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MEDIA LIABILITY FOR INJURIES THAT RESULT FROM TELEVISION BROADCASTS TO IMMATURE AUDIENCES

This comment examines the tort liability of broadcasters for injuries that result from children's imitating acts of television violence. The comment proposes a cause of action in negligence derived from tort doctrines that recognize a special duty to children. The comment asserts that the First Amendment does not preclude liability and illustrates how any effect on free speech would be minimal.

INTRODUCTION.

There was a child went forth every day, and the first object he look'd upon, that object he became, and that object became part of him for the day or a certain part of the day or for many years or stretching cycles of years.¹

A ten-year-old child arrives at school with a lethal weapon. She conceals the weapon until recess when she takes it out of her pocket and commences target practice. The weapon is a three-sided piece of sheet metal, known as an oriental throwing star or shuriken.² In California it is a felony to possess one.³ The throwing star accidentally misses its inanimate target and severely injures another child. The child might also have recklessly aimed at the other child. In either case, questions of where the child got the star and who is to be held liable for the resulting injuries must be considered. Possible answers would include:

1. The child alone thought of the idea, constructed the star, and educated herself on its use as a weapon. It is possible her parents and teachers were unaware that she possessed it or did not recognize its dangerous nature. In such a case, the child could be found subject

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¹ WALT WHITMAN, LEAVES OF GRASS, at 282 (1899).
² The San Diego Union reported that, on one day, forty oriental throwing stars were confiscated from fourth and fifth grade children at school. The children had constructed the stars themselves after getting the idea from a television show, The Master, aired at 8:00 on a Friday evening (a time likely to attract a large audience of children). San Diego Union, March 28, 1984, § 8, at 3, col. 1.
³ CAL. PENAL CODE § 12020(c) (West Supp. 1984).
to liability\textsuperscript{4} either in negligence or for intentional infliction of injury upon another.\textsuperscript{6}

2. The child's parents made the weapon and gave it to her or left it lying about and the child took it without their permission. In these situations, both the child and her parents would be held subject to liability for entrusting their child with, or negligently allowing their child to gain access to, a dangerous instrument.\textsuperscript{6}

3. The child's neighbor left the star protruding from a tree in his backyard. The child trespassed onto the neighbor's property and retrieved the star. In this situation, both child and the neighbor can be held subject to liability for any resulting damage because the neighbor's negligence made the weapon available.\textsuperscript{7}

4. The child purchased the star at a store where such weapons were sold indiscriminately to children. In addition to the child, courts could hold both the manufacturer and retailer subject to liability for having negligently marketed the item to children.\textsuperscript{8}

5. The child's shop class teacher provided instructions to her on how to make such a weapon and supervised its construction. The courts could hold the teacher subject to liability for directly inviting the child to create a dangerous weapon and providing her with the necessary materials and information to do so.\textsuperscript{9}

Common sense seems to dictate that liability be imposed in all the above situations. A consideration of the following factual variation

\textsuperscript{4} Subject to liability, here, means that the issue of liability would ultimately be determined by a jury or fact finder depending on the facts of the individual case. Each case presents unique issues of foreseeability and causation that need to be resolved by the jury.

\textsuperscript{5} Children are usually subject to liability for both negligent and intentional infliction of injuries based on what is reasonable for the child's age and experience. W. Prosser & W.P. Keeton, Torts § 134, at 1071, § 32, at 179 (5th ed. 1984).

\textsuperscript{6} A parent who either intentionally or negligently allows his or her child to have access to a dangerous weapon can be held liable for negligence. See Kuhns v. Brugger, 390 Pa. 331, 135 A.2d 395 (1957); see also Restatement (Second) of Torts § 390 (1977). For a general discussion of negative entrustment see W. Prosser & W.P. Keeton, supra note 5, § 33, at 197-203.

\textsuperscript{7} If a child who is not aware of the hazard presented by the unguarded instrumentality finds it and carries it away, and it later occasions an injury to such child or another, the person whose negligence made the instrumentality available may be held liable for the harm done by it, whether he left the instrumentality unguarded or abandoned it, in either a public place or on premises which he occupies or controls. 57 Am. Jur. 2d Torts § 119, at 471 (1971); see also Kingsland v. Erie County Agricultural Soc'y, 298 N.Y. 404, 84 N.E.2d 38 (1949); Louisville S.N.R. Co. v. Vaughn, 292 Ky. 120, 166 S.W.2d 43 (1942).

\textsuperscript{8} See Monning v. Alfono, 400 Mich. 425, 254 N.W.2d 759 (1977) (the manufacturer and retailer held liable for injury inflicted by a sling shot sold to a child).

\textsuperscript{9} The two elements of such "pied piper" liability cases are an implied invitation to do something posing a risk of harm, and maintaining or providing the instrumentality that causes injury. See Walt Disney Productions, Inc. v. Shannon, 257 Ga. 402, 276 S.E.2d 580 (1981).
also seems to lead to a similar conclusion:

6. A television broadcaster airs a show during prime time on a Friday evening. The leading characters of the program use throwing stars to inflict injury upon others. The throwing stars can easily be constructed from sheet metal or a tin can lid by a young child. A child watching the show learns by observation how to throw the stars and is inspired to construct and use the weapons for recreation. The child mentioned earlier arrives at school with the star. She throws it intentionally or negligently at another child and an injury results.

In most past cases against broadcasters involving injuries resulting from children’s imitative acts, the broadcasters have been immunized from liability by the first amendment.¹⁰ In these cases the courts did not even allow the jury to make a factual determination of negligence. Rather, the courts have held, as a matter of law, that broadcasters are immune.¹¹

For example, in the case of Olivia N. v. National Broadcasting Co., Inc.,¹² a television network broadcasted during prime time a scene that graphically depicted the artificial rape of a young girl. Several days later a nine-year-old girl was artificially raped with a bottle by a group of youngsters who had allegedly been inspired by the broadcast. The court refused to determine whether the broadcast had legally caused the rape.¹³ Instead, the court attempted to apply the strict constitutional standard of incitement established in Brandenburg v. Ohio.¹⁴

For further discussion of the first amendment and its application to tort liability for broadcasters see infra notes 111-157, and accompanying text.


¹¹ See infra notes 12-17 and accompanying text. The practice of holding broadcasters immune means the issues of causation and duty have remained undetermined.


¹³ See infra text accompanying notes 104-10, for a discussion of causation.

