

3-1993

State Restrictions on Violent Expression: The Impropriety of Extending an Obscenity Analysis

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Recommended Citation

Jessalyn Hershinger, *State Restrictions on Violent Expression: The Impropriety of Extending an Obscenity Analysis*, 46 *Vanderbilt Law Review* 473 (1993)

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State Restrictions on Violent Expression: The Impropriety of Extending an Obscenity Analysis

I. INTRODUCTION	473
II. VIOLENCE STATUTES	474
III. REGULATION OF OBSCENE SPEECH	479
IV. THE SUPREME COURT'S FREEDOM OF SPEECH JURISPRUDENCE	483
A. <i>First Amendment Analysis</i>	484
B. <i>Fourteenth Amendment Analysis</i>	488
V. STATE INTERESTS IN PROMULGATING VIOLENCE STATUTES ..	490
A. <i>Regulating Morality</i>	490
B. <i>Preventing Incitement</i>	491
C. <i>Protecting Children</i>	494
VI. THE LACK OF PROCEDURAL SAFEGUARDS	498
VII. CONCLUSION	499

I. INTRODUCTION

A group of minors allegedly attacked a nine-year-old girl at a San Francisco beach and "artificially raped" her with a bottle. The minors attacked the girl after watching and discussing a television network movie that portrayed a similar rape. The victim sued the network, claiming that it was negligent in airing the program.¹

In Miami Beach, a teenage boy shot and killed his eighty-three-year-old neighbor. Following his conviction, the minor sued three television networks for damages, alleging that a decade of viewing extensive television violence had incited him to imitate the acts that he had seen.²

Nineteen-year-old John McCollum was listening to Ozzy Osbourne's "Speak of the Devil" album on his headphones when he shot himself in the head. The album included a song entitled "Suicide Solution." John's parents sued Osbourne and the record producer, alleging that Osbourne's music proximately caused John's death by preaching that life is filled with despair and suicide is the only way out.³

1. *Olivia N. v. Nationa' Broadcasting Co.*, 178 Cal. Rptr. 888 (Cal. Ct. App. 1981).

2. *Zamora v. Columbia Broadcasting System, Inc.*, 480 F. Supp. 199 (S.D. Fla. 1979).

3. *McCollum v. Columbia Broadcasting System, Inc.*, 249 Cal. Rptr. 187 (Cal. Ct. App. 1988).

Public reaction to these unsuccessful lawsuits has sparked a new movement. Some state legislatures are passing statutes that restrict minors' access to violent video cassettes, books, and other forms of expression. Vendors of expressive material have challenged Missouri⁴ and Tennessee⁵ violence statutes. Colorado recently has passed similar restrictions on the dissemination of such material despite the uncertain constitutional status of these regulations.⁶

The emergence of violence statutes raises questions concerning the future of freedom of speech in the United States. This Note explores the implications of the Supreme Court's First Amendment jurisprudence for validating or invalidating violence statutes. Part II discusses the recent passage of violence acts and the reasoning two courts have applied in declaring the regulations unconstitutional. Part III examines the Supreme Court's approach to obscenity regulations, which served as the impetus for the development of Court-imposed restrictions on freedom of speech. Part IV compares and contrasts regulations on obscene speech and violent speech by first examining a proper First Amendment inquiry, and then applying Fourteenth Amendment Due Process analysis to restrictions on speech. Part V discusses the states' purported interests in upholding morality, preventing the incitement of their citizens toward crime, and protecting children, as they apply to regulations on violent speech. Part VI addresses the problem of providing adequate procedural safeguards in statutes that restrict expression. This Note concludes that even though states may have a stronger constitutional basis for regulating violent material than they have for restricting obscene expression, current violence statutes violate the First and Fourteenth Amendments.

II. VIOLENCE STATUTES

Missouri's violence act regulates the sale and rental of violent video cassettes to minors.⁷ The Act requires video dealers to keep videos in a

4. See Mo. Rev. Stat. § 573.090 (Supp. 1992).

5. See Tenn. Code Ann. §§ 39-17-901 to 39-17-914 (1991).

6. See 1992 Colo. Rev. Stat. § 18-7-601.

7. The statute provides:

1. Video cassettes or other video reproduction devices, or the jackets, cases or coverings of such video reproduction devices shall be displayed or maintained in a separate area . . . if:
 - (1) Taken as a whole and applying contemporary community standards, the average person would find that it has a tendency to cater or appeal to morbid interest in violence for persons under the age of seventeen; and
 - (2) It depicts violence in a way which is patently offensive to the average person applying contemporary adult community standards with respect to what is suitable for persons under the age of seventeen; and
 - (3) Taken as a whole, it lacks serious literary, artistic, political, or scientific value for persons under the age of seventeen.

separate area if the dealers determine that their content or their cover is violent expression as defined by the statute's three-part test.⁸ Further, the Act strictly forbids dealers from selling or renting these videos to minors.⁹ In enacting the three-pronged analysis for triggering the statutory requirements, the Missouri legislature essentially applied the Supreme Court's obscenity test, enunciated in *Miller v. California*,¹⁰ to violent expression.¹¹

A violation of this statute is an "infraction,"¹² which under Missouri law is not a crime¹³ but may result in a fine.¹⁴ Video dealers¹⁵ initiated a pre-enforcement challenge to the Act, claiming it unconstitutionally restricts the sale and rental of violent videos.¹⁶

In *Video Software Dealers Association v. Webster*¹⁷ the district court enjoined state authorities from enforcing the Act, declaring the statute's provisions unconstitutional on their face.¹⁸ Recently, the Eighth Circuit affirmed,¹⁹ holding the Act unconstitutional on three

2. Any video cassettes or other video reproduction devices meeting the description in subsection 1 of this section shall not be rented or sold to a person under the age of seventeen years.

3. Any violation of the provisions of subsection 1 or 2 of this section shall be punishable as an infraction . . .

Mo. Rev. Stat. § 573.090 (Supp. 1992).

8. Id. § 573.090.1. The statutory three-part test is set forth in note 7.

9. Id. § 573.090.2.

10. 413 U.S. 15 (1973). The Court stated:

The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

11. See note 7 and accompanying text.

12. Mo. Rev. Stat. § 573.090.3 (Supp. 1992).

13. According to Missouri law:

1. An offense defined by this code or by any other statute of this state constitutes an "infraction" if it is so designated or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction.

2. *An infraction does not constitute a crime* and conviction of an infraction shall not give rise to any disability or legal disadvantage based on conviction of a crime.

Id. § 556.021 (1979) (emphasis added). However, the fact that this statute falls within the Chapter entitled "Crimes and Punishment" persuaded the Eighth Circuit to find the statute "quasi-criminal." See *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992), and notes 32 to 34 and accompanying text.

14. The fine may not exceed \$200. Mo. Rev. Stat. § 560.016.1(4) (1979).

15. Three groups actually initiated the challenge: (i) video dealer associations; (ii) the Motion Picture Association of America, Inc. (including movie producers and distributors); and (iii) the owners of two Missouri video retail stores. *Webster*, 968 F.2d at 687. This Note collectively refers to these challengers as "video dealers."

16. Id. at 687.

17. 773 F. Supp. 1275 (W.D. Mo. 1991), aff'd, 968 F.2d 684 (8th Cir. 1992).

18. Id. at 1277-80.

19. 968 F.2d 684 (8th Cir. 1992).

grounds. First, the court applied strict scrutiny analysis and held that the Act is not narrowly drawn to promote a compelling state interest.²⁰ The statute's proponents (hereinafter "Missouri") argued that violent videos are "obscene" for a child audience, and therefore the court should apply a lower level of scrutiny to the statute.²¹ The court rejected Missouri's characterization of the videos as obscene, and declared that expression is obscene only if it depicts sexual conduct.²² The court explained that since the statute discriminated against expression based on its content,²³ it was subject to strict scrutiny.²⁴ The Missouri statute did not identify clearly the material that would be subject to the regulations, and thus it was unconstitutional on its face for not being narrowly drawn.²⁵

Second, the court found the Act unconstitutionally vague,²⁶ since it does not clearly identify which expression triggers its requirements. While the Missouri legislature attempted to avoid such a challenge by adopting *Miller's* obscenity test,²⁷ *Miller* still requires that either the statute specifically define the proscribed expression or the state courts develop a definition.²⁸ In this instance the Missouri courts would not be able to delineate a proper definition because the legislature failed to enunciate a purpose behind the statute and no legislative history is available.²⁹ Furthermore, courts should not require video dealers to defend prosecutions so that the courts may develop the statute's meaning.³⁰

Finally, the Eighth Circuit held that the Act unconstitutionally imposes strict liability on video dealers.³¹ The court found that the statute

20. *Id.* at 688-89.

