SCREAM-ING FOR A SOLUTION:
REGULATING HOLLYWOOD VIOLENCE;
AN ANALYSIS OF LEGAL AND LEGISLATIVE REMEDIES

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I. OVERVIEW

This Comment analyzes violent images depicted in film and their effects on children. It looks at how the government, entertainment industry, and public have responded to the growing concern about Hollywood violence and examines the legal arguments, legislative proposals, and self-regulation strategies that have been suggested in the aftermath of the Columbine massacre in Littleton, Colorado.

Although there is heightened concern about the proliferation of violent forms of entertainment, there is no consensus among the public, government, and Hollywood on what specific remedial actions to take. The First Amendment makes it difficult to draft a law that would place meaningful restrictions on violent entertainment. However, many politicians feel that even if they cannot successfully legislate, they can pressure the entertainment industry to monitor itself. This Comment concludes that the main objective of any regulation should be to protect an artist's freedom of speech while at the same time monitoring to whom the speech is targeted.

Section II of this Comment looks at recent criticisms directed toward the entertainment industry for the increase of gratuitous violence in films and at the argument that this increase has resulted in real-world violence. Section III overviews social-scientific data that reveals how children are often susceptible to violent images in films and are more prone to violence after viewing violent material. Section IV analyzes “mimicry” cases. Traditionally, courts deny plaintiffs relief when they sue members of the entertainment industry for negligence. Recently, however, state courts have awarded plaintiffs relief against members of the entertainment industry under certain circumstances. Section IV argues that tort liability is an inappropriate response to violent entertainment because it violates First Amendment principles. Finally, Section V examines the film industry’s marketing practices, possible legislative and self-regulation strategies that could serve to monitor the marketing of violent entertainment to children, and the First Amendment issues surrounding these attempts.

Overall, the Comment argues that the entertainment industry
must scrutinize its own product and work with the government to prevent Hollywood from marketing its violent wares to children.

II. THE PROBLEM

In the aftermath of the school shootings at Columbine High School in Littleton, Colorado, Hollywood has come under vigorous attack and criticism for violent images depicted in movies and television. In the aftermath of the school shootings in Littleton, many Americans wanted to place the blame on popular culture and the entertainment industry; Andrew Essex, *In The Line of Fire: In Littleton's Wake, Hollywood Suffers Aftershocks—and Criticism*, ENT. WKLY., May 7, 1999, at 8, 8 (“As attention turns toward who’s responsible, the entertainment industry—in a mixture of genuine concern and craven self-interest—is making an unprecedented effort to look accountable.”); John Leland & Corie Brown, *A Lower Body Count*, NEWSWEEK, Aug. 23, 1999, at 46 (discussing generally how Littleton has framed the public and the entertainment industry’s reactions toward violence in the media); Benjamin Svetkey, *D.C to L.A. ‘Drop Dead*, ENT. WKLY., June 4, 1999, at 45, 45 (“In the aftermath of the Littleton massacre, our nation’s capital and its entertainment capital—once more-than friendly bedfellows—are locked in mortal combat over the future of violence in TV and film. Can’t these two superpowers just get along?”).

While movies might not have the power to incite imminent lawless action, "[m]ost people would agree that ‘[t]he entertainment media play a powerful role in the formation of values,’” especially the values of very young children.

Films engage and entertain audiences through compelling stories, but they also teach children about their surrounding culture, both in positive and negative ways. In the last few years, the entertainment

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1 See, e.g., Richard Corliss, *Bang, You’re Dead*, TIME, May 3, 1999, at 49, 49 (noting that after the school shootings in Littleton, many Americans wanted to place the blame on popular culture and the entertainment industry); Andrew Essex, *In The Line of Fire: In Littleton’s Wake, Hollywood Suffers Aftershocks—and Criticism*, ENT. WKLY., May 7, 1999, at 8, 8 (“As attention turns toward who’s responsible, the entertainment industry—in a mixture of genuine concern and craven self-interest—is making an unprecedented effort to look accountable.”); John Leland & Corie Brown, *A Lower Body Count*, NEWSWEEK, Aug. 23, 1999, at 46 (discussing generally how Littleton has framed the public and the entertainment industry’s reactions toward violence in the media); Benjamin Svetkey, *D.C to L.A. ‘Drop Dead*, ENT. WKLY., June 4, 1999, at 45, 45 (“In the aftermath of the Littleton massacre, our nation’s capital and its entertainment capital—once more-than friendly bedfellows—are locked in mortal combat over the future of violence in TV and film. Can’t these two superpowers just get along?”).

2 Corliss, supra note 1, at 49.

3 See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Under the *Brandenburg* standard, speech “directed to inciting or producing imminent lawless action and ... likely to incite or produce such action” does not enjoy First Amendment protection.


5 A comedic take on the influence of movies occurs in the film *South Park: Bigger, Longer, and Uncut*. In this movie, the town’s parents blame a Canadian film for their children’s vulgar attitude—specifically their increased use of curse words. Somehow, this turns into a war between the United States and Canada. See Ed Tahaney, *Omiged! They Filmed Kenny!,* N.Y. DAILY
industry has been marred by a few tragic incidents when children modeled negligent behavior depicted in films. For example, in October 1993, two teenagers imitating a "bizarre male bonding scene" from the Disney football movie The Program laid down in the middle of a highway and were struck by a pickup truck. Unlike the movie, where the football heroes survive the dangerous stunt, one boy was instantly killed and the other was critically injured. Disney subsequently excised the scene from the film in response to its critics.

Many films have also been criticized for influencing "copycat" murders, and in the last few years, a proliferation of law suits has been filed against various members of Hollywood. For example, in March 1995, Sarah Edmondson, an Oklahoma teen, and her boyfriend, Benjamin Darras, both eighteen years-old, went on a cross-state crime spree paralyzing one person and murdering another. Before embarking on their rampage, Edmondson and Darras had repeatedly watched Oliver Stone's Natural Born Killers, a film about a couple who find fame on a brutally depicted murder spree. In 1998, the shooting victim's family filed suit against Time Warner Entertainment Company and Oliver Stone alleging that Edmondson and Darras "went upon a crime spree culminating in the shooting and permanent injury to Patsy Ann Byers as a result of seeing and becoming inspired by the movie Natural Born Killers produced, directed and distributed by the Hollywood defendants." Similarly, in 1997, fourteen-year-old Michael Carneal shot three classmates and wounded five others after a daily, voluntary student prayer session in a high school in West Paducah, Kentucky. The

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See id. at 419.

Id. An immediate public outcry went up blaming the producers of the movie for "reckless irresponsibility" for including the scene without also showing possible consequences of such an act. Id.

10 "Copycat" murders or "mimicry" occurs when young people are "inspired" to commit violent acts by what they see on the large screen. See Deborah Prothrow-Stith, M.D., Deadly Consequences 42 (1991) ("We are a suggestible species. We learn how to behave from each other. When we see one of our species act, their act becomes a model for us to emulate. In this way, we sometimes make the unthinkable thinkable, the undoable doable.").

See Josh Young, Devil's Advocate?, ENT. WKLY., Aug. 6, 1999, at 26, 30 (Edmondson told police, "It was as if [Darras] was fantasizing from the movie . . . ." (alteration in original)).


families of the three victims filed suit, alleging that Carneal was unduly influenced by the film *The Basketball Diaries*. In a fantasy sequence from the film, a character played by Leonardo DiCaprio barges into a classroom in a long black cloak and riddles his teacher and classmates with bullets. An adolescent psychiatrist concluded that Carneal was profoundly influenced by violent/pornographic media, including *The Basketball Diaries*, and that “the media’s depiction of violence as a means of resolving conflict and a national culture which tends to glorify violence further condone[d] his thinking.”

Another tragic incident occurred in England when two eleven-year-old boys murdered two-year-old James Bulger in a way that mimicked specific scenes from the film *Child’s Play 3*. The children rented the film at a local video store. Because of the media attention that these incidents have received, it is not surprising that concern about “mimicry” has increased in the last few years. The entertainment industry has been accused of marketing violent movies such as *Scream* and *Natural Born Killers* to young audiences and also glorifying the violence depicted in movie trailers and advertisements. Defenders of Hollywood, however, are quick to dismiss these “copycat” incidents as rare anomalies and argue that since millions of people watch violent films and television and do not go out and murder neighbors, “feigned violence has no causal relation to actual violence.”