¹⁴ 395 U.S. 444 (1969). In Brandenburg, the Supreme Court addressed the constitutionality of a criminal syndicalist statute that made it a crime to advocate violence. It was not a case about civil liability for resultant personal injuries nor did it deal with children or the broadcast media. Brandenberg involved a Ku Klux Klan rally where a speaker made derogatory remarks about certain ethnic groups. The court held that unless the speaker’s words were “directed to inciting or producing imminent lawless action and likely to incite or produce such action the speech could not be constitutionally pro-
the case did not satisfy the *Brandenburg* standard, and thereby immunized the broadcaster from a determination of liability by the jury.\(^{15}\)

Several other courts have used this same rationale which had the effect of protecting broadcasters. In *Walt Disney Productions, Inc. v. Shannon*\(^{16}\) and *DeFilipo v. National Broadcasting Co., Inc.*,\(^{17}\) the courts also refused to submit the plaintiff's claims to the jury for factual determinations of negligence. Unable as a matter of law to fit the facts into the preexisting categories of speech exempted from first amendment protection, the courts dismissed these cases without further analysis.

One notable case, however, refused to allow the broadcaster to hide behind the first amendment. In *Weirum v. RKO General, Inc.*,\(^{18}\) a jury found a radio station negligent as a result of a broadcast which invited the audience to participate in a contest. The contestants were encouraged to be the first to locate a disc jockey who was driving around the city. Two contestants in separate cars forced the decedent off the road as they sped to catch the disc jockey's car. On appeal from the trial court's determination of liability, it was held that the broadcast had created an unreasonable risk of harm by stimulating the youthful listeners to act recklessly.\(^{19}\) The California Supreme Court affirmed the lower court decision and explicitly stated that the first amendment would not protect a broadcaster from civil liability where a broadcast had created an undue risk of harm.\(^{20}\)

These cases illustrate the law as it currently exists concerning

\(^{15}\) Id. at 447. This Comment asserts that the *Brandenburg* standard is not applicable in a civil case where an injured plaintiff is seeking compensation. For a further discussion of the *Brandenburg* incitement standard and its inapplicability to this case see infra text and accompanying notes 146-151.

\(^{16}\) 126 Cal. App. 3d at 495, 178 Cal. Rptr. at 893.

\(^{17}\) 247 Ga. 402, 276 S.E.2d 580 (1981). This case involved a young child who attempted to imitate a sound effect demonstration broadcast on television. The demonstration consisted of placing a piece of lead into a balloon. When the child imitated the demonstration, his balloon burst and propelled the lead into his eye. The court conceded that the broadcast may have posed a foreseeable risk of injury. That issue, however, was never presented to a jury because the court held that the broadcast was protected by the first amendment. *Id.* at 405, 276 S.E.2d at 583.

\(^{18}\) 446 A.2d 1036 (R.I. 1982). In *DeFilippo*, a child hanged himself after watching a stuntman perform a hanging demonstration. As in *Olivia*, the court applied the *Brandenburg* incitement standard and held there was no liability for the broadcaster.

\(^{19}\) Id. at 47, 539 P.2d at 40, 123 Cal. Rptr. 468 (1975).

\(^{20}\) Defendant's contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.

*Id.* at 48, 539 P.2d at 40, 123 Cal. Rptr. at 472.

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broadcaster liability. On the one hand, the Olivia N., Shannon, and Defilippo courts used the first amendment to immunize the broadcasters from liability. On the other hand the Weirum court unanimously found the broadcaster accountable for negligence—notwithstanding the first amendment.

The contention of this Comment is that, when a child or a third party is injured as a result of the child’s imitative act of television violence, the broadcaster should be held subject to liability. As with the parents, teachers, and neighbors in the introductory hypotheticals (1.-5.), the issue of whether the broadcaster exercised reasonable care in the particular case should be presented to a jury for determination. The broadcaster should not be immunized from liability exposure if an innocent victim has been injured as a direct result of a negligent broadcast. Using the aforementioned hypothetical (6.), the Comment will propose a cause of action based in negligence, discuss why the first amendment does not preclude liability, and illustrate how the effect on free speech from recognizing such a cause of action would be minimal.

WHY HOLD BROADCASTERS CIVILLY LIABLE FOR IMITATIVE ACTS OF VIOLENCE?

Despite the concern of many social scientists and parents, the level of violence in the media has remained constant.21 Eighty percent of all programs contain some violence.22 The networks’ output of violence averages about eight incidents of force intended to hurt or kill per hour.23 Cartoons average twenty-two incidents of force per hour.24

In 1972 the Surgeon General published a report which concluded that “the causal relationship between televised violence and anti-social behavior is sufficient to warrant appropriate and immediate remedial action.”25 An additional ten years of study conducted by the Surgeon General affirmed that violence on television causes aggressive behavior in children and teenagers. Further studies show that

22. Id.
24. Id.
children imitate specific violent acts from television.\textsuperscript{28}

Despite these studies, however, the Federal Communications Commission (F.C.C.) prefers industry self-regulation to the adoption of rigid government standards.\textsuperscript{27} The National Association of Broadcasters (NAB) is a trade association that protects broadcasters' interests. NAB has voluntarily adopted a set of "rules" which give the appearance of self-regulation but which, in actuality, have no real efficacy.\textsuperscript{28} Self regulation may now become even less of a solution since the F.C.C. recently indicated an inclination toward deregulation of the broadcast media.\textsuperscript{29} With the F.C.C. decision to deregulate and broadcasters' refusal to voluntarily limit violent programming, the problem of televised violence is not likely to be abated by enforced regulatory or voluntary measures.