21. *Id.* at 688. See Part III for a discussion of the regulation of obscene speech.

22. 968 F.2d at 688 (citing *Miller*, 413 U.S. at 24).

23. *Id.* at 689. See also notes 93 to 98 and accompanying text.

24. 968 F.2d at 689. See also Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 48 (1987) (noting that the standard applied to content based regulations is some formulation of "compelling governmental interest," "absolute protection," or "clear and present danger").

25. 968 F.2d at 689. The statute has no legislative history, nor did the legislature articulate a purpose behind the Act's provisions. *Id.* at 687. While one commentator concluded that the statute was designed to regulate "slasher" movies, see Kenneth D. Rozell, Comment, *Missouri Statute Attacks "Violent" Videos: Are First Amendment Rights in Danger?*, 10 Loy. Ent. L. J. 655, 655 (1990), the court stated that the statute's language showed no such intent. 968 F.2d at 689.

26. 968 F.2d at 689-90.

27. See note 10 and accompanying text.

28. 968 F.2d at 690.

29. *Id.* See note 25 and accompanying text.

30. The court declared:

We believe the Missouri courts could only define the prohibited expression on a video-by-video basis. Video dealers "are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal."

968 F.2d at 690 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965)).

31. *Id.* at 690-91.

is "quasi-criminal,"³² and that a court may impose a criminal penalty for disseminating speech only when the statute requires that the video dealer have knowledge of the video's contents.³³ This Act creates too great a danger that video dealers will engage in self-censorship.³⁴

The Tennessee legislature passed a statute³⁵ similar to the one at

32. *Id.* at 690. A violation of the statute is technically not a crime, but the statute is located in the "Crimes and Punishment" chapter of the Missouri Code. See also note 13.

33. 968 F.2d at 690.

34. The court stated:

By penalizing video dealers regardless of their knowledge of a video's contents, the statute presents a hazard of self-censorship. To comply with the statute, all video dealers would have to view the contents of every video in their stores. Dealers would limit videos available to the public to videos the dealers have viewed. This would impede rental and sale of all videos, including those that the statute does not purport to regulate and that the First Amendment fully protects. Because the statute's strict liability feature would make video dealers more reluctant to exercise their freedom of speech and ultimately restrict the public's access to constitutionally protected videos, the statute violates the First Amendment.

Id. at 690-91.

35. See Tenn. Code Ann. §§ 39-17-901 to 39-17-920 (1991). The statute provides:

Sale, loan or exhibition of material to minors.—(a) It is unlawful for any person to knowingly sell or loan for monetary consideration or otherwise exhibit or make available to a minor:

(1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body, which depicts nudity, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors; or

(2) Any book, pamphlet, magazine, printed matter, however reproduced, or sound recording, which contains any matter enumerated in subdivision (a)(1), or which contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors.

(b) It is unlawful for any person to knowingly exhibit to a minor for monetary consideration, or to knowingly sell to a minor an admission ticket or pass or otherwise admit a minor to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors.

(c) A violation of this section is a Class A misdemeanor.

Id. § 39-17-911. The statute also covers display for sale or rental:

Display for sale or rental of material harmful to minors.—(a) It is unlawful for a person to display for sale or rental a visual depiction, including a videocassette tape or film, or a written representation, including a book, magazine or pamphlet, which contains material harmful to minors anywhere minors are lawfully admitted.

(b) The state has the burden of proving that the material is displayed. Material is not considered displayed under this section if:

(1) The material is:

(A) Placed in 'binder racks' that cover the lower two thirds (⅔) of the material and the viewable one third (⅓) is not harmful to minors;

(B) Located at a height of not less than five and one half feet (5.5') from the floor; and

(C) Reasonable steps are taken to prevent minors from perusing the material;

(2) The material is sealed, and, if it contains material on its cover which is harmful to minors, it must also be opaquely wrapped;

(3) The material is placed out of sight underneath the counter; or

(4) The material is located so that the material is not open to view by minors and is located in an area restricted to adults;

issue in *Webster*. Among other prohibited material,³⁶ Tennessee's Act prohibits the knowing³⁷ display, sale, or rental of videos, books, or any other printed matter or visual representations that depict "excess violence"³⁸ and are "harmful to minors."³⁹ A violation of the Tennessee Act is a misdemeanor.⁴⁰

In *Davis-Kidd Booksellers, Inc. v. McWherter*,⁴¹ retail booksellers⁴² initiated a First Amendment challenge to the statute, claiming it is unconstitutionally overbroad.⁴³ The booksellers argued that the statute would prevent constitutionally protected material from reaching the public since the only alternatives left open to booksellers would be to remove all "harmful to minors" works from display, construct "adults only" sections, or prohibit minors from entering their stores altogether.⁴⁴ The booksellers claimed that they would have to determine

....
(c) A violation of this section is a Class C misdemeanor for each day the person is in violation of this section.

Id. § 39-17-914.

36. The Act prohibits the sale, loan, or exhibition of material depicting nudity, sexual conduct, or sado-masochistic abuse if the material is harmful to minors. Id. § 39-17-911(a).

37. Unlike the Missouri statute, a person must knowingly sell, loan, or exhibit such material to a minor. Id. § 39-17-911. This avoids the strict liability problem present in *Webster*. See notes 31 to 34 and accompanying text.

38. The Tennessee statute defines "excess violence" as the "depiction of acts of violence in such a graphic and/or bloody manner as to exceed common limits of custom and candor, or in such a manner that it is apparent that the predominant appeal of the material is portrayal of violence for violence's sake." Tenn. Code Ann. § 39-17-901(4) (1991).

39. The Tennessee statute defines the term "harmful to minors" to mean:

that quality of any description or representation, in whatever form, of nudity, sexual excitement, sexual conduct, excess violence or sado-masochistic abuse when the matter or performance:

(A) Would be found by the average person applying contemporary community standards to appeal predominantly to the prurient, shameful or morbid interests of minors;

(B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and

(C) Taken as a whole lacks serious literary, artistic, political or scientific values for minors.

Id. § 39-17-901(6).

"Minor" is defined as "any person who has not reached eighteen (18) years of age and is not emancipated." Id. § 39-17-901(8).

40. A violation of the display provisions is a Class C misdemeanor, id. § 39-17-914(c), punishable by no more than 30 days imprisonment, a \$50 fine, or both, id. § 40-35-111(e)(3). A violation of the knowing sale, loan, or exhibition provision is a Class A misdemeanor, id. § 39-17-911(c), punishable by no more than a year's imprisonment, \$2500, or both, id. § 40-35-111(e)(1). Unlike the Missouri court, the Tennessee court did not find an issue as to whether a violation constitutes a crime. Compare notes 32-34 and accompanying text.

41. No. 90-1893-III (I) (Tenn. Chanc. Feb. 14, 1992). Appeal is pending.

42. The plaintiffs are owners of retail book stores, book distributors, and publishing trade associations. Id.; slip op. at 1. This Note collectively refers to these plaintiffs as "booksellers."

43. Brief of Plaintiffs-Appellants at 20; *Davis-Kidd* (No. 90-1893-III(1)).

44. Id. at 25.

which material should not be available to the general public, under fear of criminal prosecution for making a mistake.⁴⁵

The Tennessee Chancery Court partially invalidated the statute.⁴⁶ The court struck down the Act's application to material depicting excess violence.⁴⁷ The court did not hold that violent expression can never be regulated, but rather found the Act's definition of excess violence unconstitutionally vague.⁴⁸ The Act would require each bookseller to exercise his or her subjective judgment as to which material is excessively violent, without any guidance from the statute itself.⁴⁹ However, the court upheld the requirement that those selling expressive material maintain separate displays⁵⁰ for any material fitting the Act's definition of "harmful to minors," once the excess violence provision is deleted.⁵¹ The court held that requiring restrictions on the displays is a proper exercise of Tennessee's police power and is not an unconstitutional prior restraint on speech.⁵² The Tennessee Supreme Court will hear the booksellers' argument on appeal.⁵³

III. REGULATION OF OBSCENE SPEECH

In the United States, freedom of speech does not mean freedom to say anything at any time and in any place.⁵⁴ The Supreme Court has defined certain classes of speech for which the First Amendment provides no protection. These include speech that is obscene, libelous, profane, or which incites a breach of the peace.⁵⁵ The rationales behind the Supreme Court's obscenity jurisprudence demonstrate the shaky foundation on which First Amendment freedoms rest. The obscenity cases

45. *Id.*

46. *Davis-Kidd*, slip op. at 12.