Although Hollywood has braved the criticism of its product in the

15 *James*, 90 F. Supp. 2d at 800 (quoting plaintiff’s complaint).
16 See David B. Kopel, *Massaging the Medium: Analyzing and Responding to Media Violence Without Harming the First Amendment*, 4 KAN. J.L. & PUB. POL’Y 17, 17 n.3 (1995). In the film, Chucky, a baby doll, comes alive and its face is splashed with blue paint. Mimicking the movie, the two boys put blue paint on James Bulger’s face. The film also includes a kidnapping, and Bulger was abducted before being killed. The climax of the film shows two boys mutilating and killing the doll on a train. Similarly, James Bulger was mutilated, bludgeoned, and left on a railroad track to be run over. Id. See also *The Video that Caused the Murder*, N.Y. GUARDIAN, Dec. 1993, at 3.
18 See, e.g., Gregg Easterbrook, *Watch and Learn*, NEW REPUBLIC, May 17, 1993, at 22, 24 (noting that the theater sections of newspapers contain “an ever-higher percentage of movie ads in which the stars are prominently holding guns”).
19 But see FROTHROW-STITH, supra note 10, at 42 (“Researchers have established that copy-cat events are not an anomaly. Statistically-speaking, they are rare, but predictable, occurrences.”)
20 Easterbrook, supra note 18, at 24. Easterbrook notes that Novelist Martin Amis dismissed Hollywood’s responsibility for the *Child’s Play 3* incident. In the *New Yorker Magazine*, Amis wrote that he had rented and watched *Child’s Play 3* and that it had not made him want to kill anyone. Easterbrook criticizes Amis’ narrow observation: “But Amis isn’t homicidal or unbalanced. For those on the psychological borderline, the calculus is different.” Id.
past,21 "the image of all those teenage corpses in Colorado has given
the issue a heightened sense of seriousness and urgency."22 According
to a Newsweek poll conducted shortly after the massacre in Littleton, seventy-eight percent of people polled said that violence in
the media deserved some or a lot of the blame for the school shoot-
ings.23 Further, eighty percent of adults believe that there is a con-
nection between violence in entertainment and violent conduct.24 In
the wake of Littleton, the question most Americans are now asking is
"not whether a romanticized and sanitized vision of violence the en-
tertainment media presents to our kids is in fact harmful, but what we
as a national family are going to do about it."25

In response to the public's outcry, many political figures have also
spoken out against the glorification of violence in Hollywood. "[T]he
entertainment industry must do its part . . . there is still too much vio-
ence on our nation's screens, large and small," declared President
Clinton in his May 15, 1999, radio address.26 "[T]here are still too
many vulnerable children who are steeped in this culture of violence,
becoming increasingly desensitized to it and to its consequences."27
In fact, as a direct result of the Littleton tragedy, President Clinton
asked the Federal Trade Commission to study the marketing prac-
tices of the major media conglomerates to determine the extent to
which they target the sales of ultra-violent products to children.28

Violent images in film also became a major topic of the presiden-
tial election. During the 2000 presidential campaign, both George
W. Bush and Al Gore berated the entertainment industry and called
on Hollywood to take responsibility for the violent imagery depicted
in film. Similarly, Senators John McCain and Joseph Lieberman
joined together and introduced legislation to create a national com-
misson to examine the factors, including films, video games, and
music, that are suspected of contributing to the youth violence cri-
ses.29 According to the Senators, the entertainment industry has
failed to respond to the "growing chorus of concerns about the harm-

(explaining Hollywood’s denial of responsibility in the face of criticism: "Hollywood’s stands
plurrimet, advocacy groups and political leaders alternately express outrage or appeal for
restraint, industry leaders claim there is no evidence that their products have negative effects,
more violent and prurient products get sold, and little changes except for the profit margins.").
22 Id. (noting that “Littleton has momentarily halted this fruitless dance”).
23 Leland & Brown, supra note 1, at 46. This was a higher percentage of people than blamed
the increased availability of guns—seventy percent. Id.
25 Lieberman, supra note 21, at 15.
26 President William Clinton, Radio Address (May 15, 1999).
27 Id.
28 FED. TRADE COMM’N, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW
OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING &
ELECTRONIC GAME INDUSTRIES i (2000) [hereinafter FTC REPORT].
29 Lieberman, supra note 21, at 16.
ful influence of the entertainment media's romanticized and sanitized vision of violence, about its part in the toxic mix that is turning too many of our kids into killers.\textsuperscript{59} Further, McCain stated that “the various entertainment industries should declare a cease-fire in the marketing of ultra-violent products to children.”\textsuperscript{60} In response to the school shootings, Congress has initiated a slew of post-Littleton proposals aimed at toning down violence in movies.\textsuperscript{32}

Because of the harsh criticism directed toward Hollywood, many industry leaders are gradually accepting a greater sense of responsibility\textsuperscript{53} and are now scrutinizing their own product closer than they had done before:\textsuperscript{54} “We who create entertainment must honestly acknowledge and urgently address the responsibility we all have to eliminate excessive or gratuitous or unpunished violence,” one veteran screenwriter said at a conference entitled Guns Don’t Kill People Writers Do.\textsuperscript{55} At the conference a playwright added, “We in Hollywood are Dr. Frankenstein . . . we have created a monster. I’m not saying it’s all our fault. But in the equation of lethal violence in schools, I say we are a factor.”\textsuperscript{56} One of the main concerns is the amount of needless violence in movies. As one industry leader suggested, “I’m against gratuitous violence. The violence where there is no remorse. Violence that is made to look like fun, filmed in slow-motion, lighted beautifully and adorned with glib lines and uncaring heroes.”\textsuperscript{57} In response to the concern over gratuitous violence, Disney decided to tone down and “sanitiz[e] the violence” in at least one of its own movies.\textsuperscript{58}

\textsuperscript{60} Id.
\textsuperscript{53} See Svetkey, supra note 1, at 45. These proposals have included legislation making it illegal to film violent images on public property, as well as making it a federal crime to sell a ticket for an R-rated film to a minor. Id.
\textsuperscript{55} Leland & Brown, supra note 1, at 46. The head of one studio stated that the Colorado shootings made him more sensitive to an emerging responsibility: “Not that I believe [violent entertainment] causes street violence. But there is a validity to the idea that it is a contributing factor, along with guns.” Id. (alteration in original).
\textsuperscript{54} Essex, supra note 1, at 8. Sony, noting the “newfound sensitivity” after the Littleton shootings and the recent lawsuits against Time Warner over copycat murders, decided to postpone Arlington Road, a film about a conspiracy theorist who blows up buildings. Id. Similarly, MGM Home Entertainment announced that it would temporarily recall tapes of The Basketball Diaries, “perhaps the first politically motivated video recall in modern times.” Id.
\textsuperscript{57} Claudia Puig, Hollywood Examines Its Soul Worried About Censorship, USA TODAY, June 7, 1999, at D1 (quoting Sy Gomberg).
\textsuperscript{58} Id. (quoting William Mastrosimone).
\textsuperscript{56} Id. At the conference, the writers discussed the “pumped-up volume” of violence. Screenwriter Steven DeSouza (Die Hard, Die Hard 2) stated, “Every picture I have done has come out more violent than what I wrote . . . . I have sat at the screening of one of my movies and been stunned at the level of mayhem that somebody put on the screen.” Id.
\textsuperscript{55} Leland & Brown, supra note 1, at 46 (quoting director Wes Craven discussing the re-worked Scream 2). But see Gregg Easterbrook, supra note 18, at 23 (claiming that Disney is actually one of the leading promoters of violent images in American culture).
But other industry leaders and critics are adamant against blaming youth violence on Hollywood and popular culture. Sumner Redstone, Chairman of Viacom International, Inc., expressed this view at a conference of cable-TV professionals: "I'm outraged by a lot of what we hear blaming the media for what's going on," he argued. 'I don't think we have anything to be ashamed of." Wes Craven, the director of the Scream trilogy, denied that his movies could influence children to recreate actual real-world violence. Indeed many producers and directors argue that movies do not urge viewers to commit violent behavior but only reflect the violence already in society. As critic Kristen Baldwin stated:

While graphic images can affect us—desensitize us, even—they do not, cannot, create dangerous urges in people who don't already have those urges inside them. A well-adjusted kid who watches Natural Born Killers over and over... is not suddenly going to feel the need to commit a murderous act. Movies simply don't have that much power. Other artists are concerned about the threat of censorship lurking behind the public outcry over violent entertainment. Many screenwriters and directors argue that any legislation or industry self-regulation would tread on an artist's right to free speech. "[T]here is always a real danger in the government trying to make artistic decisions, which could lead to censorship," said a veteran screenwriter. I wouldn't know how to respond to a code or a consensus as to what's responsible and what isn't acceptable. That is only for me to answer in my mind," claimed one director. In addition, some critics argue that politicians unfairly focus on violent entertainment to "grab headlines" instead of focusing on more serious issues. One critic charged that politicians "stake out the moral high ground confident that the First Amendment will protect them from having to actually write legislation that would be likely to alienate the entertainment industry. Some use the issue as a smokescreen to avoid having to
confront gun control." Lastly, the Motion Picture Association of America also disputes the claimed impact of violent entertainment on real-world violence, pointing to a recent drop in the crime rate.

