

Saint Louis University Public Law Review

Volume 24
Number 1 *Out of the Closet and Into the Light:
The Legal Issues of Sexual Orientation (Volume
XXIV, No. 1)*

Article 15

2005

Violence, Minors and the First Amendment: What Is Unprotected Speech and What Should Be?

Abby L. Schloessman Risner

Follow this and additional works at: <https://scholarship.law.slu.edu/plr>



Part of the [Law Commons](#)

Recommended Citation

Schloessman, Abby L. Risner (2005) "Violence, Minors and the First Amendment: What Is Unprotected Speech and What Should Be?," *Saint Louis University Public Law Review*. Vol. 24 : No. 1 , Article 15. Available at: <https://scholarship.law.slu.edu/plr/vol24/iss1/15>

This Comment is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Public Law Review by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

**VIOLENCE, MINORS AND THE FIRST AMENDMENT:
WHAT IS UNPROTECTED SPEECH AND WHAT SHOULD BE?**

*“Congress shall make no law . . . abridging the freedom of speech”
-U.S. Constitution Amendment I*

I. INTRODUCTION

Anyone who has been to the movies in the past twenty years or played a (non-educational) video game has no doubt encountered cars blowing up, shootings with morbid physical injuries, or scenes of women being abused. Sometimes these accounts of violence portray important historical events, like the Holocaust, civil rights protests, or a war battle. Other times, the violence seems excessive and glorified for no reason other than the celebration of another’s pain. In addition, anyone who has watched the news in the past five years has observed minors committing violent acts, whether as counterparts in sniper attacks, gang violence, or in school shootings. Events like the 1999 Columbine High School shootings brought these concerns to the forefront of people’s minds and awakened others to the dreadful implications of violence acted out by children. Few would doubt that “juvenile violence is indeed a problem in the United States, and . . . American children are being exposed to violent entertainment at an alarming rate.”¹

Violence comes in many forms, including fighting, protesting, and threats. Most children encounter violence through the media, in video games, movies, internet, comic books, television, and music. The increase in violent acts committed by minors and the desensitization of minors are often attributed to media violence.² However, many social scientists believe that there are certain benefits that media violence provides children.³ These benefits include helping

1. Emily R. Caron, *Blood, Guts & The First Amendment: Regulating Violence in the Entertainment Media*, 11 KAN. J.L. & PUB. POL’Y 89, 91 (2001).

2. See *James v. Meow Media, Inc.*, 300 F.3d 683, 687 (6th Cir. 2002). Social scientists continue to debate whether media violence does in fact have negative effects on minors. See *infra* notes 3 and 4.

3. Many scholars also claim that “the belief that science has proved media violence to cause bad behavior is pervasive, persistent, and false.” Marjorie Heins, *Introduction to Brief Amici Curiae of Thirty-Three Media Scholars in St. Louis Video Games Case*, 31 HOFSTRA L. REV. 419, 420 (2002). However, in this article I will assume that violence in the media does have at least some negative impact on youth. When possible, I will note any counterarguments. Scholars in opposition claim that the reason negative impacts are profusely associated with violence in the

children to encounter and deal with reality, “encourag[ing] the imaginary,” and helping children to “overcome their fears.”⁴ There are also several negative impacts that have been attributed to youth’s encounter with violence. These include youth becoming desensitized, becoming “more accepting of real-life violence,” and becoming “more fearful and less trusting of their surroundings.”⁵

In response to society’s concerns over violence, many advocate some type of restriction on the amount or type of violence available to minors. One popular discussion has been to expand the First Amendment obscenity exception to include violence.⁶ Then, like obscene speech, violence could be regulated. Traditionally, however, “expression portraying violence not directly connected with sex has been treated under the regular rules rather than the obscenity rules.”⁷ Notwithstanding, there is another alternative: treat violence, specifically with regard to minors, under the First Amendment similar to how child pornography is treated. In other words, possibly create an exception to First Amendment speech protection for media violence with regard to minors. The concern over pornography and the push for regulation has often revolved around the fact that it “fosters violence against women and children.”⁸ Arguably, the same could be said of much of the violence portrayed in the media and commercially geared towards minors. The proposition of a new exception to the First Amendment would specifically craft any violence restrictions so that they were only applicable to minors. Most agree that some response is necessary due to the increasing amount of violent entertainment children are exposed to and due to the alarming amount of violence being acted out by children.⁹

This article will show there is a valid reason for concern over the effects of media violence on children, but it will also proceed to demonstrate why these reasons do *not* justify a new exception to the First Amendment. “No matter

media is because it is “much easier for politicians to launch attacks on the entertainment industry than for them to address the complex causes of social violence.” *Id.* at 421.

4. Christopher E. Campbell, *Murder Media—Does Media Incite Violence and Lose First Amendment Protection?*, 76 CHI.-KENT L. REV. 637, 665 (2000). Other notable effects scholars claim violence has on children “can range from the catharsis of relieving anxiety and providing a safe outlet for aggression to actual changes in attitude, or imitative behavior.” Heins, *supra* note 3, at 420.

5. Children’s Defense Act, H.R. 2036, 106th Cong., § 5 (1999).

6. *See generally* KEVIN W. SAUNDERS, *VIOLENCE AS OBSCENITY* (1996). Saunders advocates expanding the current definition of obscenity to include graphic violence. Saunders drafted a statute based on that in *Ginsberg v. New York*, 390 U.S. 629 (1968), entitled *Disseminating Excessively Violent Material to Minors*. *Id.* at 189.

7. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 467 (1970).

8. DON R. PEMBER, *MASS MEDIA LAW* 433 (4th ed. 1987).

9. *See James v. Meow Media, Inc.*, 300 F.3d 683, 687 (6th Cir. 2002).

how compelling the academic evidence detailing the harm of [media violence], nothing justifies censorship.”¹⁰ An important question in this analysis is whether “the First Amendment [is] a convenient scapegoat for violence in our society.”¹¹ It is imperative that a state not use “censorship as a tool to solve social problems.”¹²

Although children’s exposure to violence is a valid issue, there are much stronger constitutional concerns to be considered. Freedom of speech is well protected by the First Amendment and is a freedom dearly valued by Americans. “Everyone has the right to free speech, but some speak on lonely street corners and others on television sets across the land.”¹³ The Supreme Court has made clear through its jurisprudence that “although the right[] of free speech . . . [is] fundamental, [it is] not in [its] nature absolute.”¹⁴ Rather, speech may be abridged in order to “protect the State from destruction or from serious injury, political, economic or moral.”¹⁵ However, speech that does not fit into one of the First Amendment exceptions is protected.

In the last twenty years, several states and municipalities have attempted to restrict the amount of violent material accessible to children through the media. However, these attempts have, for the most part, been unsuccessful. The appellate courts, which have found such legislation unconstitutional, stand on the fact that the regulations do not fall within any First Amendment exceptions that keep the speech from being protected. Also, the content-based regulation of violent material available to children has thus far failed to meet strict constitutional scrutiny.

Censorship of violent speech is not the best solution to alleviate the effects of media violence on children. Instead of censorship of violent media speech, which would deteriorate the power of the First Amendment, there are several less restrictive alternatives available. These alternatives include self-regulation by the entertainment industries, parental control and participation, and education programs. One suggestion is that “parents and teachers can help children use television effectively.”¹⁶ This could include “viewing programs [at home] along with your children and talking about what they see on

10. David B. Kopel, *Massaging the Medium: Analyzing and Responding to Media Violence Without Harming the First Amendment*, 4 KAN. J.L. & PUB. POL’Y 17, 20 (1995).

11. Campbell, *supra* note 4, at 662.

12. Jonathan Bloom, *High Court Rejects Focus on Effects of Speech as Basis for Regulating Virtual Child Pornography*, COMM. LAW., Fall 2002, at 21.

13. DANIEL A. FARBER, *THE FIRST AMENDMENT* 216 (1998).

14. *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

15. *Id.*

16. John P. Murray, *Children and Television Violence*, 4 KAN. J.L. & PUB. POL’Y 7, 12 (1995).

television.”¹⁷ These alternatives are a better response to the problem, because they can work to actually resolve the underlying problems, rather than just hiding them with speech regulation. By addressing the underlying social issues that cause children to become violent, society is benefited by an improved social welfare, while also keeping our right to freedom of speech intact.