Government regulation, furthermore, is not the judicially preferred solution to the problem of television violence. The court in \textit{Writers' Guild of America, West v. F.C.C.},\textsuperscript{30} rejected governmental interference in programming content. The court held that programming decisions must rest with the individual broadcasters.\textsuperscript{31} This reflects the long-standing judicial policy that prior restraint on regulation of the media is less desirable than imposing sanctions after a particular broadcaster has acted improperly.\textsuperscript{32}

Sanctions other than civil liability could be imposed upon broadcasters if they negligently expose children to acts of violence that are

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{26} Walsh, \textit{Wide World of Reports}, 220 SCIENCE 804 (1982). See also infra note 83.
\item \textsuperscript{27} Turow, \textit{Non-Fiction on Commercial Children's Television: Trends and Policy Implications}, 27 J. BROADCASTING 437 (1980).
\item \textsuperscript{28} Persky, \textit{Self Regulation of Broadcasting — Does It Exist?}, 27 J. COM. 202 (1977). The NAB code is not enforced and it appears to be a public relations ploy to ward off governmental regulation. In fact, when the government attempted to enforce the standards formulated by the industry itself in the code, the NAB actively lobbied against the code's adoption. Liebert, \textit{Television and Social Learning: Some Relationships Between Viewing and Violence and Behaving Aggressively}, in \textit{TELEVISION AND SOCIAL BEHAVIOR, SURGEON GENERAL'S SCIENTIFIC ADVISORY COMMITTEE ON TELEVISION AND SOCIAL BEHAVIOR, 1975 TECHNICAL REPORT} (Vol. 2) 134 (Murray, Rubinstein & Comstock, eds. 1975).
\item \textsuperscript{29} F.C.C. Weaken Policy on Children's Program Rule, L.A. Daily Journal, Dec. 27, 1983, at 3, col. 1. For example, the F.C.C. voted to weaken a policy that encouraged programming for children much to the dismay of concerned activist organizations. \textit{Id.}
\item \textsuperscript{30} 423 F. Supp. 1064 (C.D. Cal. 1976). In this case the court struck down an F.C.C. policy of reducing violence during the prime time family viewing hour (from seven to nine p.m.) as unconstitutional because it was adopted as a result of extreme governmental pressure. \textit{Id.} at 1151.
\item \textsuperscript{31} \textit{Id.} at 1143.
\item \textsuperscript{32} "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence. . . ." Near v. Minnesota, 283 U.S. 697, 713-14 (1930).
\end{enumerate}
\end{footnotesize}
likely to be imitated. The fact remains, however, that when an innocent plaintiff is injured there is a need for compensation. Broadcasters profit from the exhibition of violence on television. It makes sense that they should compensate the innocent victim who is injured as a result of their negligence. To immunize broadcasters is incongruous with an entire body of analogous law that holds those who create an unreasonable risk of harm are subject to liability.

Establishing a Cause of Action in Negligence

For a broadcaster to be held liable in negligence for a child's imitative act of television violence it would be necessary to establish the following elements: a causal connection between the broadcast and the injury, a duty to the plaintiff to exercise reasonable care in light of the circumstances, and a breach of that duty resulting in the creation of an unreasonable risk of harm to the plaintiff.

Establishing a Duty

As with any cause of action for negligence, a primary question is whether the defendant owes a duty to the injured party. This issue must be decided on a case by case basis by applying the general rule that a person must use ordinary care to insure that others are not injured as a result of his or her conduct.

The duty of care is essentially related to circumstances of time, place, and person. It is a conclusory policy determination by the

33. These include criminal sanctions such as fines and administrative sanctions such as license revocation or refusal to renew a license. Cf. F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978) (administrative sanctions); Brandenberg v. Ohio, 395 U.S. 444 (1969) (criminal sanctions).

34. Producers use violence in television shows because it gains attention. Broadcasters air these programs in order to assemble the largest audiences and thus to maximize their profits. See G. Comstock, Television in America 73 (1980).

35. See supra notes 5-9 and accompanying text.

36. The discussion of proximate cause as an element in the establishment of a cause of action in negligence has been folded into the discussion of duty in this Comment. As stated by Prosser, "[i]t is quite possible to state every question which arises in connection with 'proximate cause' in the form of a single question: Was the defendant under a duty to protect the plaintiff against the event which did in fact occur?" W. Prosser & W. P. Keeton, supra note 5, § 42, at 274.


38. Id. at 46, 539 P.2d at 39, 123 Cal. Rptr. at 471.

court that a particular plaintiff is entitled to protection.\textsuperscript{40} A number of considerations can justify an imposition of duty in a particular case.\textsuperscript{41}

**Special Duties to Children**

In many situations, a person will be deemed to have a duty to anticipate and guard against the conduct of another,\textsuperscript{42} especially that of a child.\textsuperscript{43} In general, courts have held that greater care must be exercised when dealing with children than when dealing with adults.\textsuperscript{44} Much is to be anticipated of a child that would not be expected of an adult, such as carelessness and impulsiveness.\textsuperscript{45} The mere presence of children serves as a warning to require the exercise of a higher degree of care for their safety and the safety of others.\textsuperscript{46}

Several courts in different fact situations, have recognized such demands for a higher standard of care for children. For example, a number of cases have held street vendors liable when children attracted to their product carelessly ran into the street and were injured by traffic.\textsuperscript{47} This duty runs to children unobserved by the vendor if their presence may be anticipated due to the attractiveness of the product to young children.\textsuperscript{48} As with street vendors, broadcasters should recognize children's attraction to television and anticipate that children are in the audience. A greater degree of care should be exercised for their safety, and the safety of others, by eliminating the exhibition of acts of violence that are likely to be imitated.

Under the doctrine of negligent entrustment,\textsuperscript{49} a reasonable person must consider the immaturity, inexperience, and carelessness of children and act accordingly to ensure their safety and the safety of others.\textsuperscript{50} The court in *Monning v. Alfonso*\textsuperscript{51} held that, when dealing

\textsuperscript{40}. Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 434, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976).
\textsuperscript{41}. *Weirum*, 15 Cal. 3d at 46, 539 P.2d at 39, 123 Cal. Rptr. at 471.
\textsuperscript{42}. W. PROSSER & W.P. KEETON, supra note 5, § 33.
\textsuperscript{43}. *Id.* at 200.
\textsuperscript{44}. *E.g.*, Schwartz v. Helms, 67 Cal. 2d 232, 430 P.2d 68, 60 Cal. Rptr. 510 (1967).
\textsuperscript{45}. See infra notes 47-53 and accompanying text.
\textsuperscript{46}. *E.g.*, Hilyar v. Union Ice Co., 45 Cal. 2d 30, 286 P.2d 21 (1955).
\textsuperscript{47}. Ellis v. Trowen Frozen Foods, 264 Cal. App. 2d 499, 70 Cal. Rptr. 487 (1968); see also cases cited supra notes 44, 46.
\textsuperscript{48}. Ellis v. Trowen Frozen Foods, 264 Cal. App. 2d at 501, 70 Cal. Rptr. at 490.
\textsuperscript{49}. "It is common knowledge that from small children one can expect almost any kind of heedless and impulsive conduct." Femling v. Star Pub. Co., 195 Wash. 395, 401, 81 P.2d 243, 295 (1938). When one has notice of the likelihood of the presence of a child, "the amount of care necessary to constitute reasonable care is very great." *Id.*
\textsuperscript{50}. See supra notes 6-7.
with children, one must take into account a child's tendency to do mischievous acts. Entrusting potentially dangerous articles to a child is unreasonable because the child may "use the article frivolously due to immaturity of judgment, exuberance of spirit or sheer bravado." 