III. THE IMPACT OF VIOLENCE IN ENTERTAINMENT MEDIA

"The violence to which American children are exposed in the name of entertainment is affecting their values and behavior," according to the American Medical Association, the American Academy of Pediatrics, the American Psychological Association, and the American Academy of Child and Adolescent Psychiatry. There have been over 3,000 studies assessing the effects of violent entertainment, and "a majority of the investigations into the impact of media violence on children find that there is a high correlation between exposure to media violence and aggressive and at times violent behavior." Researchers have also concluded that a child's exposure to violent entertainment leads to an exaggerated perception of the amount of actual violence in society. The studies, however, are less conclusive regarding causation. "Most researchers and investigators agree that exposure to media violence alone does not cause a child to commit a violent act, and that it is not the sole, or even necessarily the most important, factor contributing to youth aggression, antisocial attitudes, and violence."

Although all television and film viewers are inundated with daily doses of violent media, experts say that children are the most likely to

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47 See Christopher Stern, FTC Finds Hollywood Aims Violence at Kids, WASH. POST, Sept. 11, 2000, at A1 (quoting Jack Valenti, President of the Motion Picture Association of America, as stating, "If movies are causing moral decay, then crime ought to be going up, but crime is going down").
49 Cannon, supra note 39, at 18. According to University of Kansas professor Aletha C. Hutton, chairwoman of the American Psychological Association's Task Force on Television and Society, "There is more published research on this topic than on almost any other social issue of our time." Id.
50 FTC REPORT, supra note 28, app. A, at 1 (2000) (citing L. Rowell Huesmann et al., The Effects of Media Violence on the Development of Antisocial Behavior, in HANDBOOK OF ANTISOCIAL BEHAVIOR 181 (David Stoff et al. eds., 1997)) (noting, however, that although the research on this topic is extensive, the majority of studies focus on the effects of television). Similarly, five principal commissions and review boards have looked at the range of studies regarding media violence and "[a]ll five reviews note the existence of a significant empirical association between exposure to television violence and aggressive behavior among youthful viewers." Id. at 8-9 (citation omitted). See also Davis, supra note 48 (emphasizing that of the thousands of studies assessing a link between violent behavior and violent entertainment, "all but 18 have shown an association between exposure to media violence and violent behavior. Twelve of the 18 were funded by the entertainment industry.").
51 See FTC REPORT, supra note 28, app. A, at 1 (citing SISEL BOK, MAYHEM: VIOLENCE AS PUBLIC ENTERTAINMENT 61-81 (1998)).
52 Id. (citing Huesmann et al., supra note 50, at 183).
be influenced by it. Huesmann and Eron identified three psychological processes through which exposure to violent entertainment could lead a child to behave aggressively: observational learning, attitude change, and scripts. A discussion of each follows.

A. Observational Learning

Observational learning occurs when children act aggressively while imitating violent actions depicted in films and television programs. Children learn to behave aggressively by watching others use violence to their advantage and then imitate what they have seen. This process is called "modeling," and the Child's Play and Natural Born Killers copycat murders are two real-world examples of observational learning. "A majority of experimental investigations undertaken in the laboratory report that exposure to violent programming leads children to act more aggressively." For example, one study indicated that children who watched films of adults hitting inflatable bobo dolls acted more aggressively toward the bobo dolls and their playmates than did children who did not see the film.

Social scientists have also concluded that watching violent movies and television increases a child's appetite to expose himself to the

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53 See Diane Brady, The Power of 'Cowabunga': Does TV Violence Influence Behavior?, MACLEAN'S, Dec. 7, 1992, at 50 (noting that the most susceptible viewers are young people who were raised in families where there was frequent physical violence); PROTHROW-STITH, supra note 10, at 34 ("The mass media lie about the physical and the emotional realities of violence . . . . On film or videotape violence begins and ends in a moment. 'Bang bang, you're dead.' Then the death is over. This sense of action-without-consequences replicates and reinforces the dangerous 'magical' way many children think.")


55 PROTHROW-STITH, supra note 10, at 44.


57 See FTC REPORT, supra note 28, at 4 (citing Barrie Gunter, The Question of Media Violence, in MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 170-71 (Jennings Bryant & Dolf Zillmann eds., 1994)). Note, however, that there are many criticisms of experimental studies monitoring aggressive behavior: "At issue . . . is the applicability of these results to more realistic settings." Id. Moreover, "The experimental setting for teenagers and young adults departs from the everyday in the perceptions of the subjects, in the brevity of the television exposure, in the absence of the possibility of retaliation for aggression, in the exclusion of competing and countervailing communications, and in the criterion of immediacy of the measure of effects." Id. (citing Haejung Paik & George Comstock, TELEVISION AND THE AMERICAN CHILD 241 (1991)). Others argue that youthful subjects will respond to what the researcher wants them to do. See Jonathan L. Freedman, Viewing Television Violence Does Not Make People More Aggressive, 22 HOFSTRA L. REV. 833, 841 (1994) (providing a detailed critique of the notion that research shows violent television causes aggressive behavior).
risk of violence. This is known as the self-socialization effect.49 "Imitative violence" is the most frequent actualization of this effect.

B. Attitude Change

The more violent films and television programs a child watches, the more accepting the child becomes of aggressive behavior. Many social scientists argue that violent films and television programs desensitize viewers and create "mean world syndrome" in which the image of a dangerous and violent world is cultivated among young viewers.49 As one doctor explained, "[V]iolence in media is perpetrated by heroes as an acceptable means of conflict resolution... It's our Clint Eastwoods and Arnold Schwarzeneggers, not the bad guys, who are wasting people. So what's happening is [children are] being exposed to violent behavior as an acceptable means of conflict resolution.60

Longitudinal studies, which track and survey sample subjects at different points in their life time, are used to measure and investigate the relation between early exposure to violent entertainment and subsequent aggressive tendencies. Lefkowitz, Eron, and Huesmann conducted one of the most extensive longitudinal studies measuring attitudinal change. For twenty-two years, they closely scrutinized the viewing habits of a selected group of children in upstate New York. The researchers reported that "children with a preference for violent programs at age eight were more likely to exhibit aggressive behavior at age 19. Also, preference for violent television viewing at age eight was a predictor of serious crimes engaged in by subjects when they were 30 years old."61

Another study, conducted by Donnerstein and Linz, analyzed the effects that horror movies and "slasher" films had on young men.62 Male students were divided up into four groups. One group watched no movies, a second group watched nonviolent, X-rated movies, a third group watched teenage "sexual innuendo movies," and a fourth group watched the films Texas Chainsaw Massacre, Friday the 13th Part II,

60 Davis, supra note 48 (quoting Michael Rich, M.D., M.P.H., professor of pediatrics at Harvard Medical School).
61 FTC REPORT, supra note 28, app. A, at 5. But see Rhodes, supra note 46 ("[T]he correlation [between a preference for violent television at age eight and aggressiveness at age eighteen] only turned up in one of three measures of aggression: the assessment of students by the peers. It didn’t show up in students’ reports about themselves or in psychological testing.").
Maniac, and Toolbox Murders. The young men were then placed on a mock jury panel and asked a series of question designed to measure their empathy for an alleged female rape victim. The fourth group measured lowest in empathy for the specific victim in the experiment and for rape victims in general. Based on those results, Donnerstein and Linz concluded that depictions of violence, and not sex, desensitized people.65