This article will examine whether the correct approach to concerns over the negative effects violence has on children through exposure to media violence is to create a new First Amendment exception. This article will show that violence, with regard to minors, *should* continue to be protected by the First Amendment. It will further show why violence is not entirely analogous to the child pornography exception. There are several important reasons why the current problem of violence and minors should not be redressed through speech restrictions. Section II of this article will review the historical role of the First Amendment and the types of speech the Supreme Court has carved out as exceptions to First Amendment protection, and will explore where media violence fits into these exceptions. Section III will detail speech not protected by the First Amendment, specifically with regard to minors. Next, Section IV will examine the harm caused by media violence and the overall failure of recent attempts to regulate violent material. Lastly, Section V will analyze why media violence, with regard to minors, should not be crafted into a new First Amendment exception.

II. HISTORICAL FIRST AMENDMENT PERSPECTIVES

The First Amendment’s freedom of speech clause exists to protect speech from restrictions by the government. “The very purpose of the First Amendment was to prevent assigning liability to speakers for their expression.”¹⁸ However, there are limits to this right. “The government is free to regulate conduct, as long as it is not related to the suppression of ideas.”¹⁹ Throughout the 20th and 21st centuries, the Supreme Court has carved out several exceptions to the freedom of speech granted by the First Amendment. However, the Supreme Court, through subsequent cases, has made these unprotected types of speech very well defined and limited. These exceptions are narrow in order to protect our liberties, regardless of how offensive the speech may be.²⁰ “The protection given speech and press was fashioned to

17. *Id.*

18. Caron, *supra* note 1, at 103.

19. *Id.* at 98.

20. The Supreme Court has stated:

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or

assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”²¹ The Supreme Court’s speech cases have become more protective of speech over time, making it more difficult for the government to regulate speech.

If speech is protected by the First Amendment, any attempt to restrict it must pass constitutional scrutiny. Content-based restrictions on speech are subject to strict scrutiny.²² Strict scrutiny requires a state to show that the law restricting speech serves a compelling state interest and that the law is narrowly tailored to achieve that interest.²³ Unprotected speech is the only type of speech which can be regulated based on content without meeting strict scrutiny.

A. *The Purpose of the First Amendment*

To begin our review of the First Amendment protection of speech, let us first examine what role the drafters of the First Amendment intended it to play. This review is not decisive. However, it is helpful to better understand what role First Amendment protection should take. “Some of the founding fathers of this nation viewed free and continual expression of ideas as essential to the successful functioning of a democracy.”²⁴ The Bill of Rights, which includes the First Amendment, was adopted as a limitation on the government in order to gain support from Americans after the Revolution to “adopt[] . . . the U.S. Constitution and the national government it would establish.”²⁵ The Framers of the Constitution believed that “government would be obliged to protect, not infringe upon, inherent individual liberties.”²⁶ As Justice Cardozo noted, the freedom of thought and speech is “the indispensable condition, of nearly every other form of freedom.”²⁷

publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.

Gitlow v. New York, 268 U.S. 652, 666 (1925).

21. *Roth v. United States*, 354 U.S. 476, 484 (1957).

22. Strict scrutiny is also discussed *infra* in the text accompanying notes 120-22. Some Supreme Court Justices disagree altogether with any type of balancing test in determining what speech should be unprotected. “I fear that the creation of ‘tests’ by which speech is left unprotected under certain circumstances is a standing invitation to abridge it.” *Konigsberg v. State Bar of California*, 366 U.S. 36, 63 (1961) (Black, J., dissenting).

23. EUGENE VOLOKH, *THE FIRST AMENDMENT* 274-76 (2001).

24. JOHN D. ZELEDNY, *COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA* 33 (2d ed. 1997).

25. *Id.* at 35.

26. *Id.* at 34.

27. *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937). There are three “principal values” freedom of speech promotes. They are “advancing knowledge and ‘truth’ in the ‘marketplace of

James Madison was the primary drafter of the First Amendment.²⁸ Until a 1925 Supreme Court case which expanded application of the First Amendment to the states, the Bill of Rights was believed to “prohibit[] only *federal* encroachments on individual liberty.”²⁹ Today, “the First Amendment is read to prohibit all governmental bodies—local and state, as well as federal—from abridging free expression.”³⁰ Speech has come to mean, through the Supreme Court’s interpretation, “all forms of expression, verbal or otherwise, that are designed to communicate ideas.”³¹ “This set of rights, which makes up our present-day concept of free expression, includes the right to form and hold beliefs and opinions on any subject, and to communicate ideas, opinions, and information through any medium—in speech, writing, music, art, or in other ways.”³² For each area of unprotected speech, “the Supreme Court has established a particular test, or definition.”³³ In applying these definitions, the Court “assumes that liberty may be restricted only when necessary to effectuate legitimate interests of government.”³⁴

B. *Exceptions to Speech Protected by the First Amendment*

Following is a brief analysis of some of the types of speech the Supreme Court has held to be unprotected by the First Amendment.³⁵ Perhaps these

ideas,’ facilitating representative democracy and self-government, and promoting individual autonomy, self-expression and self-fulfillment.” KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 959 (14th ed. 2001).

28. ZELEZNY, *supra* note 24, at 35.

29. *Id.* at 36. In dictum of the *Gitlow* opinion, the Court made the right to freedom of speech under the Constitution also relevant to the states. Freedom of speech is “protected by the due process clause of the Fourteenth Amendment from impairment by the States.” *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

30. ZELEZNY, *supra* note 24, at 37.

31. *Id.* at 38. Courts have found that paintings, books, and video games are all forms of speech. There is a continuing debate over whether video games are speech at all. A lower court judge remarked that “a video game, like a pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational element,” and therefore not speech. *Interactive Digital Software Ass’n v. St. Louis County*, 200 F.Supp. 2d 1126, 1133 (E.D. Mo. 2002) (quoting *America’s Best Family Showplace Corp. v. City of N.Y., Dep’t of Buildings*, 536 F.Supp. 170, 173-74 (E.D. N.Y. 1982)), *rev’d*, 329 F.3d 954 (8th Cir. 2003). The test whether something is an expression or simply action is “whether the action element in the conduct predominates; and whether the person is trying to *tell* something or *do* something, whether his conduct is representation or actuality.” EMERSON, *supra* note 7, at 495.

32. EMERSON, *supra* note 7, at 3.

33. ZELEZNY, *supra* note 24, at 54.

34. DAVID S. BOGEN, *BULWARK OF LIBERTY: THE COURT AND THE FIRST AMENDMENT* 45 (1984).

35. This analysis will not cover all unprotected speech. For instance, it will not cover commercial speech and libel. In addition, certain types of speech are considered low value

tests fashioned by the Supreme Court leave the answers to new fact scenarios unclear. “The Court’s inability to develop a comprehensive theory of the First Amendment leaves it without satisfactory tools to deal with many new developments that are emerging in the system of freedom of expression.”³⁶ However, this overview highlights some of the important cases decided by the Supreme Court with regard to freedom of speech and examines how they affect a violence analysis.

1. Incitement

One type of speech that is not protected by the First Amendment is speech which incites imminent lawless activity.³⁷ In *Schenck v. United States*, the Supreme Court articulated the clear and present danger test to determine if speech is protected. The clear and present danger standard is met when “the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils.”³⁸ For instance, Justice Holmes’ famous example is a person falsely shouting fire in a theater.³⁹ In these circumstances, speech will not be protected by the First Amendment because of the perceived threat. However, most types of media violence do not meet the “substantive evils” requirement. Moreover, the Supreme Court has proceeded to reshape the incitement test through further cases.

The Supreme Court’s modern interpretation of the incitement standard is found in *Brandenburg v. Ohio*.⁴⁰ In *Brandenburg*, the Supreme Court held that to be unprotected speech, the speech must be “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁴¹ In

speech, and therefore afforded less protection. This type of speech instills a balancing test. See SULLIVAN & GUNTHER, *supra* note 27, at 967-68.

36. EMERSON, *supra* note 7, at 718.

37. It is important to note that many of the Supreme Court’s first speech cases were very restrictive on an individual’s right to free speech, especially with regard to political speech. Most of these cases were concerned with advocacy to overthrow the government. See, e.g., *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925).

