that regulation is or is not desirable as a matter of public policy. This paper, in other words, attempts to present a relevant constitutional framework for thinking about whether or to what extent the society is free, as a constitutional matter, to consider imposing legal restraints on such programming in the television medium.

The paper is divided into four principal sections. The first speaks briefly to the matter of how laws regulating portrayals of violence would fare generally under the first amendment. The second asks that question in a more limited context, namely that of the broadcast and television medium. The conclusion of both is that the regulation of broadcast or television violence would present grave constitutional difficulties and could only be upheld if the constitutional limits on broadcast regulation were extended beyond their present bounds. In the third section it is suggested how the most favorable case for regulation might be conceived; in particular, the best method of tailoring a regulation to satisfy constitutional standards is offered. The final, and fourth, section takes up the adjunct problem of the

constitutional barriers to placing tort liability on broadcasters and television programmers for personal harm resulting from imitations of programming violence.

I

We should begin our consideration of the first amendment implications of laws regulating portrayals of violence by looking first at the general framework which has been arrived at over the last five or so decades for thinking about the constitutionality of laws which interfere with speech activities. Speaking broadly, it must be concluded that the existing framework would not be hospitable to prohibitions or limits on depictions of violence.

Any regulation of portrayals of violence for the purpose of breaking a causal connection between the expression and the behavior of the audience would run afoul of a well-established first amendment edict to the effect that, except in certain limited situations, the government may not regulate or prohibit speech activities because of a concern about the impact or effect of that speech on its hearers or viewers. The exceptions are well-known and well-defined. The government may intervene when a clear and present danger of some serious social harm exists, or when the speech is obscene, libelous or constitutes fighting

language. Unless the speech sought to be regulated can fit within one of these exceptions, however, regulation or prohibition in order to avoid the persuasiveness or offensiveness of the speech will not be permitted.

It might be thought that portrayals of violence offer an instance of a clear and present danger and, thus, regulation of them would be constitutional. As that test has been defined over the last two decades, however, that conclusion is most unlikely. The clear and present danger standard applies in its classic form to a situation relatively distant from that which would be involved in the regulation of protrayals of violence. It applies to incidents in which a speaker is attempting to incite an audience to immediidate action, and the action appears imminent.

In the common situation where violence is depicted expressively, however, neither component is typically present. The author or script writer is not seeking emulation or stimulation to violent acts and the feared adverse effects on the audience's behavior are commonly much delayed. While it may seem odd to make first amendment protection hinge upon the immediacy or lack of immediacy of the actual effects of the speech, that has been the place at which the line has been drawn, the thought being that the extended interim between the speech and the conduct offers

the society time in which to take other action, other than prohibiting the speech, to allay the harmful consequences of the communication.

Since portrayals of violence quite obviously do not fit within the other traditional exceptions to the first amendment, it is fairly clear that, unless a new category of exceptions is to be created, the regulation of that kind of speech could not successfully withstand a constitutional challenge. No new exceptions have been forthcoming in the last two decades. A well-known case ir which the Court specifically refused to create a new area of unprotected speech (and one which as we shall soon see is relevant to understanding the first amendment treatment of the broadcast or television medium) is the 1968 decision in Cohen v. California. Cohen had been arrested for wearing a jacket, in a courthouse, on the back of which the slogan "Fuck the Draft" was enscribed. Claiming that Cohen's speech was "offensive" and "disruptive," the state argued that it had a constitutional right to prohibit it. In a seminal [~~and unanimous~~] opinion for the Court, Justice Harlan rejected that position, pointing out that the speech did not fall within one of the traditional first amendment exceptions and refusing to create a new exception for this kind of speech. Similarly, the Court refused to characterize the regulation as being simply a "time, place or manner" restriction, one

which is not concerned with the "content" (ideas or messages) of the speech but only with the circumstances or method by which the content is communicated, a form of restriction long regarded as more tolerable to the first amendment. Harlan rejected the distinction in this context; the words, or form, of expressing an idea or feeling, he wrote, were often integral to the meaning of the idea or feeling communicated and could not in theory or practice be treated separably without treading on content.

All of this could just as well be said of any regulation of portrayals of violence. To be sure, the societal interest in avoiding the harm caused by that particular kind of speech may be greater than is true with other speech; and, to the extent it was, regulation of portrayals of violence would present somewhat of a new case. But, at the very least, without having greater evidence than we do at the moment on the matter of causal connections, it would seem a fairly clear starting point that such regulation (with respect to depictions of violence in magazines and books, for example) would not withstand constitutional attack.

Is the same true of such regulations in the broadcast or television medium?

II

The broadcast medium has been subjected to extensive government regulation ever since the late 1920's. As in other areas of expression within the society, broadcast regulation has prohibited speech traditionally regarded as falling outside the first amendment, like obscenity and libel. But, that regulatory system has also encompassed a wide range of other speech activities as well. Broadcasting is a medium with a unique first amendment history, one in which the conventional first amendment rules have not been applied with the same rigor or scope. No fairness doctrine is permitted in the print media, but it has been in the broadcast medium, and with the Supreme Courtis blessing in Red Lion Broadcasting Co. v. F.C.C. (1969). But the most notable instance of differential treatment for the broadcast medium, and the one most relevant to the question under consideration in this paper, is that represented by the Court's decision in F.C.C v. Pacifica, 438 U.S. 726 (1978). Because of Pacifica's centrality to the matter of regulation of television violence, the following section is devoted to providing a summary of the opinions in that case.