As illustrated in hypothetical (2) in the Introduction, if parents or neighbors give a potentially dangerous article to a child, they would be held subject to liability for any damages resulting from their negligence. Similarly if a broadcaster gives a child a dangerous idea, that he or she is likely to imitate, the broadcaster should be held subject to liability for the very same reasons.

An analogous doctrine holds that a dangerous article negligently left where a child may find it creates an unreasonable risk of harm to either the child or a third party. If the child finds the article and injures a third party with it, the owner of the article may be held liable for making it accessible to the child. Liability may result even if the child is a trespasser.

A parent or neighbor who negligently leaves a throwing star in a place accessible to a child will be held subject to liability due to the unreasonable risk of harm created. Likewise a broadcaster who allows children to gain access to a dangerous instrumentality by exposing them to an idea that can be easily imitated should be held subject to liability.

Similarly, the attractive nuisance doctrine imposes a duty of care
on a landowner to protect trespassing children because of their inability to appreciate danger and their disregard of risk. Because a child’s parent cannot possibly follow him or her about or “chain him [or her] to the bedpost,” the landowner has a duty to make the premises safe against harm to a child. The landowner’s right to use land as he or she pleases may be outweighed by the greater interest in the safety of children. Broadcasters’ rights to use the media as they please should also be balanced with the societal interest in the safety of children and others.

The requirement of the exercise of a higher standard of care for children is based on the very propensities of children that make it likely for them to imitate unique acts of violence on television: their inability to appreciate danger, their disregard of risk, their tendency to do mischievous acts, and their immaturity, inexperience, and carelessness.

There is little difference between a child who trespasses onto her neighbor’s property and retrieves a throwing star that the neighbor negligently left lodged in a tree and a child who learns by observing a television show how to fashion and use a throwing star. In both cases the child’s lack of judgment, inability to assess the risk, immaturity, mischievousness and curiosity result in a dangerous situation. Furthermore, in the broadcast situation, a child’s attraction to adult role models and his or her propensity to imitate them compounds the risk. Therefore, the defendants in both cases should be held to the same legal standard of reasonable conduct in light of the apparent risk.

Similarly, one undertaking to direct the action of another must do so with due care, especially when dealing with children. Researchers conclude that television is a powerful educator of young children. Children spend a great deal of their time watching television.

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62. Id. This same argument may be analogized to parental supervision of their children’s television viewing. Parents should not be expected to constantly supervise their children’s viewing, especially during daytime and early evening hours, any more than they should be expected to follow them around the neighborhood.
63. Id.
64. See infra notes 111-57 and accompanying text for discussion of broadcasters’ first amendment rights.
66. Id. at 444, 254 N.W.2d at 768.
67. Id. at 446, 254 N.W.2d at 768.
69. W. Prosser & W.P. Keeton, supra note 5, § 33.
70. Schwartz v. Helms, 67 Cal. 2d at 232, 238, 430 P.2d 68 at 72, 60 Cal. Rptr. 510 at 514.
71. “The bald fact is that television has the power to educate, and whether that
sion at the presumed invitation of the broadcaster. The broadcaster should be considered as having voluntarily assumed a duty to entertain and educate children with due regard for their safety.

Foreseeability of Risk

Foreseeability of risk is also essential to a finding of duty to the injured party. A broadcaster should not be held liable for all imitative acts of violence by children that result in injury. As with all negligence cases liability must be judged on a case by case basis. A broadcaster should be held liable only for those injuries that result from a foreseeable risk of harm.

While duty is a question of law, foreseeability is a question of fact for the jury's consideration. In the throwing star hypothetical (6) there is ample evidence to support a finding that a risk of harm was foreseeable. An examination of some of the factors which a jury could take into consideration, in deciding the issue of foreseeability, will support this conclusion.

The intervening act of a third party, in this instance the child,
may preclude liability. However, if the likelihood of such an act was the very hazard that made the broadcast negligent, the jury would probably find the broadcaster liable. In all of the introductory hypotheticals, it is the likelihood that the child will injure another with a dangerous weapon that makes the actor negligent. The intervening act of the child would most likely not preclude liability. On the other hand, if the act of the child was unforeseeable, or occurred in an unforeseeable way, the jury would probably not find the broadcaster liable.

The possibility of a child imitating a unique act of violence from television and causing injury to himself or another is highly foreseeable considering the available studies and statistics. These studies suggest quite convincingly "that spontaneous imitation of aggressive behaviors learned from television does occur." This has been confirmed in laboratory tests, documented case histories, and interviews with youngsters themselves.

79. The act of a third person does not break the chain of causation if "the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent. . . . [S]uch an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby." Schwartz v. Helms, 67 Cal. 2d 232, 241-42, 430 P.2d 68, 74, 60 Cal. Rptr. 510, 516 (1967).

80. For example, a child might use a gun to imitate a television show. It is not apt to be found foreseeable that a young child will have access to such a dangerous weapon. Another example might be a child who possesses knowledge that is out of the ordinary. A child prodigy who learns at an early age how to build sophisticated explosives from a television show and does build them. The issue of foreseeability in any case would be decided by the finder of fact.

81. "The studies support one broad conclusion which is quite clear . . . there is a relationship between violence on television and violence in society." Murray, Television and Youth: 25 Years of Research and Controversy 39 (1980). The number of juveniles arrested for serious or violent crimes between 1952 and 1972 increased 1600%. M. Winn, The Plug-in Drug (1978); Mednick, Human Nature, Crime, and Society: Keynote Address, 347 N.Y. Acad. Sci. Annals 319 (1980). This dramatic change in violence by children occurred during a period when the number of hours children spent viewing television was on the increase and when the violence portrayed on television increased ninety percent. M. Winn, supra, at 76. See also Devney & Bensel, supra note 72, at 834.

Most violent crimes are committed by young males in late adolescence, Eron & Huesmann, Adolescent Aggression and Television, 347 N.Y. Acad. Sci. Annals 319 (1980). Scientists claim that viewing violent television is an important cause of violent behavior in adolescents. Id. at 320. In fact it has been reported that the best prediction of how aggressive a man will be at nineteen is how much violence he watched at the age of eight. Id. at 319.