38. *Schenck v. United States*, 249 U.S. 47, 52 (1919). *Schenck* was convicted under the Espionage Act of 1917 for distributing leaflets which the Court believed encouraged draft resistance. The Court noted, in upholding the conviction, that the fact that the leaflets were distributed during a time when the country was at war was important in their decision. *Id.* at 52-53.

39. *Id.* at 52.

40. 395 U.S. 444 (1969).

41. *Id.* at 447. A Ku Klux Klan speaker was convicted of promoting violence in a speech he made at a rally where there was also a cross burning. His speech included a statement against the United States government and minorities, saying “there might have to be some revenge taken.” The Supreme Court reversed the conviction. *Id.* at 446, 448.

Hess v. Indiana, a case dealing with statements made during anti-war protests, the Court found that because the language was “not directed to any person or group of persons, it cannot be said [to be] advocating . . . any action” and it did not have a “tendency to lead to violence.”⁴² The reasoning behind not protecting threats and harassment is that “[w]hat these crimes all have in common is speech—communicative acts—that are directed at one or more specific persons and are designed to inflict certain emotions, such as fear of physical injury or emotional distress, upon the victim(s).”⁴³ However, there is more to this exception than just an infliction of strong emotions.

In a more recent case, *Virginia v. Black*, the Supreme Court held that speech or an act is punishable when it is done with the intent to intimidate.⁴⁴ The Court continued, “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of the intent to commit an act of unlawful violence to a particular individual or group of individuals.”⁴⁵ Media violence does not express the intent of violence (a true threat) because usually no violence is being directly intended towards an individual or group of individuals.

In *Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists*, the Ninth Circuit held that when speech is a true threat, “where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, [it] is unprotected by the First Amendment.”⁴⁶ In its previous decision in this case, the appellate court noted that *Brandenburg* “held that the First Amendment protects speech that encourages others to commit violence, unless the speech is capable of ‘producing imminent lawless action.’”⁴⁷ Thus, “[i]f the First Amendment protects speech advocating violence, then it must also protect speech that does not advocate violence but still makes it more likely.”⁴⁸ This directly limits any potential exception for media violence, unless the speech will result in “imminent lawless action.”

Further, media violence cannot be included in this category because there is often no direct causal link between the time someone views or hears

42. *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973).

43. Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 328 (2003).

44. *Virginia v. Black*, 538 U.S. 343, 347, 361 (2003).

45. *Id.* at 359.

46. *Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1075 (9th Cir. 2002) (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)), *petition for cert. denied*, 539 U.S. 958 (2003).

47. *Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists*, 244 F.3d 1007, 1015 (9th Cir. 2001), *rehearing en banc*, 290 F.3d 1058 (9th Cir. 2002).

48. *Id.*

violence through the media and the time at which unlawful activity is undertaken.⁴⁹ In several cases the courts have denied plaintiffs any recovery against media companies under the incitement exception.⁵⁰

2. Fighting Words

In *Chaplinsky v. New Hampshire*, the Supreme Court noted that “the right of free speech is not absolute at all times and under all circumstances.”⁵¹ Another type of speech not protected by the First Amendment is fighting words. This exception covers what is often referred to as hate speech. More specifically, face-to-face epithets which are intended to cause a violent reaction are not protected by the First Amendment.⁵² The words under this exception will tend “to incite an *immediate* assault.”⁵³

These hate words are not protected because they are “likely to cause a breach of the peace”;⁵⁴ rather, these “utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”⁵⁵ It is interesting to note that “since *Chaplinsky*, the Court has never upheld a conviction under the fighting words doctrine.”⁵⁶

Media violence is not considered to be fighting words because it is often done via an internet website, video game, or music lyrics and, therefore, not

49. In *James*, the court noted that “incitement is not imminent if it risks third-party violence at some ‘indefinite future time.’” *James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002) (citing *McCoy v. Stewart*, 282 F.3d 626, 631 (9th Cir. 2002)). For instance, if a child from age five watches violence on television programs and movies, and then at age sixteen shoots his classmates at school, proof of causation becomes a major issue.

50. See, e.g., *id.*; *Zamora v. Columbia Broadcasting System*, 480 F.Supp. 199, 206-07 (S.D. Fla. 1979) (finding claim against broadcasting companies for assertion that television violence caused child to murder women was unsupported under the First Amendment); *Olivia N. v. National Broadcasting Co., Inc.*, 178 Cal. Rptr. 888, 892 (Cal. Ct. App. 1981) (denying plaintiff recovery in claim that television film caused her assailants to sexually assault her because there was no evidence that the film advocated, encouraged, or incited the crime).

51. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). In the Court’s decision it noted that certain types of speech are not deserving of First Amendment protection. In *Chaplinsky*, a Jehovah’s Witness was proselytizing on the street. He was convicted for offensive words he said against the city and city marshal: “You are a God damned racketeer . . . the whole government of Rochester are Fascists.” The Court upheld the conviction because the words were “likely to provoke the average person to retaliation.” *Id.* at 569, 574.

52. Caron, *supra* note 1, at 97.

53. FARBER, *supra* note 13, at 105 (emphasis added).

54. *Chaplinsky*, 315 U.S. at 573. *Chaplinsky* also laid a foundation for the obscenity exception. *Id.* at 572.

55. *Id.*

56. FARBER, *supra* note 13, at 105.

face-to-face. In addition, media violence is frequently not actual “fighting words.” Rather, it is often simply a character on a screen, controlled by a child, who shoots other characters. The violence is not usually directed at anyone in particular. Also, the exception for fighting words requires a certain immediacy, which is not present with regard to media violence.

3. Obscenity

In *Roth v. United States*, the Supreme Court held that obscenity is not a form of speech protected by the First Amendment.⁵⁷ In *Miller v. California*, the Court clarified the test for whether indecent speech will be protected.⁵⁸ The requirements for speech to be categorized as obscene, and therefore unprotected, are that it must appeal to the prurient interest; depict or describe, in a patently offensive way, sexual conduct; and lack serious literary, artistic, political or scientific value.⁵⁹ Accordingly, obscenity may be regulated.⁶⁰

An expansion of the obscenity exception was noted by the Court in *F.C.C. v. Pacifica Foundation*.⁶¹ “Even when material is not obscene, but meets some lesser standard of indecency, the fact that the material is broadcast on the over-the-air media has been held to allow the federal government greater control.”⁶² Thus, there are special regulations permitted for over-the-air media. For instance, a federal criminal statute restricts obscene, indecent, or profane language on radio communications.⁶³ However, it is important to note that even the definition of indecent in the statute is directed at sex.⁶⁴

Some scholars have proposed that the obscenity exception not be restricted to sex, but be expanded to include violence. One reason for not expanding the obscenity exception to include violence is that obscenity focuses on an offense, while violence focuses on harm.⁶⁵ Recent case law has demonstrated that courts are reluctant to extend the obscenity exception to include violence.⁶⁶ Violence is not within the narrow obscenity restriction on offensive sexual images.

57. *Roth v. United States*, 354 U.S. 476, 492-93 (1957).

58. *Miller v. California*, 413 U.S. 15, 24 (1973).

59. *Id.*

60. *Ginsberg v. New York*, 390 U.S. 629, 632-33 (1968).

61. 438 U.S. 726, 746-48 (1978).

62. SAUNDERS, *supra* note 6, at 54.

63. 18 U.S.C. § 1464 (2004).

64. *Pacifica Foundation*, 438 U.S. at 740 (discussing 18 U.S.C. § 1464).

65. For an analysis of why the obscenity exception should be expanded to include violence, see generally SAUNDERS, *supra* note 6.

66. See *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002); *American Amusement Machine Ass’n. v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684 (8th Cir. 1992).

However, it is debatable whether violence really is not offensive. Many believe “[v]iolence is at least as obscene as sex,” if not more so.⁶⁷ Some people even find violence itself sexually stimulating. Many people are offended by images of someone being attacked with a knife or of a bloody fist fight. The debate over the definition of obscenity includes a discussion of the Supreme Court’s historical interpretation of obscenity. Prior to the Civil War and the enactment of the Fourteenth Amendment, obscenity was defined as “whatever outrages decency and is injurious to public morals.”⁶⁸ Thus, obscenity could be interpreted to include sex *and* violence. Currently, however, courts do not define obscenity to include violence.