A.

Pacifica was decided by a narrow vote of five to four. Justice Stevens authored the principal opinion, but only a

portion of it constituted the opinion of the Court; the remaining justices who made up the majority (Burger, Blackmun, Powell, Rhenquist) did not all agree on various theories offered in Stevens' opinion.

The case involved a radio broadcast of a 12-minute monologue by the comedian George Carlin, in which he mocked the taboos surrounding well-known four-letter words, ones that "you couldn't say on the public. . . airwaves," by repeatedly using them throughout the monologue. The broadcast occurred at 2 o'clock in the afternoon on a weekday over a New York radio station. The FCC initiated proceedings against the station after receiving a complaint from a man who complained that he had tuned into the broadcast while in his car with his son. The Commission subsequently found that the broadcaster had violated 18 U.S.C. § 1464 (forbidding the broadcasting of "any obscene, indecent, or profane language"), but it imposed the limited sanction of putting a note to that effect in the licensee's file.

In reaching its decision, the Commission explicitly noted that it was not issuing a total ban against the use of indecent words within the broadcast medium. The Supreme Court summarized the Commission's qualified decision in the following terms: "The commission identified several words that referred to execretory or sexual activities or organs,

stated that the repetitive deliberate use of those words in an afternoon broadcast when children are in the audience was patently offensive, and held that the broadcast was indecent."

Among Pacifica's arguments was the claim that the application of § 1464 to the Carlin broadcast was constitutionally impermissible. The Commission's proscription of indecent speech, Pacifica argued, was excessively vague and overbroad. Answering this contention, Justice Stevens spoke only for himself, the Chief Justice and Justice Rhenquist. He noted how the Court had in Red Lion refused to strike down the fairness doctrine because of the possibility that broadcaster would be induced by the vagueness of the doctrine into a posture of self-censorship. Stevens then went on to say that, in any event, the risk of undue self-censorship in the context of indecent language was of far lesser concern because such speech existed at the "periphery" of socially valued expression:

> "It is true that the Commission's order may lend some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at

> the periphery of First Amendment concern. . . . The danger dismissed so summarily in Red Lion, in contrast, was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort". . . . We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech."

(Justices Powell and Blackmun, who otherwise expressed general agreement with the Steven's opinion, disagreed with this particular form of analysis because of the belief that "Justices of this Court are [not] free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection, and which is less "valuable" and hence deserving of less protection.")

Justice Stevens next considered whether "the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances." The Commission's regulation was aimed at the "content" of Carlin's communication, Stevens began. Generally, under the

first amendment, he went on, regulation directed at the content of speech was permitted only when it created "a clear and present danger" of bringing about a substantive evil, when the speech constituted "fighting words," when it was libelous, and when it was obscene and so "offensive to contemporary moral standards." With this conventional litany of first amendment exceptions stated, Stevens turned to an analysis of the issue at hand. He first noted that the Commission could not constitutionally forbid the language because of its "political content." But it had not done so here, Stevens argued; Carlin's monologue was deemed improper not because of any messages it contained, because of its "point of view", but because of the "way in which it [was] expressed." Furthermore, words such as these "lack literary, political, or scientific value," and though "they are not entirely outside the protection of the First Amendment," their protection must vary depending upon the "context" in which they are used.

From this point, Stevens launched into a discussion of the "context" in which the Carlin monologue occurred, namely that of broadcasting. Noting that "of all the forms of communication, it is broadcasting that has received the most limited First Amendment protection," Stevens offered two reasons for this:

"First, the broadcast media have established a

uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. . . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. . . .

Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available for children. . . . The ease

with which children may obtain access to broadcast material . . . amply justify special treatment of indecent broadcasting."

Justice Stevens concluded with a short statement about the "narrowness of our holding." An "occasional expletive" would not "justify any sanction," nor would the Carlin monologue necessarily "justify a criminal prosecution." But the Commission could operate under a "nuisance rationale," taking into account a "host of variables" such as the time of day, the "content of the programs" and "differences between radio, television, and perhaps closed-circuit transmissions."

Justice Powell, in an opinion joined by Justice Blackmun, stated his views separately, though he generally subscribed to the constitutional analysis put forward by Justice Stevens. Like Stevens, he agreed that the Carlin monologue would be constitutionally protected in many nonbroadcast contexts, for example, if delivered "to a live audience composed of adults who, knowing what to expect, chose to attend his performance" or if published as a recording or book. And, also like Stevens, Powell thought that several special features of the broadcast medium justified its special treatment under the first amendment. He noted, in particular, (1) the potential presence of "unsupervised children" at that hour of the day at which the

monologue was broadcast (Powell assumed that the "language involved in this case is as potentially degrading and harmful to children as representations of many erotic acts") and (2) that broadcasting "comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds." Powell also observed that the Commission's ruling did not completely prohibit the airing of expressions like the Carlin monologue, but rather simply limited, or "channeled," it to later times of the day.