C. Scripts

Social behavior is controlled to a great extent by “strategies” or “scripts” that people store in memory and use as behavioral guides when they confront particular situations. The “Notel” Study analyzed how children’s scripts were impacted by the exposure to violent media when television was first introduced into their community.64 In 1973, Notel, a town in Western Canada, was wired for the first time to receive television signals. For the next two years, researchers from the University of British Columbia observed first and second grade students in Notel and compared them to children in two nearby communities that previously had access to television. They measured aggression by observing children’s interactions in the schoolyard, as well as through teacher and peer ratings. According to the researchers, rates of physical aggression and violence increased by 160% in Notel, but did not change significantly among children in the nearby communities.65 The researchers concluded that viewing televised violence elevated the level of aggression in the children from Notel. Among some researchers, “[t]he Canadian investigation is considered the best controlled study of its type, and provides some of the most persuasive evidence in support of the hypothesis that violent media content stimulates aggressive behavior in children.”66

Despite these assertions, however, some experts contend that the link between violent media and actual violence is unproven and overstated.67 First, they point out that “no direct, causal link between exposure to mock violence in the media and subsequent violent behavior has ever been demonstrated.”68 Second, they argue that the research studies that have influenced national policy and public opinion are riddled with contradictions, as well as with methodological

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65 See id. at 609-10.
64 See Brandon S. Centerwall, Television and Violence: The Scale of the Problem and Where to Go From Here, 267 JAMA 3059, 3060 (1992). Researchers withheld the true identity of the town, calling it instead “Notel.”
66 Id.
65 FTC REPORT, supra note 28, app. A, at 7 (adding, however, that other results from the study indicate a more equivocal causal link between media violence and aggressive behavior).
67 See, e.g., Brady, supra note 53, at 50 (discussing the view that the causal link between media violence and real-world aggression is not clear-cut).
68 Rhodes, supra note 46 (emphasis added).
and data problems that should preclude the finding of any correlation between media violence and actual violence.64

Despite the criticism, there appears to be general agreement among social scientists that the impact of media violence explains at least a small portion of the total variation in aggressive behavior by youths.70 "As Huesmann ... points out: 'What is important for the investigation of the role of media violence is that no one should expect the learning of aggression from exposure to media violence to explain more than a small percentage of the individual variation in aggressive behavior.'"71

In 1992, the American Psychological Association Commission on Youth and Violence examined Hollywood's response to this voluminous research.72 The researchers reported that Hollywood executives, screenwriters, producers, and directors widely ignored the evidence of the effects of film and television violence on children. The Commission argued this evidence has "for decades been actively ignored, denied, attacked and even misrepresented in presentations to the American public."73 Consequently, the Commission concluded that in America there is an "education gap" about the dangers of violent media because of the tendency to ignore television and film's documented contribution to the problems of violence.74 Overall, the Commission determined that the industry is ignoring verifiable evidence that violent images depicted on screen can affect behavioral patterns of young children.

IV. FIRST AMENDMENT, MIMICRY, AND THE BRANDENBURG STANDARD

As concern over Hollywood violence intensifies, some members of the public have brought the battle into the courtroom, seeking judicial remedies against individual members of the entertainment industry.75 Courts traditionally barred these tort claims and protected art-

69 See id.
71 Id. (quoting Huesmann et al., supra note 50, at 183).
72 See David S. Barry, Screen Violence and America's Children, SPECTRUM: J. OF STATE GOV'T, Summer 1993, at 37, 39 (discussing the APA study that was conducted by Edward Donnerstein, Leonard Eron, and Ron Slaby).
73 Id. at 42 (quoting the APA study). See also PROTHROW-STITH, supra note 10, at 40 ("Television executives have used all their energy and resources to prove that television-viewing does not teach children to behave violently.").
74 Barry, supra note 72, at 42.
75 Plaintiffs mostly allege negligence and other tort claims. If the First Amendment did not traditionally bar these negligence claims, states would permit recovery to victims who could prove that: the defendant owed a duty to the public or to the specific plaintiff; the defendant breached the duty by disseminating a form of entertainment that would cause harmful audience response; the depiction actually caused such a response; and the response resulted in foreseeable harm to the plaintiffs. See Brill, supra note 17, at 986.
ists' speech under the First Amendment. In recent years, however, the number of mimicry cases to reach the courts has grown considerably, and judges have not been as quick to dismiss the civil actions. The question remains, however, whether lawsuits against the entertainment industry best serve the public interest of protecting children from excessive Hollywood violence. This Comment argues that allowing mimicry cases to proceed to trial creates a legal dilemma because an artist's freedom of speech will be jeopardized if plaintiffs are able to recover generous damages against the entertainment industry.

A. The Brandenburg Standard

Most courts deciding First Amendment issues in mimicry cases apply the rigid incitement standard of *Brandenburg v. Ohio* and bar

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76 U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press."). The Free Speech Clause is incorporated against the states through the Due Process Clause of the Fourteenth Amendment. See *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).


78 In the last few years, courts have refused to block civil actions brought by the victims' families. In the *Hit Man* case, the Court of Appeals for the Fourth Circuit held that Paladin Enterprises was not protected by the First Amendment in its publication of *The Hit Man*, after the book allegedly assisted a reader in soliciting, preparing, and committing three murders. See *Rice*, 128 F.3d at 267. The district court's ruling in favor of the publisher was reversed and the case was remanded for trial. See *id.* The trial, however, never occurred because the parties settled. Similarly, in the *Natural Born Killers* case, the Louisiana First Circuit Court of Appeals refused to dismiss the lawsuit against Oliver Stone. See *Byers*, 712 So. 2d at 684. The court held that "based on the allegations of the petition which we must accept as true for purposes of a peremptory exception raising the objection of no cause of action, the Warner defendants are liable as a result of their misfeasance in that they produced and released a film containing violent imagery which was intended to cause its viewers to imitate the violent imagery." *Id.* at 687. Further, the court held that discovery should take place to determine whether this intent existed. See *id.* at 691. In another case that received heightened media attention, a Michigan court found that Warner Brothers, as owners, producers and distributors of *The Jenny Jones Show*, negligently caused the death of Scott Amedure. The program invited Jonathan Schmitz to the program so Scott Amedure could reveal his "secret crush" on him. Schmitz fatally shot Amedure four days after the program was taped. Warner Brothers had to pay the family members of Amedure twenty-five million dollars. See *Jury Awards $25 Million in Jenny Jones' Lawsuit*, CHI. TRIB., May 7, 1999, at 1.

79 See also Carolina A. Fornos, Comment, Inspiring the Audience to Kill: Should the Entertainment Industry be Held Liable for Intentional Acts of Violence Committed by Viewers, Listeners, or Readers? 46 LOY. L. REV. 441, 441 (2000) ("Society as a whole, and the legal system in particular, faces a crisis: should a plaintiff be permitted to state a valid cause of action against the various entertainment industries for inspiring viewers, readers, or listeners to commit intentional acts of violence, despite the right to freedom of speech?").

recovery. In *Brandenburg*, the defendant was convicted under an Ohio criminal statute for leading an "organizer's meeting" for the Klu Klux Klan. At this meeting, the defendant made derogatory statements toward African-Americans and Jews and also claimed that revenge might be taken if whites continued to be treated unfairly.

The Supreme Court reversed the conviction, finding the Ohio statute that Brandenburg was convicted under unconstitutional because it outlawed mere advocacy of violence, without regard to whether the speech was likely to incite imminent lawless action.

In *Brandenburg*, the Supreme Court created the modern test for the protection of speech with a "tendency to lead to violence." Under the *Brandenburg* test, speech is unlawful when advocacy is directed to inciting or producing "imminent lawless action" and is likely to incite or produce such action.

The *Brandenburg* test significantly increased protection under the First Amendment. No longer could draft resisters, union activists, or political dissidents be convicted because their rhetoric criticized the government and called people together. Most importantly, unlike the "clear and present danger" test, the *Brandenburg* test did not solely depend upon the danger of the environment.

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81 Id. at 446. The persons in attendance were members of the KKK who carried firearms and burned a large wooden cross. See id. at 445.

82 See id. at 446 (noting that defendant had said "[w]e're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues [sic] to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken").

83 See id. at 448.

84 This particular formulation of *Brandenburg*-type speech was first used in *Hess v. Indiana*, 414 U.S. 105, 109 (1973). See David Crump, Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the *Brandenburg* Test, 29 GA. L. REV. 1, 4 (1994). Crump notes that before *Brandenburg* the Supreme Court had looked primarily to the gravity and probability of this kind of danger in cases involving draft resisters, labor activists, and suspected communists. But in the *Brandenburg* opinion, it also focused upon the quality and context of the utterance. See id.