Clearly, media violence does not fit neatly into any current First Amendment exception. Thus, if states wish to regulate violent speech without passing the strict scrutiny standard, a new exception would have to be created by the Supreme Court.

III. SPEECH WITH REGARD TO MINORS NOT PROTECTED BY THE FIRST AMENDMENT: “HARMFUL TO MINORS” LAWS, INCLUDING THE CHILD PORNOGRAPHY EXCEPTION

There are several laws specifically geared towards protecting children from harm, known as “harmful to minors” laws. Examples include juvenile curfew and child pornography laws.⁶⁹ In addition to the aforementioned exceptions to the freedom of speech, there is a special First Amendment exception that specifically aims to protect minors. In *Prince v. Massachusetts*, the Supreme Court held for the first time that states have “a compelling interest in the protection of children from ‘harmful’ speech.”⁷⁰ The Court created a special exception solely for minors because the “State’s authority over children’s activities is broader than over like actions of adults.”⁷¹ The Court stated that it is in “the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and

67. SAUNDERS, *supra* note 6, at 3.

68. *Id.* at 104.

69. Courts in juvenile curfew ordinance cases “have found that protecting the community from crime, deterring juveniles from committing crime, and protecting juveniles from becoming victims of crime are all compelling governmental interests.” Cheri L. Lichtensteiger Baden, *When the Open Road Is Closed to Juveniles: The Constitutionality of Juvenile Curfew Laws and the Inconsistencies Among the Courts*, 37 VAL. U. L. REV. 831, 836 (2003); *see also* Bellotti v. Baird, 443 U.S. 622, 625 (1979).

70. *Prince v. Massachusetts*, 321 U.S. 158, 160 (1944). Prince was convicted for violation of a statute for permitting a minor to sell magazines in the streets. *Id.* *See also* Scott A. Pyle, *Is Violence Really Just Fun and Games?: A Proposal for a Violent Video Game Ordinance That Passes Constitutional Muster*, 37 VAL. U. L. REV. 429, 445 (2002).

71. *Prince*, 321 U.S. at 168.

independent well-developed men and citizens.”⁷² *Prince* underlines the importance the Court places on the protection of children. However, the Court also recognized the important role parents play in the upbringing of children, and that the State should not try to replace this role.⁷³ The Court cautioned against handing the State too much power to restrict speech. Justice Rutledge noted that it is “cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder.”⁷⁴

Child pornography is not protected by the First Amendment. In *Ginsberg v. New York*, the Supreme Court held that “even where there is an invasion of protected freedoms ‘the power of the State to control the conduct of children reaches beyond the scope of its authority over adults.’”⁷⁵ Under *Ginsberg*, child pornography is unprotected speech and “the State is not required to provide ‘empirical’ evidence that exposure to sexually explicit materials may harm children, because legislators are permitted to assume such harm based on common cultural understandings.”⁷⁶ This exception, therefore, makes the regulation of child pornography a much easier task.

In *New York v. Ferber*, the Court held that “[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children.”⁷⁷ Therefore, “[s]tates are entitled to greater leeway in the regulation of pornographic depictions of children” because it is “harmful to the physiological, emotional and mental health of the child.”⁷⁸ The Court made clear that the exception for child pornography is separate from the obscenity standard set out in *Miller*.⁷⁹ The reason is that the standard set forth in *Miller* “does not reflect the State’s particular and more compelling interest in prosecuting those who promote the sexual exploitation of children.”⁸⁰ *Ferber* differs from the *Miller* requirements because it does not require prurient interest, patently offensive material, “and the material at issue need not be considered as a whole.”⁸¹

72. *Id.* at 165.

73. Many would agree that parents and family play the most important role in the upbringing of children. See *infra* text accompanying notes 187-88.

74. *Prince*, 321 U.S. at 166.

75. *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (citing *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

76. Ashutosh Bhagwat, *What If I Want My Kids to Watch Pornography?: Protecting Children From “Indecent” Speech*, 11 WM. & MARY BILL RTS. J. 671, 685 (2003).

77. *New York v. Ferber*, 458 U.S. 747, 759 (1982).

78. *Id.* at 758.

79. *Id.* at 757, 764.

80. *Id.* at 761.

81. *Id.* at 764.

In Justice O'Connor's concurrence in *Ferber*, she reminds us that the overall goal should be to "protect minors . . . without attempting to restrict the expression of ideas."⁸² In its decision, the Court emphasized that "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations."⁸³ The purpose of the exception carved out in *Ferber* was to "help prevent the abuse of children who are made to engage in sexual conduct for commercial purposes."⁸⁴ Specifically, the State's interest in prohibiting child pornography is to protect children exploited by the production process.⁸⁵ In fact, *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment."⁸⁶ This has important consequences in frustrating any attempt to analogize violence with regard to minors.⁸⁷

The Supreme Court has held that child pornography is unprotected speech because "the evil to be restricted so overwhelmingly outweighs the expressive interests."⁸⁸ Accordingly, in order to protect children from abuse, states are permitted to regulate the speech. "States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."⁸⁹ In addition, in *Osborne v. Ohio*, the Court noted that another reason for the child pornography exception is that "the materials produced by child pornographers permanently record the victim's abuse."⁹⁰

Recently, in *Ashcroft v. Free Speech Coalition*, the Court granted First Amendment protection to virtual child pornography.⁹¹ The images at issue in the case, virtual pornography of minors, did "not involve, let alone harm, any children in the production process."⁹² The important distinction made by the Court is that minors must actually be at risk of being harmed in the production of the pornography in order for the speech to be unprotected; "the creation of the speech is itself the crime of child abuse."⁹³ Using virtual minors certainly does not involve the use of real children, and therefore minors cannot be

82. *Ferber*, 458 U.S. at 775 (O'Connor, J., concurring).

83. *Id.* at 773-74 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973)).

84. PEMBER, *supra* note 8, at 433.

85. *Ferber*, 458 U.S. at 758. *See also* *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249 (2002).

86. *Ashcroft*, 535 U.S. at 251.

87. *See infra* Section IV for further discussion.

88. *Ferber*, 458 U.S. at 763-64.

89. *Id.* at 754-55 (quoting *Miller v. California*, 413 U.S. 15, 18-19 (1973)).

90. *Osborne v. Ohio*, 495 U.S. 103, 110 (1990).

91. *Ashcroft*, 535 U.S. at 257.

92. *Id.* at 241.

93. *Id.* at 254.

harm (i.e., sexually abused) in the production. The Court observed that the “prospect of crime, however, by itself does not justify laws suppressing protected speech.”⁹⁴ This reiterated that “speech may not be prohibited because it concerns subjects offending our sensibilities.”⁹⁵ Notably, this case restricts the child pornography exception to a very narrow class. More relevant to our analysis here, the Court notes that the “objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.”⁹⁶

94. *Id.* at 245.

95. *Id.*

96. *Ashcroft*, 535 U.S. at 252 (quoting *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 814 (2000)).

IV. THE FAILURE OF RECENT VIOLENCE STATUTES AND THE HARM THEY INTENDED TO ADDRESS

Reflecting on the fear of too much restriction of speech, one author asks the question, “Should our society be comfortable with an increased censorship of ideas just because some sociopaths read the same books and watch the same movies as we do?”⁹⁷ To begin with, “the Supreme Court has never held that speech containing violent sentiments or imagery lies outside the protection of the First Amendment as applied to either adults or children.”⁹⁸ In one of the few Supreme Court cases addressing media violence and the First Amendment, *Winters v. New York*, the Court struck down a statute prohibiting the distribution of magazines containing criminal news and stories of bloodshed because they were believed to be “vehicles for inciting violent and depraved crimes against the person.”⁹⁹ The Court noted that although they could not see “any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.”¹⁰⁰ However, this has not acted as the end-all to the question of whether violence is protected by the First Amendment, especially with regard to minors. The process may seem frustrating because the Supreme Court “sometimes seems determined to test our commitment to free expression by finding the most unpleasant possible conduct to protect.”¹⁰¹ However, there are important reasons for allowing such a broad protection of speech.