Two dissenting opinions were filed in the Pacifica case, one by Justice Brennan (in which Justice Marshall joined) and one by Justice Stewart (in which Justices Brennan, White and Stewart joined). Only the Brennan opinion addressed the constitutional claims in the case. Brennan began by denouncing the Stevens' opinion for departing from the established practice of refusing to let first amendment protection of speech vary with the judges' assessment of the social worth or value of the particular speech. As for the claim that the regulation could be upheld because it protected the "privacy interests" of the home, Brennan argued (1) that the homeowner "voluntarily" consents to the risk of receiving "offensive" material over the television or radio by bringing them into his home in the first place; (2) that, in any event, the homeowner has

the option of simply switching off the set should he find himself offended; and (3) that to protect the sensibilities of some against this form of intrusion is to deny simultaneously the interests of others who want to receive the speech. As for the argument that the regulation was justified because of its concern for children, Brennan argued (1) that minors themselves have a constitutional right to receive material not obscene; (2) that, in any event, the State's interest in protecting children cannot be accomplished at the expense of the first amendment interests of adults; and (3) that the regulation interferes with the interests of those parents who want their children to hear the speech.

Brennan closed with some additional objections to the majority opinion. He lamented the vagueness of the rationales that had been offered to uphold the regulation ("The rationales could justify the banning from radio of a myriad of literary works, novels, poems, and plays by the likes of Shakespeare, Joyce, Hemingway, Ben Jonson, Henry Fielding, Robert Burns, and Chaucer. . . ."). He argued that it was impossible to separate the "way" in which one conveyed ideas from the "content" of the messages themselves. ("The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its

expression is transparently fallacious."). And he objected that many people could not afford to purchase the alternative means suggested by the majority for listening to speech like the Carlin monologue.

B.

The Pacifica case demonstrates, especially when set against its counterpart of Cohen v. California, that the broadcast medium is subjected to special first amendment treatment. But would that decision be sufficient to support a regulatory scheme controlling television violence as a means of combatting social violence? Consider first a regulation limiting or prohibiting certain forms of portrayals of violence entirely, a regulation not limited to restricting programming violence to certain times of the day nor to controlling the impact of such programming only on children. Would it raise serious constitutional problems? The answer is, I believe, that it most certainly would.

There are four primary areas of concern about any comprehensive attempt to control programming violence in the television medium. They are (1) the problem of vagueness that would necessarily attend any attempt to define improper programming violence; (2) the problem of the regulation opening up a more generalized system of government control of television programming; (3) the problem of regulation

spreading outside the broadcast medium into other areas of expression; and (4) the availability of alternative means of controlling social violence short of expanding the current censorship mechanism of the broadcast medium. Each of these is taken up in this section of the paper.

(1) It seems understood by all that not <u>every</u> depiction of violence on television brings about undesirable social consequences. No one is suggesting that the violent scenes in <u>King Lear</u> be deleted in the television rendition. The great as well as lesser literature of Western civilization is often founded on the human activity of violence, yet it would be unthinkable to exclude such literature from the television medium, except perhaps in an abridged form. It may be assumed that the present debate over regulation proceeds from a shared premise that the television medium should not be made inhospitable to serious art, should the temptation to produce such works ever be more keenly felt than it has been or is today. An initial and serious problem raised by any proposal to regulate television violence, therefore, is: Can the law provide a satisfactory filter, in the form of a legal standard, for separating out the "good" from the "bad" depictions of violence?

A highly vague and flexible standard is troublesome

from a first amendment perspective for several reasons. People are less able to determine in advance whether their contemplated expression will bring an unfavorable governmental response and, given that uncertainty, will in too many instances steer a communicative course far clear of the offending mark. Such self-censorship can mean in practical terms that the law will operate to restrict valued, or "protected," expression. Sometimes this can even become the design of governmental officials charged with the task of implementing the regulation. The more vague the standard under which they execute their charge the more latitude they possess to indulge impermissible desires to penalize ideas otherwise protected. An imprecise standard thus serves potentially as a cloak behind which unconstitutional action may be taken.

While courts generally serve as a safeguard against such improper official action, lawsuits take time, energy and money and so are not always available as a practical matter; and, even when they are, the real harm may already have been done and now be beyond the power of judges to undo. Judges, moreover, are not invariably reliable in making sure that protected speech is in fact protected; they too sometimes give way to pressures for censorship or to personal predilections. Flexible or amorphous legal standards, therefore, may be thought to give judges too much

maneuverability as well. These are weighty concerns; but there are more.

Trying to control or correct the harmful consequences of certain ill-defined speech can also produce an observable dynamic in the enforcement of the regulations. Because of the enormous generality of the regulation, and the concomitant difficulty of giving a reasoned defense of any particular application of it, the regulation will often not be enforced at all, instead be left standing as only a symbolic or hortatory ideal. Dissatisfaction with this state of affairs can then generate attempts to provide greater and greater definition to the concept or regulation, which then often leads to an unsatisfactory and excrutiatingly detailed examination of the facts of each case in the effort to identify all the myriad factors which contribute to a particular result. Not only does this usually become a hopeless task, but the process itself is destructive of important speech interests because it consumes so much time and energy that any victory on the merits is in practical terms a loss.

This process can be observed in two areas analogous to that of programming violence, namely those of the fairness doctrine and the regulation of obscenity. Legal standards in both of these areas have a history of moving from a stage

of definitional generality and virtual nonenforcement to one of energetic attempts to provide comprehensive definition and then back again to a state of regulatory lassitude. Sometimes, however, a third tack is taken, which is to define the standard in very arbitrary terms. Thus, obscenity has been defined with reference to particular points of the physical anatomy. And in the related area of indecent speech, a specific list of four-letter words have been provided as a guide for enforcement. Such an approach, however can be highly arbitrary and its imprecision too intrusive into the sphere of protected expression.