82. Liebert, supra note 28, at 9.

83. Id. In one study, 88% of the subjects aged 3-5 displayed imitative aggression, without being asked to do so by the researcher, after a brief exposure to a filmed model. Some of the subjects acted like virtual "carbon copies" of the filmed model; sixty percent of all first graders asked claimed they copy what they see on television. R. Liebert, J. Neal & E. Davidson, supra note 74, at 54.

There have been numerous incidents of bizarre violent acts that directly imitate and appear to be inspired by an identifiable television scene. For examples of publicized incidents, see R. Liebert, J. Neal & E. Davidson, supra note 74, at 1-3; G. Cowan, See
Foreseeability does not require the occurrence of prior, identical, or even similar events. However, evidence of prior incidents, taken as a whole, may be sufficiently related to give the broadcaster notice of the likelihood that a child may imitate a unique act seen on television. Documented cases of imitation, along with field and laboratory studies and recommendations by doctors, would seem to put the broadcaster on notice of the high foreseeability of risk of imitative behavior by children.

A child's age might also be a factor for a jury to consider in assessing the foreseeability of risk. Younger children are less able to distinguish between reality and fantasy than an older child. They are less experienced and more likely to adopt what they see on television as part of their behavior.

Because a child's age might be considered in assessing foreseeability of risk, the time of day of broadcast might also become important. It would be reasonable for a jury to consider that three- to four-year-olds are likely to watch television on weekday and weekend mornings or that it is unlikely such children will be watching late in the evening. Foreseeability and duty to that age group could diminish as the likelihood that they will be in the audience decreases.

Parental responsibility might also be a factor a jury would consider in assessing the foreseeability of risk created by the broadcast. The jury may reason that a parent should be able to assume that a television broadcast in the after-school hours is suitable for children to watch. A jury might conclude that because a broadcaster has a duty to broadcast in the public interest parents should reasonably

No Evil 70-71 (1979); Spak, Predictable Harm: Should the Media be Liable? 42 Ohio St. L.J. 671 (1981).
85. See generally id. at 330, 176 Cal. Rptr. at 498.
89. This is somewhat analogous to the attractive nuisance cases where a parent cannot be expected to follow his or her children around the neighborhood or chain them to the bedpost. See supra notes 61-62 and accompanying text.
90. Because of the limited magnetic spectrum, only a limited number of stations can operate without interference. The government issues a limited number of licenses
have some assurance that there will not be content inappropriate for children during hours when it is likely that children will be in the audience. A jury might consider that a broadcaster's liability exposure ought to be inversely correlated to parental responsibility depending on the time of day.

At certain times of day a jury might find it unreasonable for the broadcaster to rely on the responsibility of parents in light of the great risk of harm that children may imitate certain acts of violence. Juries might take into account that parents may be unaware of the possible negative effects of broadcasting upon their children. Furthermore, they are not in a position to predict, with any certainty, when a broadcaster will air programs with inappropriate content for a child. The vast number of children likely to be affected and the seriousness of the danger might convince a jury that it is unreasonable for the broadcaster to place reliance upon parents during certain hours. Conversely, it might be unreasonable for parents to place reliance on broadcasters at certain hours when it is not likely children will be in the audience.

which must be used by broadcasters in the public interest. The few who are granted access to this limited resource must represent the interests of all. See Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969); see also Note, The Future of Content Regulation in Broadcasting, 69 CAL. L. REV. 555, 577 (1981).

91. "[I]n many situations where the risk is unduly great, it is not reasonable care to rely upon the responsibility of others." W. PROSSER & W.P. KEETON, supra note 5, § 33, at 204.

92. Romar, Dealing with the Controversies Over Children's Television, USA TODAY, Sept. 1980, at 62. See also Devney & Bensel, supra note 72, at 837, "Many parents have no idea of the power of TV."

93. The factors to consider in determining whether it is reasonable to rely on another are:

The competence and reliability of the person upon whom reliance is placed, the person's understanding of the situation, the seriousness of the danger and the number of persons likely to be affected, the length of time elapsed, and above all the likelihood that proper care will not be used, and the ease with which the actor himself may take precautions. If an attempt must be made to generalize, it may be said that when the defendant is under a duty to act reasonably for the protection of the plaintiff, and may anticipate that a third person may fail to use proper care if the responsibility is transferred to him, and that serious harm will follow if he does not, it is not reasonable care to place reliance upon the third person.

W. PROSSER & W.P. KEETON, supra note 5, § 33, at 205. These factors can be applied to the case of a broadcaster's reliance on parental responsibility. The parent may not (1) be competent or reliable, or (2) understand the potential negative effects television has on young children. From a policy perspective it would be much more difficult to mass educate parents on television's potential dangers than to hold broadcasters responsible for programming material that is potentially dangerous. See G. COMSTOCK, TELEVISION AND HUMAN BEHAVIOR 396. In addition, the danger of physical injury or death is very serious; the number of persons likely to be affected, considering the vast television audience, is considerable; and parents do not exercise much control over their children's viewing. Schafer & Walsh, Factors Affecting Parental Control over Children's Television Viewing, 24 J. BROADCASTING 411 (1980). The broadcaster is in the best position to take precautions to avoid exposing children to unnecessary risk of harm.
In *Tarasoff v. The Regents of the University of California*, the court held that when a psychiatrist has reason to suspect that a patient poses a serious violent threat to a third party, he or she has a duty to warn the potential victim. If the psychiatrist fails to do so, he or she may be held liable to those foreseeably injured if the threat is carried out. The court rejected the defendant’s argument that therapists are unable to reliably predict violent acts. It reasoned that psychiatrists are capable of using the judgment required of all professionals under accepted rules of responsibility. The court has tened to say that therapists would not be held to a standard of perfection. Rather, if the therapist exercised a reasonable degree of skill, knowledge, and care expected of that professional specialty the psychiatrist could not be held liable even if an injury resulted.