A. *Proposed Federal Legislation and Documentation of the Harms Caused by Media Violence*

Few doubt that the violence children encounter through the media has at least some impact on them. Concerns over the effects of violence on minors are nothing new. Congress has been discussing these concerns for close to fifty years.¹⁰² More recently, Congressional bills have been introduced

97. Campbell, *supra* note 4, at 638. Another author notes, “Putting aside the First Amendment, it is unjust to censor entertainment for a huge majority of Americans because a small fraction of the population reacts inappropriately.” Kopel, *supra* note 10, at 20.

98. Catherine J. Ross, *Anything Goes: Examining the State’s Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 456 (2000). See generally *Winters v. New York*, 333 U.S. 507 (1948); *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684 (8th Cir. 1992).

99. *Winters*, 333 U.S. at 518.

100. *Id.* at 510. The Court also noted, “What is one man’s amusement, teaches another’s doctrine.” *Id.*

101. FARBER, *supra* note 13, at 2. For instance, the Court has protected the burning of the American flag and cross burning. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Texas v. Johnson*, 491 U.S. 397 (1989).

102. SAUNDERS, *supra* note 6, at 15.

responding to the problem of minors' exposure to violence. If the fact that this speech is clearly protected is so obvious, one may wonder why attempt after attempt has been made to restrict it. The answer may be that the protection of this type of speech may not be as certain as one thinks.

In 1999, a bill was introduced to the House of Representatives which focused on the harmful effects of violent material on children's development and would regulate minors' access to violent material.¹⁰³ The bill noted in its findings that "children between the ages of 2 and 11 years spend an average of 21 hours in front of a television each week,"¹⁰⁴ and "64 percent of teenagers played video or personal computer games on a regular basis . . . [and that among] children as young as elementary school age . . . almost half of them list violent computer games among their favorites."¹⁰⁵ Death and violence are often "glamorized" in entertainment.¹⁰⁶ The bill stated that research has found "a strong correlation between the exposure of children to televised violence and a number of behavioral and psychological problems."¹⁰⁷ The bill emphasized that concerns over violence are not unfounded, because "children who are consistently exposed to violence on television have a higher tendency to exhibit violent and aggressive behavior, both as children and later in life."¹⁰⁸

In a 2000 Congressional Report prepared by the Federal Trade Commission, *Marketing Violent Entertainment to Children*, it was noted that although the motion picture, music recording, and electronic games industries all have their own self-regulatory systems, there are still concerns to be addressed. Specifically, the "individual companies in each industry routinely market to children the very products that have industries' self-imposed parental warnings or ratings with age restrictions due to violence conduct."¹⁰⁹ The effects of the violence portrayed in these industries include "aggressive attitudes and behavior in children."¹¹⁰ This is evidence of the concern over the failure of self-regulation systems, and casts doubt over whether this solution will address the problems of minor's overexposure to violence in the media. The report's conclusion stated that the Federal Trade Commission could "do a

103. Children's Defense Act of 1999, H.R. 2036, 106th Cong. (1999).

104. *Id.* § 5(a)(2).

105. *Id.* § 5(a)(20).

106. *Id.* § 5(a)(21).

107. *Id.* § 5(a)(4). As previously noted, many social scientists challenge this theory. *See supra* notes 3-4.

108. H.R. 2036 § 5(a)(5).

109. Robert Pitofsky, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recoding, and Electronic Game Industries*, Prepared Statement Before the United States Senate Committee on Commerce, Science, and Transportation (Sept. 13, 2000) (transcript available at <http://www.ftc.gov/os/2000/09/violencerpttest.htm>).

110. *Id.*

better job of helping parents choose appropriate entertainment for their children by providing clear and conspicuous notification of violence content.”¹¹¹

The good news is that, in subsequent follow up reports, the Federal Trade Commission found that there has been improvement in the areas of media self-regulation. They found “progress by the movie and electronic game industries in complying with and improving their own self-regulatory policies restricting ad placements and requiring rating information in advertising.”¹¹² Interestingly, the Federal Trade Commission reiterated its “support [of] private sector initiatives by industry and individual companies to implement” needed changes, rather than a recommendation of legislation with potential First Amendment conflicts.¹¹³

In 2003, a bi-partisan bill was introduced before the United States Senate entitled *Children’s Protection from Violent Programming Act*.¹¹⁴ The bill is still in committee. The bill would authorize the FCC “to prohibit the distribution of violent video programming during the hours when children are reasonably likely to comprise a substantial portion of the audience.”¹¹⁵ Clearly, this bill, if passed, would encounter First Amendment challenges.¹¹⁶ This is another example of federal legislation trying to remedy the concerns over media violence and children.

A recent *Wall Street Journal* article reported that video games are becoming “more violent, racy and realistic.”¹¹⁷ One reason for this is that

111. *Id.*

112. Lee Peeler, Marketing Violent Entertainment to Children: Self-Regulation and Industry Practices in the Motion Picture, Music Recording, and Electronic Game Industries, Prepared Statement Before the United States House of Representatives Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce (Oct. 1, 2002) (transcript available at <http://www.ftc.gov/os/2002/10/marketing021001.htm>) [hereinafter Peeler Statement]. The July 8, 2004 update noted continued progress. See Report to Congress from the Federal Trade Commission, Marketing Violent Entertainment to Children: A Fourth Follow Up Review of Industry Practices in the Motion Picture, Music Recoding and Electronic Game Industries (July 8, 2004) (available at www.ftc.gov/os/2004/07/040708kidsviolencerpt.pdf). The FTC has also created a new website on entertainment ratings, which is available at <http://www.ftc.gov/bcp/online/pubs/misc/rateguide.htm>.

113. Peeler Statement, *supra* note 112.

114. S. 161, 108th Cong. (2003). There is also a related House bill, H.R. 3914, 108th Cong. (2003), also in committee as of March 2004. Also, House Bill H.R. 669, 108th Cong. (2003) would prohibit the sale and rental of adult video games to minors. This bill is also in committee. It appears these bills, as do most bills, did not make it beyond committee.

115. S. 161, § 3(b).

116. Leniency is permitted when the speech is over-the-air. See *supra* text accompanying notes 61-64.

117. Joseph Pereira, *Games Get More Explicit—And So Do Warning Labels*, WALL ST. J., Sept. 25, 2003, at D1.

“game creators are often finding that . . . violence sells.”¹¹⁸ An example highlighted in the article was the popular video game *Grand Theft Auto: Vice City* where “players roam a city, delivering cocaine to crime bosses and seeking favors from prostitutes.”¹¹⁹

All of these proposals and reports suggest the negative impact media violence can have on children. However, we are still left asking what the best remedy to this problem is. First Amendment restrictions are not the answer.

B. *Recent Violence Statutes Fail*

In the past few years, several jurisdictions have attempted to pass legislation restricting minors’ access to violent media material. However, those attempts have proved unfruitful. Legislation restricting minors’ access to violent media is usually content-based because it restricts a type of speech (violence), rather than a time or place in which the material is prohibited. As previously discussed, because there is currently no First Amendment exception for violence, in order to overcome a challenge to a content-based restriction on protected speech, a statute must pass strict scrutiny. To pass strict scrutiny, a state must demonstrate that it has a compelling interest in regulating the speech and that the regulation is narrowly tailored to achieve that end interest. A state “must do more than allege that a harm exists.”¹²⁰ A state must “show a nexus between the speech and the harm indicating that the regulation will alleviate the harm ‘in a direct and material way.’”¹²¹ However, when a restriction is limited to minors, the standard is somewhat relaxed. The Supreme Court has required that “such regulations be narrowly tailored to protecting minors from speech that may improperly influence them and not effect an ‘unnecessarily broad suppression of speech’ appropriate for adults.”¹²²

As previously discussed, violence has not been included as part of the obscenity exception. For example, the Eighth Circuit noted in *Video Software Dealers Association v. Webster* that “[m]aterial that contains violence but not depictions or descriptions of sexual conduct cannot be obscene . . . [V]ideos depicting only violence do not fall within the legal definition of obscenity for either minors or adults.”¹²³ This has been the greatest obstacle to attempts by

118. *Id.* at D8.