In an important sense, therefore, any such regulatory system is faced with a compound dilemma: If the regulation attempts to be sensitive to context, to the value or worth of speech in particular instances, it has the advantage of focusing on that speech which is truly harmful but the disadvantage of risking through its inevitable ambiguity self-censorship, improper manipulation or ineffectualness from virtual nonenforcement. On the other hand, a narrow or quantitative standard will produce greater certainty in enforcement but by being so crude that it will encompass good as well as bad speech, and probably even fail to reach all the bad speech.

Any attempt to regulate television violence will face these problems. One could devise regulations which focused

on the character or "quality" of the violence portrayed, but, given the difficulty separating good from bad depictions of violence, all the attendant risks of a context-sensitive test would arise. One could, on the other hand, turn to a different sort of regulation, one which was directed only at controlling the quantity of violence displayed, on a per hour basis for example. To be sure, this latter type of regulation would not eliminate all problems of ambiguity, since one would still confront the difficult task or deciding just what constitutes an act of "violence." Nevertheless, it would avoid the problem of separating within the category of violent acts those that were harmful from those that were not. That advantage, however, would be achieved only at the expense of arbitrariness.

(There seems to be some ambiguity in the NIMH reports, it should be said, as to what sort of regulation would deal adequately with the perceived problem of television violence and aggressive behavior. At some times it is suggested that it is simply the quantity of violence on television programming that produces bad consequences. At other times, however, the contextual character of the portrayal of violence is suggested as crucial.)

All this is not to say, of course, that the difficulties inherent in defining a legal standard in any

attempt to regulate or limit television violence would be decisive on the constitutional issue. As the Supreme Court's decisions in the areas of obscenity, indecent words and fairness doctrine make clear, it is only one of several factors to be taken into account in determining the constitutionality of any particular regulation. Is it, one might well ask, really any more difficult to identify problematic portrayals of violence within the context of television programming than it is to determine what is "obscene," or "indecent" or "a controversial issue of public importance"? Perhaps there even exists a greater social consensus about what protrayals of violence are likely to produce undesirable social behavior than about what forms of eroticism exceed a standard of social acceptability. Even if that is true, however, the gain in certainty would seem fairly marginal. But, the point is not that the vagueness/arbitrariness problem in drafting a legal standard to control television violence is determinative only that it will and ought to weigh importantly in any assessment of the constitutionality of such a regulatory scheme.

(2) A second area of first amendment concern with any regulation of television violence is its implications for a more expanded government role over television programming in general. The NIMH report itself speaks of television

violence as only one of several ways in which television programming may be thought to shape and determine peoples' attitudes adversely. Gender, racial and age stereotypes in television programming are noted and criticized, as is the contention that television often presents a "distorted" or "unrealistic" vision of the world. Other lapses of television programming are listed in the NIMH report, or could well be by other groups concerned about the undesirable social values generated by the medium. The concern naturally arises, therefore, that if the first amendment were interpreted to permit regulation of television violence, that would lead inevitably, or logically, to government control over virtually every apsect of television programming.

There are two ways in which the regulation of television violence would represent a significant departure from the existing regulatory structure and, therefore, threaten to bring in its wake a much greater lattitude for government control of programming content. While it is true, as we have observed, that the present regulatory system restricts or forbids the use of programming deemed obscene or indecent, the extension of this system to encompass the regulation of television violence would constitute a major constitutional move. Both obscenity and indecent speech have a long tradition of regulation behind

them; less so, it is true, in the case of indecent speech but still much more so than with depictions of violence. It is this "tradition" of regulation which the courts have often relied upon to maintain a very narrow and limited posture for the obscenity exception. Furthermore, both of these areas of speech deal with sexual matters, and it is arguably necessary that the first amendment permit the social personality greater latitude for intolerance there than in other areas of speech. Both of these factors bear considerable weight in keeping these exceptions to general first amendment principles cabined.

The regulation of television violence would largely sever this connection between the exceptions and their logic. Neither tradition nor the peculiar regard for sexual matters would serve to limit government intervention. Nor would it be a simple matter to find an alternative replacement for these limiting factors. That telvision violence has been the focus for two decades of social science attention and empirical study would at best provide only a temporary buffer between regulation of it and of other programming, only until other "data" on other areas could be generated. Nor would the degree of social harm arising from the speech seem to offer an adequate point of separation between television violence and other assertedly objectionable features of television programming. Racial

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and gender stereotypes may well be regarded, and properly so, as even more generative of social injury than television violence.

Government regulation of television violence would represent a significant departure from existing first amendment practice in another sense as well. The regulation of both obscene and indecent speech, though particularly the latter, can be premised upon the need to protect the sensibilities of one segment of the society against being offended by the speech of another group. Whatever one thinks about the legitimacy of taking congnizance of those feelings of offense in the context of obscene or indecent speech, it is at least possible to justify the regulatory role assumed by the government as a limited one of protecting one group against another. With the regulation of television violence, however, the function of the government shifts importantly to one of curtailing the asserted harmful effects that speech has on a willing audience. It puts the government in a role, in other words, in which it is seeking to control the influence of speech rather than simply its offensiveness; the resulting relationship established between the government and the citizenry is accordingly quite different. To be sure, the same role is permitted in the context of a "clear and present danger," but that is a highly limited area of

permissible government intervention and it has been kept limited precisely because it is the most troublesome form of government intrusion into the field of free speech.