85 See *Brandenburg*, 395 U.S. at 447 (holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").


87 Early efforts to treat the problem of speech inciting violence were based upon the "clear and present danger test" outlined in *Schenck v. United States*, 249 U.S. 47 (1919). In that case, the defendant was charged with violating the Espionage Act by causing insubordination in the military and obstructing recruiting. See id. at 48-49. The defendant had circulated a handbill criticizing politicians and the press and urging citizens to exercise "your right to assert your opposition to the draft." Id. at 51. The jury convicted Schenck, and the Supreme Court upheld the conviction. Justice Holmes wrote the opinion and argued that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Id. at 52. The overall effect of the clear and present danger test was that it denied protection to outrageously harmful utterances with little communicative value.

88 Crump, *supra* note 84, at 13 ("A speaker can be held responsible for his own utterances, but not for the countless possibilities that violence may ensue when the words are interpreted by unknown persons at an indefinite time in the future.").
Thus, under the *Brandenburg* standard, the only way courts can hold individual members of the entertainment industry negligent for inspiring a real-world activity would be if such a film urged or incited the viewer to imitate the activity. While scenes from *The Basketball Diaries* and *Natural Born Killers* depict violent acts that in fact have been imitated by children and teenagers, none of them, in any way, "exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of viewers." Therefore, the *Brandenburg* standard should bar defendants’ liability in mimicry cases.

**B. Mimicry Cases Applying *Brandenburg***

One example of a mimicry case rejected under the *Brandenburg* standard is *Olivia N. v. NBC*, in which the California appellate court denied recovery for a nine-year-old rape victim assaulted with a bottle by teenagers imitating a scene from the film *Born Innocent*. In her complaint against NBC, the plaintiff alleged that the movie was the proximate cause of her attack. However, when the plaintiff’s counsel stated in his opening statement that he would only prove negligence and not incitement, as the *Brandenburg* standard required, the trial court dismissed the case, and the plaintiff appealed. The California Court of Appeals affirmed the trial court and declared that fictional

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

90 One case that suggests a lower standard than *Brandenburg* when children are involved is *Walt Disney Prods. v. Shannon*, 276 S.E.2d 580 (Ga. 1981). In that case, the plaintiff was injured after he tried to imitate a stunt depicted on the *Mickey Mouse Club*. To create a sound effect, the child put a piece of lead into a balloon. The balloon burst, shooting the lead into the plaintiff’s eye and partially blinding him. After this accident, the plaintiff brought a tort suit against Walt Disney Productions. Although the Georgia Supreme Court refused to grant relief, it did not rest its decision on *Brandenburg*. Instead, it ruled that the *Schenck* formulation of the “clear and present danger” doctrine provided the appropriate analytical framework for resolving the case. See id. at 582. This is a very important distinction, because unlike the *Brandenburg* standard, the *Schenck* clear and present danger test contains no intent requirement and a weaker requirement of temporal proximity. Therefore, it is less speech-protective than the incitement standard of *Brandenburg*. See also *Brill*, supra note 17, at 1005 (“The court’s desire to apply *Schenck’s* standard rather than *Brandenburg’s* when speech is directed at very young audiences . . . may be an effort to accommodate non-speech-related interests of private parties in general or of children in particular.”).


92 See Quinlan & Persels, supra note 6, at 422 (describing the facts of *Olivia N.*). On September 10, 1974, NBC broadcast the movie *Born Innocent*. One scene in the film showed a young girl being artificially raped with a toilet plunger by a gang of other girls. Before the assailants attacked Olivia N., they had viewed and discussed the rape scene. Thus, the plaintiffs alleged that the movie was the proximate cause of her attack. See id.

93 *Olivia N.*, 178 Cal. Rptr. at 890 n.1 (noting that plaintiff’s counsel specifically said that “there will be no evidence that NBC ever told anybody or incited anyone to go out and rape a girl with an artificial instrument or in any other way”). See also Quinlan & Persels, supra note 6, at 422.
materials such as the film Born Innocent are accorded protection under the First Amendment. The court noted the "obvious" chilling effects that tort actions would have on broadcasters if mere negligence were enough to subject them to liability for imitative conduct. The court reasoned that such deterrence would lead to self-censorship, which, in turn, would "dampen the vigor and limit the variety of public debate."

Similarly, in Yakubowicz v. Paramount Pictures Corp., the father of a sixteen-year-old boy sued Paramount Pictures, the producer of the film The Warriors, for wrongful death after a person who had just seen the film knifed his son to death. Before stabbing the victim, the attacker had uttered one of the lines from the film. The father argued that Paramount was negligent in producing the film and that Paramount had produced, distributed, and advertised the film "in such a way as to induce film viewers to commit violence in imitation of the violence in the film." The trial court granted summary judgment for the defendants and the plaintiff appealed. The Massachusetts Supreme Court affirmed, holding that although the defendants "owed a duty of reasonable care to members of the public including the plaintiff's decedent," the film did not "exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of viewers." As the court noted, "speech does not lose its First Amendment protection merely because it has a 'tendency to lead to violence.'" These two cases exemplify how the Brandenburg standard traditionally bars tort liability and protects First Amendment principles.

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94 See Olivia N., 178 Cal. Rptr. at 891.
95 Id. at 892 ("The fear of damage awards... may be markedly more inhibiting than the fear of prosecution under a criminal statute." (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964))). See also Quinlan & Persels, supra note 6, at 423 n.29 (discussing this aspect of Olivia N.).
97 See Brill, supra note 17, at 997 (noting that The Warriors contained many scenes of gang violence and was also widely believed to be responsible for two other murders in California).
98 See id. (citing Yakubowicz, 536 N.E.2d at 1070).
99 Yakubowicz, 536 N.E.2d at 1068. This is the same argument made in the Natural Born Killers case. See Byers v. Edmondson, 712 So. 2d 681, 684 (La. Ct. App. 1998).
100 Yakubowicz, 536 N.E.2d at 1071.
101 Id.
102 Id. (citing Hess v. Indiana, 414 U.S. 105, 109 (1973)).
103 A few other mimicry cases that follow the Brandenburg standard are noteworthy. In DeFilippo v. NBC, 446 A.2d 1036 (R.I. 1982), involving a teenager who hanged himself after watching a mock hanging of Johnny Carson on an episode of The Tonight Show, the parents of the thirteen-year-old unsuccessfully sued NBC, arguing that the network was negligent in broadcasting the stunt. The Rhode Island Supreme Court affirmed the lower court and granted summary judgment holding that First Amendment protections barred the suit. Id. at 1042. In its decision, the court noted the obvious chilling effects that tort actions would have on broadcasters' free speech if they were found liable for imitative conduct. See id. at 1041-42. In McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (Cal. Ct. App. 1988), plaintiffs sued Ozzy Osbourne and CBS Records after their nineteen-year-old son shot himself in the head after re-
Since Littleton, however, courts are not as quick to dismiss mimicry cases. One example is the *Natural Born Killers* case, *Byers v. Edmondson*. In *Byers*, the Louisiana Court of Appeals refused to dismiss the negligence action against Time Warner and Oliver Stone. Plaintiffs accused Stone and Time Warner of negligently producing and distributing *Natural Born Killers*, a film "which they should have known would cause or incite persons" to copy the murders glorified on screen. The court stated that if the plaintiffs could prove its allegation that Warner Brothers and Stone "intended to urge viewers to imitate the criminal conduct of... the main characters in the film, the risk of harm to a person such as [the victim] would be imminently foreseeable, justifying the imposition of a duty... to refrain from creating such a film." In May 1998, Stone and Time Warner Entertainment requested that Louisiana's highest court and the U.S. Supreme Court review the ruling, but both denied certiorari. The result of the Courts' denial was that discovery in the case continued. Since the plaintiff must prove at trial that Stone and Time Warner intended to incite violence through *Natural Born Killers*, the plaintiff requested to see documents relating to the film, including production notes, private journals, and unused footage shot by Stone.

The *Byers* decision relied heavily on *Rice v. Paladin Enters.*, a Fourth Circuit decision that also caught the attention of the public and raised concern among the entertainment industry. In that

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peatedly listening to Ozbourne's song *Suicide Solution*. The song contained the lyrics "Where to hide, suicide is the only way out. Don't you know what it's really about... why try, why try. Get the gun and try it. Shoot, shoot, shoot." *Id.* at 190-91. The court found that the song was not intended to bring about the imminent suicide of listeners. *See id.* at 193. Therefore, the speech was protected under the Brandenburg standard.