119. *Id.*

120. Ross, *supra* note 98, at 501.

121. *Id.*

122. *James v. Meow Media, Inc.*, 300 F.3d 683, 696 (6th Cir. 2002) (citing *Reno v. ACLU*, 521 U.S. 844, 874-75 (1997) and *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 812-13 (2000)).

123. *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992). In this case, a Missouri statute was found unconstitutional which prohibited making available, renting, or

states to restrict minor's access to violence. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."¹²⁴

In *American Amusement Machine Association v. Kendrick*, the Seventh Circuit found unconstitutional an Indianapolis ordinance limiting minors' access to video games depicting violence.¹²⁵ Again it was held that "[v]iolence and obscenity are distinct categories of objectionable depiction."¹²⁶ Violence is a "different concern from that which animates the obscenity laws."¹²⁷ Obscenity regulation is concerned with material that is offensive,¹²⁸ whereas violence regulation is concerned with material that may prove to be harmful.¹²⁹ As a note to the importance of children's exposure to these different forms of media, the court observed that "[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble."¹³⁰ Because the violence prohibited in the Indianapolis ordinance did not fall within any exception to First Amendment protection, it was found unconstitutional.

The Supreme Court has held that the "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."¹³¹ Nor can the government prohibit speech "because it increases the chance an unlawful act will be committed 'at some indefinite future time.'"¹³² In addition, for those who have sought tort liability for the effects of media violence, "evidentiary weaknesses help to explain the fact that no court has ever found civil liability for violence based on the influence of controversial speech."¹³³

Legislation has also encountered the problem of overbreadth created by restricting adults in an attempt to restrict minors. In *Butler v. Michigan*, the Court struck down a statute because it was "not reasonably restricted to the evil with which it is said to deal."¹³⁴ The "invalidated . . . statute prohibit[ed] [the] distribution of an indecent publication because of its tendency to 'incite minors

selling violent videos to minors. The Eighth Circuit found that the statute did not pass strict scrutiny. *Id.* at 689.

124. *Id.*

125. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001).

126. *Id.* at 574.

127. *Id.* at 575.

128. *Id.* at 574.

129. *Id.*

130. *Am. Amusement Mach. Ass'n*, 244 F.3d at 577.

131. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002).

132. *Id.* (quoting *Hess v. Indiana*, 414 U.S. 105, 108 (1973)).

133. *Ross*, *supra* note 98, at 506.

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

to violent or depraved or immoral acts.”¹³⁵ The legislation was found to be “quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence.”¹³⁶

In *James v. Meow Media, Inc.*, violence again failed to be found as an exception to freedom of speech.¹³⁷ The Sixth Circuit did note that “certain speech, while fully protected when directed to adults, may be restricted when directed towards minors.”¹³⁸ However, the court denied tort liability and refused to extend obscenity jurisprudence to include violent material.¹³⁹ The court made sure to “confine the scope of obscene material to works which depict or describe sexual conduct.”¹⁴⁰ In addition, the court noted that a violence restriction also fails under the *Bradenburg* incitement test because the “mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it absent some showing of a direct connection between the speech and imminent illegal conduct.”¹⁴¹

Recently, in *Interactive Digital Software Association v. St. Louis County*, the Eighth Circuit invalidated an ordinance which made it unlawful to sell, provide, or rent graphically violent video games to minors.¹⁴² The court found that the ordinance was not constitutional because it violated the First Amendment’s guarantee of freedom of speech and did not pass the strict scrutiny standard.¹⁴³ The court directed that “the County must come forward with empirical support for its belief that ‘violent’ video games cause psychological harm to minors” in order to pass strict scrutiny.¹⁴⁴

However, in *Rothner v. City of Chicago*, the Seventh Circuit upheld a City of Chicago ordinance prohibiting minors from playing (any) video games during school hours.¹⁴⁵ The ordinance was a time, place and manner

135. *Ashcroft*, 353 U.S. at 252.

136. *Butler*, 352 U.S. at 383.

137. 300 F.3d 683 (6th Cir. 2002). In *James*, parents of victims of a shooting at a Kentucky high school sued companies under tort claims for violent products they claimed caused the gunmen’s actions. *Id.* at 687. The court held that the companies did not owe a duty of care to the victims. *Id.* at 699.

138. *Id.* at 696. However, even these “regulations [must] be narrowly tailored to protecting minors from speech that may improperly influence them and not effect an ‘unnecessarily broad suppression of speech’ appropriate for adults.” *Id.*

139. *Id.* at 698.

140. *Id.* at 697.

141. *Id.* at 698 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 236 (2002)).

142. *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954, 956 (8th Cir. 2003). In many ways, *Interactive Digital Software Ass’n* was a repeat of *Video Software Dealers Ass’n*, discussed in *supra* notes 123-24 and accompanying text, with video games being at issue instead of movies.

143. *Interactive Digital Software Ass’n*, 329 F.3d at 956, 958.

144. *Id.* at 959.

145. *Rothner v. City of Chicago*, 929 F.2d 297, 298 (7th Cir. 1991).

restriction, and applied to all video games “irrespective of any message, theme or plot.”¹⁴⁶ Therefore, it was not subject to a strict scrutiny test, and was constitutional.

A lawsuit has recently been filed in Florida against the maker and distributors of the video game *Grand Theft Auto: Vice City*.¹⁴⁷ The plaintiffs want the game to be banned or its sale restricted because they assert the game advocates and causes violence against Haitians.¹⁴⁸ Specifically, the groups “claim that the violence in [the] video games causes psychological harm to children and directly causes some of them to commit violence.”¹⁴⁹ Based on case precedent, this attempt to restrict the video game for its violent conduct will not succeed because it will be classified as protected speech under the First Amendment unless it can meet the requirements of strict scrutiny, regardless of the fact that the violence is directed at a particular group of persons.

One interesting note is a Colorado statute that has remained unchallenged which prohibits videos from being sold or rented to minors which “predominantly appeal[] to the interest in violence.”¹⁵⁰ If challenged, the issue would be whether the statute meets strict scrutiny because it is a content-based restriction.¹⁵¹ Unless the Supreme Court creates a new exception for violence, this type of legislation would be held unconstitutional.

146. *Id.* at 303. Content-neutral regulations on speech can be more easily imposed:

The government may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are “justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.”

Id.

147. Gary Young, *Suit Takes Aim at Video Game: Haitian-American Groups Decry Content in the Latest of Several Suits*, 26 NAT’L L.J. 4 (Jan. 12, 2004).

148. The game includes the phrase “kill the Haitians” and has its characters involved in “ethnic gang warfare.” *Id.*

149. There is an increased fear of the negative effect video games have on children. “[S]ocial science research indicates that the games are more damaging than less interactive media, such as violent movies. They may also make violent children more efficient killers by teaching the military-style tactics that were on display in the Columbine High School massacre and other school assaults.” *Id.* However, the president of Entertainment Software Association claimed that “[p]eople who commit crimes and blame video games are simply making excuses to duck responsibility to avoid paying for their illegal acts.” *Id.*

150. COLO. REV. STAT. § 18-7-601 (2004).

151. I cannot see any reason why this statute would not be challenged and found unconstitutional based on current First Amendment case precedent. *See, e.g.*, *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *American Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684 (8th Cir. 1992).

V. NO VALIDATION FOR CREATION OF A SPECIAL EXCEPTION FOR MEDIA VIOLENCE AND MINORS

Currently, “[i]ndecent material is protected by the First Amendment unless it constitutes obscenity or child pornography.”¹⁵² However, if media violence with regard to minors is analogous to child pornography, perhaps it too should be made into an exception. Thus, we must explore how far the analogy between child pornography and minors’ exposure to media violence should be extended. Undoubtedly, the “contemporary free speech doctrine definitely rejects offense and hurt feelings as a legitimate ground for suppressing public discourse.”¹⁵³ The child pornography exception to First Amendment protection focuses on the harm done to children when they are used in the making of the pornographic speech. However, minors who are exposed to and used in the making of violent movies and other forms of media entertainment are also exposed to harm.