The standards set forth in *Tarasoff* could also be applied to the broadcast industry. The jury would consider whether the broadcaster had exercised a reasonable degree of skill, knowledge, and care expected of professional broadcasters. The standard of care might be met if precautions given by professionals employed by the broadcasters were followed. The networks employ advisors who act as professional censors to regulate content. The network standards on violence, however, are not promulgated in recognition of a duty to prevent harm to the public but in fear of losing viewers. Censors’ instructions are often ignored, even when they warn about a risk of possible imitation. Broadcasting a show, in light of such professional warnings, certainly adds to the foreseeability of risk and

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95. Id.
96. Id. at 433-34, 551 P.2d at 344-45, 131 Cal. Rptr. at 24-25.
97. Id. at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25.
98. Id.
99. W. PROSSER & W.P. KEETON, supra note 5, § 32, at 185. Just as psychiatrists have special skills and training, so do broadcasters. The competitiveness of the industry necessitates that the broadcasters know about mass psychology and marketing. Because broadcasters have this special knowledge, they ought to apply it reasonably to prevent foreseeable injury. As might be expected, however, quite the opposite is the case. Many broadcasters themselves have provided evidence that they use violence as an easy way to raise ratings. Writers Guild v. F.C.C., 423 F. Supp. 1064, 1095 (1976). “[T]he race for audience ratings too often blinds us to our basic responsibilities. And in serving ourselves we often do great disservice to our viewers” (quoting James E. Duffy, President of American Broadcasting Company (ABC) Television Network). Id.
100. R. LIEBERT, J. NEAL & E. DAVIDSON, supra note 74, at 140.
101. Id. at 146.
102. Id. at 141. Actual recommendations made by a censor include the following: “[D]o not reveal demonstration of arson techniques, . . . to invite imitation. Do not show how the torch is made and invite imitation . . . ,” etc. Id. at 142.
would be a factor to influence a jury determination.

All of the positive and negative factors that are relevant to a specific case could be balanced by the jury to ascertain the foreseeability of risk in broadcasting a particular show. The balancing of these factors, concededly, may be difficult. It must be remembered, however, that "the alleged inability to fix definitions for recovery on the different facts of future cases does not justify the denial of recovery on the specific facts of the instant case; in any event proper guidelines can indicate the extent of liability for such future cases." 103 Such guidelines will give broadcasters known parameters within which to work.

In the throwing star hypothetical, the broadcast of a unique act of easily imitable violence, during hours when it is known children will be watching, suggests a possible breach of the broadcaster's duty of reasonable care. Considering all the facts of the particular case, a jury would be justified in concluding that there was such a breach.

Cause in Fact

Once it is determined that the broadcaster has breached a duty of reasonable care to the plaintiff, it must be further demonstrated that the defendant's breach of that duty was the actual cause of the injury. 104 Again, this is a question for the jury's consideration. 105

Because of the complexity of human behavior, when a child imitates an act of violence, there may be many additional factors that contribute to cause an injury. 106 An examination of documented incidents illustrates this problem. One example involved a child who put ground glass into the family stew after observing such an act on television. 107 If the child had not seen the act on television he almost certainly would not have thought to do it. However, once exposed to the idea, the televised suggestion combined with all his individual behavioral tendencies to produce an injurious result.

Nevertheless, scientists have established a relationship between television violence and imitative violent behavior. 108 This correlation

104. See generally W. Prosser & W.P. Keeton, supra note 5, § 41.
105. The issue of causation in fact can be determined by applying a "but for" test or a "substantial factor" test. The former entails determining whether the event would not have happened "but for" the defendant's conduct. The latter asks whether the conduct was a substantial factor in causing the injury, recognizing that other causes may also have contributed. See W. Prosser & W.P. Keeton, supra note 5, 341.
106. See generally Stein & Fredrich, Impact of Television on Children and Youth (1975) (thorough discussion of factors that affect the relation of violence to behavior).
107. Incident reported in R. LIEBERT, J. NEAL & E. DAVIDSON, supra note 74, at 3.
108. Many scientists have proven to their own satisfaction that children imitate
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is supported by laboratory and field studies as well as actual documented incidents. This evidence, taken as a whole, may reasonably lead to a determination of cause in fact, dependent on the individual facts of the case. Generally, the more unique an act of broadcast violence is and the more closely an imitation resembles it, the easier it should be to establish cause in fact.

In the hypothetical situation, a jury could determine that the broadcast was the cause in fact of the injury. If the child did not know how to construct or use a throwing star prior to the broadcast, when she was exposed to the idea, she was given access to dangerous information. This idea, combined with her behavioral tendencies, resulted in an injury. The broadcast which gave the child the idea was not the only cause, but a jury could determine that it satisfies either the "substantial factor" or the "but for" test of causation.

The causal connection between a negligent broadcast and the resulting injury is highly analogous to the causal relationships in all of the introductory hypotheticals (1 through 5). A jury may find that a neighbor who negligently abandons a dangerous article is the cause of any resulting injuries if a trespassing child wrongfully obtains the article and uses it to injure someone. Likewise, a jury may find that a broadcast is the cause of any resulting injuries when a child is negligently exposed to an act of violence likely to be imitated.

**THE FIRST AMENDMENT DOES NOT BAR LIABILITY**

Once the basic elements of a cause of action for broadcaster liability have been established, one must consider whether the first amendment should protect the broadcaster from liability. The first amendment was not intended to protect all speech. There have al-

violence on television. See supra notes 76-82. The issue, however, should not be "proving a case against TV violence . . . . The legal analogy [of causation] simply doesn't apply to science where we come closer to an elusive truth by a constant reexamination of the evidence." See Strickland & Carter, T.V. Violence and the Child 100 (1977). Part of the problem for scientists in establishing a definite cause and effect relationship is their inability to ethically experiment with young children in laboratory settings. Researchers are not able to place children in situations where they could be observed directly imitating the violence that is seen daily on commercial television. Much of the violence involves weapons and results in severe injury or death. What investigator would place a child in a room with a real weapon to 'scientifically' observe what happens? R. Liebert, J. Neal & E. Davidson, supra note 74, at 57. The documented cases of imitation, however, provide ample support for the scientists' conclusions. See supra notes 82-83 and accompanying text.

109. See supra notes 81-83, 86.

110. See supra note 7.

ways been certain classes of speech deemed unworthy of constitutional protection. The policies behind punishment for or prevention of certain classes of speech apply to an even stronger degree in the situation where a broadcaster may have proximately caused death or severe injury to an innocent victim. An examination of unprotected areas of speech will illustrate.

**Unprotected Speech**

In *Chaplinsky v. New Hampshire,* the Supreme Court held that certain words are of such slight social value that the interests of order and morality clearly outweigh any benefit possibly derived from them. In *Chaplinsky,* the prohibited speech consisted of insulting or "fighting words," words that are likely to cause an average addressee to fight or to incite an immediate breach of the peace. The "average" addressee in the *Chaplinsky* case was the city marshal, a law enforcement officer. It is clear from *Chaplinsky* that the first amendment protects a law enforcement officer from being called a name. It would be illogical if the first amendment, on the other hand, denies a child who is emotionally and physically injured from a bottle rape which the perpetrators allegedly imitated from a television show, the right to take her case to a jury for determination.