The last mentioned point is not without complications; it is admittedly difficult to decide when the government is acting only to protect one segment of the population against being "misled" and when it is acting to insulate one group against being "offended" by expression. Nevertheless, it does constitute a potentially serious concern about the regulation of television violence, one which must be considered in connection with the possible absence of other self-limiting factors for containing the regulation. To loosen the moorings of the exceptions for censoring obscenity and indecent speech would be very troublesome indeed.

(3) Concern about the expandability of the regulation of television violence is not limited to the content within the broadcast medium alone. It extends to the television medium as a whole and even beyond into the entire area of free speech, where (as was suggested in section I above) the idea of regulation would encounter strong first amendment resistance. To understand the dimensions of this concern it is first necessary to appreciate the difficulties with the traditional justifications for broadcast regulation and the

evolutionary trends at work with respect to the first amendment status of the television medium in general.

The traditional rationale for regulating broadcasting has been the so-called "scarcity" thesis. Its meaning is ambiguous: It is used to refer to at least two alleged distinguishing characteristics of the broadcast medium. One is that broadcasting, in contrast to other media, must make use of a "physically scarce" resource, or the electromagnetic spectrum. Since the spectrum is finite, the argument goes, and since there are more people who wish to use it than is possible for compatable usage, it is appropriate for the government to enter the fray, allocate the available space and regulate in the "public interest" those who are fortunate enough to obtain a license. The other meaning of "scarcity" focuses on the fact that the resulting allocation yields only a "few" channels for communication; the restriction of channel availability, it is then argued justifies or perhaps even mandates, a corrective role for the government in insuring that a range of vioces and opinions are heard.

The "scarcity" rationale, whatever its chosen meaning, was affirmed by the Supreme Court as early as 1943 in the case of National Broadcasting Co. v. F.C.C., and then reaffirmed some 26 years later in the famous decision of Red Lion Broadcsting Co. v. F.C.C. It continues to be the

primary justification for regulation of the broadcast medium. This is so despite the fact that the rationale has been widely discredited in the general literature on the con titutionality of broadcast regulation. If one takes the "scarcity" thesis as referring to the phenomenon of finiteness of the spectrum, it makes no sense whatever as a basis for distinguishing broadcasting from the print media (where of course it has been held unconstitutional for the government to try to do what it does regularly in the broadcast media) because all things are "scarce" in the sense used, including those things used by the print media in communicating its messages (paper, steel and the like). On the other hand, if one takes the "scarcity" principle as pointing to the degree of concentration within the broadcast medium, again as a distinguishing point regarding the print media, the argument seems unconvincing. One must, it is true, make a preliminary decision about what parts of the "print" media one is going to compare with the broadcast medium (all printing presses? daily newspapers above a certain level of circulation? magazines and shoppers?); but almost any general survey of the newspaper and broadcast industries will show that it is far from an easy task to demonstrate that the broadcasting is significantly more concentrated or monopolized than daily newspapers. And even if it were, the emergence of new technologies like cable and

direct broadcast satellite transmission make the limited channel argument nearly a doctrinal anarchronism.

The point here is not to engage in an extended discourse on the lack of merits of the traditional justifications for broadcast regulation, for even if they were found after close examination to be valid, they would not provide much help in supporting a case for the regulation of television violence. The relevance of "scarcity" is that it points to an imperfect "marketplace of ideas," which then justifies the government in intervening for the purpose of supplying through regulation what an unencumbered marketplace would have provided had it existed. But there is little reason to think that a more open marketplace for the television medium would provide an independent solution to the perceived adverse effects of television violence. Indeed, it might very well make the problem more acute than it is thought to be now.

Of course there are other possible bases for regulating the television medium, two of which were suggested in the Pacifica case: the pervasiveness of the medium and the fact that it enters the home. But, whatever one might think of the constitutional merits of these proposed substitute justifications for government regulation, the proposals to regulate television violence do not fit comfortably within either one. The pervasiveness rationale, like the

monopolization or concentration rationale, is an argument for making sure that full discussion occurs, or when it occurs that it is handled fairly. Under it, speech should not be censored but rather added to the medium. The home rationale, on the other hand, is typically offered as a justification for restricting, or limiting, speech, as it was in the Pacifica case. But its relevance arises from concerns about "privacy," about protecting people from being "offended" by speech thrust upon them in contexts in which they are thought to have a legitimate interest in avoiding such confrontations. But, of course, this is not at all the case with the regulation of television violence. Such regulation is not concerned with protection against "offense" but rather with controlling speech that is appealing or attractive. Nor, as with the pervasivenss rationale, is the purpose of the regulation to expand the marketplace so that all sides are presented; it is to restrict the speech already there.

The rationale for televsion regulation that comes closest to justifying regulation of television violence (apart from a rationale which will be suggested in the next section of the paper) is the so-called "impact" thesis. Under this justification, regulation is said to be necessary because the medium possesses characteristics that give it an extraordinary power of control over the minds of the

audience. Judge Bazelon's opinion for the Court of Appeals decsion in F.C.C. v. Banzhaf is probably the most well-known occasion in which a court has relied on the impact thesis in upholding a regulation of the medium. But Banzhaf is another instance in which the regulation upheld was one that expanded speech within the medium; the issue there was whether the fairness doctrine, or the public interest standard, could be interpreted to require broadcasters to air anti-smoking commercials as a response to the advertisements of cigarette companies. Banzhaf, though it relied on an impact rationale, was thus firmly implanted in the traditional form of regulation for the medium, namely that of combatting supposedly harmful effects by expanding opportunities for speech instead of by direct censorship.