A century ago sexual content was not tolerated and was tightly controlled due to concerns of the negative impact it would have on minors. But today, arguably, there is much greater tolerance of sex. Instead, violence is much less tolerated and is a major concern. Modern society’s values are changing, and have changed, since the obscenity exception was articulated by the Supreme Court. Today, society has significant concerns over the impact of violence on today’s youth. Some examples of the attempts by society to regulate violence are zero-tolerance school policies, increasing pressures to reduce violence in the movie industry, and the establishment of metal detectors at schools and libraries for safety.¹⁵⁴

An important distinction between sex and violence is the “difference between peer pressure to participate in either sex or violence and the possibility of becoming a victim of violence.”¹⁵⁵ The main concerns over involvement in sex are typically pregnancy and sexually transmitted diseases, not becoming a victim of a violent crime.¹⁵⁶ This is one reason why it is difficult to make a clear comparison of violence with regard to minors and child pornography.

Furthermore, violence itself has become an actual form of entertainment for youth. Minors are detached from the distinction between reality and

152. HENRY COHEN, *OBSCENITY, CHILD PORNOGRAPHY AND INDECENCY* 5 (Mathew D. Clark ed., 2002).

153. JAMES WEINSTEIN, *HATE SPEECH, PORNOGRAPHY, AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE* 128 (1999).

154. For a discussion on the negative effects censorship has on schools, see Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089 (2003).

155. SAUNDERS, *supra* note 6, at 27.

156. Rape is excluded because it is an act of violence, not sex.

fiction, and often the harm that violence causes actually becomes the entertainment. This is because “children often do not perceive distinctions between fantasy and reality in media presentations.”¹⁵⁷ Perhaps regulating violent speech aimed at minors would, in turn, keep with society’s changing values. Nevertheless, the First Amendment is not a ship riding the currents of society’s trends. While our Constitution is an adaptable, living Constitution, it is also a firm foundation for liberty of the freedom of thought and expression.¹⁵⁸ “The First Amendment, like the other guarantees in the Bill of Rights, is not subject to revision on the basis of cost/benefit calculations.”¹⁵⁹ An exception to First Amendment protection is not justified for violence. Instead, “[c]ontrols over such matters will have to remain, as they undoubtedly should, with parents, schools, churches and similar institutions.”¹⁶⁰

One real obstacle to creating a new exception to the First Amendment is that “[c]ontroversial speech about violence merely portrays violent acts or characters but does not expressly advocate imminent violence.”¹⁶¹ The concern over child pornography is in the creation of the medium, not the viewing of the medium. This is evident in the Supreme Court’s holding in *Free Speech Coalition*.¹⁶² With violence, the real concern is the viewing and participation of the medium, not the creation of it. Some similarities can be found between the harms involved with child pornography and minors’ exposure to media violence. However, denying violence First Amendment protection will seriously hinder the First Amendment’s underlying purpose, and censorship of violence with regard to minors is the wrong avenue for resolution of the concerns.¹⁶³

The Supreme Court has previously been willing to create new First Amendment exceptions. “When a definable class of material . . . bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First

157. SAUNDERS, *supra* note 6, at 188.

158. In addition, because the Supreme Court Justices are appointed for life, they “never need respond to the electorate or any specific constituency.” Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1297 (1978).

159. Kopel, *supra* note 10, at 20.

160. EMERSON, *supra* note 7, at 502 (author makes this observation with regard to erotic material).

161. Ross, *supra* note 98, at 456.

162. See *supra* text accompanying notes 91-96.

163. See *supra* text accompanying note 18 (the purpose “to prevent assigning liability to speakers for their expression”). For instance, if a famous painting happened to motivate someone to rape a woman, it seems ridiculous to hold the painter, who had no such intention, responsible.

Amendment.”¹⁶⁴ This statement, made by the Supreme Court in *Ferber*, makes clear that the Court recognizes the importance of protecting the welfare of children. However, it is important to point out that the Court was specifically referring to the potential injury to children in the *production* of pornography. It is difficult to compare this with violent media forms. For example, child actors can be harmed in the production of a movie with a violent war scene.¹⁶⁵ Yet, most of the time stunt actors or special graphic effects are probably used, and the potential harm to the child actor is very limited. Any constitutional exception limited to only children on violent movie sets would be too narrow to rectify the harm it seeks to redress.

Any control of media violence would have to work within the limits of the First Amendment.¹⁶⁶ “If depictions or descriptions of violence were within an exception to the First Amendment, violent material could be banned or controlled without meeting strict scrutiny.”¹⁶⁷ However, “[w]hen the harm of speech is great enough and its value is small enough, the Court should be willing to carve out a new exception.”¹⁶⁸ Protecting children from the harm of media violence is a strong incentive. However, it does not outweigh the value of allowing expression through speech.¹⁶⁹ Further restrictions on speech pose a danger to our fundamental freedom of free expression. Rather, suppression of violent entertainment, while to some may be an “advocacy of violation, 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.”¹⁷⁰ In addition, a First Amendment exception is not necessarily the most effective remedy.

As *Free Speech Coalition* points out, the goal of protecting children from potential harm is not sufficient for denying speech protection under the First Amendment.¹⁷¹ Instead, the Court noted that it must be examined whether there are less restrictive means available. If there are, then these means should instead be applied over speech restrictions. Thus, even if the child pornography exception was analogous to making a special exception for

164. *New York v. Ferber*, 458 U.S. 747, 764 (1982).

165. One author notes the possible negative implications if regulation of harm were to extend too far: “[A]ction films could be banned because of the danger to stuntpeople, westerns suppressed because of the danger to animals, and any movie with child actors censored because of the documented exploitation of juveniles in the film industry.” WEINSTEIN, *supra* note 153, at 165.

166. SAUNDERS, *supra* note 6, at 58.

167. *Id.* at 59.

168. VOLOKH, *supra* note 23, at 169.

169. Especially since, as previously noted in *supra* notes 3-4, this harm is still debatable.

170. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

171. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252-53 (2002).

violence with regard to children, there are arguably many less restrictive means still available.

In determining what is the best solution to the current social problems of minors and violence, one must “identify the harms . . . and then judge how effective the proposed restriction would be in eliminating these harms.”¹⁷² Any First Amendment restrictions would be the wrong restriction and ineffective in eliminating these harms. Instead, it would “permit restrictions that would impair basic free speech values.”¹⁷³ Also, “the problem of drafting regulations that will be effective for children and not interfere with adults is almost insuperable.”¹⁷⁴ Moreover, this path of resolution includes a high possibility of misapplication, restricting more speech than necessary.¹⁷⁵

However, in lieu of creating an expanded or new exception for violence, there are several alternatives to a First Amendment exception that are available. These efforts could focus on changing “the conditions that make the children so vulnerable and dangerous in the first place.”¹⁷⁶ These include self-regulation and parental controls. “The fact that the First Amendment does not allow the government to compel the media to act responsibly does not, however, preclude the media from choosing to act responsibly.”¹⁷⁷ For instance, “the coin-operated video game industry has implemented an intricate system of self-regulation for games placed in arcades and other establishments based largely on the type of video game and the content of the message that the game conveys.”¹⁷⁸ Other examples of self-regulation in the media industry are MPAA ratings board for movies, V-Chip television ratings, parental advisory labels on music, and Electronic Software Ratings Board for video games.¹⁷⁹

172. WEINSTEIN, *supra* note 153, at 125.

173. *Id.* at 126.

174. EMERSON, *supra* note 7, at 502.

175. *See* WEINSTEIN, *supra* note 153, at 142-43.

176. Kopel, *supra* note 10, at 18.

177. *Id.* at 20.

178. Pyle, *supra* note 70, at 464.

179. Caron, *supra* note 1, at 93. *See* this article for a short discussion on the effectiveness of media self-regulation.

The most dramatic evidence of the failure of the entertainment media to self-regulate is the recent Federal Trade Commission report dealing with the marketing of violent entertainment to children. The report highlights results showing that entertainment companies have taken steps to alert concerned parties about explicit content to help parents shelter their children from exposure to questionable content. Regardless of the fact that the companies themselves declare the material inappropriate for young viewers, they directly target that group in the marketing and advertising efforts.