104 See Fornos, *supra* note 79, at 446 ("The crisis which the legal system faces... is not that the entertainment industries are being sued under tort law, but rather that courts no longer seem to automatically dismiss these claims on the ground that they are barred by the First Amendment's right to free speech.").

105 712 So. 2d 681 (La. Ct. App. 1998). CNN legal analyst Greta Van Susteren emphasized the importance and high-profile nature of this case: "Both Hollywood and First Amendment activists are nervously monitoring this civil action, since it promises to transfer the battle over movie violence from the op-ed pages into the courtroom, where any decision could set a landmark precedent." *See Young, supra* note 11, at 30.

106 *Byers*, 712 So. 2d at 684.

107 *Id.* at 688.


110 128 F.3d 233 (4th Cir. 1997).

111 *See, e.g.,* Martin Carbus, *Deliberate Intent: A Lawyer Tells the True Story of Murder by the Book*, 222 N.Y. L.J. 2 (1999) (criticizing the holding in *Rice*). *See also Byers, 712 So. 2d at 690* (noting that Paladin was joined "by a spate of media amici," including the major networks that recognized that "even a potential cause of action against Paladin will have far-reaching chilling effects on the rights of free speech and press").
case, the court held that the publisher of *Hit Man*, an instruction book for would-be-assassins, could be held civilly liable for the deaths of victims killed by a third person who followed the book's steps in order to commit a murder.\(^\text{115}\) According to the court, *Hit Man* should not be afforded First Amendment protection because it "so overtly promotes murder in concrete, nonabstract terms."\(^\text{113}\)

Are these two cases setting new legal precedent that the entertainment industry should be concerned about? As one legal analyst explained: "There’s a climate of wanting to teach Hollywood a lesson on violence . . . [T]he courts are one place that’s happening."\(^\text{114}\) Hollywood, however, should not worry about courts becoming more active in monitoring and censoring violence in films. *Rice* was a "rare" case because the publisher "stipulated in almost taunting defiance that it intended to assist murderers and other criminals."\(^\text{115}\) And according to the *Byers* opinion, recognizing a cause of action against Paladin did not subject filmmakers to liability whenever someone copied conduct depicted in their movies.\(^\text{116}\) The court stated that:

In the "copycat" context, it will presumably never be the case that the broadcaster or publisher actually intends, through its description or depiction, to assist another or others in the commission of violent crime; rather, the information for the dissemination of which liability is sought to be imposed will actually have been misused vis-à-vis the use intended, not, as [in *Rice*], used precisely as intended. It would be difficult to overstate the significance of this difference insofar as the potential liability to which the media might be exposed by our decision herein is concerned.\(^\text{117}\)

Further, the *Byers* court did not reject the *Brandenburg* standard that has traditionally barred plaintiff victories in mimicry cases. Rather, it noted that courts almost always refuse to hold members of the entertainment industry liable for injuries sustained from imitating actions depicted in films but emphasized that "many of these dismissals came after the filing of a motion for summary judgment, or even after a trial on the merits, and thus, after the parties had the

\(^\text{112}\) *Rice*, 128 F.3d at 233. See also *Byers*, 712 So. 2d at 690 (discussing the *Hit Man* case); Garbus, supra note 111 (noting that the case settled right before jury selection and that "Paladin Press's reported settlement paid to the families of three murdered people is the first payment of its kind in American legal history").

\(^\text{113}\) *Byers*, 712 So. 2d at 690 ("The unique text of *Hit Man* alone, boldly proselytizing and glamorizing the crime of murder and the 'profession' of murder as it dispassionately instructs on its commission, is more than sufficient to create a triable issue of fact as to Paladin's intent in publishing and selling the manual."). Further, Paladin admits that it intended and knew that its book would be used in the commission of murder. See *id*.

\(^\text{114}\) *Young*, supra note 11, at 30 (alteration in original) (quoting CNN legal analyst Greta Van Susteren).

\(^\text{115}\) *Byers*, 712 So. 2d at 691 ("In fact, neither the extensive briefing by the parties and the numerous amici in this case, nor the exhaustive research which the court itself has undertaken, has revealed even a single case that we regard as factually analogous to this case.").

\(^\text{116}\) See *id*.

\(^\text{117}\) *Id*.
opportunity to conduct discovery pertinent to the alleged facts." Therefore, the *Byers* court's ruling was consistent with the precedent of other mimicry cases.

Lastly, the *Byers* court indicated that Oliver Stone and Warner Brothers were not precluded from invoking the First Amendment guarantee of free speech to bar Byers' claim after discovery had taken place. In fact Oliver Stone and Time Warner sought summary judgment to end the case in January 2001, after three years of discovery. In an affidavit filed with the motion, Stone stated that his film was not intended to incite violence but was a satire "to encourage the audience to think critically about society's contradictory relationship to violence." Stone's attorney said, "At the heart of this [summary judgment] motion are First Amendment issues that could affect filmmakers, writers, artists and the entire creative community in the country." The *Natural Born Killers* case is controversial because as much as the public would like to protect its children from gratuitous screen violence, using the courts to punish Hollywood through mimicry lawsuits is problematic. If courts permit negligence actions to proceed against individual members of the entertainment industry, then freedom of speech will be "chilled" because "[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." Imposing liability on the entertainment industry would therefore lead to self-censorship. Self-censorship would result because producers, artists, directors, and other creators within the entertainment industry would fear that images depicted in their films might lead to mimicry. They would censor these ideas and images in response to potential damage liability. Liability imposed on a simple negligence theory would render movie producers and directors significantly more inhibited in the selection of controversial materials. Free expression is not given full protection if it depends on the vote of a jury. "Allowing judges and juries to

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118 Id. at 688.
119 See id. at 691.
121 Id. (quoting Oliver Stone).
122 Id.
124 Id. at 892-93 (noting that the imposition of tort liability on television broadcasters would "dampen the vigor and limit the variety of public debate" and effectively "could reduce the U.S. adult population to viewing only what is fit for children"); DeFilippo v. NBC, 446 A.2d 1036, 1041-42 (R.I. 1982) (noting that permitting plaintiffs to recover in mimicry case would invariably lead to broadcaster self-censorship and limit viewers' access to diverse programming).
125 Olivia N., 178 Cal. Rptr. at 892 ("[T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 278 (1964))).
decide whether a media defendant is liable for damages would be to sanction a system of *de facto* censorship." Moreover, self-censorship will not only violate the entertainment industry's right to make its own creative decisions, it will also violate the "paramount rights of the viewers to suitable access to 'social, esthetic, moral, and other ideas and experiences.'" Therefore, imposing negligence liability would deprive both filmmakers and viewers of freedom of choice.

"[I]n a free and democratic society, it is unacceptable 'to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals.'" Imposing such a duty would limit artistic expression "to only the broadest standard of taste and acceptance and the lowest level of offense, provocation, and controversy." Unfortunately, some people, notably young children, react violently to movies that depict gratuitous violence. "It is typically impossible 'to predict what particular expression will cause such a reaction, and under what circumstances.'" Therefore, although there is concern about children's exposure to Hollywood violence, censoring movie violence through trials and damage awards violates an artist's freedom of speech.

V. REGULATING HOLLYWOOD: FTC REVELATIONS

After the school shootings in Littleton, President Clinton commissioned a Federal Trade Commission report (FTC Report) on the marketing of violent movies, music, and video games to children and teenagers. On September 11, 2000, after investigating the marketing practices of the major media conglomerates, the FTC concluded that Hollywood targets sales of ultra-violent products to children. According to the FTC Report, the film industry aggressively markets

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106 Quinlan & Persels, *supra* note 6, at 433. *See also* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("One's right to ... free speech, a free press, ... and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

107 *DeFilippo*, 446 A.2d at 1041 (quoting *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973)).


109 *Id.*

110 *Id.* (quoting *Bill v. Superior Ct. of San Francisco*, 187 Cal. Rptr. 625, 629 (Cal. Ct. App. 1983)).

111 *See* FTC REPORT, *supra* note 28, at i; *see also* *Stern*, *supra* note 47 ("The Columbine killings put the spotlight on a spate of deadly killings in schools and raised questions over whether violent films ... were contributing to this increase in violence."). News reports suggested that the boys responsible for the Columbine killings were immersed in a violent subculture.