47. *Id.* at 8-9.

48. *Id.* at 9.

49. *Id.* at 8-9.

50. See Tenn. Code Ann. § 39-17-914.

51. *Davis-Kidd*, slip op. at 9-10, 12.

52. *Id.* at 10.

53. When this Note went to press, the Tennessee Supreme Court had not yet decided the case. See note 41.

54. See *Rowan v. Post Office Dep't*, 397 U.S. 728 (1970) (declaring that there is no constitutional right to mail erotic material to an unwilling recipient); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding sanction on a radio station that broadcast indecent speech in the afternoon); *Sable Communications of Cal. v. FCC*, 492 U.S. 115 (1989) (holding that the FCC may regulate obscene interstate commercial telephone messages).

55. "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—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

also provide a basis for determining the constitutionality of the violence acts.

In the 1940s New York enacted a statute purporting to regulate "obscene prints and articles."⁵⁶ The New York legislature passed this Act in order to prevent the incitement of violent crimes.⁵⁷ In *Winters v. New York*,⁵⁸ a bookseller challenged the constitutionality of the statute after he was convicted of selling magazines that allegedly would incite readers to commit criminal acts. The Supreme Court recognized that a state has an interest in reducing the incitement of its citizens to commit criminal acts, and that it may exercise its police powers to achieve this end. However, the Court struck down the statute, stating that publications of no value to society warrant as much First Amendment protection as those considered classics.⁵⁹

The *Winters* Court seemed to give broad meaning to the right to freedom of speech. The Court, however, indicated that states may justifiably regulate acts injurious to the public morals⁶⁰ as long as they do not violate the Constitution in the process. In later cases, this aspect of the opinion actually undermined a broad interpretation of freedom of speech.⁶¹

In *Roth v. United States*⁶² the Supreme Court reversed its stance regarding the role of expressive material's "value." At issue in *Roth* were a federal statute that made it a crime to mail obscene material,

56. See N.Y. Penal Law § 1141 (Consol. 1941). The statute provided:

1. A person . . . who,

2. Prints, utters, publishes, sells, lends, gives away, distributes, or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of *deeds of bloodshed, lust or crime*; . . . [i]s guilty of a misdemeanor.

Id. (emphasis added), quoted in *Winters v. New York*, 333 U.S. 507, 508 (1948). Note that the only reference to obscenity is in the title of the Act: "Obscene Prints and Articles."

57. See *Winters*, 333 U.S. at 511-14.

58. 333 U.S. 507 (1948).

59. *Id.* at 510.

We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are *as much entitled* to the protection of free speech as the best of literature.

Id. (emphasis added).

60. *Id.* at 515.

61. See notes 160-69 and accompanying text for a discussion of the regulation of "immoral" speech and the role this alleged governmental interest is playing in the passage of the violence acts.

62. 354 U.S. 476 (1957).

and a Massachusetts statute that made selling obscene material a criminal offense.⁶³ The Court declared these regulations constitutional. While the Court began by stating that the First Amendment, as written, is an unconditional grant of free speech, it claimed that this was not the actual intent of the Framers in drafting the amendment.⁶⁴ The *Roth* Court, in direct contradiction to the *Winters* Court,⁶⁵ declared that the First Amendment has a purpose, which is to allow the free exchange of ideas so that people can bring about desired political and social changes.⁶⁶

Once the Court defines a purpose behind the constitutional grant of free speech, it may limit any speech that does not thereby comport with the articulated intent. By declaring the purpose behind the First Amendment, the *Roth* Court paved the way for courts to carve out exceptions to both the freedom to speak and the corresponding freedom to receive information.⁶⁷ The constitutional propriety of developing such a list of exceptions is questionable.⁶⁸

The *Roth* Court's test for determining when expression is protected under the First Amendment asks whether the speech at issue has any social importance.⁶⁹ If any such importance exists, the expression is protected.⁷⁰ *Roth* holds that obscenity has absolutely no social importance and, therefore, states may regulate it without any constitutional infirmity. While in one breath the Court stated that the Constitution fully protects unorthodox ideas, controversial ideas, and even ideas generally hateful to prevailing community opinion,⁷¹ in the next breath it declared that obscenity is socially unimportant because many nations and most of the American states traditionally have enacted laws prohibiting obscene publications.⁷² The Court contradicted itself by claiming that a majority determination of which expression is constitu-

63. *Id.*

64. *Id.* at 483.

65. It is interesting to note that Justice Brennan wrote the opinions of the Court in both *Winters* and *Roth*.

66. 354 U.S. at 484. Compare this declaration to the Court's statement in *Winters*: "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas." 333 U.S. 507, 510 (1948).

67. See *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 756 (1976) (holding that the First Amendment's protection extends to a communication, its source, and to its recipients). See also *McCollum*, 202 Cal. App. 3d at 989.

68. See notes 110-14 and accompanying text.

69. 354 U.S. at 484.

70. *Id.*

71. *Id.*

72. *Id.* The Court stated:

But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of

tionally protected is inconsistent with the First Amendment, yet allowing a majority's determination of what is "socially important" speech accomplish the same objective.⁷³ This defective constitutional analysis of free expression is what the Framers specifically sought to avoid,⁷⁴ and becomes a recurrent problem with the passage of violence acts.⁷⁵

After *Roth*, Supreme Court opinions no longer questioned the idea that the First Amendment does not protect obscene speech. The Court instead turned its focus to refining the definition of obscene. In *Miller v. California*,⁷⁶ the Court set forth the obscenity test that is still in effect today.⁷⁷ The Court specifically rejected its previous conclusion that speech is protected unless it is utterly without redeeming social value.⁷⁸ Instead, the Court determined that the First Amendment only protects expression that has serious literary, artistic, political or scientific value.⁷⁹

The Court's decision in *Barnes v. Glen Theatre, Inc.*⁸⁰ continued the erosion of First Amendment protection into the 1990s. In *Barnes*, an Indiana indecency law required that barroom dancers at least wear pasties and a G-string. Two establishments sued to enjoin enforcement of the law so that they could provide completely nude dancing as entertainment. While the Supreme Court recognized that nude dancing is a form of expression, it declared that it was symbolic speech and therefore not entitled to the full protection of the First Amendment.⁸¹

The *Barnes* case represents the erosion of established First Amendment freedoms in two ways. First, the Court has continued to assert that the government has a valid interest in achieving "morality" through legislation.⁸² While morality may be a proper basis for the state

over 50 nations, in the obscenity laws of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956.

Id. at 484-85 (footnotes omitted).

73. Id. at 485-86.

74. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 79 (1981) (Blackmun concurring) (invalidating convictions for offering live nude dancing as a form of entertainment).

75. See Part V.A.

76. 413 U.S. 15 (1973).

77. Id. at 24. The *Miller* test is cited in note 10. Compare Missouri's violence statute cited in note 7 and accompanying text.

78. See *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966).

79. 413 U.S. at 23.

80. 111 S. Ct. 2456 (1991). See Zachary T. Fardon, Recent Development, *Barnes v. Glen Theatre, Inc.: Nude Dancing and the First Amendment Question*, 45 Vand. L. Rev. 237 (1992), for a critique of the *Barnes* decision.

81. 111 S. Ct. at 2460-61. The *Barnes* Court determined that its opinion in *United States v. O'Brien*, 391 U.S. 367 (1968), held that symbolic speech is less protected than purely expressive speech.

82. See 111 S. Ct. at 2461-63.

to define certain conduct as illegal, such as murder, it is an insufficient rationale to suppress expression.⁸³ If a state or court is permitted to define whether speech has "value" based on prevailing notions of morality, the view of the majority determines what others may express, whether through speech, writing, or body language.⁸⁴

Second, the *Barnes* Court makes a distinction between expression and expressive conduct,⁸⁵ and declares that incidental restrictions on expression are permissible if the regulation of the conduct furthers substantial governmental interests.⁸⁶ Such a distinction is constitutionally sound,⁸⁷ but only if the definition of conduct is approached carefully in order to prevent actual expression from becoming unprotected and subject to extensive regulation.⁸⁸

IV. THE SUPREME COURT'S FREEDOM OF SPEECH JURISPRUDENCE

An examination of the Supreme Court's jurisprudence shows that the Court applies a two-tiered analysis in determining whether a state has restricted expression unconstitutionally. The first tier requires an examination of the First Amendment itself. This examination involves a consideration of the alleged expression involved and the alleged unconstitutional violation of the freedom to disseminate or receive a particular message. The second tier requires the Court to inquire into the

83. See Part V.A.

84. *Id.*

85. 111 S. Ct. at 2460.