Id. at 94 (citations omitted). *See also* Timothy D. Casey & Jeff Magenau, *A Hybrid Model of Self-Regulation and Governmental Regulation of Electronic Commerce*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1 (2002); Angela J. Campbell, *Self-Regulation and the Media*, 51

So far, self-regulation has not been entirely successful. However, that does not mean that it is an ineffective resolution. As the FTC's own reports indicate, there is evidence that over time the self-regulatory systems are becoming more effective.¹⁸⁰ Another alternative is the "inclusion of media literacy courses in school systems."¹⁸¹

It is also possible that a new exception denying media violence First Amendment protection would cause a slide down a slippery slope. Any definition of violence would have to be very specific so as not to be overbroad. While some things portray violence, such as news programs about war and television shows like *Law & Order*, they "have many positive attributes."¹⁸² Many people who are adamantly opposed to any remedy that would threaten the First Amendment protection of free speech note that media violence can also be "plentifully found in Shakespeare, Homer, and the Bible as readily as in Bruce Willis movies or Bugs Bunny cartoons."¹⁸³ Further, "as long as material is available to adults it is hopeless to try and keep it out of the hands of adolescents."¹⁸⁴ Thus, a resolution that censors speech may not even solve the problems it seeks to redress.

Where further restrictions on an individual's, even youth's, freedom of speech are permitted, there is an eating away of the core of the First Amendment's purpose:

[A] regulation of otherwise protected speech on the ground that it may stimulate improper thoughts or be used as an instrument of crime in the hands of deviant persons, absent compelling evidence of a causal link to actual harm, is a dangerous incursion on the First Amendment, an invitation to censorship,

FED. COMM. L.J. 711 (1999); Kevin W. Saunders, *Media Self-Regulation of Depictions of Violence: A Last Opportunity*, 47 OKLA. L. REV. 445 (1994).

180. See *infra* text accompanying notes 104-13.

181. Murray, *supra* note 16, at 12.

182. Caron, *supra* note 1, at 99. As noted earlier, there are many who argue that there are positive effects media violence has on youth. "[M]edia violence has an important role in satisfying some young people's needs for fantasy role-playing, empowerment, and temporary escape from troubles and anxieties." Heins, *supra* note 3, at 422. They contend that society needs to "abandon the popular political sport of 'blaming the media.'" *Id.* Instead, other possibilities to be examined are the "easy availability of guns, . . . provid[ing] impoverished public schools with better facilities, or creat[ing] job training programs in urban areas still recovering from economic restructuring." Karen Sternheimer, *Blaming Television and Movies Is Easy and Wrong*, L.A. TIMES, Feb. 4, 2001, at M5.

183. Heins, *supra* note 3, at 421. An example of proposed regulations that may have gone too far is a 2000 Harvard School of Public Health recommendation that the Motion Picture Association of America regulations include *Bambi*, *Aladdin*, and *The Lion King* as having too much violence for minors. MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN 257 (2001).

184. EMERSON, *supra* note 7, at 502.

and a return to an approach, long ago discarded as unconstitutional by the U.S. Supreme Court.¹⁸⁵

The recently decided case *Free Speech Coalition* “stands for the proposition that attempting to control evil conduct by banning evil thoughts is fundamentally antithetical to the concept of free speech.”¹⁸⁶

I do not contend that violence in the media does not have any negative effects on children. However, other alternatives besides a constitutional exception can help alleviate the harm done to children as a result of media violence without censorship. “Parents play key roles in their children’s lives, and are one of the best means of combating violence in the media.”¹⁸⁷ It is important that the State does not try to replace the role of the parent. The Court has recognized that “parents have a constitutionally protected right to raise their children free from unwarranted interference by the State.”¹⁸⁸ This is just one avenue for addressing the problem of violence in an effort to really attain a solution, instead of just putting a Band-Aid over the problem.

Justice Holmes’ “marketplace of ideas” concept, articulated in *Abrams v. United States*, recognizes that “in a truly open marketplace of ideas the truth will ultimately prevail.”¹⁸⁹ As stated by the Supreme Court, “it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”¹⁹⁰ The Fifth Circuit has observed that

[t]he constitutional protection accorded to the freedom of speech and of the press is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.¹⁹¹

Instead of censorship, a possible “proper response to offensive speech is not to prohibit it, but to combat it with counterspeech.”¹⁹² If censorship is allowed to persist in response to society’s concerns, then “much of the nation’s

185. Bloom, *supra* note 12, at 20.

186. *Id.*

187. Caron, *supra* note 1, at 95. Another author points out that “solving the violence problem, which is partly derivative of the literacy problem, cannot be accomplished without strong families.” Kopel, *supra* note 10, at 19.

188. *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972); Krattenmaker, *supra* note 158, at 1241.

189. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); ZELEZNY, *supra* note 24, at 33.

190. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 745-46 (1978)).

191. *Hecceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1019 (5th Cir. 1987).

192. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); Okianer Christian Dark, *Violence and the Mass Media: Lessons Learned from the Battle Over “Words that Wound,”* 4 KAN. J.L. & PUB. POL’Y 25, 28 (1995).

communication system will reflect only the views of a small privileged minority.”¹⁹³ Further, every time society has a concern, it will solve the problem by suppressing speech. Instead, “[o]nly by staunchly defending every person’s right to public speech does our society guarantee that the best ideas will continue to enter and prevail in the public arena.”¹⁹⁴

One must recognize that “concerns about media violence also have more to do with socializing youth than with objective proof of psychological harm.”¹⁹⁵ There are several adverse reasons for not censoring violence with regard to minors:

The ponderous, humorless overliteralism of so much censorship directed at youth not only takes the fun, ambiguity, cathartic function, and irony out of the world of imagination and creativity; it reduces the difficult, complicated, joyous, and sometimes tortured experience of growing up to a sanitized combination of adult moralizing and intellectual closed doors.¹⁹⁶

Of course, this does not mean the problems facing minors due to media violence should be disregarded all together. But limiting minors’ access to violent speech through the First Amendment is not the best response. “We cannot restore a ‘lost innocence’ that may never have existed, but we can offer perspectives from our experience and help interpreting the world, flaws and all.”¹⁹⁷ Instead of the censorship route to remedy the problem of minors and media violence, “policymakers [should] focus on affirmative, productive ways of improving the upbringing of youth and inculcating good values (including alternatives to violence).”¹⁹⁸ This will continue to respect the purpose of the First Amendment while also helping to alleviate the problems caused by violence in the media with regard to children.

VI. CONCLUSION

There is no doubt that there is growing concern over the impact of violence in the media on children. Finding violence’s place within the First Amendment is a dangerous task. In one direction, it could result in unnecessary censorship. In another, it could expand First Amendment protection beyond that intended by the Framers. When regulations on violence

193. FARBER, *supra* note 13, 216.

194. Matthew G. T. Martin, *True Threats, Militant Activists, and the First Amendment*, 82 N.C. L. REV. 280, 324-25 (2003).

195. HEINS, *supra* note 183, at 255.

196. *Id.* at 256.

197. *Views on the News from the Executive Director*, CENSORSHIP NEWS ONLINE, Spring 1998, at www.ncac.org/cen_news/cn69views.html.

198. Heins, *supra* note 3, at 421. The same article lists sample “affirmative approaches” as “media literacy education, funding of independent, noncorporate media, and hands-on experience in youth arts and journalism programs.” *Id.*

are limited to minors the task becomes somewhat less questionable. Any restriction on violence could not include news of war or other materials that will benefit children's educational and maturing experience. But there are some things that may simply not be in children's best interest, and some remedy may be appropriate.

However, because violence does not comport itself well into any current exception and would create many difficulties in its own exception, the potential injuries to freedom of speech are too grand for a true violence for minors exception to First Amendment protection. Restrictions through legislation have failed to meet the requirements of the First Amendment. Violence portrayed through media with respect to minors should instead be controlled through alternative means such as self-regulation and parental control. Any creation of a new or expanded exception to the First Amendment will promote a dilution of the constitutional guarantee of free speech. This step would be much more dangerous to society than any harm caused by minors' exposure to violence.

ABBY L. SCHLOESSMAN RISNER*

* J.D. Candidate, Saint Louis University School of Law, 2005; B.A., Principia College, 2000. The author would like to thank Professor Alan Howard for his assistance in writing this comment. Also, thank you to her family and friends for all their support and encouragement. Finally, thank you Joseph for your love, friendship and patience.