112 *See* FTC REPORT, *supra* note 28, at i. In commissioning the Report, "[t]he President raised two specific questions: Do the industries promote products they themselves acknowledge warrant parental caution in venues where children make up a substantial percentage of the audience? And, are these advertisements intended to attract children and teenagers?" The Report concluded that the answers to these questions are "plainly 'yes.'" *Id.*
violent movies to children, even when its own ratings board labels the films inappropriate for young children without adult supervision. The Report stated that "[t]he practice of pervasive and aggressive marketing of violent movies ... to children undermines the credibility of the industries' ratings and labels. Such marketing also frustrates parents' attempts to make informed decisions about their children's exposure to violent content." The FTC Report was extremely critical of the film industries' marketing and advertising techniques. First, the Report criticized the amount of violence depicted in movie trailers that are seen before feature films. The Report cited numerous examples of trailers approved for "all audiences" that contained violence. For example, in the trailer for *I Know What You Did Last Summer*, there were references to a decapitation as well as a person being "gutted with a hook." Similarly, the trailer for *Scream 2* depicted several violently graphic images including a woman being pursued by a knife-wielding masked killer. The Report also noted that despite a self-regulating policy established by the National Association of Theater Owners, the studios routinely placed trailers for R-rated movies at PG-13 and PG-rated films. For example, R-rated trailers including *The General's Daughter* and *South Park: Bigger, Longer, and Uncut* regularly preceded *Star Wars Episode 1: The Phantom Menace*, which was rated PG.

Second, the FTC Report criticized the film industry's self-regulatory system because it did not monitor advertisement placement or marketing directed at children. In studying the motion picture industry's marketing techniques, the FTC analyzed the promotion of forty-four violent R-rated films and twenty violent PG-13-rated films distributed by nine major studios from 1995-1999. Thirty-five of the forty-four R-rated films analyzed by the FTC (eighty
percent) targeted children under seventeen. Further, promotional reports for twenty-eight of the forty-four films (sixty-four percent) contained “express statements” that the film’s target audience included children under seventeen. Records indicated that studios routinely recruit teenagers and children as young as ten years to evaluate story concepts, commercials, trailers and rough cuts for R-rated movies. For example, before Hollywood Pictures released *Judge Dredd*, an R-rated film about urban crime, the studio tested the film before a focus group that included more than one hundred youths aged thirteen to sixteen. Similarly, MGM/United Artists tested advertising for the R-rated film *Disturbing Behavior* by showing two thirty-second commercials to more than four hundred twelve- to twenty-year-olds, and Columbia Tristar’s research staff sampled one hundred children ages nine to eleven to evaluate concepts for the slasher sequel *I Still Know What You Did Last Summer*.

Third, the FTC Report revealed that the movie studios marketed their R-rated films by buying advertising spots during television programs that specifically appealed to young viewers. According to the Report, “[t]he studios repeatedly advertised films rated R for violence on television programs that were the highest rated among teens or where teens comprised the largest percentage of the audience.” In fact, MTV, the music network with a core teen demographic, was found to be the largest cable advertising outlet for R-rated films. Studio marketing materials also indicate that the film industry reached young audiences with advertisements that ran during “after school” viewing hours as well as on weekends, the times when children predominately watch television.

The FTC Report stated that the Cartoon Network and Nickelodeon heavily advertised PG-13 movies, which caution that violent material may be inappropriate for young children, particularly during the afternoons and during Saturday morning cartoons. For example, Universal Studios attempted to market the film *The Mummy* to

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145 Id. at 13.
146 Id. at 14.
147 Id. at 14.
148 See Doreen Carvajal, *How the Studios Used Children to Test-Market Violent Films*, N.Y. TIMES, Sept. 27, 2000, at A1 (noting that the company’s research and surveys indicated that young male teenagers were the most enthusiastic about the film).
149 See id. (noting that children were asked to rate the advertising commercials “scene by scene,” including one scene in which a girl’s head was bashed into a mirror and another where a needle was forced toward a clamped eye).
150 See FTC REPORT, supra note 28, at 14.
151 Id. The most popular programs for studios to market their films included *Buffy The Vampire Slayer*, *WWF Raw*, *WCW Wrestling*; and *Xena: Warrior Princess*. Id. at 15.
152 Id. at 15.
153 Id.
154 See id. at 15.
young teenagers by advertising it on television shows that appealed to young viewers such as Pokémon, Mighty Morphin Power Rangers, and Spiderman. Columbia Pictures attempted to advertise its ultra-violent The Fifth Element on Nickelodeon, but "MTV Networks, which oversees Nickelodeon, refused to allow an advertisement because it considered the movie inappropriate for [Nickelodeon] viewers, who are mostly under 12." The studio unsuccessfully appealed the ban, arguing in part... that the violence would be suspect to 'the children of today who are more sophisticated.' The marketing of these PG-13 films is further broadened through toy tie-ins which may attract children as young as four years old.

The studios also attract children to their films through promotional activities intended to generate film interest. The FTC Report found that one of the more popular methods to attract teens to R-rated movies was to distribute free merchandise, such as t-shirts and posters, at places where teens congregate. One marketing plan for an R-rated film revealed that:

[O]ur goal was to find the elusive teen target audience and make sure everyone between the ages of 12-18 was exposed to the film. To do so, we went beyond the media partners by enlisting young, hip "Teen Street Teams" to distribute items at strategic teen "hangouts" such as malls, teen clothing stores, sporting events, Driver's Ed classes, arcades and numerous other locations.

Overall, the FTC Report concluded that despite warning labels, the entertainment industry aggressively markets its violent products to young children.

Despite its criticism toward Hollywood marketing practices, the FTC decided not to pursue legal charges against the major film studios for deceptive or unfair advertising practices. Traditionally, laws against deceptive advertising have been used to punish companies making false product claims. To bring a successful case, the FTC would have to prove that the film industry intended to mislead consumers to their detriment or that the advertisement caused injury that was not reasonably avoidable. In this case, FTC attorneys determined that the First Amendment would bar effective legislation of

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154 See Carvajal, supra note 146.
155 Id.
156 Id. (quoting Columbia Pictures).
157 See id.
158 FTC REPORT, supra note 28, at 17.
159 Id.
160 Id. (quoting anonymous film-marketing plan).
161 See id. at 13-15.
marketing campaigns. The FTC acknowledged that if it took legal action against major film studios, the agency would be forced to explain which movies are appropriate for children and which are not. The First Amendment bars this type of censorship. Robert Pitofsky, the Commission’s Chairman, expressed concern about government bureaucrats picking apart a film’s content: “I don’t want the Federal Trade Commission to be the thought police.” The Report, however, urged the entertainment industry to strengthen its attempts at self-regulation.

Nonetheless, Pitofsky did warn that if the industry did not expand self-regulation, the FTC would take action under existing laws or encourage Congress to pass new ones. These actions could include introducing mandatory rating or labeling systems, limiting advertisements for violent films to restricted venues that are not likely to attract children, and requiring the entertainment industry to regularly report to the FTC on its marketing practices (not unlike the reporting requirement the tobacco industry has faced since 1967). According to Pitofsky, legal action would be a “sanction of last resort” if the industry did not clean up its act, and FTC officials noted that any legislation would be crafted in a way that did not violate a company’s right to free speech.

But many scholars believe that the First Amendment bars effective legislation of marketing practices and thus hinders the FTC and politicians from making such idle threats. Historically, the First Amendment has been interpreted broadly, protecting individuals from government restrictions on artistic freedoms of expression, including films. In limited circumstances, however, the government may regulate the content of that speech. Under the strict scrutiny test, the Supreme Court has carved out content-based exceptions to the First Amendment.

See Stern, supra note 162. In a letter addressed to John McCain, FTC Chairman Robert Pitofsky said that bringing a case against Hollywood would “place the agency in a position that raises serious questions under the First Amendment.” Id.

See id.

Rosenbaum, supra note 134. See also Stern, supra note 162 (quoting Jack Valenti, who stated that “Chairman Pitofsky’s letter plainly states that any attempt to charge the movie industry with deceptive advertising of R-rated films would be fatally infected with serious constitutional problems”).

See Stern, supra note 162 (quoting Lee Peeler, the FTC’s Associate Director for Advertising Practices, as saying self-regulation “would do more and do it quicker than government law enforcement actions”).

See Shiver & Fiore, supra note 163.

See Stern, supra note 162.

See Shiver & Fiore, supra note 163.

FTC REPORT, supra note 28, app. C, at 1, 10 n.3 (citing Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65 (1981)). In striking down an ordinance prohibiting live nude dancing, the Schad Court declared that “[e]ntertainment, as well as political and ideological speech is protected; motion pictures, programs broadcast by radio, and television and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.” Schad, 452 U.S. at 65 (emphasis added).
Amendment. "[T]he government must prove that: (i) the regulation serves a compelling governmental interest; (ii) the means chosen to achieve that interest are narrowly tailored; and (iii) it has chosen the 'least restrictive means' of accomplishing the government's objective."  