86. *Id.* at 2461. The Court quoted *United States v. O'Brien*:

[E]ven on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.* (quoting 391 U.S. 367, 376-77 (1968) (footnotes omitted)).

87. Compare *United States v. Eichman*, 110 S. Ct. 2404 (1990) (holding that flag burning as a mode of expression enjoys full First Amendment protection) with *Adderley v. Florida*, 385 U.S. 39 (1966) (holding that demonstrations on premises of city jail are not speech but conduct, and do not deserve full First Amendment protection). The expression versus conduct debate is beyond the scope of this Note. For a discussion concerning drawing the line between conduct and expression, see Laurie Magid, Note, *First Amendment Protection of Ambiguous Conduct*, 84 Colum. L. Rev. 467 (1984).

88. Note that the *Barnes* Court does find nude dancing to be expressive conduct, albeit "only marginally so." 111 S. Ct. at 2461.

procedures the state used in the deprivation of expression and ask whether the procedures are inadequate under the due process clause of the Fourteenth Amendment.

A. First Amendment Analysis

The First Amendment⁸⁹ grants freedom of speech and of the press. An ongoing debate⁹⁰ exists as to whether courts ever may permit states to limit the freedom of speech constitutionally. Textualists argue that the Amendment's mandate that "no law" shall abridge the freedom of speech means what it says.⁹¹ In contrast, those attempting to divine the framers' intent believe that the only expression that states may not abridge constitutionally is that which implicates the First Amendment's purposes.⁹²

The proposition that the government may not discriminate against expression based on its content is relatively uncontroversial.⁹³ Content-based restrictions on speech are direct censorship⁹⁴ because they prohibit the public from receiving communications based on the state's reaction to the message's content. Whether a regulation is content-based depends on whether the limitation on expressive material targets a communication because of the message it conveys.⁹⁵

The violence acts are clearly content-based. The Missouri act regulates video cassettes, while the Tennessee act regulates video cassettes, tapes, films, or any written representations.⁹⁶ It is beyond question that these are forms of expression that the First Amendment protects.⁹⁷

89. According to the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press." U.S. Const., Amend. I.

90. Compare Douglas N. Husak, *What is so Special About [Free] Speech?*, 4 Law & Phil. 1 (1985) (arguing that freedom of speech is not a special right, and that states are warranted in limiting it) with Sol Wachtler, *Right to Free Speech as a Cherished Heritage*, 201 N.Y. L. J. 37 (Jan. 18, 1989) (arguing that the right to freedom of speech is unique).

91. For a discussion of textualist theory, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189, 1195-98 (1987).

92. The purposes that are the most often articulated as those the Framers intended the First Amendment to serve are truth and political participation. See Eric Hoffman, *Feminism, Pornography, and Law*, 133 U. Pa. L. Rev. 497, 499-500 (1985); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 20 (1971). For a more expansive view of the purpose of the First Amendment, see Thomas Irwin Emerson, *The System of Freedom of Expression* 6-7 (Random House, 1970); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 990-91 (1978).

93. See Stone, 54 U. Chi. L. Rev. at 55 (cited in note 24).

94. See *id.* at 54-57.

95. *Id.* at 47.

96. See notes 7 and 35 and accompanying text.

97. "The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication . . ." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64-65 n.6. This is true whether the expressive activity is noncommercially motivated or commercially motivated.

Since the regulations only apply to expression that meets the statutory definition of violent,⁹⁸ the two Acts regulate the content of these forms of expression.

The violence statutes apply a "variable" definition⁹⁹ of violence—they divide the country into two worlds according to age.¹⁰⁰ Thus, courts must explore two possible ways in which the states may be censoring protected material. First, the violence acts may directly censor statutorily-defined violent expressions as applied to minors. Second, they may censor the same material as applied to adults.

The purpose behind the violence acts is apparent on the face of the legislation—preventing minors' access to these expressions. Therefore, Missouri and Tennessee have directly censored minors' access to violent material. The Supreme Court has declared that not all forms of censorship are unconstitutional,¹⁰¹ but the Court has established a rebuttable presumption that prior restraints violate the First Amendment.¹⁰² Since the violence acts implicate minors' First Amendment rights, the Court must turn to the second tier of its analysis. Under this tier, the regula-

Smith v. California, 361 U.S. 147, 150 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952).

98. In *Video Software Dealers Ass'n v. Webster*, the district court stated:

Plaintiffs argue that the challenged provisions are a form of unconstitutional censorship because restrictions are placed on the dissemination of video cassettes based solely on their content. The kind of expression recorded on a particular video cassette determines whether it must be kept in a "separate area" and whether it can be rented or sold to a person under 17 years of age. . . .

Defendants do not dispute that the Act restricts the dissemination of certain video cassettes based on their content.

773 F. Supp. at 1277.

99. Similarly, in *Ginsberg v. New York* the Supreme Court upheld a statute that applied a more stringent definition of obscenity to minors than that applied to adults. 390 U.S. 629, 635-37 (1968). The Court adopted a lower court's declaration that a variable definition of obscenity was useful in analyzing regulations aimed at limiting the availability of expressive material for minors but not adults. *Id.*

100. The Missouri statute used age 17 as the cut-off, Mo. Rev. Stat. § 573.090(2) (Supp. 1992), while Tennessee placed it at age 18, Tenn. Code Ann. § 39-17-901(8) (1991).

101. See, for example, *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961) (holding that prior submission of movies to a censorship board is not necessarily unconstitutional); *Near v. Minnesota*, 283 U.S. 697, 708 (1931) (stating that "[l]iberty of speech, and of the press, is also not an absolute right").

102. See *Bantam Books*, 372 U.S. at 70. The Court stated that: "[a]ny system of prior restraints of expression comes to this Court hearing a heavy presumption against its constitutional validity." *Id.* The Court also noted:

Nothing in the Court's opinion in *Times Film Corp. v. Chicago*, 365 U.S. 43, is inconsistent with the Court's traditional attitude of disfavor toward prior restraints of expression. The only question tendered to the Court in that case was whether a prior restraint was necessarily unconstitutional *under all circumstances*. In declining to hold prior restraints unconstitutional *per se*, the Court did not uphold the constitutionality of any specific such restraint. Furthermore, the holding was expressly confined to motion pictures.

Id. at 70 n.10. See also *Near*, 283 U.S. at 716; *Freedman v. Maryland*, 380 U.S. 51, 57 (1965).

tions can only survive Fourteenth Amendment scrutiny if they are appropriately tailored.¹⁰³

The censorship of expression with respect to adults is less apparent in the passage of the violence statutes, but is present nonetheless. Courts have referred to this form of restraint as informal censorship or self-censorship,¹⁰⁴ but regardless of the label, the effect is the same. Despite the legislators' intentions, regulations that implement prior restraints as to youths may also result in a reduction in the quantity and quality of the regulated material that is available to adults. In *Smith v. California*¹⁰⁵ the Supreme Court declared unconstitutional a Los Angeles statute that imposed strict criminal liability on booksellers who possessed obscene material. The Court declared that such a statute would have the unconstitutional effect of inhibiting constitutionally protected expression.¹⁰⁶ Such informal censorship may have even more constitutional infirmities than direct censorship due to the fewer procedural safeguards generally present.¹⁰⁷

Informal censorship deprives adult readers, viewers, and listeners of the opportunity to purchase expression that they have a constitutional right to receive.¹⁰⁸ States, therefore, must consider carefully the Supreme Court's warning that such legislation impermissibly may "reduce the adult population . . . to reading only what is fit for children"¹⁰⁹ before they enact statutes restricting expression.

The Court has declared that, with certain exceptions, all speech is constitutionally protected.¹¹⁰ The Court defines these unprotected ex-

103. See Part IV.B.

104. See *Bantam Books*, 372 U.S. at 67 (involving informal censorship); *Smith*, 361 U.S. at 151, 154 (involving "self-imposed restriction of free expression" and "self-censorship"); *Freedman*, 380 U.S. at 59 (involving discouraging effect on the exhibitor).

105. 361 U.S. 147 (1959).