Additionally, it must be said that the "impact" type of rationale for government censorship of broadcasting is the most troublesome of all the justifications which have surfaced over the years. It fits the least comfortably into our traditional first amendment jurisprudence. The notion that the state should be authorized to limit speech because of its tendency to induce people to do things which they ought not to do, or perhaps would not themselves "want" to do in some sense, cuts against a basic premise of the first amendment as it has evolved over the past half century. Furthermore, as one examines the history of communications

technologies, one soon sees that the newest form of communication is always feared for its potential for popular manipulation. One does well to adopt a cautious attitude towards any claim which experience shows has arisen repeatedly and been found repeatedly wanting.

The points come down to these: The regulation of violence in television programming raises very serious concerns about greatly expanding the role of the government in matters of expression generally, and not just within the television medium. The traditional sources of legitimacy for government regulation of the broadcast medium are undergoing a rather rapid erosion, both from the force of logic and from that of technological change within the television medium itself. The regulation of programming violence, moreover, would probably be justified (see, however, the next section) on a basis that would tend to legitimate regulation throughout the television medium as a whole and even beyond. It is to be feared of such regulation, therefore, that it would, if undertaken, bring such additional weight onto the already weakened structure of broadcast regulation that it would simply all topple to the ground for lack of adequate internal support.

(4) A final concern with the regulation of television violence is the possibility of employing means other than

limiting speech as a way of dealing with the problems of social violence. Of course violence in the society is a proper and major concern of the government; no one would dispute that fundamental proposition. But it is natural to wonder whether it makes much sense to try to solve that social problem by controlling speech within the television medium. Many alternative means of dealing with the matter short of censorship spring to mind -- augmenting public support to the criminal justice system and instituting public education programs are two possible suggestions. Given the significant implications for our first amendment jurisprudence of any scheme of government regulation of the content of the television medium, it might well be expected of proponents of such a scheme that they demonstrate, not only that a causal link exists between television violence and anti-social behavior, but that no adequate alternative means exist for severing the link. Such a showing is a regular component of the first amendment analysis of speech-restrictive laws and would be highly pertinent to any proposal to regulate television violence.

The problem of alternative means recognized here, it might be noted, was not raised in the same degree by the Pacifica case. There the claim was that certain speech "offended" some people and should therefore be limited, and in that context the govenment could not be expected to do

much more than decide how to resolve the particular controversy, either by choosing to limit the speech, as it did, or by refusing to do so. It could have, of course, decided to pursue a course of trying to "educate" either side into a new attitude, whether to get the George Carlins of the world, or the broadcasters who chose to air Carlin's speech, not to speak with "indecent language," or to persuade people who claimed to be offended by such language not to be any longer. But neither of these possibilities seems quite as realistic as those one considers in the matter of controlling social violence, and neither seems quite appropriate either. Thus, the television violence question, and what to do about it, poses a much more serious constitutional quesiton than did that of regulating indecent speech in the Pacifica case; not only in the sense noted earlier that the television violence rationale that would apply expansively to other expression but also in the sense noted here that there exist many more possibilities of alternative government responses to remedying the underlying social problems.

All in all, then, the regulation of television violence would raise most difficult first amendment issues which, in all probability would be insuperable. Nevertheless, in the next section we will consider how a more tailored form of regulation might be designed and defended.

III

In light of the foregoing discussion, a case for the constitionality of regulating television violence would have to be built around a number of arguments which would seek to minimize the impact of the regulation on traditional first amendment doctrine. Only then, with the scope of the regulation sufficiently narrowed, might it be constitutionally palatable. This section will summarize the central theories which could be utilized in creating and defending a regulatory system for television violence.

One of the critical problems with regulating television violence, as was seen in the last section, is that of keeping the regulation limited to the broadcast medium and, within the medium, to the content of violence alone. The more the regulation has the potential to expand the more troublesome it becomes. A central difficulty with the "impact" rationale for regulating television violence is precisely its potential to spread to many forms of expression. It would be preferable to defend a regulation of television violence on a more self-limiting theory, or set of theories. What would those be?

(1) A theory of broadcast regulation. Instead of pinning on the broadcast or television medium a charge of possessing extraordinary powers of mental manipulation, it would be preferable to see the medium as one which does not

possess unique powers of persuasion but which is nonetheless, subject to different first amendment treatment because of a perceived need or desirability of permitting limited remedies to problems generally inherent to the mass media as a whole. In this regard, it may be thought significant that the technology of broadcast communication has come down to us with a history of regulation, even though that regulation may not have been justified as an original proposition. The fact that the medium has been perceived as different, and therefore a proper place for regulation, can also be thought to possess some constitutional significance. At the very least it helps to contain the regulations which are imposd there, since to approve them will not signal to the society a general shift in free speech doctrine. In any event, to defend a regulation of television violence it need not be argued that the medium of television is fundamentally different in principle from other media within the society.

(2) The value of the speech regulated. One of the difficult issues raised by the Pacifica case was whether indecent words should be assigned a "social value," which would then be considered in deciding whether or to what extent the speech would receive first amendment protection. Justice Stevens, it will be recalled, concluded his opinion with the argument that the language regulated by the FCC's

order was at the periphery of valued speech and, accordingly, entitled to less protection than would be true of other expression. Two other Justices subscribed to this contention, but the rest of the Court either shied away from it or vigorously dissented. Violence on television is typically portrayed in the context of entertainment programs and, presumably, it is that -- and not scenes of violence on the news programs -- which would be regulated. Should such regulation receive a lesser first amendment review because it only touches upon a less valued form of expression?