By contrast, the First Amendment provides less protection for commercial speech. Commercial speech is defined as "expression related solely to the economic interests of the speaker and its audience." It often does "no more than propose a commercial transaction," such as television advertisements for commercial products. Under the Central Hudson test, the government may restrict commercial speech that is "neither misleading nor related to unlawful activity" only if it asserts an interest that is substantial and proves that the restriction directly advances, and is no more excessive than necessary to serve, that interest. In forming legislation, the government does not have to employ the least restrictive means available, but it must at least narrowly tailor the regulation to the asserted interest. Thus, the success of legislation restricting the marketing of violent entertainment will depend largely on whether courts treat advertisements and marketing plans for movies as commercial or non-commercial speech.

Some critics argue that movie trailers and television spots should be deemed commercial speech because they are "merely advertising products that have been placed in the stream of commerce for

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172 See FTC REPORT, supra note 28, app. C, at 5, 15 n.39 (citing Arkansas Writers' Project v. Ragland, 481 U.S. 221, 231 (1987)). Although content-based regulations are considered presumptively invalid, the Court has upheld restrictions when speech is obscene as well as when speech is deemed harmful to minors. Nonetheless, the government's interest in protecting children does not always outweigh First Amendment considerations. FTC REPORT, supra note 28, app. C, at 6. For example, the Supreme Court recently struck down a regulation requiring cable operators to either scramble sexually explicit channels or limit programming to late-night hours because it infringed on adults' First Amendment rights. See United States v. Playboy Entm't Group, Inc., 120 S. Ct. 1878 (2000).


176 See FTC REPORT, supra note 28, app. C, at 3. The Supreme Court has upheld limits on commercial speech "such as restrictions on targeted direct mail solicitations by lawyers to families of accident or disaster victims and bans on solicitations by commercial enterprises on public university premises." Id. at 3, 14 nn.20-21 (citing Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995); Board of Trustees of SUNY v. Fox, 492 U.S. 469 (1989)).


178 See id. at 564.

In contrast, members of the entertainment industry contend that film advertisements should be considered non-commercial speech and therefore are protected from undue government restrictions. They argue that movie advertisements are non-commercial speech because they promote products that are themselves entitled to full protection and because they usually incorporate parts of the filmmaker's artistic expression, therefore constituting a "subset of the content of the non-commercial expression." The Supreme Court has not ruled whether film advertisements are commercial or non-commercial speech, and existing federal and state court opinions are not uniform.

If Congress proposed a bill limiting the violent content of film advertisements and trailers marketed to children or a bill that restricted advertisements for these products to certain media venues that did not attract children, the level of First Amendment scrutiny would depend on whether the speech was classified as commercial or non-commercial speech. The government would first have to prove, by using scientific, psychological, or empirical evidence, that either there is a "compelling" (non-commercial speech) or "substantial" (commercial speech) reason to protect children from viewing violent entertainment or advertisements promoting such films. Second, the government would have to prove that its regulation either is "narrowly tailored" to achieve (non-commercial speech) or "directly advances" (commercial speech) that interest. Third, the government would have to argue that such restrictions are either the "least restrictive means" of accomplishing (non-commercial speech) or a "reasonable fit" with (commercial speech) the government's objectives.

Regardless of which standard is eventually applied, the legislature and the courts will find it very difficult to formulate a clear regulation that could effectively monitor that to which a child is exposed. Questions would arise regarding the precise meaning of "violence," and it would be hard to draw a line between the types of Hollywood violence to which a child may and may not be exposed. There are many films that are violent but also socially valuable, like Saving Private Ryan and Glory, to which children should be exposed. One could imagine FTC lawyers watching films and counting the type, range, and content of violent depictions. Surely a movie "featuring murder, suicide, gang violence, and knife fighting is violent, but does anybody want

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180 FTC REPORT, supra note 28, app. C, at 3.
181 Id.
182 Id. The FTC Report notes, however, that one state court has held that a movie advertisement "goes beyond proposal of a commercial transaction and encompasses the ideas expressed in the motion picture which it promotes; thus it is afforded the same First Amendment protections as the motion picture." Id. (quoting Lewis v. Columbia Pictures Indus., 23 Media L. Rep. 1052 (Cal Ct. App. 4th Dist. Nov. 8, 1994)).
183 See FTC REPORT, supra note 28, app. C, at 8.
the FTC to ban the broadcast of Romeo and Juliet?" Further, the restrictions should not be so overbroad as to affect adults. "The Supreme Court has repeatedly emphasized that regardless of the government's interest in protecting children, it may 'not reduce the adult population ... to ... only what is fit for children.'" As Senator John McCain explained, "The notion of letting unelected bureaucrats at the [FTC] commission decide what can be broadcast and when it can be broadcast is objectionable to most free people." Therefore, self-regulation is probably the best recourse for the entertainment industry. But unlike in years past, the industry must now take proactive measures to develop regulations that will be effective in protecting children.

The film industry must now decide what appropriate actions to take to curtail the marketing of violent movies to children. In September 2000, in response to the FTC Report, the major film studios announced a new twelve-point plan for marketing R-rated movies. This plan prohibits R-rated movies from being advertised along with G-rated pictures or video releases. It also bans children under seventeen from focus groups for R-rated films unless an adult accompanies them. Advertisements for movies have also started to carry detailed advisories about their ratings system. Some studios have gone even further. Warner Brothers and 20th Century Fox announced that they would no longer advertise R-rated films on any television program for which thirty-five percent or more of the audience is under the age of seventeen, and Disney implemented a policy not to advertise R-rated films on any of its networks before 9 p.m.

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185 FTC REPORT, supra note 28, app. C, at 6 (quoting Reno v. ACLU, 521 U.S. 844, 875 (1997)).
186 Rosenbaum, supra note 184.

Hollywood is now asking 'OK, I know we need to do something, but realistically what do we do?' There are some things we can do relatively simply, and there are a lot that are more difficult .... When you're trying to reach a general audience that kids may, in fact, tune into—is that different from targeting kids directly? Is that going to satisfy the FCC or parent groups or anybody else? These are difficult issues that are only beginning to be explored now.

Id.

188 See Rosenbaum, supra note 24 (quoting Jack Valenti, President of the Motion Picture Association of America, who explained that each studio had set a "goal of not inappropriately specifically targeting children in its advertising of films rated R for violence").
189 See Carvajal, supra note 146. Jack Valenti admitted that the FTC Report had prompted studios to take a "fresh new look at the way we market films." Disney was the first studio to announce that it would no longer test R-rated films to focus groups with members under seventeen. See id.
190 See Rick Lyman, Overhaul of R-Rated Movies Gets a C Rating: Confusing, N.Y. TIMES, Nov. 1, 2000, at A18.
dio has also appointed a compliance official responsible for monitoring its marketing practices. These steps are voluntary, however, and the entertainment industry has not set up any type of enforcement mechanism. Therefore, the entertainment industry should appoint an independent group to monitor the self-regulation techniques.

However, the leaders of the film industry reject the notion that they stop marketing all R-rated movies to children. “[T]he motion picture studios . . . believe that it is appropriate to target advertising for R-rated films to children under 17 and to target advertising for PG-13-rated films to children under 13, on the grounds that these ratings are merely cautionary warnings to parents.” According to Jack Valenti, President of the Motion Picture Association of America, “Some movies with an R rating because of violent scenes like Saving Private Ryan are not only acceptable but worthwhile for some children.”

Overall, the film industry must work together and use common sense in its marketing practices. It must be conscious of its power to influence young minds and it must act more responsibly in the depictions it is marketing to young children. However, even with more self-regulation, it will ultimately be up to parents to protect children from what they feel is questionable material. Parents play an important role in monitoring what films their children watch. “Any action against the entertainment industry is just one piece of the puzzle . . . . It all falls back on the judgment of parents. We can’t legislate the lack of parenting.”

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191 See id.
192 See Rosenbaum, supra note 24.
193 FTC REPORT, supra note 28, app. C, at 11-12 (noting also the industry’s argument that filmmakers have the right to draw as much attention to their work as possible, even the attention of children who are allowed to see the films in the company of their parents).
194 Rosenbaum, supra note 24.
195 See Stern, supra note 162 (quoting parent Erik Braun).