106. According to the Court:

Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience. And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material that the owner had inspected, these shops and stands may very well become depleted. The physical limitations on the bookseller's ability to become familiar with every item for sale coupled with his timidity in the face of absolute criminal liability would tend to restrict indirectly the public's access to reading material which the State could not constitutionally restrict directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less offensive for being privately administered. Through this indirect restriction, the distribution of all books, both obscene and not obscene, would be impeded.

Id. at 143-54. See also *Freedman*, 380 U.S. at 59.

107. See *Bantam Books*, 372 U.S. at 66.

108. *Id.* at 71.

109. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

110. See note 18 and accompanying text.

ceptions on a case-by-case basis. Since the Court has not yet found that violent speech is unprotected,¹¹¹ courts considering the constitutionality of violence acts must reason that they regulate protected expression.¹¹² The Supreme Court creates exceptions to the First Amendment by classifying certain speech as "low value"¹¹³ expression, thereby making it either completely unprotected by the Constitution or deserving of less protection. By placing values on speech, the Court makes itself the final arbiter as to which speech has a high value and is thus permissible for American society. While not all speech may deserve constitutional protection, classifying the content of such expression as "obscene" or "violent" is unconstitutional content-based discrimination, and is dependent upon the subjective values of nine unelected justices.¹¹⁴ The result is that only the Supreme Court can determine whether particular expression has value; any such moralizing by the state or federal governments is unconstitutional censorship.

In *Zamora v. Columbia Broadcasting System*,¹¹⁵ the district court recognized the proper limitations on the ability of courts to make First Amendment value judgments. The plaintiff, a minor, sued the television networks after he killed his eighty-three-year-old neighbor, claiming that he had become desensitized and addicted to violence after a ten-year period of watching network programming.¹¹⁶ The court warned that both the courts and the legislatures have a limited ability to set the standards for determining depictions of violence.¹¹⁷

In *Zamora*, the plaintiff did not seek an injunction against violent programming, but rather sought damages for any harm such program-

111. See *Webster*, 773 F. Supp. at 1278.

112. *Id.*

113. See *Stone*, 54 U. Chi. L. Rev. at 47 (cited in note 24).

114. In analyzing *Miller's* obscenity test, one commentator notes that the court's determinations are:

aesthetic because their resolution requires analysis and judgment of the content of images and its effect on an audience. Liberal Justices and commentators tend to place aesthetic judgments beyond the scope of the judiciary's proper role in the determination of first amendment issues. Yet, there is little doubt that judges consciously make such judgments in the realm of obscenity law.

Hoffman, 133 U. Pa. L. Rev. at 502-03 (footnotes omitted) (cited in note 92).

115. 480 F. Supp. 199 (S.D. Fla. 1979).

116. The court noted that two rights are involved in such a case: the right of the broadcaster to disseminate messages, and the right of the public to receive them. *Id.* at 205.

117. The Court declared:

[T]his Court lacks the legal and institutional capacity to identify isolated depictions of violence, let alone the ability to set the standard for media dissemination of items containing 'violence' in one form or the other. . . . The point here, of course, is that improper judicial limitation of first amendment rights is as offensive as unwarranted legislative incursion into that area.

Id. at 203-04 (footnotes omitted).

ming allegedly caused. Plaintiffs have brought several cases along similar lines,¹¹⁸ but only one such plaintiff has ever been successful.¹¹⁹ This low success rate is due to the courts' focus on the effect that damage claims would have on the disseminators of such expression. The courts have generally found that self-censorship would result and the First Amendment would effectively die.¹²⁰ Broadcasters would err on the side of releasing less expression to the public for fear of incurring liability in close cases. In the cases involving violence statutes, booksellers and video dealers presumably would do the same.

In the obscenity cases, one overriding question is what is obscenity, and who defines it.¹²¹ With obscenity, the issue becomes a moral decision based on a majority-imposed system of values or a judge-made system of values¹²² that inhibit the minority's freedom of speech. Similarly, unless a Fourteenth Amendment ends-means analysis is applied to the violence statutes, a moral issue will also exist regarding what a majority of the population considers to be violent expression and what material the state should suppress for the general welfare.

B. Fourteenth Amendment Analysis

After concluding that the First Amendment is implicated, the court must determine whether and under what conditions a state may limit protected expression. The conclusion the court reaches will depend first and foremost upon the court's view of the First Amendment's role in American society. Some commentators and courts¹²³ argue that the

118. See *Shannon v. Walt Disney Prod., Inc.*, 275 S.E.2d 121 (Ga. Ct. App. 1980), rev'd, 276 S.E.2d 580 (Ga. 1981) (involving an 11-year-old who placed a large piece of lead into a balloon, after watching a sound effect demonstration on the "Mickey Mouse Club" on television and was partially blinded when the balloon burst); *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982) (involving a boy who hanged himself after watching a hanging stunt on "The Tonight Show"); *Olivia N.*, 178 Cal. Rptr. 888 (1981) (involving a 9-year-old girl who was sexually assaulted by a group of minors after the group viewed a similar scene on a made-for-television movie); *Zamora*, 480 F. Supp. 199 (S.D. Fla. 1979) (involving a 15-year-old who, after he shot and killed his elderly neighbor, then sued the networks on the basis that he had become desensitized to violence after ten years of watching television).

119. *Weirum v. RKO General, Inc.*, 539 P.2d 36 (Cal. 1975).

120. See cases cited in note 118.

121. Recall Justice Stewart's infamous statement in *Jacobellis v. Ohio*: "I could never succeed in intelligibly [defining obscenity]. But I know it when I see it." 378 U.S. 184, 197 (1963) (Stewart concurring).

122. Richard Quaresima, Comment, *Protection of First Amendment Freedom of Speech and Expression Does Not Extend to Music Lyrics Judicially Determined to be Obscene*, 22 Rutgers L. J. 505, 523 (1991).

123. For example, one lower court describes the value of the First Amendment as follows: The importance of the First Amendment to our freedoms as a whole cannot be overemphasized. It is the lens through which the operations of government are viewed and the support and protection for the commentary which may result. Thus any action, legislative or other-

First Amendment only protects political speech; thus, the notion of freedom of all types of expression is a fallacy.¹²⁴ Other commentators argue that the First Amendment is an absolute guarantee of the right to say anything, at any time, and in any place.¹²⁵ Under this view, the First Amendment is unqualified; the text itself states that government shall make "no law." Therefore, no Fourteenth Amendment analysis is necessary—states may not limit expression regardless of the procedural safeguards or limited circumstances. The Supreme Court appears to value free speech as a fundamental right¹²⁶ included within the concept of liberty,¹²⁷ which the Fourteenth Amendment protects.¹²⁸

The Constitution, however, is filled with competing interests and rights,¹²⁹ some of which conflict at times. Thus, it is unrealistic and impractical to declare that states may never limit free speech. At the same time, free speech is a right fundamental to American society and states must be careful in applying restrictions. Courts try to balance these competing concerns by applying a Fourteenth Amendment analysis to state restrictions on speech.¹³⁰

In order to determine how much process is due before a state abridges freedom of expression, the Supreme Court applies an ends-means analysis.¹³¹ The level of scrutiny it applies varies according to the importance of the interests at stake.¹³² When a fundamental right such as freedom of expression is at issue, the state must show that it has a compelling interest for the regulation, and that it has narrowly

wise [sic] which has as its purpose placing limitations upon freedom of expression must be viewed with suspicion.

Zamora, 480 F. Supp. at 203.

124. See note 55 and accompanying text.

125. See Thomas I. Emerson, *The System of Freedom of Expression* 6-7 (Random House, 1970). See also note 91 and accompanying text.

126. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Tinker v. Des Moines Comm. Sch. Dist.*, 393 U.S. 503 (1969); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968).

127. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 500 (1952).

128. The Fourteenth Amendment states that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., Amend. XIV.

129. See Mark Schadrack, *Privacy and the Press: A Necessary Tension*, 18 Loyola L.A. L. Rev. 949 (1985).

130. The Fourteenth Amendment analysis is appropriate because freedom of speech and of the press is implicit in the concept of liberty, which may not be deprived without due process of law. *Joseph Burstyn*, 343 U.S. at 500.

131. See, for example, Stone, 54 U. Chi. L. Rev. at 50-54 (cited in note 24); Kent D. Lollis, *Strict or Benign Scrutiny Under the Equal Protection Clause: Troublesome Areas Remain*, 35 S.L.U. L. J. 93 (1990); Stephen T. Parascandola, *There's Trouble in Paradise . . . The Supreme Court Weakens Strict Scrutiny Analysis*, 17 Stetson L. Rev. 549 (1988).