The matter of the relationship between first amendment protection and the social "value" of expression is very complex. In one sense, the first amendment cases stand firmly for the proposition that no distinctions will be drawn between discussions of political affairs and, for example, "entertainment." In the late 1940's and early 50's, the Court specifically extended first amendment status to entertainment presentations in the context of movies, claiming that the line was too fine to draw between that and political dialogue. And on other occasions the Court has specifically refrained from making judgments about the "worth" of the speech in deciding whether it was entitled to protection. Nazi or racist expression, for example, has been, or presumably would be, protected despite a consensus about its social inutility or even harmfulness.

On the other hand, the traditional explanation given for permitting the government and states to regulate obscenity, libel and fighting words has been that they lack "social value." To take the libel area specifically, the Court has explicitly acknowledged in recent years that misstatements of fact injurious to individual reputations are to be accorded only qualified levels of protection because they lack cognizable value. And in determining which of the levels of protection a given statement is to receive, the current standard followed by the Court (the "public figure" standard) requires it to engage in a general valuation of the discussion in which the statement occurred.

It is not the case, therefore, that the first amendment precludes all evaluation of the expression in deciding whether or to what degree it should be protected. What was so troublesome, then, about Justice Stevens' evaluation of indecent language in Pacifica? Primarily it was his willingness to expand the preexisting categories of "unvalued" speech, but it was also the suggestion that the valuation occur on more of a case-by-case basis instead of by broad category.

To identify "television entertainment" programs as entitled to a lesser degree of first amendment protection would be less objectionable than what Justice Stevens did in two respects. First, it need not involve the regulatory

agency and courts in making a case-by-case examination of the merits of the particular program. Second, and more importantly, it would not require an examination of programming which, like Carlin's monologue, frequently has a significant political speech component to it. This last mentioned point would also help to distinguish a "television entertainment" exception from a more general "entertainment" exception. One of the critical difficulties with a political speech/entertainment distinction is that the "entertainment" category often includes fiction with distinctive political or social commentary to it, thus creating the substantial risk that important and valuable speech will be suppressed. Given the generally unpolitical character of television entertainment programs, this risk is substantially reduced. Thus, just as the commercial portions of a newspaper have been held permissibly subjected to various social regulations, so too might the entertainment portion of television's general fare be carved out for different constitutional status.

(3) Applying the form/content distinction. Another difficult component of the free speech analysis in Pacifica was the argument that the regulation was more tolerable because it did not seek to ban particular ideas but only the "manner," or form, in which ideas were expressed. Again the dissenters objected bitterly to reliance on this type of

argument. Would it be relevant to the regulation of violence?

As with the "speech value" factor discussed above, the form/content distinction raises highly complicated first amendment issues. Traditionally, first amendment doctrine has drawn a distinction between regulations which affect the "content" of expression and those which touch only the "time, place or manner" of the speech. In recent years, however, this distinction has been redefined by several commentators as one between those regulations which are directed at avoiding the "communicative impact" of the speech and those which are motivated by other purposes but incidentally have an inhibiting impact on expression. This restatement is helpful but it is not sufficiently refined. A regulation of television violence would certainly be concerned with the "communicative impact" of the speech, since the concern motivating the regulation would be the behavior of the audience exposed to the "idea" of violence. On the other hand, the regulation might not be deemed as objectionable as one which sought to exclude or ban a particular "idea," as for example, a regulation which forbade the broadcasting of any programming with a "racist" theme. Admittedly, the distinction is a fine one and arguably unpersausive for first amendment analysis. Since the function of the regulation is to stop the evocation of a

particular idea, that violence is an attractive activity, it can be regarded as fundamentally directed at eliminating an "idea." It may be answered, however, that the "idea" is not central to the message sought to be conveyed by the speakers, (that is, the people who create and broadcast television programming) and that the "idea" is one which can still be advocated in the medium, only not in this way."

(4) Zoning speech and protecting children. There are two final elements of the Pacifica decision which have relevance to the problem of regulating television violence. It will be recalled that the majority of the Court emphasized, in upholding the regulation, that the Commission's regulation only "channeled" the use of indecent language to particular times of the day in order to shield children from being exposed to it. Both of these factors might well be applied to create a more limited regulatory scheme for television violence.

A limitation on television violence to particular times of the day would not seem to satisfy the purposes of the regulation (assuming the purpose is to limit its impact on adults) in the same way that a time limitation might for purposes of controlling indecent language. It makes sense to use time limitations for controlling "offensive" expression, since people are thereby enabled to avoid more easily that which bothers them. But, when the problem is

not offensiveness but the attractiveness of the image presented, then a time limitation is really only an indirect attempt to control the total quantity of the expression (which, as was noted earlier in the paper, may or may not be a successful means of dealing with the problem of social violence caused by television violence).