An imitatable act of violence broadcast to young children has the same "direct tendency to cause acts of violence," as the fighting words discussed in *Chaplinsky.* If the judiciary seeks to protect adults from words that may cause them to act violently, it likewise should prevent young children, who have less experience, judgment, and self-control, from exposure to a barrage of enticing and dangerous acts that they are likely to imitate. If the social interest in order and morality overrides the usual right of free speech in the former situation, it should impose liability in the latter.

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The right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or "fighting words."

113. *id.* at 572-3.

114. *id.* at 572.

115. *id.*

116. *id.*


118. 315 U.S. at 573.

119. *Chaplinsky* was a case involving state regulation of individuals. It was not a civil liability case. It is discussed for the purpose of establishing judicial standards for treatment of speech which is considered harmful. The same social policies that permit
Defamation is another form of speech for which social interests outweigh first amendment protection. A broadcaster may be held civilly liable for negligent infliction of injury to a private individual. Gertz v. Robert Welch, the leading case on this subject, recognizes that imposition of civil liability may result in self-censorship. The legitimate state interests in compensating individuals for the harm inflicted on them, however, outweighs the interest in avoiding self-censorship.

If a private individual can establish a cause of action in negligence, he can recover for injury to his reputation. It is illogical to allow recovery for negligent harm to a person’s reputation but not to allow recovery if his or her injury is physical in nature. The policy interest of compensating an individual for wrongful injury is present in both situations.

In a defamation case, the broadcast would be the direct cause of the injury to a person’s reputation. By contrast, in the case of imitated violence, the broadcast would be the indirect cause of the injury. Nevertheless, if legal cause can be established in both situations, there is no reason to impose liability in one instance and allow first amendment protection in the other. To allow first amendment protection, without resolving the issue of duty and causation, allows immunity from liability despite fault and ignores the policy of compensating wrongfully injured plaintiffs. Such potential immunity is especially troublesome when dealing with serious physical injuries.

The court in Gertz allowed defamation victims recovery for negligence because many deserving plaintiffs would otherwise be unable to receive compensation for wrongful injury to their reputations. The court in Olivia N., however, denied a nine-year-old rape vic-

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state regulation of harmful speech should permit the self-regulation that may result from civil liability.

121. Id.
122. Id. at 342.
123. “The need to avoid self-censorship by the news media is not the only societal value at issue.” Id. at 341. Absolute protection of the communications media would “require a total sacrifice of the competing values served by the law of defamation,” one of which is “the compensation of individuals for harm inflicted on them.” Id. Likewise, the absolute protection of broadcasters, in the case of imitative violence, is a “total sacrifice” of the value of compensating individuals for harm inflicted on them.
125. Id. at 342-43.
tim the chance to receive compensation for a wrongful physical injury. It is incongruous that broadcasters are liable for injuries to a person’s reputation that result from negligence, but immunized from liability by the first amendment for physical injuries that also result because of the broadcaster’s negligence.

The Supreme Court has recognized a special interest in the protection of children when applying the first amendment. The Constitution permits regulation of speech for the well being of children. In Ginsberg v. New York, material containing nudity, while constitutionally protected for adults, was not protected for children. The Court reached this conclusion by adopting a definition of obscenity which varies in accordance with the audience to whom the material is directed. The Court adopted this standard in recognition of the need to protect the health, safety, welfare, and morals of the community.

The Court in Ginsberg offered two reasons for applying a special standard to children: (1) a parental right of supervision in the home, and (2) society’s legitimate interest in the well-being of children. The courts in interpreting the first amendment have consistently recognized a parent’s authority to supervise the upbringing of children in his or her own household. The Court held that a parent should be supported by the laws in fulfilling his or her parental responsibilities.

Responsible parents who wish to avoid exposing their children to imitable televised acts of violence may have a very difficult time. As in Ginsberg, parents in this situation are entitled to the support of the laws which should encourage responsible programming, by holding broadcasters responsible for failing to use reasonable care.

The Court in Ginsberg also recognized that the states are justified in imposing reasonable regulations on the distribution of material to children, based on society’s interest in protecting their welfare. In Ginsberg, the Court held that exposure to material containing nudity

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128. Id. at 634-5.
129. Id. at 635.
130. Id. at 636.
131. Id.
132. Id.
133. Eighty percent of all television shows are violent; overt acts of violence occur on children’s shows on the average of one per minute. Devney & Bensel, Television and Children: A Physician's Guide, 62 MINN. MED. 833 (1979). It is presently impossible for a parent to predict when an act of imitative violence will be shown. Parents cannot be expected to sit with censor buttons and prescreen every show. See generally supra note 93 and accompanying text. Short of not keeping a television set in the home, or severely restricting its use, a parent has only limited control of the material to which a child will be exposed. The broadcaster, on the other hand, is in a position not only to predict but also to control programming content.
134. Id. at 640.
impaired the morals and ethics of the young and was a clear and present danger to the people of the state. If the sale of material containing nudity to a sixteen-year-old constitutes a clear and present danger to the public, then educating children in subjects such as weaponry, rape, and arson is equally such a danger.

In Ginsberg, the state only had to show that it was not irrational to find material containing nudity harmful to justify its exclusion from first amendment protection. With thousands of studies warning of the dangerous effects of television violence on children, it likewise is not irrational to find such violent material harmful.

Limited Protection of the Broadcast Media

Of all communication forms, broadcasting receives the least amount of first amendment protection. In F.C.C. v. Pacifica, the Court prohibited the radio broadcast of allegedly obscene language during the hours children were likely to be listening. The Court enumerated several reasons for this limitation of a broadcaster’s protection. These reasons are the pervasive presence of the media and its accessibility to children.

Television plays a very large role in the lives of most Americans. In Pacifica, the pervasiveness of radio was a reason for limiting first amendment protection. Television is even more pervasive than radio. Children apparently spend considerably more time watching television than they do listening to the radio.