132. Lollis, 35 S.L.U. L. J. at 110.

tailored the limitation to fit the interest.¹³³ The Court should apply close scrutiny to any law that attempts to regulate speech.¹³⁴

V. STATE INTERESTS IN PROMULGATING VIOLENCE STATUTES

In determining the constitutionality of restrictions on expression, the Court must determine what constitutes a "compelling interest" for legislation and whether the restrictions' means of attaining this interest have a sufficiently close fit with the ends. With respect to the violence acts, the states allegedly have three compelling interests at stake.

A. *Regulating Morality*

Legal theorists maintain an ongoing debate concerning the proper role of morality in governmental regulations.¹³⁵ This debate is even stronger when a fundamental right is at stake. Whenever a government makes a law it is defining societal morality. For example, in some societies cannibalism is not illegal.¹³⁶ Perhaps a nation ought to limit legislating morality to instances where laws are necessary to effect societal order and to prevent physical harm to its members.

When the Supreme Court declared that the First Amendment does not protect obscene publications, it was engaging in judicial moralizing.¹³⁷ Arguably, allowing the Court to define American morals is even worse than legislative moralizing, since the Court is not necessarily representative of American society. However, both judicial and legislative moralizing violate the text and the intent of the Bill of Rights, which values the viewpoint of every individual, not just those of the majority.¹³⁸

133. *Id.* at 113.

134. See Stone, 54 U. Chi. L. Rev. at 46. The Supreme Court's list of exceptions to the First Amendment, see note 55 and accompanying text, which it classifies as "low value" speech, does not comport with the Due Process analysis it applies to what it deems "protected" speech. Rather than developing exceptions to the forms of speech that are protected by the First Amendment by deeming such forms of slight social value, such value to be determined by the nine unelected justices sitting on the Court, the Court should use a Fourteenth Amendment analysis for all forms of speech. Under such a system, the Court would find that certain statutes regulating forms of speech, such as obscenity, serve a compelling government interest, with the means to effectuate such interest narrowly tailored to that end.

135. See John F. Murphy, *Clandestine Warfare: Morality and Practical Problems Confronted*, 39 Wash. & Lee L. Rev. 377 (1982).

136. See Gerald Scott, *Romancing the Stone Age; Papua New Guinea is Paradise for Ocean View Assistant Coach Randy Karcher*, L.A. Times 3-17 (Mar. 8, 1986).

137. For a discussion of the propriety of judicial moralizing, see John B. McArthur, *Abandoning the Constitution: The New Wave in Constitutional Theory*, 59 Tul. L. Rev. 280, 291 (1984).

138. In *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959), the Court struck down a state statute's prohibition of the exhibition of obscene, indecent, or immoral films as it was applied to censor a film that favorably portrayed adultery:

If legislating morality is not a compelling governmental interest, then any statute seeking to regulate violent speech because of its slight social value is unconstitutional since it deprives a person of a fundamental right without due process of law.

B. Preventing Incitement

One crucial difference exists between statutes that regulate obscene speech and those which limit violent speech. The government's objective in enacting obscenity laws is the achievement of a legislatively-defined level of societal morality.¹³⁹ States may have this same goal when regulating violent speech, in which case such regulations should not withstand constitutional scrutiny.¹⁴⁰ However, states may have another legitimate and compelling interest in regulating violent speech. If so, such regulations may withstand constitutional scrutiny, whereas obscenity regulations should not. This compelling governmental interest is the state's desire to protect its citizens from violent acts.¹⁴¹

Feminist theorists argue that states must regulate obscenity not due to abstract notions of morality, but rather because such forms of expression lead to the commission of violent acts against women.¹⁴² Thus, the compelling interest such statutes seek to achieve is not legislating morality, but rather curtailing criminal violence. State legislatures and the Supreme Court, however, have not determined that the purpose behind obscenity statutes is the prevention of violence. Additionally, feminist theorists have not produced sufficiently persuasive data to substantiate their claim that obscenity leads to violence against women.¹⁴³

It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the *moral* standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.

Id. at 688-89 (emphasis added).

139. Feminist theorists, however, argue that obscene speech, and pornography in general, is properly subjected to governmental regulation because such expression sanctions and condones violence against women. See Hoffman, 133 U. Pa. L. Rev. at 498 (cited in note 92); Caryn Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 Harv. Women's L. J. 5, 9-23 (1984). See also notes 141-42 and accompanying text.

140. See Part V.A.

141. See generally Hoffman, 133 U. Pa. L. Rev. at 497.

142. See note 139.

143. Some commentators argue that the legislature does not need data to support its decisions. See Hoffman, 133 U. Pa. L. Rev. at 501 n.25. Without such a requirement, however, when a fundamental interest such as freedom of expression is involved close scrutiny of the restrictions would become impossible.

The violence statutes more clearly involve the less controversial governmental interest in preventing the occurrence of violent crimes. States enacting these statutes do so based on the theory that violent speech tends to incite the occurrence of violent crimes. In *Brandenburg v. Ohio*,¹⁴⁴ the Supreme Court held that the First Amendment does not protect speech that incites violent crimes if two conditions are met: the speech advocating violence is directed toward incitement, and it is likely to produce such action.¹⁴⁵ In *Tinker v. Des Moines Community School District*,¹⁴⁶ the Court invalidated a school district policy that prevented students from wearing black armbands in protest against the Vietnam War. The school district claimed that wearing the armbands would cause disturbances among the students. The Court declared that something more than a fear of a disturbance is needed before the school district may curtail expression constitutionally.¹⁴⁷

Commentators debate the effects of violent expression on the audience, especially violence portrayed on television.¹⁴⁸ Some claim that such expression causes desensitization to violence and the occurrence of criminal acts of violence.¹⁴⁹ Courts thus far have not found a direct line of causation between violent expression and criminal acts.¹⁵⁰ One of the problems in finding causation is statistical: thousands of people may have watched a particular program, but only one viewer reacted violently.¹⁵¹ The grant of free speech encompasses the idea that states can-

144. 395 U.S. 444 (1969).

145. The Court stated:

[T]he 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. . . . [T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steering it to such action.

Id. at 447-48 (citations omitted) (emphasis added).

146. 393 U.S. 503 (1969).

147. Id. at 508. "The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Id.

148. Compare Thomas G. Krattenmaker and L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 Va. L. Rev. 1123 (1978) (condemning regulation of television violence) with James A. Albert, *Constitutional Regulation of Televised Violence*, 64 Va. L. Rev. 1299 (1978) (favoring regulation of television violence).

149. See, for example, *Zamora*, 480 F. Supp. at 200-01.

150. See note 118 and accompanying text.

151. "There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression." *Zamora*, 480 F. Supp. at 205 (citations omitted).

not punish the act of expressing, but only the one whose conduct, separated from expression, violates the law.¹⁵²

The regulation of violent speech serves a more compelling interest than do limitations on obscene speech. The ends in regulating obscenity are intangible, moral goals,¹⁵³ while the end in regulating violence is the prevention of physical harm. However, because First Amendment freedoms are so vulnerable to disintegration when the Court begins to carve out exceptions to protected speech, the Court should not declare that violent expression is not subject to constitutional protections because of its "low value."¹⁵⁴ Rather, all speech is constitutionally protected; states may deprive its citizens of this liberty interest only through strict conformity with procedures consonant with the Fourteenth Amendment.¹⁵⁵ This requires an ends-means analysis under the courts' close scrutiny.

Preventing violent criminal acts is a compelling governmental interest. Without clear empirical evidence¹⁵⁶ showing that violent expression in fact causes the occurrence of violent acts, however, states cannot narrowly tailor the means contained in statutory restrictions on violent speech. Thus, violence statutes will fail constitutional muster under close scrutiny.¹⁵⁷ The First Amendment is too fundamental to allow any

152. See *Whitney v. California*, 274 U.S. 357, 376, 378 (1927) (stating that "advocacy of violence, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on," and that "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly"); *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (stating that "since there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the state on the ground that they had 'a tendency to lead to violence'") (citation omitted). See also *Olivia N.*, 178 Cal. Rptr. at 892-93; *Zamora*, 480 F. Supp. at 206.