A time limitation, however, would make more regulatory sense if the object of the regulation was to control exposure of children to violent programming. There are, however, two problems with such a regulation. First, the nature of the television medium means that regulations directed at children will inevitably have an impact on the speech which adults receive over the medium. And, second, children themselves are not completely without first amendment protections. Both of these factors were raised in the Pacifica decision, though a majority of the Court was unpersuaded that they were controlling for that particular regulation. It is not possible here to provide an elaborate disussion of the appropriate limits of government regulation of speech in the interests of protecting children. Obviously, much depends upon the age of the children one is talking about protecting and the corresponding programs that are to be brought under regulatory control. It is important, nevertheless, to recognize that a regulation of television violence which was limited to protecting children

would stand a better chance of success than a broader regulation directed at controlling expression for adults.

The foregoing discussion identifies a number of arguments and theories which might be employed in both devising and defending a regulation controlling television violence. Whether they would or ought to be regarded as outweighing the considerations raised in Part II is an open and difficult question. The author's view is that the balance tips in favor of those raised earlier in Part II.

Besides creating a regulation built around the suggestions in this section as a means of passing constitutional muster, it might also be worth considering taking a different regulatory tack altogether. Two suggestions come to mind. One would be to treat the television violence as essesntially raising a fairness doctrine type of issue, which would then be used to require broadcasters to offer the "alternative viewpoint" of nonviolence. Although there would be a great deal to consider before an imprimatur could be extended to such an approach, it at least begins with the great merit of being designed to "expand" instead of "ban" speech. A second suggestion would be to finance less or non-violent programming for the public broadcasting system, as an indirect attempt to address the problem of violent

programming on commercial programming.

IV

In recent years the question has arisen in a few lawsuits whether broadcasters should be held liable in tort for injuries sustained by individuals which were allegedly "caused" by violence in television programming. The most famous case is Olivia N. v. National Broadcasting Co. (74 Cal. App. 3d 383, 141 Cal. Rptr. 511 (1977), cert. denied, 435 U.S. 1000 (1978), remanded & appealed, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981)*), which involved a claim by a young girl who had been sexually assaulted in a manner similar to a scene portrayed in a NBC television drama shortly before the assault. The damage claim against the network was denied, in part because it was found by the court to be an unconstitutional infringement on speech. The opinion is slight on reasons, consisting largely of a string of quotations from and citations to a variety of Supreme Court first amendment decisions. Two primary justifications, however, support the result reached by the Olivia court.

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* See also, Zamore v. State, 361, So.2d 776 (Fla. App. 1978), cert. denied, 372 So. 2d 472 (Fla. 1979); Zamora v. Columbia Broadcasting System, 480 S.Supp. 199 (S.D. Fla. 1979).

The first is the familiar concern that liability would induce undesirable self-censorship. Liability could not be justified on the ground that the broadcaster had created a clear and present danger of significant harm. There was no attempt to incite the audience to do what in fact was done; and to make a speaker liable on the basis that he should have expected or anticipated that someone might imitate something he said or wrote would expand enormously the potential liability for speech activities. The possibility that, with hindsight, a jury or court would conclude that the speaker should have seen the likelihood of imitation would be so great, that many speakers would undoubtedly adopt a conservative approach in making their programming decisions. The possibility of a potential liabililty of virtually unlimited proportions would only add to this conservative, self-defensive posture.

There is a second, related justification -- namely, that the wide potential for imposing liability could result in liability being imposed for impermissible reasons, because the program contained themes which were unpopular or offensive to the judge or jury. Since it will always be difficult to determine whether impermissible hidden motives have guided a decision, when the decisionmaker operates under a highly discretionary legal standard, it is often wisely regarded as the better course to avoid the problem

altogether by not permitting regulation at all..

These are powerful reasons for not imposing tort liability on broadcasters for particular acts of harm allegedly brought about by television programming, but it must be acknowledged that the whole question is more difficult than it might seem at first glance. Just as there can be no doubt that tort liability may run afoul of the first amendment, so too is it a recognized feature of the first amendment that tort liability may be imposed on speech in some situations. Misrepresentation and fraud are two familiar instances where liability can follow upon speech acts; but even closer to the core of the concept of free speech is the acknowledged legitimacy of tort liability for defamatory misstatements of fact. Why, might it be asked, should we permit plaintiffs to sue for damage to their reputational interests arising out of false statements of fact but not permit them to sue for bodily or psychic harm suffered as a result of speech which the defendant might reasonably have expected would induce imitative and hurtful behavior?

It has been suggested elsewhere in this paper that established tradition often marks the boundaries of the first amendment, and that would seem to be a relevant consideration here. Liability for libelous remarks antedated and survived the adoption of the first amendment,

and it is not surprising that the Supreme Court has not chosen to undo entirely the state legal doctrines established over centuries for that purpose. That is not to say, of course, that established practice is decisive under the first amendment; only that it is relevant. A theory of imposing liability for speech that describes illegal activity and poses a risk of imitation, of course, possesss no such historical lineage or experience.

There is more to distinguish the two types of actions, however. It is typically a far easier matter for a person to reduce the risk of liability for defamation by checking or double-checking the factual assertions he is about to make than it would be for a person to determine in advance the extent to which the contemplated speech would induce imitative behavior. The greater open-endedness of the latter form of action makes it all the more likely to induce greater self-censorship.

While it seems fairly clear, on reflection, that tort liability for acts of violence which are imitative of television programming should not be constitutionally permitted, at the same time it needs to be recognized that liability may well be imposed in situations where there is a true attempt at incitement and a clear and present danger of serious social harm is presented. Nothing insulates the television medium from the application of this normal first

amendment rule. The point is only that that normal rule should not be extended beyond situations of incitement to encompass those in which inducement takes only the form of imitation.

END