Pacifica also pointed out that because radio is broadcast into the privacy of one’s own home, the subject of its broadcast should be afforded less protection than other forms of communication. According to the Court, the individual’s right to be left alone in the privacy of his or her home outweighs a broadcaster’s first amendment right. The Pacifica rationale should apply with greater weight to television broadcasts where the visual characteristics add to the potential intrusiveness of the communication and the pervasive

135. Id. at 642.
136. See supra notes 71-72 and accompanying text.
137. Id. at 641.
138. See supra notes 81-85.
140. Id. at 748-50.
143. Id.
presence is much greater.

The second factor in *Pacifica* which justified limiting first amendment protection to broadcasters was radio's easy accessibility to children.\textsuperscript{144} Television is not only easily accessible but also highly attractive to children who spend a great deal of their time watching. The court in *Pacifica* found that the easy access to and pervasiveness of the medium, combined with those special considerations applied to children in the *Ginsberg* case, justified limiting first amendment protection for broadcasters. If these considerations permit a total prohibition of offensive language during hours when children may be watching, they could also serve to justify the minimal amount of self-regulation regarding violence that would result if liability were imposed.

*Pacifica* prohibited the broadcasting of "filthy language" during hours when children were likely to be listening.\textsuperscript{146} It would be inconsistent of courts to be more concerned about a child's exposure to "naughty words" than they are about a child's assimilation of aggressive behavior. The latter has a much greater potential for damage, both to the child and to society.

**The Brandenberg Standard of Incitement**

As noted previously, the incitement standard of *Brandenberg v. Ohio*\textsuperscript{46} is not applicable to a civil suit alleging an injury resulting from a child's imitation of television violence. It is, nevertheless, the standard which courts have applied.\textsuperscript{147} The courts have ignored the judicial recognition of different standards for children in all areas of law.

The law of torts recognizes special duties owed to children because of certain characteristics which make them more vulnerable than adults.\textsuperscript{148} Likewise, in construing the first amendment the courts have applied different standards to children than those applied to adults.\textsuperscript{149} This reflects society's interests in the moral upbringing of children.\textsuperscript{150} By analogy to these special standards, courts should not apply the same adult standard of incitement to cases involving children.

\textsuperscript{144} Id. at 749.

\textsuperscript{145} Id. at 750.


\textsuperscript{147} See supra note 14 and accompanying text.

\textsuperscript{148} These characteristics include lack of experience, lack of judgment, inability to assess risk, immaturity, mischievousness, exuberance of spirit, and bravado. See supra notes 43-68 and accompanying text.

\textsuperscript{149} For a discussion of *Ginsberg* and *Pacifica*, see supra notes 127-45 and accompanying text.

Furthermore, *Brandenburg* also requires a finding of imminence of harm.\(^{151}\) A child with a dangerous idea may think about it for several weeks before he acts on it; likewise, he might hide a dangerous weapon under his bed for an indefinite period of time. The potential lack of imminence in both cases does not decrease the potential for danger. In fact, in broadcaster liability cases the potential danger has already resulted in an actual injury for which the plaintiff seeks compensation.

The *Brandenburg* incitement standard appears badly misapplied in these cases. The definition of incitement should be modified if courts are going to apply it to television broadcasts aimed at young children. Or preferably, it should not be applied at all because it blindly protects the broadcaster from liability while ignoring the real issues of duty and causation that should be addressed.

**PREVENTING A CHILLING EFFECT ON FREEDOM OF SPEECH**

Courts in media cases are understandably very concerned about causing a "chilling effect" on free speech.\(^{152}\) Because of the difficulty of proving the elements of a negligence cause of action, however, only those televised acts of violence which truly pose a foreseeable risk of injury would subject a broadcaster to liability. A broadcaster who exercises reasonable care in programming decisions would not be found liable even if an injury were to result. The chilling effect in this situation would be very slight.

First, the proposed liability would not result in a noticeable diminution of televised violence. Most violence would probably remain. The only chilling effect would be on the broadcasts that contain violence that pose a foreseeable risk of imitation. Broadcasters could conceivably portray violent conduct using army tanks, machine guns, airplanes, laser weaponry and sophisticated explosives (provided they did not reveal how to construct them) because such acts could not foreseeably be imitated by children. Imposition of liability would merely cause broadcasters to substitute non-imitatable acts of violence for imitatable acts of violence. This would be its only effect on free speech.

In addition, broadcasters would not be held to a standard of strict liability. As in *Gertz*,\(^{153}\) they need only exercise reasonable care in determining the likelihood of imitation. If broadcasters do not

\(^{151}\) 395 U.S. at 447.


breach the duty of reasonable care, they will not be held liable, even if an act of imitation results in injury to someone. In this way the broadcaster is protected from undefined standards that might chill free speech.\textsuperscript{154}

Furthermore, the government would not be censoring ideas based on their political, philosophical or religious value but on their potential for causing a physical injury. The determination of the likelihood of imitation should be based on the research of politically neutral sociologists, psychologists, scientists, and the reasonable judgment of the broadcasters themselves, not on some politically charged body of censors.\textsuperscript{155}

Finally, imposition of liability would not limit adult viewers only to programs suitable for children.\textsuperscript{156} Alternatives to commercial television, such as movies on home video recorders, and pay TV channels, are available to mature adults who wish to view acts of violence that children might imitate if viewed.

Concededly, imposing liability on broadcasters may have a slight chilling effect on television broadcasters. But that has always been the ultimate purpose of the law of torts, to chill and thereby discourage tortfeasors.\textsuperscript{157}

**CONCLUSION**

The law has long recognized that cases involving children require special standards. This is true in both the law of torts and in the application of the first amendment. In light of the extremely pervasive presence of television in the lives of most children and the grave risk involved in subjecting them to countless acts of imitable violence, courts should no longer allow broadcasters to hide behind the first amendment. Broadcasters should not be treated any differently than parents, teachers, or neighbors. If they create an unreasonable risk of harm which results in an injury, they should be subjected to liability.

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\textsuperscript{154} With the imposition of a defined standard of care, the broadcaster would have known parameters within which to work. For example, where a broadcaster fails to heed a censor's warning to edit out a scene illustrating how to set fire to a building, and instead broadcasts the scene with full knowledge that it is likely to be imitated, there is no reason to shield the broadcaster on the basis of a first amendment immunity when a child actually sets fire to a building. Conversely, if a parent leaves a gun within the child's reach and the child uses it to imitate her favorite television character, the broadcaster should not be liable because it is not foreseeable that a child will have access to such a dangerous weapon.

\textsuperscript{155} See F.C.C. v. Pacifica Foundation, 438 U.S. at 745-46.

\textsuperscript{156} Butler v. Michigan, 352 U.S. 380 (1957).