153. But see Hoffman, 133 U. Pa. L. Rev. at 497-98 (cited in note 114).

154. See note 113 and accompanying text.

155. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986). The court stated that "yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us." *Id.*

156. Considerable disagreement surrounds the role of statistical data in examining a legislative enactment. For arguments favoring the need for such an examination, see Suzanne Rosenkrans, *Fighting Films: A First Amendment Analysis of Censorship of Violent Motion Pictures*, 14 Columbia-VLA J. of L. & Arts 451, 452 (1990) (stating that "without empirical data to substantiate the alleged causal connection between violence witnessed on screen and imminent violence perpetrated in society at large, the task of formulating a constitutionally workable test is nearly impossible"); Hoffman, 133 U. Pa. L. Rev. at 501 n.25 (claiming that the Supreme Court will at times use empirical evidence in constitutional analysis, although in obscenity cases it avoids doing so).

157. In *Zamora* the district court recognized the possibility of scientific causation data being produced: "One day, medical or other sciences with or without the cooperation of programmers may convince the F.C.C. or the Courts that the delicate balance of First Amendment rights should be altered to permit some additional limitations in programming." 480 F. Supp. at 206-07.

less stringent examination of governmental restrictions on expression. One of the philosophies that separates American society from others is a citizen's absolute right to propagate opinions that the government finds wrong, or even hateful.¹⁵⁸ The evidence that violent expression may lead to violent behavior¹⁵⁹ is thus insufficient to justify limitations on a right as fundamental to American society and values as is the freedom of speech.¹⁶⁰

C. Protecting Children

While children have a right to freedom of speech, this right is in tension with the States' interest in protecting children's health, welfare, and safety.¹⁶¹ States must also carefully limit any regulation that restricts expressive material available to children so as not to violate the rights of the adult public. For instance, in *Butler v. Michigan*¹⁶² the Court considered a Michigan statute that made it a misdemeanor to sell any book to the general public which contained obscene language tending to corrupt youths' morals. The Court did not deny that protecting the general welfare of children is a compelling governmental interest. However, the Court held that the statute in question was not narrowly tailored to achieve this interest,¹⁶³ and was thus unconstitutional under the Due Process Clause.

158. *Hudnut*, 771 F.2d at 327-28.

159. See Krattenmaker and Powe, 64 Va. L. Rev. at 1134 (cited in note 148).

160. See *Bill v. Superior Court*, 187 Cal. Rptr. 625 (1982), in which a minor sued a film producer for injuries received outside a theater after a showing of the defendant's film. The plaintiff claimed that the defendant should have known his film would attract people with violent proclivities. In rejecting the plaintiff's claims, the court stated:

It is an unfortunate fact that in our society there are people who will react violently to movies, or other forms of expression, which offend them, whether the subject matter be gangs, race relations, or the Vietnam war. It may, in fact, be difficult to predict what particular expression will cause such a reaction, and under what circumstances. To impose upon the producers of a motion picture the sort of liability for which plaintiffs contend in this case would, to a significant degree, permit such persons to dictate, in effect, what is shown in the theaters of our land.

137 Cal. App. 3d at 1008-09.

161. *Ginsberg v. New York*, 390 U.S. 629, 636 (1968). The *Ginsberg* Court also declared that the state has an interest in protecting children's morals. *Id.* This Note rejects this proposition. See Part V.A.

162. 352 U.S. 380 (1957).

163. The *Butler* Court declared: "The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig. . . . We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." *Id.* at 383. See also *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957) (finding that limitation of speech is the exception and must be closely confined to preclude licensing or censorship).

In order to balance the right to free speech with the varying degrees of governmental interests at stake, the Supreme Court has allowed states to apply a variable definition of obscenity—one definition that is applicable to adults and a second that is applicable to minors.¹⁶⁴ In *Ginsberg v. New York*,¹⁶⁵ the Court proclaimed that the Constitution does not forbid a state from placing more restrictions on children's rights to read or view sexually explicit publications than it places on adults' rights.¹⁶⁶ The Court's conclusion rested on two grounds: (1) the legislature was not usurping the role of parents in rearing their children, but rather it was merely providing a law to support and respect the role of parental guidance, and (2) the State itself has an interest in promoting the general welfare of its children and their progression into citizenship.¹⁶⁷

The Supreme Court thus allows a state's legitimate interest in the well-being of its children to override the children's constitutional guarantees with seemingly little scrutiny.¹⁶⁸ This lack of adequate judicial examination violates children's constitutional rights to due process of law. When an individual's fundamental interest is at stake, the government must show that any restrictive regulation serves a compelling interest and that the regulation's means are narrowly tailored to fit these ends—all subject to the Supreme Court's strict scrutiny. When a fundamental right requiring close scrutiny is at stake, the legislature must produce sufficient data to show that the governmental interest is in fact

164. See 352 U.S. at 380.

165. 390 U.S. 629 (1968). At issue was the constitutionality of a New York statute barring sales of "girlie" magazines to minors. *Id.* at 631.

166. *Id.* at 636-37.

It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York . . . to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see. We conclude that we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors.

Id. See also *Prince v. Massachusetts*, 321 U.S. 158 (1944).

167. *Ginsberg*, 390 U.S. at 639-41.

168. According to the *Ginsberg* Court:

[T]he law states a legislative finding that the material condemned by [it] is 'a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state.' It is very doubtful that this finding expresses an accepted scientific fact. . . . To sustain state power to exclude material defined as obscenity by [the statute] requires only that we be able to say that it was *not irrational* for the legislature to find that exposure to material condemned by the statute is harmful to minors. . . . But the growing consensus of commentators is that 'while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either.

390 U.S. at 641-42 (footnotes omitted) (emphasis added).

compelling, that the means will accomplish the objective and that the means are the least restrictive manner of achieving the end.¹⁶⁹

The Court corrected the deficiencies in the *Ginsberg* rationale with its reasoning in *Sable Communications, Inc. v. FCC*.¹⁷⁰ In *Sable*, the contested federal statute regulated telephone services such as "Dial-A-Porn."¹⁷¹ The Court divided its analysis into two parts: one upheld the ban on *obscene* commercial telephone messages and the other struck down the same prohibition as applied to *indecent* messages.

The *Sable* Court's analysis made apparent the precedential dangers inherent in decisions relating to fundamental rights such as freedom of speech. When examining the constitutionality of the regulation as applied to obscene speech, the Court simply noted that the First Amendment does not protect such expression.¹⁷² When it began its analysis of indecent telephone messages, the Court was quick to note that it had not previously stated that the Constitution does not protect indecent speech.¹⁷³ The Court recognized that states have a compelling and legitimate interest in protecting minors from indecent speech, but held that the means employed were not narrowly tailored to fit the ends.

Obscene speech does not even receive the limited protection this balancing test provides—it is completely excluded from First Amendment protections.¹⁷⁴ This result is not due to any constitutional text or any congressional amendment; nor is it because each obscenity statute has passed a test in which a court has found a compelling governmental interest and a narrowly tailored regulation designed to meet this interest. The Constitution does not protect obscene speech simply because the Supreme Court and most of society considers it to be without value.

In holding the statute's ban of indecent telephone messages unconstitutional, the Court distinguished its holding in *FCC v. Pacifica Foundation*.¹⁷⁵ The *Pacifica* Court upheld a time regulation on indecent broadcasts. The *Sable* Court emphasized that courts must construe *Pacifica* narrowly, and found *Pacifica* distinguishable on two grounds: (1) broadcasting is unique since it can enter one's home without prior

169. The *Ginsberg* Court disagreed with this proposition: "[W]e do not demand of legislatures 'scientifically certain criteria of legislation.'" *Id.* at 642-43 (citation omitted).

170. 492 U.S. 115 (1989).

171. Section 223(b) of the Communications Act of 1934 was amended as of November 1989 to initiate a complete ban of indecent and obscene interstate commercial telephone messages. 47 U.S.C. § 223(b) (Supp. 1990).

172. *Sable*, 492 U.S. at 124.

173. *Id.*

174. See *id.*

175. 438 U.S. 726 (1978).

warning as to its content,¹⁷⁶ and (2) it is uniquely accessible to children, even those too young to read.¹⁷⁷

Thus, the factors the Court looks at in determining whether a regulation of children's speech is constitutionally sound are: minors' accessibility to the expressive material,¹⁷⁸ whether minors are a captive audience,¹⁷⁹ whether the regulation incidentally restricts expression protected as to adults,¹⁸⁰ whether the government is infringing on the role of parents in rearing their children,¹⁸¹ whether it is a reasonable time, place or manner restriction,¹⁸² whether other solutions less intrusive on First Amendment freedoms are plausible,¹⁸³ and arguably whether appropriate legislative findings have been made.¹⁸⁴

In *Video Software Dealers Association v. Webster*,¹⁸⁵ the Eighth Circuit struck down the Missouri violence act despite the state's alleged purpose of protecting the welfare of minors. The court reasoned that while the state has more control over the content of speech aimed at children than speech aimed at adults, children still have the right to freedom of speech under the First Amendment.¹⁸⁶ The court noted that since the Supreme Court has not held that violent speech is unprotected by the Constitution, the state must narrowly tailor any legislation regulating violent expression directed toward young people to further the state's interest in the welfare of minors without unnecessarily interfering with First Amendment freedoms.¹⁸⁷ The court concluded that because the statute did not narrowly define the type of violent expression being proscribed, the legislation was unconstitutionally overbroad.¹⁸⁸

Protecting children is a compelling governmental interest, and under a sufficiently narrow statute, censorship of expression available to children may be constitutionally permissible.¹⁸⁹ Empirical data shows

176. *Sable*, 492 U.S. at 127.

177. *Id.* See also *Pacifica*, 438 U.S. at 748-49.

178. *Pacifica*, 438 U.S. at 750.

179. *Id.* at 748-49.

180. *Sable*, 492 U.S. at 128.

181. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Pacifica*, 438 U.S. at 749-50.

182. *Pacifica*, 438 U.S. at 750.

183. *Sable*, 492 U.S. at 128. See also *Pacifica*, 438 U.S. at 748-50.

184. But see *Sable*, 492 U.S. at 129 (stating that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake") (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)).

185. 968 F.2d 684 (8th Cir. 1992).

186. *Id.* at 688-89.

187. *Id.* at 689.

188. *Id.* at 690.

189. Compare *Olivia N.*, 126 Cal. App. 3d 488 (1981).

that children sometimes mimic violence portrayed on television.¹⁹⁰ However, these studies show that only certain groups of children tend to experience increased aggression after viewing televised violence.¹⁹¹ Furthermore, imitative behavior varies according to a child's age. For example, violent programs are less likely to affect teenagers.¹⁹² Therefore, under close scrutiny, the violence statutes are overbroad for failure to take these factors into account.

Violence statutes may be constitutional if state legislatures adopt a "reasonable child standard." The definition of child would only include those younger than thirteen, and the regulation would limit its coverage to the types of violence that children are likely to imitate.¹⁹³ In order to survive Due Process scrutiny, however, supporters of the regulation must produce sufficient reliable data showing that the specific violent expression tends to cause harm to children.

VI. THE LACK OF PROCEDURAL SAFEGUARDS

Before a state may alter or limit any First Amendment rights, it must follow certain procedures.¹⁹⁴ Although private booksellers and video dealers implement the violence acts, their decisions are enforced under the color of state law, and thus constitute acts of the state within the meaning of the Fourteenth Amendment.¹⁹⁵ As a preliminary matter, the Supreme Court has declared that the burden lies on the party desiring the censorship to prove that the Constitution does not protect the speech.¹⁹⁶ Under the theory articulated herein, all speech is constitutionally protected but subject to limitation if, under close scrutiny, the government has a compelling interest and the regulation's means are narrowly tailored to achieve this interest. Therefore, the censor must carry the burden of proving these elements.

Second, the Court has declared that a restraint imposed prior to a judicial determination on the matter is constitutionally permissible only

190. Surgeon General's Scientific Advisory Comm. on Television and Social Behavior, *Television and Growing Up: The Impact of Televised Violence*, Report to the Surgeon General 122-25 (1972) (hereinafter "*Surgeon General's Report*").

191. *Id.* "For *some* children, under *some* conditions, *some* television is harmful. For other children under the same conditions, or for the same children under *other* conditions, it may be beneficial. For *most* children, under *most* conditions, *most* television is probably neither particularly harmful nor particularly beneficial." E. Barrett Prettyman, Jr. and Lisa A. Hook, *The Control of Media-Related Imitative Violence*, 38 Fed. Comm. L. J. 317, 354 (1987) (quoting *Surgeon General's Report* at 20).

192. See Prettyman and Hook, 38 Fed. Comm. L. J. at 327.

193. A bill along these lines was introduced in the U.S. House of Representatives in 1973. See *id.* at 330-31 n.55.

194. See *Freedman*, 380 U.S. at 57-58; *Bantam Books*, 372 U.S. at 65-66.

195. See *Bantam Books*, 372 U.S. at 68.

196. *Freedman*, 380 U.S. at 58.

if two requirements are met: 1) the restraint must be limited to preserving the status quo; and 2) the restraint must be imposed only for the shortest time necessary for judicial resolution of the matter.¹⁹⁷ The violence acts fail this test. The acts require booksellers and video dealers to remove from their shelves any material they feel may meet the vague statutory definition of "violent" expression. Their other options are placing the materials on "binder racks" where minors supposedly cannot see them, not allowing minors into the store, or covering the covers of the books and videos.¹⁹⁸ Whichever choice is made, the effect is a drastic change of the status quo without a judicial determination that the suppression of a particular work serves a compelling governmental interest. In fact, the Due Process rights of authors of particular books or producers and writers of particular films on video cassettes are violated unless a court reviews the decision for each particular restricted work. Such a result is neither desirable nor feasible. The effect would be to make courts censors¹⁹⁹ of the material available to the general public, since restricting access to children would have the incidental effect of limiting access to adults.²⁰⁰

A final aspect of Due Process analysis inquires into the clarity of the regulation.²⁰¹ The degree of ambiguity that constitutionally will be permissible varies according to the importance of the interests at stake.²⁰² As applied to the First Amendment, the statute must pass strict standards of vagueness, due to the potential for an inhibiting effect on speech.²⁰³ "[A] man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."²⁰⁴

VII. CONCLUSION

Statutes that attempt to restrict the availability of expressive material to the public bear a heavy presumption of unconstitutionality. Courts must carefully scrutinize any such restrictions in order to protect against the gradual disintegration of a right deemed fundamental to the proper functioning of American society. The emergence of vio-

197. *Id.* at 59.

198. Brief of Plaintiff-Appellants at 25 (cited in note 43).

199. In *Freedman*, the Court stated: "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 380 U.S. at 58.

200. See *Bantam Books*, 372 U.S. at 71.

201. See *Smith*, 361 U.S. 147 (1959).

202. See *id.* at 150-51.

203. *Id.* at 151.

204. *Id.* (citing *Winters v. New York*, 333 U.S. 507, 509-10 (1948)).

lence statutes represents the most recent threat to the First Amendment right to freedom of speech.

Because the Constitution contains abundant competing rights and interests, it cannot be said that the right to express oneself freely and to freely receive communications from other members of society is an absolute guarantee, never subject to abatement or suspension. In order to determine when such a fundamental right constitutionally may be subject to regulation, the Supreme Court has developed certain procedures that must be followed, consonant with the Fourteenth Amendment.

The procedures delineated in the violence statutes do not survive close scrutiny. It is debatable whether these restrictions are in fact an attempt to implement the values of a majority as to what expressive material is suitable for society. While the statutes on their face are aimed at protecting children's welfare, they may also be viewed as an attempt to impose a new set of values on those who represent the country's future. Additionally, since an indirect effect of the statutes is to restrict the expressive material that is available to adults, the regulations may in fact be intended to impose a majority's definition of morality on the general public.

Nevertheless, it is also possible that the violence acts could be a bona fide attempt to reduce the number and degree of acts of violence upon society. Such an end to a statute is a compelling governmental interest, and if the means of attaining such an interest are narrowly tailored to achieve this end the right to free expression may be subordinated.

The means set forth in the violence statutes, however, do not approach the degree of precision necessary for a restriction on the First Amendment right to freedom of speech to survive a constitutional attack. Booksellers and video dealers are required to be censors for the general public. They are not provided with any guidelines to determine whether a particular material falls under the statute's terms. No possibility exists for judicial review of every bookseller's and every video dealer's determination of "violent" or "acceptable." Most importantly, researchers have not produced sufficient data to conclude that violent expression in fact causes violent actions by those who read, view, or listen to it. Absent such a connection, the violence statutes cannot survive close scrutiny under the Fourteenth Amendment. Freedom of speech is a liberty not to be denied without due process, and such process must first include a determination that the compelling governmen-

tal interest apparent on the face of a statute is in fact implicated and possibly achieved by way of the restriction on expression.

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* The author wishes to thank Professor Barry Friedman of the Vanderbilt University School of Law for allowing this Note to cite the Plaintiff's Brief in the case of *Davis-Kidd Booksellers, Inc. v. McWherter*, and for his help in preparing this Note.

